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MORRILL COUNTY, NEBRASKA, ON BEHALF OF HAYDEN F. CAHOY, A MINOR CHILD, APPELLEE, V. PETER DARSAKLIS, APPELLANT, AND JENNIFER CAHOY, APPELLEE.

584 N.W.2d 36

Filed August 11, 1998. No. A-97-1040.

1. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an independent obligation to reach the correct conclusion.
3. **Child Support: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion by the trial court.
4. **Paternity: Child Support.** Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock.
5. **Rules of the Supreme Court: Child Support.** The Nebraska Child Support Guidelines are presumptively applicable in determining child support in cases of children born out of wedlock.
6. **Child Support: Proof.** When a parent seeks modification of child support obligations, it is that parent's burden to produce proof that a material change of circumstances has occurred which justifies the modification.
7. **Rules of the Supreme Court: Child Support: Taxation.** The Nebraska Child Support Guidelines contemplate that income for purposes of child support may differ from taxable income and do not prevent consideration of tax-exempt benefits in determining the amount of a parent's income derived from all sources.
8. **Stipulations: Parties: Courts: Good Cause.** Courts will enforce valid stipulations voluntarily entered into by the parties unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that a party relying upon it cannot thereafter be restored to his or her prestipulation status quo.
9. **Attorney Fees.** Attorney fees are recoverable in Nebraska only where provided for by law or allowed by custom.

Appeal from the District Court for Morrill County: BRIAN SILVERMAN, Judge. Affirmed.

Tylor J. Petitt, of The Van Steenberg Firm, P.C., for appellant.

Jean Rhodes, Morrill County Attorney, for appellee County.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Appellee Morrill County, Nebraska, filed a paternity action against appellant, Peter Darsaklis, on behalf of Hayden F. Cahoy (Hayden), a minor child born to appellee Jennifer Cahoy (Cahoy). The trial court found that Darsaklis was Hayden's father and ordered, inter alia, that Darsaklis pay child support. In subsequent proceedings, Darsaklis sought a modification to decrease his child support obligation, a request which the trial court denied. Darsaklis appeals. We affirm.

STATEMENT OF FACTS

Hayden was born on December 15, 1995. Hayden's mother, Cahoy, was not and is not married to Hayden's father, Darsaklis. On April 18, 1996, the Morrill County Attorney filed a petition against Darsaklis, seeking a court order to declare Darsaklis' paternity and establish his monthly obligation to support Hayden. Cahoy was not designated as a party to the filiation proceedings commenced by the county attorney, and she did not initially participate in them.

The record on appeal does not contain a record of early proceedings conducted on the petition filed by the county attorney. However, the record does contain a letter to counsel dated November 4, 1996, in which the trial court announced its finding that Darsaklis was Hayden's father and ordered Darsaklis to pay $324 per month in child support, made retroactively effective to October 1. These findings by the trial court were formalized in an order filed on December 4. Darsaklis filed a motion for new trial, seeking to reduce his child support obligation, but the trial court overruled the motion.

The December 4, 1996, order contained no provision pertaining to Darsaklis' visitation with Hayden. Cahoy subsequently moved to intervene in the filiation case on March 3, 1997, seeking orders to define Darsaklis' visitation rights, as well as additional financial contributions to be paid by Darsaklis for Hayden's health care costs unreimbursed by insurance and the cost of child care while Cahoy was at work.

In Darsaklis' responsive pleading to Cahoy's motion to intervene, he admitted that he had a legal responsibility to financially support Hayden, including the cost of child care and

unreimbursed health care costs. In this responsive pleading, Darsaklis also requested the court to modify his previously ordered child support obligation.

Less than a week after Cahoy sought leave to intervene in the filiation case, on March 7, 1997, the county attorney requested an order finding Darsaklis in contempt of court for failure to pay child support. Despite the trial court's 1996 order determining Darsaklis' monthly support obligation, Darsaklis paid no support whatsoever for Hayden's benefit until the contempt motion was filed. By April 1, Darsaklis' unpaid child support obligation exceeded $2,200. On April 24, Darsaklis was found in willful contempt of court and sentenced to 90 days' incarceration. He avoided serving his sentence by completely paying the support arrearage and depositing $1,000 with the court as security for future delinquent payments. The bond was soon put to use: Darsaklis again failed to pay child support in July 1997. The county attorney requested, and the trial court allowed, payment for Hayden's support to be withdrawn from the bond posted by Darsaklis.

On August 15, 1997, the trial court convened a hearing on Cahoy's motion and petition to intervene in the filiation case, as well as on Darsaklis' motion to modify his child support obligation. At the beginning of the hearing, before evidence was adduced, counsel for Darsaklis advised the court that Darsaklis stipulated to Cahoy's intervention in the action and further stipulated that Darsaklis would pay a share of child-care costs and unreimbursed health care costs for Hayden's benefit. The trial court accepted the stipulation and ordered that Darsaklis' share of these expenses be paid in the same proportion as Darsaklis' proportionate share of the total amount of Hayden's monthly support, determined in accordance with the Nebraska Child Support Guidelines.

The court then heard evidence on the merits of Darsaklis' motion to modify his child support obligation. Darsaklis testified that he owns a 235-acre farm, which formerly belonged to his parents. Darsaklis purchased it through bankruptcy proceedings, and he pays approximately $21,000 annually on the debt for the farm. He testified that he pays for irrigation water and land taxes, which roughly total $12,000 annually; the irrigation

fees include payment for farmland and pastureland owned by his brother. In the bankruptcy proceedings, Darsaklis also obtained farm equipment, for which he makes an annual payment of approximately $8,000 to $9,000.

In 1997, Darsaklis cash-rented his farm to a local farmer for $34,500, and Darsaklis agreed to irrigate the crops on the farm for a 3-month period for an additional payment of $750 per month. He testified that he also earned income totaling $1,150 from cultivating another farmer's land and driving a truck, and he received $280 in flood relief funds. Darsaklis claimed he was unemployed for the period of January through April because "I was trying to get a deal done to lease my farm. . . . I was going to see lawyers every other day, that was a job anyway."

Darsaklis testified that he was receiving medical treatment for injuries sustained as a result of a gunshot wound to his head. He had filed a tort action to recover damages as a result of this shooting, but he had not received any money at the time of trial. Although Darsaklis claimed that he suffered ongoing medical problems because of the gunshot wound, he also testified that he worked at irrigation on a full-time basis, and he admitted that he recently entered his horse in a "[r]ubber check" race, in which "[m]y horse did pretty good."

Darsaklis testified that in a recent flash flood, he lost farm equipment he valued at $12,500. He testified that he also owned other, unspecified farm equipment which was suitable for use, but which he simply stored. He did not use it for his own farming purposes, or rent, lease, or loan it to any other person. At the time of trial, Darsaklis was living in a three-bedroom house located on the farm he owned. The cost of that house was apparently included within the $21,000 he paid annually on the farm debt, and Darsaklis made no other payment on the house. In the affidavit of financial condition he submitted to the trial court for purposes of calculating his child support obligation, Darsaklis referenced his 1994, 1995, and 1996 tax returns, in which he claimed the farm payments as deductions from income. He asserted that these payments should likewise be excluded from consideration as income for purposes of determining his child support obligation. Darsaklis claimed that his house utility pay-

ments, including electricity, gas, and water, should also be excluded from consideration as income.

Exclusive of payment for child care and unreimbursed health care costs, Darsaklis argued that his monthly obligation to support Hayden should be reduced from the previously ordered amount of $324 to $165.31. The trial court disagreed, offering the following observations from the bench:

> A couple things, I cannot wade through all this bankruptcy stuff and refigure this and that. It — you know, you can make these figures into whatever they want to be. Clearly, anybody that can irrigate — and I've done it in the past, it's hard work and you've really undersold yourself on what you're getting paid for that, Mr. Darsaklis. I agree it's probably a full time job but for $750 a month, you can go out and in September make minimum wage at 5.15 an hour, which comes out to $892, and I think clearly Mr. Darsaklis is capable and a competent individual, if anything it underplaces [sic] his abilities to say that he's a minimum wage earner because he's much smarter than that and if he can work irrigating, he's enough of a good hard worker.
>
> Basing one thing here, I think that you take all this bankruptcy buyout thing and all it says to me is he's got the farm thing going on the side and it'll provide him with housing[,] and I figure his housing is worth $600 a month and I figure he can make $892 on minimum wage so I want his income figured at the level of $1,492[.]"

On August 22, 1997, using the child support guidelines, the trial court entered an order finding Darsaklis liable for 62 percent of the total amount of monthly support for Hayden. The trial court ordered that Darsaklis' monthly support obligation continue at $324, and consistent with Darsaklis' stipulation at the commencement of the trial, the trial court also ordered that Darsaklis pay for 62 percent of unreimbursed costs for Hayden's health care and 62 percent of child-care costs.

Darsaklis timely filed a motion for new trial, which was overruled by the trial court on September 10, 1997. Darsaklis appeals.

ASSIGNMENTS OF ERROR

Darsaklis avers that the trial court erred in failing to find that a material change in circumstances supported reduction of Darsaklis' child support obligation. He claims the trial court erred in assessing him responsible for 62 percent of the costs of child care and unreimbursed health care expenses, and Darsaklis also claims the trial court erred in awarding Cahoy $200 for attorney fees and costs to be paid by Darsaklis.

STANDARD OF REVIEW

[1,2] A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). On questions of law, an appellate court has an independent obligation to reach the correct conclusion. *Id.*

[3] Modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion by the trial court. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

ANALYSIS

Modification of Child Support Obligation.

[4-6] Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock. *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995). A parent is required to provide his or her child with the basic necessities of life. *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993). Both parents have a duty to support their minor children, and the amount of child support awarded is a function of the status, character, and situation of the parties. The primary consideration in determining the level of child support payments is the best interests of the child. *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992). It is well established that the Nebraska Child Support Guidelines are presumptively applicable in determining child support in cases of children born out of wedlock. *Sylvis v. Walling, supra.* See *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989). When a parent seeks modification of child support obligations, it is that

parent's burden to produce proof that a material change of circumstances has occurred which justifies the modification. See *Sabatka v. Sabatka, supra.*

Darsaklis claims the trial court erred in calculating his child support obligation and in failing to find that a change of circumstances had occurred which merited a substantial decrease in Darsaklis' monthly support obligation. Darsaklis avers that the trial court wrongly imputed $600 of monthly income to him derived from his use of the home on his farm in lieu of rent. As noted above, Darsaklis maintained at trial that payment for the cost of his housing and utilities is part of the farm expenses which he deducts from his income on his federal tax returns and that these amounts should not have been considered by the trial court as income. In support of his position, Darsaklis adduced evidence of his federal tax returns for the 3 years immediately preceding trial, all of which showed significant deductions from income and sizable farming losses. Darsaklis reasoned that he was, therefore, entitled to have the costs of his housing deducted from his income for purposes of determining his child support obligation pursuant to the Nebraska Child Support Guidelines. The trial court disagreed, as do we.

Paragraph D of the guidelines provides that the total monthly income used to calculate a parent's child support obligation includes the "income of both parties derived *from all sources*, except all means-tested public assistance benefits and payments received for children of prior marriages." (Emphasis supplied.) "Income," for purposes of the guidelines calculation, is not necessarily limited to figures detailed on a tax or wage payment statement provided by an employer. For example, in *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994), the Nebraska Supreme Court found no abuse of discretion in a trial court's calculation of a parent's income, which included the value of housing he received rent free, as well as free use of a car owned by his employer. Similarly, in *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995), we found that the value of meals provided free of charge to a parent by his employer was properly considered as part of his income.

[7] These cases indicate that "income" may assume a variety of forms. The recent paternity case *State on behalf of Hopkins v.*

Batt, 253 Neb. 852, 573 N.W.2d 425 (1998), which was released after trial in the instant case, reinforces these holdings. In *State on behalf of Hopkins*, the minor child's father was employed by a branch of the federal armed services and received housing on a military base and a "subsistence allowance" as tax-exempt benefits incident to his employment. The trial court included the value of those benefits as income in calculating the father's child support obligation, and the father appealed. The Nebraska Supreme Court affirmed the calculations, holding that "the guidelines contemplate that income for purposes of child support may differ from taxable income and do not prevent consideration of tax-exempt benefits in determining the amount of a parent's income 'derived from all sources.' " *Id.* at 865-66, 573 N.W.2d at 435.

Applying *State on behalf of Hopkins*, *Baratta*, and *Robbins* to the instant case, we find no abuse of discretion in the trial court's imputation of $600 in monthly income to Darsaklis to represent the value of his housing, regardless of the manner in which Darsaklis characterizes the value of his housing for purposes of federal tax liability.

We also find that the trial court properly held that Darsaklis failed to meet his burden of proof to prove a material change of circumstances which justified the reduction in child support. Darsaklis testified that he did not consistently work at income-generating employment during the months of January through April 1997, and the record contains no evidence that Darsaklis was seeking employment during that period of time. Further, the record shows that despite the court order for child support entered in early December 1996, Darsaklis paid nothing at all for the support of his child until a contempt order was filed against him in March 1997.

Darsaklis' course of conduct is not unlike the factual pattern set forth in *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989). In *Smith*, the father of a child born out of wedlock quit his employment as a brand inspector when he learned that the child's mother planned to seek child support payments from him. Smith then worked on his parents' ranch, receiving no remuneration except for room and board and occasional compensation for work as a day laborer on other ranches, and his tax

returns indicated a continuous loss of money. The Nebraska Supreme Court refused to accept Smith's claim that he was without income or earning capacity to pay child support, and the court affirmed a child support order based upon Smith's demonstrated earning capacity as a brand inspector. Following *Smith*, Nebraska courts have consistently examined a parent's earning capacity, as well as actual wages, to determine child support. This is particularly apposite when a parent receives valuable benefits which are not paid as cash, see *State on behalf of Hopkins, supra*; *Baratta, supra*; *Robbins, supra*, and also when a parent unjustifiably chooses to be underemployed or unemployed, see, e.g., *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991); *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984); *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992). See, also, Nebraska Child Support Guidelines, paragraph C(5), which allows deviation from application of the guidelines if application of them would result in an unjust or inappropriate result.

In the instant case, the trial court did not abuse its discretion in finding that Darsaklis failed to meet his burden of proof to show that he had suffered a bona fide reduction in his income. Therefore, we affirm the trial court's judgment regarding child support.

Payment of Proportionate Share of Child-Care Costs and Unreimbursed Health Care Expenses.

The trial court ordered that Darsaklis pay 62 percent of the monthly costs of child care while Cahoy was at work, as well as 62 percent of all costs for Hayden's health care which were not reimbursed by insurance. Sixty-two percent of these expenses is consistent with the trial court's finding that, based upon Darsaklis' income, he was responsible for 62 percent of the total monthly cost of support for Hayden.

As noted above, Darsaklis admitted in his responsive pleading that he should be held responsible for paying his proportionate share of the child-care costs and unreimbursed health care expenses. These statements constitute judicial admissions to which the trial court could and did properly consider

Darsaklis held bound. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997).

[8] The trial court's order is further justified on the basis that Darsaklis stipulated in open court to payment of these expenses. Generally, courts will enforce valid stipulations voluntarily entered into by the parties unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that a party relying upon it cannot thereafter be restored to his or her prestipulation status quo. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

In the instant case, relying upon the court's acceptance of the stipulation that the court could order a reasonable visitation schedule and further payments by Darsaklis for child care and unreimbursed health care costs, Cahoy presented no evidence to the trial court in support of her petition in intervention. The trial court correctly entered orders regarding Darsaklis' obligation to pay for child care and unreimbursed health care costs, consistent with the stipulation that he would do so.

Paragraph N of the Nebraska Child Support Guidelines expressly provides that child-care costs are a separate item of support for which a child's parent may be held liable, in addition to separately ordered child support. This provision of the guidelines applies to paternity cases, as well as support ordered for children born within a marriage relationship. *Dworak v. Fugit, supra.*

Paragraph O of the guidelines provides that a trial court may apportion all nonreimbursed health care costs for a minor child between the child's parents according to the same formula used to determine each parent's share of child support. Consistent with the rule that children born out of wedlock are as entitled to appropriate parental financial support as children born within a marriage, see *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993), and that the Nebraska Child Support Guidelines are presumptively applicable in determining child support obligations in filiation cases, see *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998), we logically apply paragraph O of the guidelines to filiation cases. The trial court could and did properly order Darsaklis to pay for 62 percent of the unreimbursed costs of

health care for Hayden independent of and in addition to the monthly child support payment, which the trial court calculated based upon evidence of all of the circumstances of the parties. Therefore, we affirm these findings of the trial court.

Award of Attorney Fees and Costs.

In Darsaklis' last assignment of error, he contests the trial court's award of $200 to Cahoy for attorney fees and costs she incurred in the trial court.

[9] Attorney fees are recoverable in Nebraska only where provided for by law or allowed by custom. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996), relying on *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989). Neb. Rev. Stat. § 43-1406 (Reissue 1993), much of the substance of which is now found at Neb. Rev. Stat. § 43-512.04 (Supp. 1997), as well as Neb. Rev. Stat. § 43-1412 (Reissue 1993 & Supp. 1997), all specifically provide that attorney fees and costs are allowed in paternity and child support cases brought by a child's mother, father, guardian or next friend, the county attorney, or other authorized attorney. We are aware that *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), may be inconsistent with the foregoing statement. Attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed. *State ex rel. Mooney v. Duer*, 1 Neb. App. 84, 487 N.W.2d 575 (1992).

We find no evidence in the record of an abuse of discretion by the trial court, and we affirm its award of fees and costs to Cahoy.

AFFIRMED.

ARCADIAN FERTILIZER, L.P., APPELLANT, V. SARPY COUNTY BOARD OF EQUALIZATION, APPELLEE.

583 N.W.2d 353

Filed August 11, 1998. No. A-97-1199.

1. **Taxes: Appeal and Error.** Any person aggrieved by a final decision in a case appealed to the Tax Equalization and Review Commission, whether the decision is affirmative or negative in form, shall be entitled to judicial review in the Nebraska Court of Appeals.

2. ____: ____. In an appeal from the Tax Equalization and Review Commission, the Nebraska Court of Appeals reviews for errors appearing on the record of the commission.
3. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.
5. **Taxation: Valuation: Appeal and Error.** A taxpayer's appeal to the Tax Equalization and Review Commission is limited to consideration of questions raised before the board of equalization, and the commission is without power to adjudicate any other factual question or issue in the taxpayer's appeal.
6. **Administrative Law: Jurisdiction: Parties.** Lack of jurisdiction may exist even where the parties submit an issue to an administrative agency in the mistaken belief that the agency has statutory authority to resolve it.
7. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
8. **Administrative Law: Taxation: Evidence: Appeal and Error.** Because proceedings before a referee are a part of the board of equalization process, it is plain error for the Tax Equalization and Review Commission to deny a motion to admit the transcript of the refereed proceedings in an appeal from a decision by the board of equalization, where the dispositive issue is whether a question had been raised before the board of equalization.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded for further proceedings.

Norman H. Wright, of Fraser Stryker Vaughn Meusey Olson Boyer & Bloch, P.C., for appellant.

Michael A. Smith, Deputy Sarpy County Attorney, for appellee.

HANNON, IRWIN, and INBODY, Judges.

INBODY, Judge.

Arcadian Fertilizer, L.P., now known as PCS Nitrogen, L.P. (Arcadian), appeals from the dismissal for lack of jurisdiction of its appeal of a real property tax assessment to the Tax Equalization and Review Commission (Commission). For the reasons set forth below, we reverse, and remand to the Commission for further proceedings.

STATEMENT OF FACTS

Arcadian operates a chemical manufacturing facility in Sarpy County, Nebraska. After the Sarpy County assessor notified Arcadian that the 1996 real estate assessment on its facility would be $6,130,680, Arcadian timely appealed to the Sarpy County Board of Equalization (Board of Equalization). Arcadian appealed to the Board of Equalization by completing a copy of "Form 422," a form provided by the Nebraska Department of Revenue for such appeals. On the section of that form prefaced with the following language, "I hereby request that the values of the described property be changed to the requested values for the following reasons," Arcadian stated as follows:

> The assessment is nonuniform with respect to property assessments within county. The valuation is arbitrary and capricious. The valuation is an inaccurate assessment of the property's fair market value. The valuation is based upon an erroneous calculation. Arcadian reserves the right to present additional facts, data, opinions and other relevant information and argument to support our protest.

The Board of Equalization appointed a referee pursuant to Neb. Rev. Stat. § 77-1502.01 (Reissue 1996). The referee conducted a hearing on July 12, 1996, which hearing was attended by Arcadian. Following that hearing, the referee recommended a reduction in valuation from $6,130,680 to $4,173,600, a recommendation the Board of Equalization adopted on July 23.

Arcadian then appealed to the Commission, using a preprinted appeal form provided by the Commission. One portion of that form directs the appellant as follows: "Reason for Appeal: Be Specific and attach exhibits." Arcadian inserted the following, in part, in that section of the appeal form:

> The only issue remaining after the County B.O.E. appeal is whether certain chemical storage tanks located on the property are real property or personal property. The taxpayer asserts that these tanks should not be classified and taxed as real property, but rather, constitute personal property and should be deleted from the value for improvements to real estate.

A formal hearing before the Commission was held on July 9, 1997. During that hearing, the Commission chair, Mark P.

Reynolds, sua sponte raised the issue of jurisdiction, specifically whether the issue Arcadian had presented to the Commission was the same issue as had been presented to the Board of Equalization. The jurisdictional issue was raised in the following manner:

> COMMISSIONER REYNOLDS: Mr. Wright [counsel for Arcadian], Nebraska Revised Statute Section 77-1502 requires, and I quote, "Attached to each copy of the protest shall be a written statement of the reason or reasons why the requested reduction in assessment should be made, or the protest shall be automatically dismissed." Exhibit No. 4, which on page 3 contains the original Form 422 . . . doesn't appear to recite the issue at hand, whether . . . the subject property, the tanks, are improperly classified as real property versus personal property . . . .
>
> MR. WRIGHT: Well, I think the explanation is that the raise notice that was received just increases the — basically the building or the structural increase, and until the actual investigation is made with regards to what went into increasing that, the taxpayer has no notice that there was that kind of an error . . . . And so it would be covered under the . . . "Present additional facts, data, opinions and other relevant information to support the protest." It's through the protest process . . . with the county referee that they at that time determined that there were items of personal property . . . included in what the county assessor believed to be real estate.
>
> COMMISSIONER REYNOLDS: Do I take it from your statement that the Form 422 does not allege that there is an issue regarding classification? Does that explicitly recite that?
>
> MR. WRIGHT: I guess I would agree. It doesn't explicitly recite it.

Following the commissioner's comments, Arcadian moved to supplement the record with the transcript and records of proceedings before the referee and of the Board of Equalization's meeting from which the referee's report had been adopted. Arcadian's motion was granted concerning the Board of Equalization's meeting, to be designated exhibit 25, but denied

as to the proceedings before the referee, designated exhibit 26. We note that the record before us contains a transcription of the refereed proceedings, but no transcript or other records of the Board of Equalization proceedings are included.

On October 23, 1997, the Commission entered an order dismissing Arcadian's appeal for lack of jurisdiction. Arcadian timely appealed to this court.

ASSIGNMENT OF ERROR

Arcadian makes a single assignment of error: "The Tax Equalization [and] Review Commission . . . erred in its interpretation of Neb. Rev. Stat. § 77-1511 (Reissue 1996) by holding that Arcadian failed to raise the same 'question,' before the Sarpy County Board of Equalization." It is claimed by Arcadian, in slightly restated and expanded form, that the Commission erred in concluding that the question presented to the Commission had not, by implication or inference, been previously presented in Arcadian's appeal to the Board of Equalization and that, accordingly, the Commission erred in holding that it was without jurisdiction to hear the appeal.

STANDARD OF REVIEW

[1-3] Any person aggrieved by a final decision in a case appealed to the Commission, "whether the decision is affirmative or negative in form, shall be entitled to judicial review in the [Nebraska] Court of Appeals." Neb. Rev. Stat. § 77-5019(1) (Reissue 1996). In an appeal from the Commission, the Court of Appeals reviews for errors appearing on the record of the Commission. § 77-5019(5). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998); *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). This court may affirm, reverse, or modify the decision of the Commission or remand the cause for further proceedings. § 77-5019(5).

On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions indepen-

dent of the legal determinations made by the agency below. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996); *McHenry v. Nebraska Liquor Control Comm.*, 5 Neb. App. 95, 555 N.W.2d 350 (1996).

ANALYSIS

[4,5] It is uncontroverted that administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996). Appeals from a county board of equalization to the Commission are controlled by Neb. Rev. Stat. § 77-1511 (Reissue 1996), which provides, in pertinent part, that in such appeals, the Commission "shall hear . . . and determine anew *all questions raised before the county board of equalization* which relate to the liability of the property to assessment, or the amount thereof." (Emphasis supplied.) The statute "restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other factual question or issue in the taxpayer's appeal." (Syllabus of the court.) *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987). See, also, *Harrison Square v. Sarpy Cty. Bd. of Equal., supra* (question of proper capitalization rate was neither presented to nor raised before board for ruling, thus it was not properly before either Commission or court on appeal); *US Ecology v. Boyd Cty. Bd. of Equal., supra.*

[6] At the threshold, we address Arcadian's argument that because the jurisdictional issue was raised by the Commission and not by the parties, there should be a "presumption . . . that issues being raised on appeal were those issues, in fact, before the Sarpy County Board of Equalization . . . ." Brief for appellant at 13. The fact is that lack of jurisdiction may exist even where the parties submit an issue to an administrative agency in the mistaken belief that the agency has statutory authority to resolve it. The parties' understanding or intentions are irrelevant to the issue of whether the Commission had jurisdiction, since the parties cannot confer subject matter jurisdiction upon a tribunal by either consent or acquiescence. *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). There

is, accordingly, no "presumption" that the Commission had jurisdiction.

We are mindful that this court has recently cited § 77-1511 for the general proposition that "the Commission has no authority to consider questions not raised before a county board of equalization." *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 460, 574 N.W.2d 180, 185 (1998). Accord *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). However, in those cases, we found that the issue was sharply defined: It was obvious that the question presented to the Commission had not been first presented to the Board of Equalization. Resolution was therefore one of straightforward application of the statute—because the question clearly had not been presented to the Board of Equalization first, it could not be presented to the Commission. But in the instant case, our problem is more subtle: We must determine whether the question as presented to the Board of Equalization and the question as presented to the Commission were sufficiently related in content and context to be deemed the same question at both levels. In other words, does the statutory language of § 77-1511, "all questions raised before the county board of equalization," mean that the wording and content must be identical at both levels, or, if not, to what extent and in what manner must they match?

Thus, the question becomes whether, in the instant case, Arcadian's presented questions at the separate appeal levels are sufficiently the same. The Board of Equalization argues that if Arcadian "believed the Assessor was wrong in including certain storage tanks as real property when they should be characterized as personal property, it is impossible to reach that determination based upon the language written in Form 422." Brief for appellee at 6-7. Arcadian argues that its statement of reasons for appeal should not be limited to the statement set out in Form 422 but must be evaluated in the context of the proceedings before the referee and the Board of Equalization, where, Arcadian asserts, the underlying reasons were clearly explained and set out in detail.

[7] Although Arcadian now argues that the Commission erred in refusing to permit Arcadian to supplement the record with a

transcript of the proceedings before the referee, Arcadian did not assign that refusal as error on appeal. Ordinarily, we would not consider this argument in the absence of an assigned error, since errors which are argued but not assigned need not be considered by an appellate court. *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996). However, while an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). It appears to us that this is such a case.

[8] The Commission held that the refereed proceedings were irrelevant, stating that "whatever proceedings may have been held before the referee would not be relevant to this issue . . . . It's the issue presented to the County Board of Equalization." However, proceedings before the referee are in fact a part of the board of equalization process. The statute providing for appointment of a referee in taxpayer appeals, § 77-1502.01, provides, in pertinent part:

> [T]he county board of equalization may appoint one or more suitable persons to act as referees. . . . The county board of equalization may direct that any protest filed in accordance with section 77-1502, shall be heard in the first instance by the referee in the manner provided for the hearing of protests by the county board of equalization. Upon the conclusion of the hearing . . . the referee shall transmit to the county board of equalization all papers relating to the case, together with his or her findings and recommendations in writing. The county board of equalization, after considering all papers relating to the protest and the findings and recommendations of the referee, may make the order recommended by the referee or any other order[.]

Thus it appears that the transcript of the refereed proceedings, as well as any other "papers" introduced during those proceedings, is clearly relevant to proceedings before the Commission, especially where, as here, the dispositive ques-

tion, posed by the Commission itself, is the scope of the issues previously raised before the Board of Equalization. Logically, it would be impossible to determine jurisdiction without reviewing the transcript of the refereed proceeding. Accordingly, it was plain, prejudicial, and reversible error for the Commission to deny Arcadian's motion to admit the transcript of the refereed proceedings.

CONCLUSION

Specifically, because the question of whether Arcadian had raised the issue of personal property versus real estate before the Board of Equalization requires consideration of the records before the Board of Equalization, including the proceedings before the referee, it was error to make a jurisdictional determination without considering those records. Therefore, the Commission erred in holding that it had no jurisdiction in this case without first reviewing the records before the Board of Equalization.

Accordingly, the order of dismissal by the Commission is reversed, and the matter remanded to the Commission for reconsideration of the jurisdictional issue. If, on remand, the Commission determines that it has jurisdiction, the Commission should proceed to resolve the underlying substantive issues.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AMERICAN STATES INSURANCE COMPANY, A CORPORATION, APPELLANT, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A CORPORATION, ET AL., APPELLEES.

583 N.W.2d 358

Filed August 18, 1998. No. A-97-339.

1. **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.
2. **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.

3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Insurance: Motor Vehicles.** There may be implied permission to drive an automobile.
5. ____: ____. An automobile is being used by an individual who is traveling in it, regardless of whether it is being operated by him or her or by another.
6. **Statutes: Public Policy: Insurance: Contracts: Motor Vehicles: Damages: Liability.** The uninsured motorist statute established in this state a public policy that every insured is entitled to recover damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance in a solvent company capable of responding for damages duly adjudicated against its insured.
7. **Statutes: Insurance: Contracts: Motor Vehicles.** A provision, drawn by an insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute.
8. **Insurance: Motor Vehicles.** Under the Uninsured and Underinsured Motorist Insurance Coverage Act, an insured is entitled to recover the same amount he or she would have recovered if the offending motorist had maintained insurance.

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

Dan H. Ketcham, Suzanne M. Shehan, and Robert S. Keith, of Hansen, Engles & Locher, P.C., for appellant.

Terry M. Anderson and David S. Lathrop, Jr., of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee Luikens.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

Barbara Luikens, Tara Lawson, and Amanda Hill took a car belonging to Amanda's parents, James and Jonnie Andersen, while the Andersens were not at home. All three girls were under the legal driving age. The girls were subsequently involved in a one-vehicle accident while Tara was driving, and Barbara, who was sitting in the back seat, was injured. This case involves a dispute over which, if either, of two insurance policies issued by two insurance carriers covers Barbara's claim for injuries, that is, the liability policy covering the vehicle involved issued by Farm Bureau Insurance Company (Farm Bureau), or the uninsured motorist insurance provision of the

policy covering Barbara's father's vehicle issued by American States Insurance Company (American States).

American States, the plaintiff, filed a declaratory action against both Barbara, by and through her father, Alvin Luikens, and Farm Bureau, seeking a judgment determining that its policy did not provide uninsured motorist coverage to Barbara. Upon cross-motions for summary judgment, the district court found that Tara was not covered by liability insurance at the time of the accident and further that the uninsured motorist coverage issued by American States was applicable to Barbara. Therefore, the court denied American States' motion and granted a summary judgment of dismissal. American States now appeals, arguing that an exclusion in its policy providing that an otherwise covered person is excluded from uninsured motorist coverage if that person is using the vehicle without the reasonable belief that he or she may do so, is applicable in the instant situation and necessarily excludes Barbara from coverage. We agree that, if valid, the provision would have that effect. However, we conclude that the exclusion is contrary to the provisions of the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 44-6401 through 44-6414 (Cum. Supp. 1994 & Cum. Supp. 1996), and is therefore void as against public policy. Thus, we affirm.

SUMMARY OF EVIDENCE

At the hearing on the motions, the court received the depositions of the three youths; the deposition of Tara's mother, Yvonne Lawson; and copies of the policies issued by American States and Farm Bureau. We will quote the applicable provisions of these policies in the discussion below.

The undisputed evidence shows that on August 10, 1995, Barbara, age 14; Tara, age 13; and Amanda, age 14, congregated at Amanda's house in Valley, Nebraska. Neither Amanda's stepfather, James Andersen, nor her mother, Jonnie Andersen, was home. Amanda was expecting her boyfriend to arrive, and when he did not, she began to worry. After a while, the three girls decided to use the Andersens' vehicle to drive to Elkhorn to look for him. After Amanda had difficulty driving, Tara drove to Venice, Nebraska. There the girls became frightened and decided to return to Amanda's home. On the way home, Tara

lost control of the vehicle and crashed into a ditch. Amanda, sitting in the front passenger's seat, was not seriously injured, but Barbara, who was sitting in the back seat, sustained serious injuries.

The depositions contain a detailed examination of all three girls. Based on the issues in this case, the only additional facts necessary to frame the issues in this appeal are that Barbara lived at home with her father, Alvin; that she had spent the night before the accident at Amanda's home; that when the girls decided to take the Andersens' vehicle, Amanda's parents were not at home; and that the girls made no effort to contact either of Amanda's parents. Barbara admitted that she did not think anyone had permission to drive the car, and she further admitted that she understood that Amanda did not have permission to take the car. Barbara additionally admitted that Amanda did not say that her mother had given her permission to drive the car, but she did testify that Amanda had told her that Amanda's mother had given Amanda a key to the car. Barbara also admitted that she knew that Tara was an underage driver and that Tara did not have a license.

Amanda testified that taking the vehicle to go visit her boyfriend was a "mutual thing" among the girls, but she did not testify that she had permission or that the other two girls thought she had permission to take the vehicle. Tara's mother, Yvonne, testified that she, Yvonne, was not insured on the date of the accident.

The court sustained Barbara's motion for summary judgment as to American States, sustained Farm Bureau's motion for summary judgment, and overruled American States' motion for summary judgment.

ASSIGNMENTS OF ERROR

American States contends that the court erred in (1) granting Barbara's motion for summary judgment and (2) overruling its motion, because the undisputed facts show that a provision in the uninsured motorist section of its policy excludes coverage in this case. American States also argues that there is a genuine issue of material fact as to whether Barbara had reason to believe that she was entitled to use the Andersens' vehicle.

STANDARD OF REVIEW

[1,2] 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. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). 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. *Id.*

[3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998).

ANALYSIS

Is Tara an Uninsured Motorist?

There is no dispute of material fact on this issue. The only possible sources of liability insurance for Tara arise either from her family or in connection with the vehicle she was driving. Tara's mother testified that she was uninsured on the date of the accident. Thus, the only remaining source of liability insurance could be the insurance policy on the Andersens' vehicle.

Farm Bureau had issued a policy to James and Jonnie Andersen, insuring the vehicle the girls were driving when the accident occurred. The liability provision of that policy provided in significant part as follows: "**Part I**[.] **Liability**[.] **Additional definitions used in this Part: Insured** under this Part means: 1. With respect to a **covered automobile**: a. *you* and any **resident relative**; b. any other person using it with *your* permission and within the scope of your permission . . . ." The definitional section defines "**Resident relative**" as a person "1. who is related to *you* by blood, marriage or adoption; and 2. who is a resident of *your* household."

It is undisputed that Amanda lived with her stepfather and mother in their home in Valley. Thus, she is a resident relative within the meaning of the policy and, therefore, an insured.

The liability coverage section of that policy states: "*We* will pay damages for **bodily injury** or **property damage** for which the law holds an **insured** responsible because of an **automobile accident** resulting from the ownership, maintenance or use of a **covered automobile** or **non-owned automobile**." Amanda, the insured, was not the driver. Any negligence of Tara, the driver, cannot be imputed to Amanda, a passenger, as a joint adventurer, or one involved in a joint enterprise, because there was no "community of pecuniary interest." See Restatement (Second) of Torts § 491, comment *c.* at 548 (1965). See, also, *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995) (adopting definition of joint enterprise found in Restatement). No one puts forth any other theory under which Amanda is responsible for Barbara's injuries.

[4] The Farm Bureau policy lists as an insured "any other person using it [the insured vehicle] with *your* permission and within the scope of your permission." In the definitional section of that policy, "your" is defined to mean the named insured, or, in this case, James and Jonnie Andersen. Thus, the issue is whether Tara was driving with the permission of the Andersens. Nebraska recognizes that there may be implied permission to drive an automobile. *MFA Ins. Companies v. Mendenhall*, 205 Neb. 430, 288 N.W.2d 270 (1980). The evidence is very clear that Tara did not have either the express or implied permission of either of the Andersens to drive their automobile.

Neb. Rev. Stat. § 60-534 (Reissue 1993) provides that a "motor vehicle liability policy . . . (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured . . . ." Thus, as far as liability coverage, the insurance statute authorizes the exclusion of such persons as Tara from that coverage. Later, in considering a related provision of uninsured motorist coverage, we do not find such statutory permission.

In this case, there are no facts that would support a finding that Tara had the Andersens' permission. Tara's mother testified that she was not insured on the day of the accident. There is no suggestion that there is any other possible source of liability insurance covering Tara as she drove on August 10, 1995. We

hold that there is no genuine issue of material fact on the issue and that, as a matter of law, Tara was an uninsured driver during the accident.

Does Luikens' Policy Extend Uninsured Motorist Coverage to Tara?

The uninsured motorist coverage provisions of the policy issued by American States to Barbara's father, Alvin, provided in significant part:

> [W]e will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured . . . vehicle" because of "bodily injury" sustained by an "insured" and caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the "uninsured" or "underinsured motor vehicle."

The policy provides that an insured includes any member of the named insured's family. Barbara would clearly be an insured and be entitled to uninsured motorist benefits unless a valid exclusion applies.

Part C, the "Uninsured or Underinsured Motorists Coverage" section, contains the following exclusions:

> A. We do not provide Uninsured . . . Motorists Coverage for "bodily injury" sustained by any person:
>
> 1. [Regarding an uninsured vehicle owned by the named insured or a member of his family. See § 44-6413(b) (Cum. Supp. 1996).]
>
> 2. [Regarding settlement without the insurer's consent. See § 44-6413(a).]
>
> 3. [Using the insured vehicle for public conveyance. See § 44-6413(c).]
>
> 4. Using a vehicle without a reasonable belief the person may do so.
>
> B. [Stipulating no benefits of an insurer under workers' compensation or disability benefit laws.]
>
> C. [Regarding punitive or exemplary laws. See § 44-6408 (Cum. Supp. 1994).]

All of the exclusions except A(4) are summarized for brevity, as only A(4) is of importance to our consideration. The statutory

references included above are to those statutes which appear to authorize the exclusion, and we were unable to locate a statute authorizing the exclusion when no statutory section is given. Exclusion A(4) is the exclusion under consideration in this opinion and is therefore quoted verbatim.

[5] American States argues that Barbara was using the Andersens' vehicle without the reasonable belief that she had permission to do so and that, therefore, the exclusion applies. The Nebraska Supreme Court has repeatedly stated that an automobile is being used by an individual who is traveling in it, regardless of whether it is being operated by him or her or by another. *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966); *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964). Compare, *State Farm Mutual Automobile Ins. Co. v. Kersey*, 171 Neb. 212, 106 N.W.2d 31 (1960). As explained by the court,

> "For the 'use' of an automobile by an individual involves its employment for some purpose or object of the user while its 'operation' by him involves his direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle. It is perfectly clear that an automobile is being used by an individual who is traveling in it regardless of whether it is being operated by him or by another. . . ."

Metcalf, 176 Neb. at 472-73, 126 N.W.2d at 474.

It is clear that Barbara was using the vehicle when she sustained her injuries. Barbara's testimony establishes that she knew neither she, Tara, nor Amanda had permission to use the Andersens' automobile. Therefore, the evidence establishes that Barbara did not have a reasonable belief that she had permission to use the Andersens' vehicle, and there is no genuine issue of fact on this issue.

Is Exclusion Against Public Policy?

Barbara argues that the aforementioned exclusion is contrary to public policy. She argues that uninsured and underinsured motorist policies must conform to the spirit and terms of the Uninsured and Underinsured Motorist Insurance Coverage Act. Barbara argues that § 44-6408 makes such coverage mandatory

for the protection of persons insured and further that the "insured" under the policy is any member of the Alvin Luikens family.

[6,7] The Supreme Court has said:

> [T]he uninsured motorist statute established in this state a public policy that every insured is entitled to recover damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance in a solvent company capable of responding for damages duly adjudicated against its insured.

Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 569, 156 N.W.2d 133, 138 (1968). The Supreme Court has recently followed *Stephens* as precedent, and in so doing quoted as follows:

> "The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through 'other insurance,' excess insurance, or medical payment reduction clauses . . . . And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance."

Muller v. Tri-State Ins. Co., 252 Neb. 1, 7, 560 N.W.2d 130, 135 (1997).

> "A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision . . . is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he 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."

Id. at 8, 560 N.W.2d at 135.

Muller and *Stephens* were concerned with uninsured or underinsured policies that limited the insurer's liability to its insureds by providing for setoffs. In the case at hand, we are concerned with the validity of a contractual exclusion that limits or decreases the insurance carrier's exposure by decreasing the number of events where uninsured or underinsured coverage

would otherwise be extended to the insured. A review and summary of the current applicable statutes are helpful in understanding the legislative purpose.

Section 44-6408 provides in summary:

> (1) No policy insuring against liability . . . shall be delivered . . . with respect to any motor vehicle principally garaged in this state unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages . . . from (a) the owner or operator of an uninsured motor vehicle . . . .

As previously determined, Barbara is an insured under her father's policy. Barbara therefore argues that § 44-6408 requires the policy to extend uninsured motorist coverage to her. The following are other provisions of the act which may be helpful in considering this argument.

Section 44-6405 (Cum. Supp. 1994) defines uninsured motor vehicle as "a motor vehicle with respect to the ownership, operation, maintenance, or use of which: (1) There is no bodily injury liability insurance or bond applicable at the time of the accident. . . ."

Section 44-6407 (Cum. Supp. 1996) provides for exclusions from the definition of "uninsured motor vehicle" and includes a vehicle covered by the same policy as the insured; a vehicle owned by, furnished, or available for the regular use of the named insured or any resident of the insured's household; a self-insured vehicle; and a vehicle owned by the government.

Section 44-6409 (Cum. Supp. 1996) provides: "The maximum liability of the insurer . . . shall be the amount of damages . . . less the amount [recovered from the one liable], but in no event shall the maximum liability of the insurer under either such coverage be more than the limits of the coverage provided." Section 44-6410 (Cum. Supp. 1996) provides that policies shall not be stacked, and § 44-6411 (Cum. Supp. 1996) provides for the amount of recovery and the priority of payment when there are multiple policies. Sections 44-6412 and 44-6413(1)(a) (Cum. Supp. 1996) provide for the party's rights in the event of settlement with the liable party or parties.

Subdivisions (1)(b) through (e) of § 44-6413 contain a list of events where the "coverages provided in the Uninsured and

Underinsured Motorist Insurance Coverage Act shall not apply." These exclusions include cases where the bodily injury occurs where the "insured" is occupying a vehicle owned by the "named insured," where the vehicle is used as a public conveyance, where the insured is struck by a vehicle owned by the named insured or a spouse or a relative residing with the named insured, or where the statute of limitations has run on the claim. Section 44-6413 also provides that insurers providing excess or umbrella coverage need not provide uninsured motorist coverage and that insurers may make underinsured motorist coverage part of uninsured motorist coverage. Section 44-6414 (Cum. Supp. 1996) provides that the Director of Insurance shall adopt and promulgate the carrying out of the provisions of the act.

One provision that is significant to our analysis is § 44-6413(4), which provides: "Nothing in the [act] shall be construed to prevent an insurer from offering, making available, or providing coverage under terms and conditions more favorable to its insured or in limits higher than are required by the act." This provision necessarily suggests, and common sense dictates, that insurers may not issue policies which carry terms and conditions less favorable to the insured than those provided in the act.

The exclusion under consideration in the instant case provides coverage less favorable to the insured than would be provided in the absence of such exclusion. The same is true with regard to the other exclusions, both those authorized by statute and those not authorized. The act clearly requires liability policies to contain provisions extending uninsured motorist coverage. As noted above, the act defines the required coverage, the minimum amount of liability, and some exclusions. It is obvious that an insurance company could reduce its exposure or risk by excluding coverage of certain events or conditions and that if enough exclusions are allowed, the public could receive markedly less than what the Legislature has decreed it is entitled to. With each exclusion, the insured would receive less coverage than what the Legislature has directed, although exclusions such as the one in the American States policy would probably affect very few of its insureds. What possible basis

could the courts have for deciding that some exclusions unauthorized by statute are valid and some not?

The Nebraska Supreme Court recently ignored a policy's underinsured motorist provision which had the effect of lessening the rights provided to insureds under the act, and instead, the court applied the provisions of the act. In *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 645, 538 N.W.2d 168, 172 (1995), the policy in question provided that underinsured coverage was excluded where there was a settlement with " 'any person or organization who may be legally liable therefor . . . .' " (Emphasis omitted.) What was then Neb. Rev. Stat. § 60-582 (Reissue 1993), now codified as § 44-6413(1)(a), provided that underinsured motorist coverage was excluded where the insured settled without the written consent of the insurer and such settlement "adversely affect[ed]" the rights of the insurer. Without discussing the specific point, the *Horace Mann Cos.* court stated that the statutory provision controlled and proceeded to determine that the settlement in question did adversely affect the insurer. In so doing, it stated that "the issue is controlled by § 60-582, which requires that the settlement adversely affect the rights of the insurer before coverage can be denied." 248 Neb. at 649, 538 N.W.2d at 174. If the *Horace Mann Cos.* court had thought that the contract provision controlled over the more restrictive statute, it would not have needed to analyze the evidence to determine if the insured was prejudiced thereby.

American States relies on *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 310, 436 N.W.2d 164, 166 (1989), in which the court examined an uninsured motorist provision requiring physical contact with a " 'hit and run vehicle' " in order for the injured insured to be covered. At the time, the relevant statute required such insurance to cover " 'hit-and-run motor vehicles,' " *id.*, but nothing was said about the necessity for physical contact. The court, citing extensively to its previous decision in *Grace v. State Farm Mut. Auto. Ins. Co.*, 197 Neb. 118, 246 N.W.2d 874 (1976), decided that in view of the history of the term in the courts, the Legislature probably intended hit-and-run incidents to require physical contact. *Mayfield, supra*, and *Grace, supra*, at least imply that had the court decided that the Legislature *understood* hit-and-run *did not* include a require-

ment of physical contact, the exclusion would have been void and against public policy.

American States also relies on *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985), where the court concluded that a provision in a policy excluding "stacking" of the coverage from more than one uninsured motorist policy was valid. Compare § 44-6410 (generally prohibiting stacking). In doing so, the *Kracl* court stated: "As the statute neither requires nor prohibits stacking, the question then becomes, What does the language of the insurance policy in question provide?" *Id.* at 874, 374 N.W.2d at 44. This principle was recognized earlier in *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985). *Kracl* and *Charley* are clearly distinguishable from the case at hand, because after the exclusions allowed in them are given their effect, the injured person is still covered by uninsured motorist insurance to the full limit of the policy on the automobile the person is using and, therefore, to the full limit of the amount the statutes require. That would not be the effect of the exception under consideration here.

We find only one case involving a similar situation concerning uninsured motorist coverage. In *Dingsor v. Merchants Mutual Insur. Co.*, 72 Misc. 2d 862, 340 N.Y.S.2d 562 (1973), the uninsured motorist coverage provided to a mother was extended to her daughter who was injured while a passenger in an automobile owned by a third party, which automobile the jury found to have been operated without the consent of the owner. The driver was an uninsured motorist, and the mother's policy stated that coverage was extended to any relative, provided that " 'the other actual use thereof is with the permission, or reasonably believed to be with the permission of the owner . . . .' " *Id.* at 863, 340 N.Y.S.2d at 564. The relevant New York statute specifically protected the insured's benefits against injury or death specifically caused by the owner or operator of a motor vehicle operated without the permission of the owner. The comparable Nebraska statute, § 44-6408, is arguably broader, in that it provides such insurance whenever the operator of the car has no liability coverage.

It might be argued that excluding a person that is using a motor vehicle without a reasonable belief that he or she has the

permission of the owner from uninsured motorist coverage would have the tendency to discourage people from using other persons' vehicles without their permission. This is probably a desirable result. However, such a general notion should not fly in the face of the rather clear intention of the Legislature that the insured driver's benefits be protected from uninsured or underinsured motorists.

[8] In the instant case, the vehicle in question was an uninsured motor vehicle within the meaning of § 44-6405. Moreover, § 44-6408 provides that "[n]o policy insuring against liability . . . shall be delivered . . . unless coverage is provided for the protection of persons insured . . . ." Barbara is an insured person under her father's policy. The statutory directives are clear and absolute. An interpretation which would approve the exclusion at issue would fly in the face of the statements of *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997), and *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968), as quoted above, that is, that an insured is entitled to recover the same amount he or she would have recovered if the offending motorist had maintained insurance.

We therefore conclude that there is no genuine issue of fact and that the trial court was correct in granting the defendants' motions for summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JIMMY R. HARRIS, APPELLANT.
583 N.W.2d 366

Filed August 18, 1998. No. A-97-867.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** An abuse of discretion occurs where the judge's ruling is clearly untenable and deprives a litigant of a just result in a judicial proceeding.
3. **Sentences.** Neb. Rev. Stat. § 29-2204 (Supp. 1997) provides that where the criminal offense for which an indeterminate sentence is to be imposed is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be more than one-third of the maximum term.

4. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise.

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

Alan G. Stoler and Jerry M. Hug for appellant.

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

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jimmy R. Harris appeals from the sentence imposed by the district court upon Harris' conviction for felony driving under suspension pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1993). Although we do not find the sentence to be an abuse of discretion, because of an amendment to the indeterminate sentencing statute, Neb. Rev. Stat. § 29-2204 (Supp. 1997), we modify the sentence and affirm it as modified.

II. BACKGROUND

Harris, who is now 69 years old, has a lengthy history of encounters with law enforcement arising primarily out of driving under the influence of alcohol (DUI) and driving under a suspended license (DUS). Despite having had his license previously revoked for DUI, on October 7, 1996, Harris was once again stopped for DUI and DUS.

After pleading guilty, Harris was sentenced to 4 to 5 years' incarceration for the DUS charge. Harris timely appealed the sentence on the DUS charge.

III. ASSIGNMENT OF ERROR

The only error assigned in this appeal is that the district court abused its discretion in imposing an excessive sentence for Harris' DUS conviction.

IV. ANALYSIS

1. Excessive Sentence

Harris asserts that the sentence imposed by the district court was excessive when considering his age, mentality, education, health, and background. Essentially, Harris asserts that he is approaching 70 years old, faithfully served the country in the military, has a steady job, and is in relatively poor health and under a great deal of stress. As such, he argues that a sentence of probation would be more appropriate in this case. We strongly disagree.

The presentence investigation report in this case reveals that Harris has been given numerous opportunities in the past to stop his dangerous and destructive habits, but repeatedly chooses to violate the law. Specifically, Harris had five prior DUI convictions at the time of this offense, and the DUI offense which occurred on the same night as the present DUS offense raises his total to six DUI convictions. Harris has previously been sentenced to probation for DUI, and his license had been suspended four times prior to the present offense, for periods of time ranging from 1 year to 99 years. Harris has previously been convicted of DUS on three occasions, and he received probation each time. Additionally, Harris has twice been convicted of carrying a concealed weapon and has been cited once each for DUI and DUS where prosecution was declined. Finally, Harris' record indicates a previous charge of violating his probation, although no disposition is noted. That violation of probation charge is in addition to Harris' apparent repeated probation violations of continuing to drive without a license.

[1,2] The law in Nebraska is very clear that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Thomas*, 6 Neb. App. 510, 574 N.W.2d 542 (1998); *State v. James*, 6 Neb. App. 444, 573 N.W.2d 816 (1998). An abuse of discretion occurs where the judge's ruling is clearly untenable and deprives a litigant of a just result in a judicial proceeding. *State v. Thomas, supra.*

From a review of the court's comments during the sentencing hearing, it is apparent that the court was concerned with Harris' refusal to heed prior admonishments to stop his behavior and

his repeated violation of the law and endangerment of the public. The court noted as follows:

> [W]e're worried that you're going to kill somebody, and you've been extremely lucky. Now, just think about this: I count six, but when we get up over four or five, you know, what are we doing, DWIs? And what that basically means, being at this 20-some years and being in municipal court for some 12, 13 years, is that you're driving drunk the majority of the time that you drive. Probably 90 percent of the time that you're behind the wheel you've got too much alcohol in your system, and you're a menace to everybody that's out on the roads, and that's just, you know, really inexcusable. And you've just been extremely lucky that you haven't killed somebody or killed yourself. . . .
>
> . . . [A]pparently your modus operandi is I'm going to go out and drink and drive and I don't care if I have a driver's license, I don't care who I might hurt, I'm going to go drive. . . .
>
> . . . [Y]ou are a menace to the citizens of the State of Nebraska because your track record is such that you just keep coming back. The system has done everything it could do. I mean, you had DWI after DWI. You had probations. . . .
>
> . . . [E]very opportunity has been given to you to look at your problem and try to resolve it. But your answer to that is to keep drinking and driving.

Given Harris' repeated refusal to comply with the law or previous orders of the court that he stop drinking and driving and driving without a license, the judge's sentence in this case is clearly not an abuse of discretion. We are not persuaded by Harris' argument on appeal that his crime was "victimless." Rather, Harris' past behavior indicates that if Harris is given the opportunity to continue, it is only a matter of time before somebody is seriously injured by Harris' actions. We are also not persuaded by Harris' argument on appeal that although he knew he should not be driving, he was merely trying to help somebody else out by driving a woman and her ill infant to the hospital on this occasion. If nothing else, those circumstances illustrate clearly that Harris cannot exercise good judgment regarding

drinking and driving while his license has been revoked, and the previous probation orders are clearly not benefiting him.

2. Legislative Amendment

[3] Although the sentence of the district court was not an abuse of discretion, the Legislature has amended the indeterminate sentencing statute, and we are compelled to consider if the amendment has any effect on Harris' sentence. At the time the district court entered the sentence in this case, § 29-2204 (Reissue 1995) provided, in relevant part, that "in imposing an indeterminate sentence upon an offender, the court shall: . . . [f]ix the minimum and maximum limits of the sentence to be served within the limits provided by law . . . ." In 1997, the Legislature amended this provision, however, to provide that where the criminal offense for which an indeterminate sentence is to be imposed is a Class IV felony, "the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term . . . ." § 29-2204 (Supp. 1997); 1997 Neb. Laws, L.B. 364. The operative date of this amendment was July 1, 1998.

[4] The law is well settled in Nebraska that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995); *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686; *State v. Bennett*, 2 Neb. App. 188, 508 N.W.2d 294 (1993). A sentence is not a final judgment until the entry of a final mandate of an appellate court if an appeal is taken. *Jones v. Clarke, supra*; *State v. Schrein, supra*; *State v. Bennett, supra.* As such, the amendment in the present case occurred after the criminal activity but prior to the final judgment.

Under the newly amended statute, the district court could no longer order a sentence of 4 to 5 years' imprisonment, because the minimum portion of the indeterminate sentence may not

exceed one-third of the maximum portion of the sentence. As such, we modify the sentence to reduce the minimum portion of the sentence to 20 months. Harris is, accordingly, sentenced to serve a term of 20 months' to 5 years' imprisonment.

V. CONCLUSION

The district court committed no abuse of discretion. However, because of a legislative amendment, the sentence is modified.

AFFIRMED AS MODIFIED.

JERRY W. BENNETT, APPELLANT, V.
J. C. ROBINSON SEED CO., APPELLEE.
583 N.W.2d 370

Filed August 18, 1998. No. A-97-1185.

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. ____: ____. Findings of fact made by a Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous, but an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Proof.** An applicant seeking modification of a workers' compensation award must prove by a preponderance of the evidence that the increase in his or her incapacity is due solely to the injury resulting from the original accident.
4. ____: ____. In proving an increase in incapacity, an applicant for a modification in a workers' compensation award must demonstrate by a preponderance of the evidence that there exists a material and substantial change for the worse in the applicant's condition justifying a modification and distinct and different from that for which an adjudication has been previously made.
5. ____: ____. In order to succeed in obtaining a modification of a workers' compensation award, an applicant must demonstrate a change in his or her physical disability.
6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
7. **Statutes: Legislature: Intent: Presumptions.** An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Stephen L. Gerdes, of Law Offices of Stephen L. Gerdes, for appellant.

Melvin C. Hansen and Julie M. Martin, of Hansen, Engles & Locher, P.C., for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jerry W. Bennett appeals from an order of the Workers' Compensation Court review panel which affirmed an order of the Workers' Compensation Court dismissing Bennett's application to modify a previous compensation award. On appeal, Bennett challenges the court's conclusion that he failed to demonstrate a material and substantial increase in his incapacity since the time of the previous award and the court's method of computing the amount of temporary total disability benefits to which Bennett was entitled for a short period of temporary total disability. For the reasons stated herein, we affirm in part and in part reverse, and remand with directions.

II. BACKGROUND

Bennett was injured in a work-related accident on April 28, 1987. As a result of the accident, Bennett suffered injuries to his back. Bennett was awarded temporary total disability benefits and permanent partial disability benefits in an award on August 15, 1989. The initial permanent partial disability award was computed based upon a finding that Bennett had suffered a 40-percent permanent impairment of earning capacity. On September 15, 1992, the court modified the initial award by raising Bennett's impairment rating to 60 percent and modifying his permanent partial disability benefits accordingly.

On May 14, 1996, Bennett filed a petition to modify the September 1992 compensation award. Bennett alleged that he had suffered a material and substantial increase in his incapacity and sought to have the court declare him permanently totally

disabled. On January 13, 1997, the compensation court entered an "Order of Dismissal." In the order, the court found that Bennett failed to prove by a preponderance of the evidence that he had suffered a material and substantial increase in incapacity. The court found that Bennett had suffered a short period of temporary total disability during October and November 1994 and held that Bennett was entitled to temporary total disability benefits for a 2⅘-week period. The entire temporary total disability period occurred after Bennett had received his full 300 weeks of permanent partial disability benefits pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 1993). Nonetheless, the compensation court gave defendant, J. C. Robinson Seed Co. (J. C. Robinson), credit for having paid past partial disability benefits based on an impairment rating of 60 percent and ordered it to pay the 2⅘ weeks of temporary total disability benefits based on the remaining 40-percent impairment rating.

On October 23, 1997, the review panel entered an order of affirmance on review. The review panel held that the compensation court's factual findings were not clearly wrong and that they were supported by competent evidence. Bennett filed this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Bennett has assigned nine errors. Because a number of these assigned errors are merely restatements of one another, we have consolidated the assigned errors for discussion to two. First, Bennett asserts that the compensation court erred in finding that he failed to prove a material and substantial increase in incapacity. Second, Bennett asserts that the court erred in giving J. C. Robinson credit for past permanent partial disability benefits when computing the amount he was entitled to receive for the period of temporary total disability.

IV. ANALYSIS

1. Standard of Review

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Smart v. Scrivner/Food 4 Less*, 254 Neb. 111, 574 N.W.2d 505 (1998); *Hammelman v. Dreesen Enters.*, 6 Neb. App. 564, 575 N.W.2d 176 (1998). In determining whether to affirm, modify, reverse, or set aside the judgment of the review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Hammelman v. Dreesen Enters., supra.*

[2] Findings of fact made by a Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.* However, as in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Smart v. Scrivner/Food 4 Less, supra*; *Hammelman v. Dreesen Enters., supra.*

2. INCREASED INCAPACITY

[3,4] Neb. Rev. Stat. § 48-141 (Reissue 1993) provides the statutory authority for an action to modify a previous compensation award. Under § 48-141, an applicant seeking modification of a workers' compensation award must prove by a preponderance of the evidence that the increase in his or her incapacity is due solely to the injury resulting from the original accident. *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991). In proving an increase in incapacity, the applicant must demonstrate by a preponderance of the evidence that there exists a material and substantial change for the worse in the applicant's condition justifying a modification and distinct and different from that for which an adjudication has been previously made. *Id.*

In the present case, Bennett testified that various physical symptoms had gotten worse since the most recent award was entered in September 1992. Additionally, Bennett offered various medical records and office notes from treating physicians to support his claim that his physical condition had deteriorated. Bennett did not offer any evidence that his impairment rating had changed, except that his treating physician's notes indicated that he may have become "totally disabled."

In concluding that Bennett failed to demonstrate a material and substantial change in incapacity, the compensation court found that most, if not all, of the physical complaints which Bennett testified about had been documented in medical records prior to September 1992 and that Bennett had failed to provide any numerical impairment rating. The court considered two functional capacity assessments and various vocational rehabilitation reports contained in the record.

[5] Previous cases in Nebraska recognize that in order to succeed in obtaining a modification, an applicant must demonstrate a change in his or her physical disability. See, *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989); *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942). As such, where a claimant is unable to demonstrate that his physical condition has changed since the prior award, a compensation court does not commit error in refusing to modify the previous award. *Gomez v. Kenney Deans, Inc., supra.*

The record in the present case contains competent evidence to support the compensation court's conclusion that Bennett failed to demonstrate a material and substantial change in incapacity. The rehabilitation specialist concluded that there were "no knew [sic] objective findings other than [Bennett] has reported increased pain. Dr. Bowman does report degenerative changes, however, degenerative changes have been noted in the medical records going back to 1981." Because there was competent evidence to support a finding that Bennett's physical condition had not materially changed, we conclude that the compensation court was not clearly wrong in finding that Bennett failed to meet his burden of proof.

3. Credit for Past Partial Disability Benefits

The compensation court found that Bennett had demonstrated that he was temporarily totally disabled during a period of time between October 24 and November 10, 1994. During those 2⅘ weeks, J. C. Robinson failed to pay Bennett any compensation for his disability, and his period of partial disability payments pursuant to § 48-121(2) had expired. The compensation court concluded that Bennett was entitled to temporary total disability benefits for the 2⅘-week period. However, rather

than awarding Bennett benefits computed at a rate of 100-percent impairment, the court gave J. C. Robinson credit for having previously paid benefits computed at a rate of 60-percent impairment and ordered that Bennett receive 2⅘ weeks' compensation computed at a rate of 40-percent impairment.

Section 48-121(2) limits the number of partial disability payments which may be received by a plaintiff to 300 weeks' payments. Section 48-121(2) further provides that if a period of temporary total disability is followed by partial disability, then the 300-week period is to be reduced by the number of weeks for which temporary total disability benefits are paid. Bennett argues on appeal that § 48-121(2) does not apply when the period of temporary total disability occurs *after* the conclusion of partial disability payments but applies only where the period of temporary total disability occurs *before* a portion of the partial disability period.

[6,7] The general rules of statutory interpretation in Nebraska provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996). It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Memorial Hosp. of Dodge Cty. v. Porter*, 4 Neb. App. 716, 548 N.W.2d 361 (1996). An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Id.*; *Gatewood v. Powell*, 1 Neb. App. 749, 511 N.W.2d 159 (1993).

In light of the foregoing principles, we conclude that the compensation court erred in determining that Bennett's period of temporary total disability, which occurred entirely after he had received his entire permanent partial disability award of 300 weeks' payments, should be computed based on a 40-percent impairment instead of a 100-percent impairment. The effect of the court's action was to reduce the 300-week period of partial disability payments by the 2⅘-week period of total disability which occurred *after* Bennett's partial disability. The wording

of § 48-121(2), in plain and unambiguous language, provides that such a reduction is to be done when "total disability [is] followed by partial disability." To hold that the compensation court was correct in reducing the period of partial disability by the number of weeks of temporary total disability occurring after the partial disability would render the above-quoted language meaningless.

4. Signatures on Review Panel Decision

We note that Bennett also indicates in his brief that the order of the review panel was "signed by only two of the three judges who heard the case." Brief for appellant at 2. Our review of the record indicates that this is correct. The order of the review panel contains three lines, with the word "Judge" immediately below each line. On two of the three lines are signatures, while the third line remains blank. Nothing else on the order indicates who the third judge was or what the third judge's decision was.

Workers' Comp. Ct. R. of Proc. 12 (1998) provides that an appeal from a trial judge's decision will be to "a three-judge panel." There is no allegation raised by Bennett that his review was heard by less than a complete panel, and he has not assigned or argued any error concerning the fact that only two of the judges signed the order. In *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980), the Nebraska Supreme Court noted that a decision of the review panel, even if signed by only one of the judges, constitutes a valid judgment so long as the findings and award are concurred in by at least two of the three judges. As such, despite the confusion caused by the review panel's actions in this case, and despite the fact that the review panel's order would be clearer if all three judges' votes were reflected on this order, we need not comment further on the failure of the third judge to render a signature on the order of the review panel.

V. CONCLUSION

We conclude that the compensation court was not clearly wrong in finding that Bennett failed to meet his burden of establishing a material and substantial change in his physical condition, and the compensation court's order is affirmed in that regard. We conclude that the court erred, however, in comput-

ing Bennett's temporary total disability award for the period of October 24 through November 10, 1994. As a result, we reverse that portion of the court's order and remand the case with directions to enter an award of temporary total disability in conformance with this opinion.

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

STATE OF NEBRASKA, APPELLEE,
v. CORY J. FOCHTMAN, APPELLANT.
584 N.W.2d 468

Filed August 25, 1998. Nos. A-97-1056, A-97-1057.

1. **Courts: Appeal and Error.** Appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court.
2. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
3. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. **Constitutional Law: Pleas.** In order to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, before accepting such plea, the court must inform the defendant of the defendant's rights as stated in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).
5. **Constitutional Law: Waiver: Records.** A voluntary and intelligent waiver of the rights stated in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), must affirmatively appear from the face of the record.
6. **Pleas: Proof: Appeal and Error.** It is plain error for a trial judge to accept a criminal defendant's guilty plea without an affirmative showing that it was intelligent and voluntary, and a conviction must be set aside if it is the result of an invalid plea.
7. **Criminal Law: Self-Incrimination.** The right of a defendant to remain silent in a criminal prosecution consists of more than a right to decline to testify.
8. **Constitutional Law: Criminal Law: Self-Incrimination.** The right to remain silent, that is, the privilege against self-incrimination guaranteed by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, prevents the State's compelling a defendant to testify in his or her own prosecution on a criminal charge and prohibits an individual's compulsory answer to an official question in any proceeding, civil or criminal, formal or informal, when the answer might incriminate the individual in a future criminal proceeding.
9. **Constitutional Law.** At a bare minimum, a defendant must be informed that he or she has a constitutional right to not be compelled to testify.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Thomas L. Spinar, Saline County Public Defender, and Holly J. Parsley for appellant.

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

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

This opinion covers two related appeals by the appellant, Cory J. Fochtman. Pursuant to a plea bargain, Fochtman pled guilty and was convicted of unlawful distribution of marijuana, a Class III felony, and attempted possession of amphetamine, a Class I misdemeanor. The court sentenced Fochtman to not less than 3 nor more than 3 years 50 days' imprisonment on the felony conviction (with credit for 49 days served) and 8 months in jail on the misdemeanor conviction, to be served concurrently. Fochtman now appeals on the basis that the State violated that part of the plea agreement in which the county attorney agreed to "make no recommendation at the time of the sentence." On the basis of plain error, we reverse the convictions and sentences because Fochtman was not adequately advised of his privilege against self-incrimination before the court accepted his plea and remand the cause for further proceedings.

SUMMARY OF RECORD

The record in this case may be summarized as follows: In case No. 97-2, which composes the appeal in case No. A-97-1056, Fochtman was charged, in an information filed January 9, 1997, with two counts of unlawful distribution of methamphetamine, a Class III felony, one occurring on July 30, 1996, and the second on November 25. Under the plea agreement, this information was later amended to charge Fochtman only with attempted possession of amphetamine, a Class I misdemeanor. In case No. 97-11, which composes the appeal in case No. A-97-1057, Fochtman was charged, in an information filed on January 29, 1997, with unlawful distribution of mari-

juana, a Class III felony, on July 17, 1996. Under the plea bargain, Fochtman pled guilty to this charge.

On February 3, 1997, Fochtman was arraigned on the original informations in both cases. The informations were separately read to Fochtman, and the court advised him as to the pleas available to him, but not of any rights. Fochtman pled not guilty to all charges.

On May 5, 1997, Fochtman appeared with counsel before the court in both cases. A plea bargain was announced to the court which in substance provided that Fochtman agreed to plead guilty in case No. 97-11 to the charge of distribution of marijuana and plead guilty in case No. 97-2 to the amended charge of attempted possession of amphetamine, a Class I misdemeanor. In exchange, the remaining charges would be dismissed and the State would make no recommendation at the time of sentencing.

Subsequently, the court read the amended information in case No. 97-2 to Fochtman, advised him of the pleas available to him, and then asked him how he wanted to plead. Fochtman stated that he wished to plead guilty to the charges. The court then repeated the process with the remaining charge in case No. 97-11. Again, Fochtman pled guilty. The court then promptly called Fochtman as a witness on behalf of the court, had him duly sworn, and then proceeded to examine him about his date of birth, education level, reading and writing ability, and occupation. The court also inquired as to Fochtman's medical and psychological treatment and the possibility that either drugs, alcohol, or mental condition might prohibit him from understanding the proceedings being conducted.

The court then proceeded to inquire if Fochtman understood the procedure that would be followed and specifically questioned Fochtman as to some of the procedures which implement the rights which judges are required to advise defendants of when they plead guilty, as guaranteed by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The inquiry was in detail, and Fochtman answered that he understood that 40 or 50 persons would be called at random from those who vote and have driver's licenses to be a jury; that before the trial he or his

attorney could ask the jurors questions to attempt to ascertain if they could be fair; and that "once the trial began, you understand that you could sit by your lawyer or counsel and not help the prosecutor find that you were guilty beyond a reasonable doubt, *you could decline to testify*, you understand that?" (Emphasis supplied.) Fochtman was also asked if he understood that if the county attorney put witnesses on the stand, his lawyer could ask them questions, and that he had the right to force people to come to testify on his behalf.

The judge elicited from Fochtman that he was satisfied with his attorney, that no threats were made other than the charges filed, and that he understood he could go to jail for up to 21 years and be fined $25,000. The judge next inquired whether Fochtman understood that the plea bargain had the effect of reducing one of the felony charges to a misdemeanor charge. The judge also elicited from Fochtman that no one had promised that he would not go to the penitentiary.

The judge then had the county attorney state the evidence which would constitute a factual basis for the charges, and the county attorney did so in detail. The court then inquired of Fochtman if he understood that the State would have to prove every element of every charge beyond a reasonable doubt. Next, the court stated: "And if I send you to the penitentiary there will be little or nothing you can do about it because you're giving up most of your constitutional rights by entering this plea, you understand that?" Fochtman responded in the affirmative. When asked whether, "[t]aking into consideration all those things, [you are] sure that you want to enter this plea of guilty to the misdemeanor and to the Class III felony, 20 years worth, of delivering marijuana?" Fochtman replied, "Yes, sir." Thus, the hearing was concluded.

Fochtman was sentenced at a later hearing, at which time, undisputedly, the county attorney breached the terms of the plea bargain. Fochtman now appeals.

ASSIGNMENTS OF ERROR

Fochtman argues that he was denied effective assistance of counsel in the "trial proceedings" in that his trial counsel failed to object to the State's violation of the plea bargain at the time

of the violation as required by *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990), and further that the court imposed an excessive sentence. Since we reverse upon the basis of plain error, the assigned errors are rendered moot and need not be considered.

STANDARD OF REVIEW

[1-3] Appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). However, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *Id.* Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.*

ANALYSIS

[4] In order to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, before accepting such plea, the court must inform the defendant of the defendant's rights as stated in *State v. Irish*, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986):

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

Accord *State v. Hays, supra.*

[5,6] We observe that the above admonition is not simply to ascertain if the defendant knows the procedure but first to inform the defendant of the rights specified and then to determine if the defendant understands the rights and that by pleading guilty, the defendant is waiving those rights (with the excep-

tion of the right to assistance of counsel, see *id*). A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record. *Id.* It is plain error for a trial judge to accept a criminal defendant's guilty plea without an affirmative showing that it was intelligent and voluntary, and a conviction must be set aside if it is the result of an invalid plea. *Id.*

In the instant case, it is clear that the judge did not inform Fochtman of his privilege against self-incrimination, nor did he even ask Fochtman if he knew he had such a right. We observe that before the court advised Fochtman of anything but the charges against him and the pleas available to him, the court called Fochtman to the witness stand, put him under oath, and began to ask him questions. We can think of no method more calculated to lead a defendant to believe that he or she does not have the right to remain silent. After this procedure, the judge's phrase "you could decline to testify," interspersed between questions about trial procedure and burden of proof, is essentially meaningless and certainly contradictory. Aside from the fact that it is, as set forth below, insufficient to inform a defendant of his or her right to remain silent, the court's act in calling and swearing a defendant in order to advise the defendant of his or her *Irish* rights is, to say the least, highly unusual and a practice we cannot condone. When a defendant who has not yet been advised of his or her rights indicates a willingness to plead guilty, it is basic that the court inform the defendant of his or her rights. Placing a defendant under oath to do so, however, is useless and confusing.

[7,8] The right of a defendant to remain silent in a criminal prosecution consists of more than a right to decline to testify. The right has been summarized as follows:

> The right to remain silent, that is, the privilege against self-incrimination guaranteed by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, prevents the State's compelling a defendant to testify in his or her own prosecution on a criminal charge and prohibits an individual's compulsory answer to an official question in any proceeding, civil or criminal, formal or informal, when the answer might

> incriminate the individual in a future criminal proceeding. *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 274 (1973).

State v. Sites, 231 Neb. 624, 625-26, 437 N.W.2d 166, 168 (1989).

[9] While such a detailed explanation of the right is not necessary in taking a plea, merely informing a defendant that he or she could decline to testify, after he or she has already been sworn, is clearly insufficient. At a bare minimum, the defendant must be informed that he or she has a constitutional right to not be compelled to testify. The judge's failure to advise Fochtman of his privilege against self-incrimination constitutes plain error. See *State v. Litzenburg*, 220 Neb. 807, 374 N.W.2d 1 (1985).

We further note that the judge did not ask Fochtman whether he understood that by pleading guilty, he was waiving his rights to confront witnesses, his right to a jury trial, and his privilege against self-incrimination. The judge did inform Fochtman, "And if I send you to the penitentiary there will be little or nothing you can do about it because you're giving up most of your constitutional rights by entering this plea, you understand that?" However, the judge did not specify which constitutional rights would be waived. As such, it is likely that such failure also constitutes plain error. See *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

Additionally, we highlight the fact that the judge did not inform Fochtman of his *Irish* rights or ask Fochtman if he understood that he had those rights, so much as he asked Fochtman whether he understood the upcoming procedure. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In our experience, defendants have a propensity to agree with a proposition suggested by a judge's question, and therefore a clear distinction exists between informing defendants of their rights and asking them if they understand their rights or that they could do something at trial. Of course, in order to ascertain whether a defendant is voluntarily and intelligently waiving his or her rights, the court must ask the defendant if he or she understands those rights, but the process is supposed to be a two-step process. First, defendants are to be informed of their rights, and

then the record must demonstrate that they understand them to the extent necessary to support a finding that those rights are being waived knowingly and intelligently.

CONCLUSION

Having found plain error, we must now reverse the judgment, vacate Fochtman's convictions and sentences, and remand the cause to the district court for further proceedings with the direction that Fochtman be rearraigned on the original charges.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF ANDRE W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANDRE W., APPELLANT.

584 N.W.2d 474

Filed August 25, 1998. No. A-97-1169.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial judge's ruling on a motion to suppress, the ultimate determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. ____: ____: ____: ____: ____. Apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, a trial judge's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of that of the lower court.
4. **Warrantless Searches: Police Officers and Sheriffs: Probable Cause: Weapons.** Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a police officer who reasonably believes that a person may be armed and dangerous is entitled for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her.
5. **Warrantless Searches: Police Officers and Sheriffs: Probable Cause: Weapons: Intent.** A pat-down search which includes the removal of a shoe and patting down of a sock or a look into a boot is legal if the officer conducted the search with the appropriate intentions, that is, to reveal weapons.

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

Dennis R. Keefe, Lancaster County Public Defender, and Jenny R. Witt for appellant.

Gary Lacey, Lancaster County Attorney, and Marcie Hagerty for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Andre W. appeals the adjudication order of the separate juvenile court of Lancaster County in which the court found beyond a reasonable doubt that Andre had knowingly or intentionally possessed a controlled substance, to-wit, cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1995), and therefore concluded that Andre was a child as defined by Neb. Rev. Stat. § 43-247(2) (Supp. 1997). On appeal, Andre contends that the juvenile court erred in failing to grant his motion to suppress. For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

A juvenile petition was filed in this case on September 18, 1997. The State alleged that Andre was a child as defined by § 43-247(2) because he had possessed cocaine in violation of § 28-416(3). Andre filed a motion to suppress all evidence seized as a result of a seizure and search of his person, contending that his constitutional rights were violated. A hearing was held on the motion on October 27. Dennis W. Miller, the police officer who discovered the cocaine on Andre's person as a result of a pat-down search for weapons, testified for the State. Andre also testified.

The facts are generally undisputed. We summarize the testimony of Miller, a police officer with the Lincoln Police Department. Miller is a detective sergeant with 18 years' experience who is assigned to the specialized drug unit of the department. On September 17, 1997, at approximately 9:50 p.m., Miller was supervising the execution of a search warrant at 2805 F Street, a residential apartment. The warrant was a night-

time, no-knock warrant authorizing a search for controlled substances, other drug-related evidence, and an individual known as Crumb. Crumb was described in the warrant as a "black male 5'7", thin build, wearing a white T-shirt and blue slacks."

The officers gained forcible entry into the apartment. All persons found inside were handcuffed and removed from the residence. Andre, a young black male dressed in a white T-shirt, blue jeans, and high-top tennis shoes, was found on a bed in a bedroom of the apartment. Andre indicated that he did not live at the apartment.

After Andre was taken outside, Miller conducted a pat-down search of Andre's person for weapons. According to Miller, at the time of the pat down, Andre was suspected of distribution of cocaine. Informants had indicated that no one actually lived at the apartment and that the only use of the apartment was to distribute crack cocaine. The informant had purchased crack cocaine from a person who described his contact at the apartment as a younger black male named "Crumb," dressed in a white T-shirt and blue jeans.

As part of the pat-down search, Miller had Andre remove his high-top tennis shoes in order to search for weapons. He did so because, based on his experience, people encountered in this type of situation often have weapons, including knives and razor blades, hidden in their socks and shoes. While patting down Andre's socks, Miller felt an object inside one sock that he "immediately" knew to be crack cocaine, based on his training and experience. Miller then removed the crack cocaine and arrested Andre.

After hearing the evidence, the court overruled the motion to suppress. On October 30, 1997, a trial was had on stipulated facts, at which time Andre preserved his objection to the receipt of the evidence obtained as a result of the seizure and search. Thereafter, the court found beyond a reasonable doubt that Andre had illegally possessed cocaine and exercised its jurisdiction over him. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

Generally, Andre assigns that the juvenile court erred in overruling his motion to suppress and that there was insufficient evidence to adjudicate Andre under the Nebraska Juvenile Code.

IV. ANALYSIS

1. Standard of Review

[1-3] In reviewing a trial judge's ruling on a motion to suppress, the ultimate determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, a trial judge's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *Konfrst, supra*; *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.* Regarding questions of law, an appellate court is obligated to reach a conclusion independent of that of the lower court. *J.C. Penney Co. v. Balka*, 254 Neb. 521, 577 N.W.2d 283 (1998).

2. Detention

Andre first argues that the seizure of his person was an arrest which was not supported by probable cause. In response, the State argues that pursuant to the U.S. Supreme Court's holding in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), the detention of Andre was a permissible investigatory stop pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

(a) *Summers* Case

In *Summers, supra*, an occupant of a residence was detained by police while they executed a search warrant for narcotics. After narcotics were found on the premises, the occupant was arrested and searched. The defendant sought to suppress the narcotics, claiming that he was detained in violation of the Fourth Amendment to the U.S. Constitution. The U.S. Supreme Court concluded that the detention of the defendant was constitutionally permissible.

In assessing the justification for the detention, the *Summers* Court considered the law enforcement interests and the nature of the facts supporting the detention. The legitimate law enforcement interests identified by the Court were the interest in preventing flight and, "of greater importance," the interest in minimizing the risk of harm to the officers. 452 U.S. at 702. The Court stated:

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

452 U.S. at 702-03.

The Court also found it appropriate to consider the existence of a search warrant. The Court stated that the search warrant

> provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

452 U.S. at 703-04.

(b) Application to Facts

Just as was the defendant in *Summers, supra*, Andre was detained by the police during the execution of a search warrant for controlled substances. The police could reasonably believe that Andre was an occupant of the premises because he was found on a bed in a bedroom and because he matched the general description set forth in the search warrant of the individual called Crumb. Based on the *Summers* holding, we conclude that the detention of Andre was constitutionally permissible.

3. Pat-Down Search

Andre also challenges the police's right to conduct a pat-down search. He argues that such a search is unconstitutional pursuant to the U.S. Supreme Court's holding in *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

(a) Relevant Case Law

[4] Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a police officer who reasonably believes that a person may be armed and dangerous is entitled for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her. See, *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997); *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

In *Ybarra, supra*, a pat-down search was conducted on several patrons of a public tavern. The patrons were searched during the execution of a warrant to search the tavern and a bartender for controlled substances. The Court rejected the State's argument that despite a lack of probable cause to search Ybarra, the pat down was justified as a search for weapons under the *Terry* doctrine. The *Ybarra* Court held that "[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." 444 U.S. at 92-93. The Court regarded the pat-down search to be a "generalized 'cursory search for weapons.' " 444 U.S. at 93-94. The Court observed that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91.

We do not find *Ybarra* to be controlling, because of its factual dissimilarity to the case before us. The *Ybarra* holding is limited by the facts of that case. *Ybarra* involved the patting down of customers at a tavern, whereas our case involves the patting down of occupants of a private residence. The reasons set forth by the U.S. Supreme Court in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), to justify the detention of occupants of a private residence during the

execution of a warrant apply with equal force to justify the patting down of occupants of a private residence during the execution of a search warrant. The execution of a warrant to search for controlled substances may give rise to sudden violence and other frantic efforts. See *id.* Furthermore, the search warrant provides an objective justification for the police to believe those in the residence are engaged in criminal activity and are armed and dangerous. *Id.*

In *People v. Thurman*, 209 Cal. App. 3d 817, 257 Cal. Rptr. 517 (1989), a California appeals court addressed a situation factually similar to that before us. In distinguishing *Ybarra, supra*, the court stated:

> Unlike a business open to the general public, a private residence does not attract casual visitors off the street. When the private residence has been judicially determined as the probable site of narcotic transactions, the occupants are very likely to be involved in drug trafficking in one form or another. Moreover, because of the private nature of the surroundings and the recognized propensity of persons "engaged in selling narcotics [to] frequently carry firearms to protect themselves from would-be robbers," [citations omitted] the likelihood that the occupants are armed or have ready accessibility to hidden weapons is conspicuously greater than in cases where, as in *Ybarra*, the public freely enters premises where legal business is transacted.

209 Cal. App. 3d at 824-25, 257 Cal. Rptr. at 520-21. The *Thurman* court rejected the defendant's argument that the police had no reason to believe he was armed and dangerous and that therefore, under *Terry, supra*, the search was unlawful. The court stated:

> We have no hesitation whatever in holding that [the officer] acted reasonably and prudently in conducting the pat search of [the defendant] in the circumstances. Here, a neutral and detached magistrate had judicially approved a warranted search for evidence of drug trafficking at the private residence where appellant was found. The officers whose duty required them to execute the warranted search were thus well aware they were engaged in an undertaking fraught with the potential for sudden violence. They were

> necessarily cognizant of the very real threat that the occupants of the residence were within an environment where weapons are readily accessible and often hidden, nor could they discount the possibility that one or more of the individuals found inside were personally armed.
>
> . . . That [the defendant's] posture, at that moment, was non-threatening does not in any measure diminish the potential for sudden armed violence that his presence within the residence suggested. To require an officer to await an overt act of hostility, as [the defendant] suggests, before attempting to neutralize the threat of physical harm which accompanies an occupant's presence in a probable drug trafficking residential locale, would be utter folly.

209 Cal. App. 3d at 823, 257 Cal. Rptr. at 520. Other jurisdictions have adopted the *Thurman* holding. See, *State v. Guy*, 172 Wis. 2d 86, 492 N.W.2d 311 (1992), *cert. denied* 509 U.S. 914, 113 S. Ct. 3020, 125 L. Ed. 2d 709 (1993); *State v. Alamont*, 577 A.2d 665 (R.I. 1990); *State v. Zearley*, 444 N.W.2d 353 (N.D. 1989). See, also, *State v. Trine*, 236 Conn. 216, 673 A.2d 1098 (1996) (applying reasoning of *Summers, supra*, to justify pat-down search of occupants of private residence during execution of search warrant). Although we recognize that some jurisdictions have applied the *Ybarra* holding to pat-down searches of occupants of private residences, see, *United States v. Ward*, 682 F.2d 876 (10th Cir. 1982); *United States v. Cole*, 628 F.2d 897 (5th Cir. 1980), *cert. denied* 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241 (1981); *State v. Carrasco*, 147 Ariz. 558, 711 P.2d 1231 (Ariz. App. 1985); *Lippert v. State*, 664 S.W.2d 712 (Tex. App. 1984); *State v. Broadnax*, 98 Wash. 2d 289, 654 P.2d 96 (1982), we find more persuasive the line of cases applying the *Thurman* holding.

(b) Resolution

In the case before us, the police were executing a search warrant on a private residence. The warrant authorized the search for controlled substances and other items related to the distribution of controlled substances. The police were aware that according to informants, the only use of the apartment to be searched was to distribute crack cocaine. When the police

forcibly entered the apartment, there were several individuals, including Andre, present. Andre was found on a bed in a bedroom and matched the general description provided in the warrant of the person dealing drugs from that apartment. As discussed above, it was proper for the police to detain Andre. Under these circumstances, we conclude that Miller's belief that Andre could be armed and dangerous was reasonable. Therefore, the pat down of Andre for weapons for officer safety reasons was constitutionally permissible.

4. Scope of Pat-Down Search

Next, we address the scope of the pat-down search. Andre argues that the officer exceeded the lawful scope of a pat-down search when the officer had him remove his shoes and patted his socks. During the pat down of Andre's socks, the officer felt an object which he "immediately" recognized to be crack cocaine.

[5] As discussed above, police may conduct a limited search of the outer clothing of an individual they reasonably believe is armed and dangerous. See, *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997); *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990). Neither this court nor the Nebraska Supreme Court has addressed whether such a search may include the removal of high-top shoes and the patting down of socks. However, other states which have addressed issues similar to those before us have found that a pat down which includes the removal of a shoe and patting down of a sock, or a look into a boot, is legal if the officer conducted the search with the appropriate intentions, that is, to reveal weapons. See, *Hodges v. State*, 678 So. 2d 1049 (Ala. 1996); *Stone v. State*, 671 N.E.2d 499 (Ind. App. 1996); *State v. Mitchell*, 87 Ohio App. 3d 484, 622 N.E.2d 680 (1993); *Thompson v. State,* 551 So. 2d 1248 (Fla. App. 1989); *Commonwealth v. Borges*, 395 Mass. 788, 482 N.E.2d 314 (1985).

In the case before us, Miller testified at the suppression hearing that his purpose in having Andre remove his high-top tennis shoes and in patting down Andre's socks was to search for weapons. Miller testified that based on his training and experience, people encountered while a warrant to search for controlled substances is being executed often have weapons hidden

in their socks and shoes. According to Miller, weapons that may be hidden in socks and shoes include knives and razor blades.

It is clear from the record that Miller had Andre remove his shoes and patted down Andre's socks with the proper intentions, that is, to ensure that Andre had no hidden weapons. Therefore, we conclude that the scope of the pat-down search was proper.

5. Seizure of Crack Cocaine

Finally, we address the seizure of the crack cocaine from Andre's sock. While patting down Andre's sock, Miller felt an object which he knew "immediately" was crack cocaine. He then removed the object from the sock and arrested Andre.

A *Terry* search is ordinarily limited to outer clothing. See *Caples, supra*. However, in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), the U.S. Supreme Court held that an officer may make a warrantless seizure of nonthreatening contraband detected during a pat-down search permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. The Court reached its conclusion by drawing an analogy to the plain-view doctrine. The Court stated:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified[.]

508 U.S. at 375-76. This has become known as the plain-feel doctrine. See *State v. Craven,* 253 Neb. 601, 571 N.W.2d 612 (1997).

In *State v. Craven*, 5 Neb. App. 590, 560 N.W.2d 512 (1997), *affirmed* 253 Neb. 601, 571 N.W.2d 612, a panel of this court applied the plain-feel doctrine. This application of the plain-feel doctrine was affirmed by the Nebraska Supreme Court. In *Craven*, a police officer felt an object during a pat-down search which, based upon his training and experience and without manipulation or further examination, he recognized as an object of criminal activity. As a result, the officer was justified in plac-

ing his hand in a pocket in order to retrieve what he reasonably believed to be contraband. See *id.*

Similarly, in the case before us, Miller testified that upon feeling an object inside Andre's sock during the pat-down search, he "immediately" recognized it as crack cocaine, based upon his training and experience. As a result, Miller possessed a reasonable belief that Andre was illegally in possession of a controlled substance. Therefore, based on *Craven, supra*, Miller was justified in placing his hand inside Andre's sock and retrieving the crack cocaine.

V. CONCLUSION

In summary, the detention of Andre, the subsequent pat-down search, and the seizure of the crack cocaine were proper. As a result, Andre's motion to suppress was properly denied. Because the crack cocaine was properly admitted at trial, there was sufficient evidence for the juvenile court to find Andre to be a child as defined by § 43-247(2). Therefore, Andre's second assigned error is without merit.

We affirm the judgment of the separate juvenile court of Lancaster County.

AFFIRMED.

JIM DEVOR, APPELLANT, V. AMY DEVOR, APPELLEE.
584 N.W.2d 670

Filed September 1, 1998. No. A-97-042.

1. **Injunction.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 1993) is analogous to an injunction.
2. **Judgments: Appeal and Error.** The granting or denial of a protection order is reviewed on appeal de novo on the record.
3. ____: ____. In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court, but where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Sandra Hernandez Frantz for appellant.

Roberta S. Stick, of Legal Services of Southeast Nebraska, for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jim Devor appeals from an order of the district court denying his application for a protection order. Because we conclude that the district court improperly based the decision to deny the application on gender rather than the merits of the claim, we reverse, and remand for further proceedings.

II. BACKGROUND

On December 3, 1996, Jim filed an application for a protection order, pursuant to Neb. Rev. Stat. § 42-924 (Reissue 1993). There had been a divorce proceeding filed relating to the marriage of Jim and his wife, Amy Devor, and the parties were apparently living separately at all times relevant to this action. In the application, Jim alleged that Amy had been "willfully and maliciously harass[ing]" him and had "engaged in a knowing and willful course of conduct directed at [him] which seriously terrifie[d], threaten[ed], or intimidate[d him]." Specifically, he alleged that she had been coming to his house, entering without invitation, threatening him, hitting him, calling him at all hours of the night, and leaving messages on his telephone answering machine, as well as harassing his girl friend. At least one of the parties' two minor children lived with Jim at the time.

On December 3, 1996, a protection order was granted, to be effective for a period of 1 year. On December 16, a hearing was held before the district court pursuant to § 42-924(2). The colloquy from that hearing is replicated in the analysis section below. At the conclusion of the hearing, the court entered an order denying Jim's request for a protection order, rendering the previous protection order of no further effect. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Jim has assigned three errors, which we have consolidated for discussion to one. Jim asserts that the district court erred in denying his application for a protection order.

IV. ANALYSIS

1. District Court Hearing

The entire hearing before the district court comprises less than four pages of testimony. Because of its length, and because it illustrates the point made in our resolution below, we reproduce the entire hearing as follows:

> THE COURT: Well, let's see. You're married and you have two different children. The word here is you are calling, leaving messages on the machine, threatening[,] hitting, walking in without being invited, harassing the child.
>
> So there is a divorce filed.
>
> MR. DEVOR: Yes, there is, Your Honor.
>
> THE COURT: Okay.
>
> What difference does it make, Mr. Devor, you don't want to harass her, do you?
>
> MR. DEVOR: No.
>
> THE COURT: And you don't want to hurt her.
>
> And this has nothing to do with child visitation, there has got to be visitation, so I am just going to issue this order telling you not to do what you don't want to do and we'll just assess cost to the divorce and see how that comes out and the cost will be assessed then.
>
> MS. JOHNSON [counsel for Amy]: Just for clarification, this is filed against Mrs. Devor.
>
> THE COURT: It is? It's you [who] are afraid of her.
>
> MR. DEVOR: Because she keeps coming in my house.
>
> THE COURT: She's going to hurt you?
>
> Why don't you change the lock?
>
> MR. DEVOR: I am in a different house. Am I suppose[d] to lock my door when I am living there wit[h] my kids.
>
> THE COURT: Why not? Is that impossible?
>
> I don't want to argue. Just change the lock.
>
> MR. DEVOR: What about the calling on the machine and leaving messages for my little boy to hear.
>
> THE COURT: Don't listen.
>
> MR. DEVOR: My little boy is right there listening in when she calls. I tell him not to answer the phone.

THE COURT: She is going to get to visit the child anyway, so she expects —

MR. DEVOR: If you heard the tapes, you [would] know what I mean.

THE COURT: Did you bring them with you?

MR. DEVOR: No, I don't have them, the cops have [them].

THE COURT: If she is harassing you, have her arrested. These protection orders are not for divorces.

MR. DEVOR: I know that. I am not saying that.

THE COURT: Then why are you here?

MR. DEVOR: Why am I here? Because she comes over to my house all the time and she harasses me.

THE COURT: Harass is not a simple thing, you have to be in fear and you are not afraid of her, you're not afraid of her for a second. You are wasting my time with your marital squabbles.

MR. DEVOR: I do not bother her.

THE COURT: She's not accusing you of that.

MR. DEVOR: You don't know what she's done.

THE COURT: All right, I don't know, then why isn't — why don't you put it in there, that's what you are suppose[d] to do.

You are not the slightest bit afraid of her, you are just wanting to fight back.

Who's your lawyer?

[MR. DEVOR:] Sandra — can't remember her last name, out of Lincoln. Frantz.

THE COURT: Sandra who? Frantz. She didn't tell you to do this.

MR. DEVOR: No, she didn't.

THE COURT: That's good.

MR. DEVOR: The cops told me to do this.

THE COURT: Yes, I believe that. They tell anyone who comes in with a domestic squabble that they don't want to mess with to go see the Judge, get a protection order.

You're not afraid of her and I know it and you know it, you are not afraid of her.

MR. DEVOR: I'm afraid of what she might do.

It's hard telling what she might do.

THE COURT: What reason do you have to be afraid of her?

MR. DEVOR: I don't want my kid to have to hear her.

THE COURT: If she did anything that amounted to anything the cops could arrest her. I can't believe that you are afraid of her.

Request denied.

2. Resolution

[1-3] A protection order pursuant to § 42-924 is analogous to an injunction. *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994). The granting or denial of an injunction is reviewed on appeal de novo on the record. *Vaccaro v. City of Omaha*, 6 Neb. App. 410, 573 N.W.2d 798 (1998); *Old Omaha Assn. v. City of Omaha*, 2 Neb. App. 618, 513 N.W.2d 329 (1994). See, also, *Riha v. FirsTier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995). In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court, but where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Old Omaha Assn. v. City of Omaha, supra.* As such, the district court's order in this case is similarly reviewed de novo on the record.

A review of the colloquy between the court and the parties, as set out above, dictates one conclusion: The district court in the present case did not base the decision to deny the protection order on the pleadings or on the merits, but denied the protection order solely because the applicant was Jim, not Amy. It is apparent that when the hearing began, the court mistakenly believed that Amy was the applicant. From the outset of the hearing, the court was prepared to grant the protection order. The court even stated to Jim, as almost the first statement made during the hearing, that "I am just going to issue this order telling you not to do what you don't want to do . . . ." Because Amy did not even speak at the hearing, this decision was presumably based on the pleadings, the application and affidavit requesting the protection order.

When the court was corrected and informed that the applicant was actually Jim, the court immediately began to indicate that the protection order would be denied. This is so despite the fact that nothing had been adduced at the hearing to indicate that circumstances were any different than they were when the hearing began, except that Jim was the applicant instead of Amy. The court suggested changing the locks, ignoring the calls, or having the police arrest Amy if she continued her actions, but refused to grant the protection order. The court even accused Jim of "wasting [the judge's] time with . . . marital squabbles." Again, nothing had been adduced to indicate any changed circumstances since the outset of the hearing except that the applicant was Jim, not Amy.

In this case, it is obvious that the district court did not consider the pleadings or the merits of the request for a protection order in concluding that the application should be denied. If the court had considered the merits, the court would not have indicated immediate willingness to grant the application when the court believed Amy was the applicant, but unwillingness upon discovering the applicant was Jim. Instead, it is obvious that the court based the decision in this case on some preconceived notions of gender roles, namely, that a man cannot be afraid of a woman and is merely wasting the court's time in seeking a protection order.

We make no ruling on whether the protection order should have been granted or denied. Because the district court did not base the decision in this case on the merits, but, rather, based the decision on an improper basis, gender, the record does not afford us an opportunity to conduct a meaningful de novo review of the merits. As such, we expressly do not reach the merits of Jim's claim.

The case must be remanded for a new hearing on Jim's application. Because of the unusual circumstances of this case, and the obvious preconceived notions of the district court concerning these parties, we direct that the rehearing be conducted by a different district judge.

We note that Jim's application was filed approximately 1½ years ago, and the alleged circumstances occurred at that time, approximately 1½ years ago. Pursuant to § 42-924(3), if the dis-

trict court had granted the protection order, it is apparent that the order would have expired by now because the order may have a term of only 1 year. However, because the 1-year limitation in § 42-924(3) is based upon when the order is entered, rather than when the harassment occurred, the timeliness of Amy's alleged actions in relation to the rehearing will be an issue affecting the merits of Jim's claim, an issue we do not reach, but does not necessarily mean that Jim is not entitled to relief or a rehearing.

V. CONCLUSION

Because the district court erred in denying the application for a protection order solely on the basis of gender, the court's order is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

YVETTE DOLLISON, APPELLANT, v. MERCY SERVICES CORP., APPELLEE.

584 N.W.2d 674

Filed September 1, 1998. No. A-97-225.

1. **Small Claims Court: Jury Trials.** Any defendant in an action in small claims court may transfer the case to the regular docket of the county court by giving notice to the court at least 2 days prior to the time set for the hearing, and the defendant may demand trial by jury in the county court.
2. ____: ____. A plaintiff is not authorized to demand a jury trial when the case has been transferred from small claims court to the county court.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Statutes: Legislature: Intent: Presumptions: Appeal and Error.** An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
5. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court treats the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed.

6. **Directed Verdict.** The party against whom a motion for directed verdict 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.
7. ____. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
8. **Damages: Appeal and Error.** The amount of damages is a matter solely for the fact finder, whose decision will not be disturbed on appeal if supported by the evidence.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Catherine Mahern, of Creighton Legal Clinic, for appellant.

Michael S. Degan, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Yvette Dollison appeals from an order of the district court which affirmed a judgment of the county court in this action which was transferred from the small claims court to the county court upon request of defendant, Mercy Services Corp. On appeal, Dollison challenges the county court's denial of her request for a jury trial, the county court's dismissal of her negligence action, the admission of allegedly irrelevant evidence, and the amount of damages awarded by the county court. Because we conclude that the district court erred in affirming the county court's grant of Mercy Services' motion for directed verdict, but was correct in other regards, we affirm in part and in part reverse and remand the case with directions.

II. BACKGROUND

Dollison was a resident of the Mason School Apartments in Omaha. At the relevant times, the Mason School Apartments were being managed by Mercy Services for a parent corporation, Mercy Housing, Inc.

According to the record, in late July and August 1995, the Mason School Apartments were the target of numerous burglaries. Dollison's apartment was burglarized on August 8. According to Dollison, the following items were stolen from her apartment: a Sega video game system, four video games, a tote bag, school clothes belonging to Dollison's son, and a cordless phone. Dollison valued the stolen items at several hundred dollars. Dollison hired a locksmith to replace the locks in her apartment. According to Dollison, because of lost wages and the cost of the locksmith, changing her locks cost her approximately $125.

Dollison initially filed a suit against Mercy Services in the small claims court. Mercy Services transferred the case to the county court. Dollison then filed an amended petition, alleging three causes of action. Dollison alleged that Mercy Services had been negligent, that Mercy Services had breached an express contract by violating a provision of the lease, and that Mercy Services had breached an implied contract to provide a reasonably safe place to live, in contravention of the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. § 76-1401 et seq. (Reissue 1993 & Cum. Supp. 1994). Dollison also requested in the amended petition that the case be heard by a jury, which request was denied by the county court.

At the conclusion of Dollison's evidence, the court granted a directed verdict in favor of Mercy Services on the negligence cause of action. At the conclusion of the entire case, the court generally found in favor of Dollison on the breach of contract causes of action and awarded Dollison $123.60.

Dollison appealed to the district court, which affirmed the judgment of the county court. Dollison then filed this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Dollison has assigned four errors. First, Dollison asserts that the county court erred in denying her request for a jury trial. Second, Dollison asserts that the county court erred in dismissing her negligence action. Third, Dollison asserts that the county court erred in admitting irrelevant evidence. Finally, Dollison asserts that the county court erred in failing to award general damages.

IV. ANALYSIS

1. JURY TRIAL

Dollison initially filed this action in the small claims court. Mercy Services transferred the case to the county court pursuant to Neb. Rev. Stat. § 25-2805 (Reissue 1995). Thereafter, Dollison filed an amended petition, which included a "Demand for Jury Trial." The county court denied Dollison's demand, and the case was tried to the court. On appeal, Dollison asserts that she was entitled to a jury trial in this case.

[1,2] Section 25-2805 provides that "[a]ny defendant in an action or such defendant's attorney may transfer the case to the regular docket of the county court by giving notice to the court at least two days prior to the time set for the hearing." Section 25-2805 further provides that "any defendant or such defendant's attorney may demand trial by jury." Mercy Services argues on appeal that the statute does not authorize a plaintiff to demand a jury when the case has been transferred to the county court.

[3,4] The general rules of statutory interpretation in Nebraska provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996); *Bennett v. J. C. Robinson Seed Co.*, *ante* p. 525, 583 N.W.2d 370 (1998). It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Memorial Hosp. of Dodge Cty. v. Porter*, 4 Neb. App. 716, 548 N.W.2d 361 (1996). An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Id.*; *Gatewood v. Powell*, 1 Neb. App. 749, 511 N.W.2d 159 (1993).

In light of the foregoing principles, we conclude that Dollison was not entitled to request a jury trial in this action. The plain, direct, and unambiguous language of § 25-2805 clearly indicates that *a defendant* may transfer the case from small claims court to county court and that *a defendant* may request a jury

trial when making a motion for a transfer. To hold that a plaintiff may also request a jury trial when the case has been transferred would not only fail to give effect to the plain, direct, and unambiguous language of the statute but would actually read the word "defendant" entirely out of the statute. We decline to so hold, and the lower court did not err in concluding that Dollison was not entitled to a jury trial in this case.

Dollison argues in support of her contention that she should be entitled to a jury trial that she had a common-law right to a jury trial when the constitutional guarantee of jury trials went into effect in Nebraska. See Neb. Const. art. I, § 6. As such, she asserts that her common-law right must be preserved. Dollison has not provided us with any authority to suggest that there ever existed a common-law right to a jury trial in cases transferred from a small claims court to a county court. In fact, we note that the statute creating small claims courts did not take effect until 1972.

Dollison also points to the provisions of Neb. Rev. Stat. § 25-2705 (Reissue 1995) to argue that all parties in county court are entitled to a jury trial, with limited exceptions. Our reading of § 25-2705, however, leads us to conclude that the provision applies only to actions originally filed in the county court. Section 25-2705 provides that the demand for jury trial "shall be in writing and shall be filed on or before answer day except as otherwise provided in section 25-2805." As noted above, § 25-2805 provides that a defendant may demand a jury trial in county court when the defendant files a motion to have a case transferred from the small claims court. As such, the general provision of § 25-2705 that "either party to any case in county court" may demand a jury trial pertains only to actions originally filed in county court.

Finally, Dollison argues that judicial efficiency dictates that a plaintiff be able to request a jury in this procedural situation. Dollison argues that a plaintiff could secure the right to a jury by simply dismissing the case after the defendant transfers it and then refiling it as an original filing in county court to take advantage of § 25-2705. Although Dollison may be correct in asserting that a plaintiff could secure a jury trial by dismissing and refiling, and although such may indicate inefficiency, this

court is not free to legislate merely to achieve a more efficient result. Dollison's arguments are without merit.

2. DISMISSAL OF NEGLIGENCE ACTION

At the conclusion of Dollison's evidence, Mercy Services moved for a directed verdict. The court granted the directed verdict with respect to Dollison's cause of action for negligence but denied the motion with respect to Dollison's causes of action for breach of contract.

[5-7] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court treats the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997); *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). The party against whom a motion for directed verdict 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.*; *Suiter v. Epperson*, 6 Neb. App. 83, 571 N.W.2d 92 (1997). In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Blose v. Mactier, supra*; *Bahrs v. R M B R Wheels, Inc., 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. *Suiter v. Epperson, supra.*

The evidence in this case indicates that at least three other apartments in the building were burglarized within approximately 1 week prior to Dollison's burglary. Each of the three prior break-ins was accomplished without force. Each of the tenants from these three apartments testified that he or she believed somebody had entered his or her apartment with a key, and at least one of them testified that she reported to Mercy Services that she believed somebody had entered her apartment with a key.

One of the tenants of the building, Orvella Jones, testified that she had needed a replacement key in early July 1995. Jones resided in apartment No. 207, but the replacement key which

she was given was stamped with 107. Jones testified that her ex-boyfriend was ultimately arrested for the burglaries and that some of the stolen property was located in her apartment.

Although Dollison's witnesses testified that they believed a master key had been used to enter their apartments, none of them was able to testify that he or she had seen any such key being used to burglarize the apartments. Jones conceded that she never tried the 107 key in any door other than her own. Dollison presented evidence in a police report, however, which indicated that the police spoke to a resident manager of the apartment building after a subsequent burglary in late August 1995. The resident manager informed the police that "one of the apartment maintenance gave Jones, Orvilla [sic] at apartment #207 a master key to the building."

Our review of the evidence in this case leads us to conclude that the county court erred in directing a verdict on the issue of negligence. The evidence was such that, giving Dollison the benefit of every reasonable inference, a reasonable mind could conclude that Mercy Services was negligent in giving out a master key; that the master key was used to enter Dollison's apartment; and, therefore, that Mercy Services' negligence was a proximate cause of the damage suffered by Dollison. As such, the issue should not have been decided as a matter of law.

3. Admission of Evidence

Dollison asserts that the county court admitted improper evidence concerning the "socio-economic status of Ms. Dollison and other tenants" because the court stated near the end of the trial that "[a]ny landlord that takes one of these types of properties, where they know they're going into a bad situation . . . we give them a little bit more leeway." Brief for appellant at 27. Our review of the record indicates that there was no evidence about Dollison's or anyone else's "socio-economic" status. The only testimony cited by Dollison on appeal was the testimony by a representative of Mercy Services that Mercy Services' parent corporation's main mission " 'is to provide decent affordable housing for low income families[.]' " *Id.* at 28. There is nothing in the record to suggest that "[t]he verdict of the trial court was the result of prejudice in favor of a philanthropic

institution," *id.*, or that the county court acted with "partiality, bias, and prejudice," *id.* at 27. We will not further address this meritless argument.

4. Damages Award

Finally, Dollison asserts that the county court erred in not awarding her general damages. The county court found generally in Dollison's favor on the breach of contract causes of action and awarded her $123.60. The district court found that the county court had "limited plaintiff's damages to her repairs and loss of wages in being available when the repairs were undertaken." Dollison asserts that she was entitled to damages for the property stolen from her apartment as well.

[8] Upon our review of the county court's order, we cannot conclude that the county court awarded Dollison damages specifically for the costs incurred in having her locks changed, as the district court found. The county court was not asked to make any specific findings, and the court's order merely indicates that the court "hereby finds generally in favor of the plaintiff in the amount of $123.60, plus taxable court costs herein." Although Dollison's testimony indicated that it cost her approximately $50 to have the locks changed and that she lost approximately $75 in wages, it would be mere speculation to conclude that the court therefore awarded her damages specifically and only for those costs. The amount of damages is a matter solely for the fact finder, whose decision will not be disturbed on appeal if supported by the evidence. *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998); *Eledge v. Farmers Mut. Home Ins.*, 6 Neb. App. 140, 571 N.W.2d 105 (1997). Because there are no specific findings by the county court regarding how the $123.60 figure for the breach of contract causes of action was arrived at, we cannot conclude that the award was erroneous. This assigned error is without merit.

V. CONCLUSION

Because we conclude that the county court erred in directing a verdict on the negligence claim, the district court's order

affirming the county court's judgment is reversed, and the case is remanded with directions to reverse the judgment and remand the case to the county court for further proceedings in conformity with this opinion. The remainder of the court's judgment is affirmed.

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

HANNON, Judge, concurring in part, and in part dissenting.

I must respectfully dissent from that portion of the opinion which holds that Dollison is not entitled to a jury trial. Article I, § 6, of the Constitution of the State of Nebraska provides in significant part: "The right of trial by jury shall remain inviolate . . . ." I agree that the Legislature may and does provide procedures whereby litigants may waive this constitutional right. Neb. Rev. Stat. § 25-2705 (Reissue 1995), requiring a demand for a jury trial before answer day, is the clearest example. The statutes do not provide that by commencing an action in small claims court the plaintiff waives his or her right to trial by jury, but, rather, provide: "All matters in the Small Claims Court shall be tried to the court without a jury." Neb. Rev. Stat. § 25-2805 (Reissue 1995).

This case was transferred out of the small claims court by the defendant, and therefore, it was not tried in the small claims court. I am inclined to think the Legislature could provide that by filing an action in small claims court the plaintiff waives the right to trial by jury. Instead, the Legislature saw fit to provide only that trials in small claims court shall be without a jury. I also recognize that the existing statutes do not provide a time limit for a plaintiff to request a jury trial after a defendant has caused a case to be transferred out of small claims court. However, I refuse to believe that a constitutional right can be lost inadvertently merely because a statute could have been drafted to provide for the waiver of that right. In the absence of a statutory limitation, I think the plaintiff would have a reasonable time to demand a trial by jury.

SUZANNA M. HOINS, APPELLANT, V. MARK A. HOINS, APPELLEE.
584 N.W.2d 480

Filed September 1, 1998. A-97-958.

1. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
2. **Modification of Decree: Child Custody.** Custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action.
3. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred.
4. **Modification of Decree: Child Custody: Evidence: Time.** Evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Jeffry D. Patterson, of Healey & Wieland Law Firm, for appellant.

Lyle Joseph Koenig, of Koenig & Stover, P.C., for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Suzanna M. Hoins appeals from an order entered by the Saline County District Court granting Mark A. Hoins' application to modify custody of their minor child from Suzanna to him. Because we conclude that Mark failed to provide any evidence to demonstrate a material change of circumstances justifying a modification of custody, we reverse, and remand the case with directions.

II. BACKGROUND

On August 20, 1990, Suzanna and Mark's marriage was dissolved by the district court. In the dissolution decree, the district court granted custody of the parties' minor child, Renae Sue Hoins, to Suzanna. Mark was granted reasonable visitation

rights. Additionally, Mark was ordered to pay $240 per month child support.

Following the dissolution, Suzanna became involved with a man named "Duane." Suzanna and Duane lived together for a period of approximately 1 year before they were married. Suzanna and Duane were married for approximately 3½ years before the marriage ended in dissolution in 1995. Renae lived with the couple throughout their relationship. During Suzanna and Duane's relationship, they lived in Dorchester, Nebraska, and Renae attended school in Dorchester.

In 1995, after Suzanna's marriage to Duane was dissolved, she and Renae moved to Kramer, Nebraska, to live with a man named "Bob," with whom Suzanna had become involved. According to the record, Bob had a son who was approximately 15 years old at the time. After moving to Kramer, Renae began the 1995-96 school year attending school in Crete. After approximately 2 months, however, Renae requested to return to school in Dorchester. Suzanna granted this request, and Renae completed that school year in Dorchester, although she continued to live with Suzanna and Bob in Kramer.

On December 8, 1995, Suzanna and Renae were involved in an automobile accident. According to the record, the accident occurred while Suzanna was driving Renae from Kramer to Dorchester before school in the morning. Renae suffered only minor injuries. Suzanna, however, suffered serious injuries. According to the record, Suzanna spent 2 weeks in the hospital. During the 9 weeks immediately following the accident, Renae lived with Mark's father in Crete, Nebraska. Mark moved in with his father during this period to care for Renae. In February 1996, Renae returned to live with Suzanna.

In August 1996, Suzanna and Bob stopped seeing each other. Suzanna and Renae moved back to Dorchester. Renae asked to begin the 1996-97 school year in Crete, and Suzanna granted her request. Suzanna became involved with a man named "Randy," who moved into Suzanna and Renae's home in October 1996.

On August 12, 1996, Mark filed an application to modify the dissolution decree. Mark alleged that there had been a substantial change of circumstances since the entry of the dissolution decree and that a change of custody was warranted. In support

of his allegation of a substantial change of circumstances, Mark alleged that Renae was not in a stable environment, because she had recently moved from one residence to another; that Renae had been in and out of school and had not attended school regularly; that Renae was not properly cared for and was often left in the care of others; that Suzanna had been in and out of the hospital and was not able to properly care for Renae; that Suzanna failed to provide Renae a proper role model because she frequently had a boyfriend in the house; and that Suzanna caused constant turmoil for Renae.

On September 4, 1996, Suzanna filed an answer and cross-petition. Suzanna generally denied that any substantial change justifying a change of custody existed. Additionally, Suzanna alleged that there had been a material change of circumstances justifying a change in the child support order. Suzanna alleged that Mark now had significantly higher wages, that Suzanna had significantly lower income, and that the Nebraska Child Support Guidelines had been amended since the entry of the dissolution decree.

On September 8, 1997, the court entered an order modifying the original dissolution decree. The court granted Mark's application and awarded custody of Renae to Mark. The court held that "there has been a substantial change in circumstances since the divorce, and it is in the best interest of the minor child . . . to be transferred from the custody of her mother to that of her father." The court also ordered Suzanna to pay child support, but ordered her to pay only $25 per month "because her income appear[ed] to be below the federal poverty level." Suzanna filed this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Suzanna has assigned two errors. First, Suzanna asserts that the district court erred in modifying custody of Renae from Suzanna to Mark. Second, Suzanna asserts that the district court erred in failing to increase Mark's child support obligation.

IV. ANALYSIS

1. Standard of Review

[1] The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its deci-

sion will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997). See, also, *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996); *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

2. Custody

[2,3] Suzanna first asserts that the district court erred in modifying the custody of Renae from Suzanna to Mark. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action. *Sullivan v. Sullivan, supra*; *Smith-Helstrom v. Yonker, supra*; *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); *Hassenstab v. Hassenstab, supra*. The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred. *Id.*

In determining a child's best interests for purposes of custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 1994) provides that the factors to be considered shall include, but not be limited to, the following:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child; and
>
> (d) Credible evidence of abuse inflicted on any family or household member.

Additionally, a court may consider other factors in determining a child's best interests in custody matters, including the moral fitness of the child's parents and the parents' sexual conduct, the attitude and stability of each parent's character, and the parental capacity to provide physical care and satisfy educational needs of the child. See *Smith-Helstrom v. Yonker, supra*.

In the present case, Mark wholly failed to provide any evidence to demonstrate a material change in circumstances affecting the best interests of Renae. Although Mark did present evi-

dence that in the 7 years between the divorce and the modification hearing, Suzanna has lived with three different men, there was absolutely no evidence to indicate what effect, if any, these relationships had on Renae. The record indicates that Suzanna was married to one of the three men for nearly 3½ years and was engaged to be married to the third man at the time of the modification hearing. No testimony was presented to indicate Renae's relationship with these men or how the relationships affected her.

Mark also presented evidence that Renae changed schools between Dorchester and Crete on a couple of occasions. However, the record also indicates that except for the initial change in schools from Dorchester to Crete, which lasted for only 2 months, the subsequent changes were at Renae's request. Mark also failed to provide any evidence whatsoever concerning the effect that changing schools had on Renae. There was no evidence presented concerning her behavior in school, her attendance in school, her grades in school, or any difficulties she may have had as a result of the changes.

Finally, there was evidence presented which indicated that Suzanna was disabled as a result of the automobile accident. However, once again, Mark utterly failed to produce any evidence to suggest that Suzanna's disability had any effect on her ability to care for and provide for Renae. There was no testimony or other evidence presented to indicate that the disability had any effect at all on Renae. We also note that the trial judge made no specific findings concerning the disability or its impact on Suzanna's ability to care for Renae.

We also note that there was absolutely no evidence adduced to show any changes in Suzanna and Renae's living environment or in Renae's school setting in the year preceding the modification hearing. According to the record, for the entire year prior to the modification hearing Suzanna and Renae lived in Dorchester and Renae attended school in Crete. The only change in circumstances evidenced during the preceding year was that Suzanna's boyfriend Randy moved into the home in October 1996. The record also indicates that Suzanna and Randy were engaged to be married approximately 2 weeks after the modification hearing.

[4] Although not determinative, we note that prior case law in Nebraska indicates that evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997). The focus is on the best interests of the child now and in the immediate future, and how the custodial parent is behaving at the time of the modification hearing and shortly prior to the hearing is therefore of greater significance than past behavior when attempting to determine the best interests of the child. *Id.*

On the record before us, there is not even a scintilla of evidence to support the findings of the district court. It is apparent from the court's order that the court's decision was driven by a judgment that Suzanna's having three different boyfriends during the preceding 7 years was somehow detrimental to Renae. There was no evidence upon which to base such a finding, because Mark failed to present any evidence concerning Renae.

The district court noted that Suzanna "has had seven (7) years to adjust to the 1990 divorce" and that "Renae has had to adjust to living with three (3) adult men since custody was granted to her mother, whether she witnessed any sexual acts or not." There was absolutely no evidence presented concerning sexual activity of Suzanna, just as there was absolutely no evidence presented concerning any effect on Renae from "ha[ving] to adjust to living with three (3) adult men." The record does, however, indicate that Mark failed to exercise his visitation rights on several occasions, including five or six occasions during the 6 months immediately preceding the modification hearing and that Mark has, on occasion, had female guests overnight in his home while Renae was present on visitation. On the record before us, the district court committed an abuse of discretion in modifying the custody award, and the court's order must be reversed.

3. Child Support

Suzanna also challenges the district court's failure to modify the child support award. In light of the district court's grant of

custody to Mark, the court did not reach the issue of whether Mark should be ordered to pay a higher amount of child support. The court did, however, find that Suzanna's income level was now "below the federal poverty level" and ordered her to pay $25 per month in support to Mark.

The record indicates that Suzanna's monthly income consists of $600 per month in disability payments. At the time of the modification hearing, she was also receiving sick leave payments from her employer, but she testified that she had only 2 weeks of sick leave left at that time and that she would not be able to return to her employment because the doctor would not release her to work as a result of the injuries she sustained in the automobile accident.

The record also indicates that Mark was averaging approximately $2,236 per month in wages and more than $590 per month in consistent overtime wages through the first 6 months of 1997. Mark earned approximately $36,000 in wages in 1996, although there was no evidence as to how much was ordinary wages and how much was overtime wages. As such, Mark has substantially more income than Suzanna.

Finally, since the initial dissolution decree was entered in August 1990, the Nebraska Supreme Court has amended the child support guidelines. Table 1, which is used to determine the total amount of child support to which a minor child is entitled per month, was amended effective January 1, 1996, and effective March 26, 1997, and the entire guidelines were amended effective January 1, 1996. As a result of these amendments and the parties' current financial circumstances, it is apparent that application of the current guidelines would result in a variation of more than 10 percent of Mark's current obligation, and the record supports a finding that the financial circumstances have lasted for at least 3 months and can reasonably be expected to last for an additional 6 months. See Nebraska Child Support Guidelines, paragraph Q.

In light of the amendments to the guidelines and the change in the parties' incomes, it is apparent that the child support award needs to be modified. The district court recognized that the parties' incomes have substantially changed by ordering Suzanna to pay only $25 per month in support to Mark upon the

court's erroneous modification of custody. As a result, on remand the district court is to hold a hearing and complete a child support worksheet and modify the child support appropriately.

V. CONCLUSION

Because the district court abused its discretion in modifying the custody order, we reverse that portion of the district court's order and restore custody to Suzanna. The case is remanded for an order modifying the child support award.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
AARON ADAMS III, APPELLANT.
585 N.W.2d 96

Filed September 1, 1998. No. A-97-1065.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, 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; 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.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment to the U.S. Constitution and the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government, including police officers. The Fourth Amendment applies to the State pursuant to *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
4. **Search and Seizure: Search Warrants: Presumptions.** Searches conducted pursuant to a warrant are generally considered reasonable.
5. **Constitutional Law: Warrantless Searches.** There are several categories of searches considered reasonable under the Fourth Amendment to the U.S. Constitution although conducted without a warrant.

6. **Police Officers and Sheriffs: Arrests: Search and Seizure: Motor Vehicles.** When a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, and Brenda J. Leuck for appellant.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Aaron Adams III appeals his conviction for possession of a controlled substance. On appeal, Adams argues that the district court erred in finding that a search of a vehicle in which contraband was found was a valid search incident to a lawful arrest and in overruling his motion to suppress. For the reasons set forth below, we affirm as modified.

BACKGROUND

In an information filed July 9, 1996, the State charged Adams with possession of a controlled substance, a Class IV felony under Neb. Rev. Stat. § 28-416(3) (Reissue 1995). On July 18, Adams was arraigned and pled not guilty.

On September 10, 1996, Adams filed a motion to suppress all evidence obtained from the search of a vehicle on May 21. After a hearing on January 29, 1997, the district court overruled Adams' motion, finding that the search of the vehicle was a search incident to a lawful arrest.

On April 30, 1997, Adams waived his right to a jury trial, and a bench trial was held on June 3 and 20. A review of the trial record shows the following: At approximately 10 p.m. on May 21, 1996, Dave Bianchi, a police officer for the city of Omaha, was in the area of 18th and Burdette Streets in Omaha. At that time, Bianchi observed a brown pickup truck turn east onto Burdette Street without using a turn signal. Bianchi then

stopped the pickup truck, and the driver, later identified as Keith Page, then immediately exited the pickup truck and started walking toward Bianchi. The passenger, later identified as Adams, also immediately got out of the pickup truck and started walking away from Bianchi and toward a nearby apartment building. Bianchi physically grabbed Page and started walking him back toward the pickup truck. Bianchi then yelled at Adams, ordering him to return to the pickup truck as well. Subsequently, Adams sat down on the curb, in between the front of Bianchi's cruiser and the back of the pickup truck.

As Page reentered the pickup truck, he told Bianchi that his driver's license was suspended. Bianchi arrested Page at that point for driving under suspension, handcuffed Page, and placed him in the back of the police cruiser. Another Omaha police officer, Joseph Baudler, arrived as backup immediately after Bianchi placed Page in handcuffs, and after Bianchi ran a data check on Page to confirm that his license was suspended, Baudler conducted a search of the pickup truck.

Upon conducting a search of the pickup truck, Baudler discovered two syringes on the "hump" of the pickup truck, the bump in the middle of the floorboard between the two seats. Subsequently, both syringes were sent to the Eastern Nebraska Forensic Testing Laboratory, and the test results were positive for cocaine. Testimony both at the suppression hearing and at trial showed that the syringes were not in plain view.

At this point, Adams was also placed under arrest, and Page and Adams were taken to central police headquarters, read their rights, and interrogated. Bianchi testified at trial that Page stated that the syringes belonged to Adams, that Adams had a bad drug habit, and that Adams used cocaine every day. Bianchi testified at trial that Page told him that he also uses cocaine and that he had recently used a needle to inject cocaine.

Bianchi testified that Adams stated that he was a needle user and a heroin addict, but that he does not use cocaine. Bianchi testified at trial that he questioned Adams at headquarters and that Adams stated that he did not know anything about the syringes. Bianchi testified at trial that Adams made inconsistent statements regarding the ownership of the pickup. According to Bianchi, Adams last stated that the pickup truck was not his, but

his father's. Adams also stated to Bianchi that he was not driving the pickup truck because his license was suspended and that he had given Page permission to drive the truck but that he retained control over it. Adams also stated to Bianchi that he had been driving around in the pickup truck with Page all day and that no one else besides him and Page had been in the pickup truck on May 21, 1996.

At the suppression hearing and at trial, Bianchi testified that both Page and Adams had track marks on their arms on May 21, 1996, which Bianchi defined as puncture marks from needle insertion, indicative of drug use. Bianchi testified at trial that some of the marks on Adams' arms appeared to be new.

Three witnesses testified on Adams' behalf at trial, and all three testified that subsequent to May 21, 1996, Page told them that the syringes seized by the police were his and not Adams'. After hearing all the evidence, the trial court found Adams guilty of possession of a controlled substance. On October 9, 1997, the trial court sentenced Adams to not less than 3 nor more than 4 years' imprisonment, with credit given for 4 days served.

Adams appeals.

ASSIGNMENT OF ERROR

On appeal, Adams contends that the district court erred in finding that a search of the vehicle was a valid search incident to a lawful arrest.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997) (relying on two-part appellate analysis articulated in *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996)).

[2] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a

criminal conviction, 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; a conviction will be affirmed in the absence of prejudicial error if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id.*

ANALYSIS

[3-5] The Fourth Amendment to the U.S. Constitution and the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government, including police officers. The Fourth Amendment applies to the State pursuant to *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Searches conducted pursuant to a warrant are generally considered reasonable. *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). See *Konfrst, supra.* There are several categories of searches considered reasonable under the Fourth Amendment although conducted without a warrant. *Neely, supra.* See *Konfrst, supra.* The law is clear, however, that "[i]f police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Vermuele*, 241 Neb. 923, 925, 492 N.W.2d 24, 27 (1992).

In this case, the search of the pickup truck was a warrantless search, and the district court found that the State met its burden of proving the search of the pickup truck was a proper search incident to the lawful arrest of Page.

On appeal, Adams contends generally that the vehicle was under his control and specifically that the district court erred in finding that the search of the vehicle was a search incident to a lawful arrest. In particular, Adams argues that the search of the pickup truck was not incident to the lawful arrest of Page because at the time of the search, Page was handcuffed and secured in the back seat of Bianchi's cruiser. Since Page was the only person under arrest at the time of the search of the pickup truck, we focus on whether the search of the pickup truck that Page had been driving was a search incident to the lawful arrest of Page.

The State contends that the search incident to Page's arrest was proper, despite the fact that Page was handcuffed and positioned inside Bianchi's cruiser. The State relies, inter alia, on *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). We agree with the State and find that the search of the pickup truck was a valid search incident to the lawful arrest of Page.

In *State v. Gonzalez*, 1 Neb. App. 47, 487 N.W.2d 567 (1992) (single-judge opinion), Chief Judge Sievers addressed the issue presented in this case. As noted below, we agree with the reasoning in *Gonzalez* and repeat it here as an opinion of this court.

In *Gonzalez*, an officer observed a vehicle driven by a driver whom the officer knew to have a suspended driver's license. The officer stopped the vehicle and cited the driver. Gonzalez was a passenger in the vehicle at that time. After citing the driver, the officer started to drive away when he noticed that Gonzalez had moved into the driver's seat and that he was driving without his vehicle's headlights on after dark. The officer then attempted to catch up with the speeding vehicle, subsequently activating the red lights on his cruiser and eventually the siren. After the officer pulled the vehicle over, Gonzalez got out of the vehicle and walked toward the officer, stumbling as he approached. The officer noted that Gonzalez smelled strongly of alcohol. The officer then placed Gonzalez under arrest, handcuffed Gonzalez, and placed him in the back seat of his cruiser. At this point, the officer searched the passenger compartment of the vehicle, where he found a small plastic bag under the driver's seat containing a white powder that later proved to be cocaine. Subsequently, Gonzalez filed a motion to suppress the fruits of the officer's search, which the district court sustained. On appeal, the single judge of this court, relying on Nebraska and federal authority, reversed the order of the district court, stating that the search was a valid search incident to a lawful arrest.

[6] Under *Belton*, 453 U.S. at 460, when "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." In *Gonzalez*, 1 Neb. App. at 55-56, 487 N.W.2d at 572-73, it was stated:

> *Belton* creates an exception to the Fourth Amendment prohibition against warrantless searches where there is an arrest from an automobile and a contemporaneous search of the passenger compartment for contraband or weapons. As was earlier emphasized, *Belton* is cast in terms of whether the arrestee is a recent occupant. A suspect who gets out of the car before a police officer can get out of his is nonetheless still a recent occupant of the vehicle to be searched. In addition, I hold that handcuffing the arrestee and placing the suspect away from the grabbable area of the vehicle does not prohibit a contemporaneous *Belton*-type search of the vehicle from which the arrestee recently came. *Belton* was intended to create a bright line whereby officers who arrest recent occupants of vehicles can search those vehicles, and the officer need not do it at his or her peril in the presence of an unrestrained and potentially dangerous arrestee. Thus, the warrantless search of the passenger compartment of a vehicle recently occupied by a handcuffed and restrained arrestee is not offensive under the Fourth Amendment, when it is a contemporaneous search incident to a lawful arrest.

We adopt this reasoning found in *Gonzalez* and recite it here as an opinion of this court. See, also, *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996) (holding that search of Pittman's vehicle was valid search incident to Pittman's arrest even though search of Pittman's vehicle was performed while Pittman was at scene handcuffed in police car).

Other jurisdictions have also held that a search of a vehicle is valid incident to a lawful arrest even if the arrestee is secured and away from the vehicle at the time of the search. See, *U.S. v. Sholola*, 124 F.3d 803 (7th Cir. 1997); *U.S. v. Doward*, 41 F.3d 789 (1st Cir. 1994); *U.S. v. Patterson*, 993 F.2d 121 (6th Cir. 1993); *U.S. v. Franco*, 981 F.2d 470 (10th Cir. 1992); *U.S. v. White*, 871 F.2d 41 (6th Cir. 1989); *U.S. v. Lorenzo*, 867 F.2d 561 (9th Cir. 1989); *U.S. v. Karlin*, 852 F.2d 968 (7th Cir. 1988); *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985); *United States v. Cotton*, 751 F.2d 1146 (10th Cir. 1985).

For the sake of completeness, we note that we are aware of cases to the contrary. See, *U.S. v. Strahan*, 984 F.2d 155, 159

(6th Cir. 1993) (holding that passenger compartment of automobile was not within defendant's " 'immediate control' " at time he was arrested about 30 feet away from vehicle, and thus, search of passenger compartment was not justified as search incident to arrest), and *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (holding that search of vehicle was not incident to arrest because search was conducted 30 to 45 minutes after defendant had been arrested and placed in police car, making any threat from him remote).

In the instant case, both Page and Adams immediately exited the vehicle, once it was stopped by Bianchi. After finding that Page was driving under suspension, Bianchi arrested Page, handcuffed him, and placed him in the back of his police cruiser. As Bianchi was placing the handcuffs on Page, Baudler arrived as backup, and Bianchi immediately instructed Baudler to search the pickup truck. During the search of the pickup truck, Page was handcuffed and seated in Bianchi's cruiser. Under the authorities cited above, we find that the search of the pickup truck was contemporaneous to Page's arrest, that Page was a "recent" occupant of the pickup truck, and that the search was proper. The issue of linking the contraband properly found in the vehicle to Adams was one of proof and credibility, which the trier of fact resolved against Adams.

Although the trial court did not err in overruling Adams' motion to suppress, we note plain error in Adams' sentence. Plain error may be found on appeal when an error is plainly evident on the record and which prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

In 1997, the Legislature amended the indeterminate sentence statute, Neb. Rev. Stat. § 29-2204 (Reissue 1995), to provide that where the criminal offense for which an indeterminate sentence is to be imposed is a Class IV felony, "the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term . . . ." § 29-2204(a)(i) (Supp. 1997); 1997 Neb. Laws, L.B. 364. The operative date of this amendment was July 1, 1998.

The law is well settled in Nebraska that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically stated otherwise. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971). A sentence is not a final judgment until the entry of a final mandate of an appellate court if an appeal is taken. *Jones, supra.*

Because under the new law the minimum portion of the indeterminate sentence may not exceed one-third of the maximum term, we must modify Adams' sentence to reduce the minimum portion of the sentence to 20 months. Adams is, accordingly, sentenced to serve a term of 20 months' to 4 years' imprisonment.

CONCLUSION

The search of the pickup truck was incident to Bianchi's lawful arrest of Page and not violative of the Fourth Amendment. The trial court did not err in overruling Adams' motion to suppress the fruits of Baudler's search. However, because of a legislative amendment, the sentence is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE,
v. GERALD R. TLAMKA, APPELLANT.
585 N.W.2d 101

Filed September 8, 1998. No. A-97-263.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Proof.** In order to state a claim of ineffectiveness of counsel and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
3. ____: ____. Where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary.

4. **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 conclusion reached by the courts below.
5. **Criminal Law: Statutes.** Penal statutes are to be strictly construed.
6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes: Words and Phrases.** It is not for the courts to supply missing words or sentences to make clear that which is indefinite or to supply that which is not there when interpreting a statute.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Gerald R. Tlamka, pro se.

Don Stenberg, Attorney General, J. Kirk Brown, and, on brief, Jay C. Hinsley.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Gerald R. Tlamka appeals the order of the district court for Lancaster County denying his motion for postconviction relief. On appeal, Tlamka challenges the enhancement of his sentence based on prior convictions and the effectiveness of his trial and appellate counsel. For the reasons set forth below, we affirm.

II. FACTUAL BACKGROUND

On September 16, 1994, Tlamka, with counsel present, entered a plea of no contest to motor vehicle homicide and driving while under a 15-year suspension of his driver's license. On October 27, an enhancement hearing was held on the motor vehicle homicide conviction to determine whether the charge was punishable as a Class III felony or a Class IV felony. The court received evidence without objection showing that Tlamka had been convicted of driving while under the influence of alcoholic liquor (DUI) in 1983, 1985, and 1986. Subsequently, the district court found that Tlamka's prior DUI convictions could be used to enhance his present motor vehicle homicide convic-

tion to a Class III felony. Tlamka was subsequently sentenced. He then appealed. His sentences were affirmed by a panel of this court in an unpublished opinion filed December 12, 1995.

On October 7, 1996, Tlamka filed a motion for postconviction relief from his motor vehicle homicide conviction. The State opposed his motion. A telephonic hearing was held on the motion on November 19. Thereafter, the district court denied Tlamka's motion. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

Tlamka assigns that the district court erred in finding that prior convictions for DUI were properly used to enhance his sentence for motor vehicle homicide and that his trial and appellate counsel was ineffective in failing to challenge the use of the prior DUI convictions and the information that was not properly verified.

IV. ANALYSIS

[1] We address Tlamka's contention that he was denied effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

[2,3] In order to state a claim of ineffectiveness of counsel and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *Becerra, supra.*

1. Verification

Tlamka contends that his trial and appellate counsel was ineffective in failing to challenge the adequacy of the information under which he was charged. Tlamka contends that the information was not properly verified pursuant to Neb. Rev. Stat. § 29-1603 (Reissue 1995). This statute provides, in relevant part: "All informations shall be verified by the oath of the county attorney, complainant, or some other person . . . ." *Id.* Apparently, Tlamka is arguing that the deputy county attorney who filed the information in his own name on behalf of the State did not have the authority to do so.

We conclude that Tlamka was not prejudiced by this alleged deficiency. The issue whether a deputy county attorney may file and verify an information in his or her own name on behalf of the State was addressed by the Nebraska Supreme Court in *Thompson v. O'Grady*, 137 Neb. 641, 290 N.W. 716 (1940), *cert. denied* 311 U.S. 645, 61 S. Ct. 9, 85 L. Ed. 411. In *Thompson*, an information was filed in the district court for Lancaster County charging Thompson with robbery. The information was signed and verified by the " 'Chief Deputy County Attorney.' " 137 Neb. at 643, 290 N.W. at 717. Thompson alleged that the information upon which he was convicted and sentenced was a " 'nullity,' and wholly void, 'in that it was not made, signed, verified, nor filed by a person authorized by law so to do.' " *Id.* at 642, 290 N.W. at 717. In affirming the judgment of conviction, the Nebraska Supreme Court reasoned that the objections to the information were made for the first time on appeal and, therefore, were waived and that "[i]n addition, the deputy county attorney was vested with ample authority to perform the questioned act." *Id.* at 645, 290 N.W. at 718. See *Holland v. State*, 100 Neb. 444, 160 N.W. 893 (1916). Therefore, Tlamka's contention that he received ineffective assistance of counsel on this basis is without merit.

2. Enhancement of Sentence

Tlamka also contends his counsel was ineffective in failing to challenge the use of his prior DUI convictions to enhance his sentence for motor vehicle homicide. Tlamka argues that his attorney should have asserted that the provisions of Neb. Rev.

Stat. § 60-6,196 (Reissue 1995) prohibiting the use of DUI convictions more than 8 years old to enhance a current DUI conviction also apply to Neb. Rev. Stat. § 28-306 (Reissue 1995), which is the motor vehicle homicide statute. We note that effective April 19, 1998, § 60-6,196 was amended to provide that prior DUI convictions up to 12 years old may be used to enhance a current DUI conviction. 1998 Neb. Laws, L.B. 309. We address whether Tlamka has proved prejudice in this regard.

Section 28-306(c) provides: "If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,196, motor vehicle homicide is a Class III felony *if the defendant has a prior conviction under section 60-6,196* . . . ." (Emphasis supplied.) The subsections of § 60-6,196 that Tlamka argues should apply to § 28-306 set forth the penalty for a DUI conviction. Under these subsections, the severity of the penalty for a current DUI conviction depends on whether the defendant has prior DUI convictions. Subsections (b) and (c) of § 60-6,196 provide that prior DUI convictions "under this section in the eight years prior to the date of the current conviction" may be used to enhance the current DUI conviction.

[4-7] The question before us is one of statutory interpretation. 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 conclusion reached by the courts below. *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998); *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). Penal statutes are to be strictly construed. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996). See, also, *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). It is not for the courts to supply missing words or sentences to make clear that which is indefinite or to supply that which is not there. *Ryan, supra.*

Sections 28-306 and 60-6,196 each have a separate subsection that defines the respective crime, and each has a subsection that provides the penalties for the crime defined. In reading the statutes, it is clear that when § 28-306 refers to "a prior conviction under section 60-6,196," it is simply referring to the crime defined in § 60-6,196, i.e., DUI. Section 28-306 provides its own penalties for the crime of motor vehicle homicide. If the Legislature had intended to place a time limitation on the use of prior DUI convictions to enhance the penalty for motor vehicle homicide, it could have done so by including such a limitation in § 28-306, just as it did in § 60-6,196 to limit the time that prior DUI convictions may be used to enhance subsequent DUI convictions.

We note that the Legislature has chosen to enhance the sentence for other crimes by proof of a prior conviction, without limiting the time that such prior convictions may be used. For example, Neb. Rev. Stat. § 28-319 (Reissue 1995) provides that a sentence be enhanced if a defendant is convicted of first degree sexual assault for a second time, without providing a time limitation regarding the use of the prior conviction. The habitual criminal statute also provides no time limitation for the use of prior convictions. See Neb. Rev. Stat. § 29-2221 (Reissue 1995). It is apparent that the Legislature has chosen to apply time constraints regarding the enhancement of the penalty for some crimes and has chosen not to do so with others. This is the Legislature's prerogative.

For these reasons, we conclude that the portion of § 60-6,196 providing that DUI convictions more than 8 years old may not be used to enhance subsequent DUI convictions does not apply to § 28-306. Based upon our reading of the statutes, a prior DUI conviction may be used to enhance a subsequent conviction for motor vehicle homicide regardless of the age of the prior DUI conviction. As a result, Tlamka was not prejudiced by the failure of his counsel to challenge the use of his prior DUI convictions to enhance the penalty for his conviction of motor vehicle homicide to that for a Class III felony.

V. CONCLUSION

As Tlamka was not prejudiced by the alleged deficiencies of his counsel, Tlamka did not prove that his constitutional right to

effective assistance of counsel was violated. Because his prior DUI convictions were properly used to enhance his sentence for motor vehicle homicide, his assigned error to the contrary is without merit. For these reasons, Tlamka was not entitled to postconviction relief. Therefore, we affirm.

AFFIRMED.

LOUIS C. MARTIN, APPELLANT, V. NEBRASKA DEPARTMENT OF PUBLIC INSTITUTIONS, APPELLEE.

584 N.W.2d 485

Filed September 8, 1998. No. A-97-326.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. ____: ____: ____. 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.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Administrative Law: Appeal and Error.** If an administrative agency agrees with the recommended decision of the hearing officer in a contested case, the agency may simply adopt or affirm the recommendation.
6. ____: ____. An administrative agency must articulate reasons for its rejection of a recommended decision of the hearing officer in a contested case.
7. **Administrative Law: Records: Presumptions: Appeal and Error.** When an administrative agency chooses not to adopt the findings and recommendations of its hearing officer, it must examine the record independently. In the absence of evidence to the contrary, it will be presumed that the deciding officials have so considered the record.
8. **Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.
9. **Termination of Employment: Property: Due Process: Notice.** As a prerequisite to terminating the employment of an employee with a property right in continued employment, the employer must provide notice and an opportunity for a hearing appropriate to the nature of the case.
10. ____: ____: ____: ____. Before termination of employment, an employee with a property right in continued employment must be given oral or written notice of the

basis for the termination, an explanation of the employer's evidence, and an opportunity to present his or her side of the story.

11. **Termination of Employment: Due Process.** Procedurally adequate posttermination of employment proceedings do not cure pretermination due process violations.
12. **Due Process.** Postdeprivation remedies do not provide due process if predeprivation remedies are practical.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with directions.

Patricia A. Knapp, of Polsky, Cope & Knapp, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Dr. Louis C. Martin filed a petition for review in the district court for Lancaster County seeking review of a decision of the Nebraska State Personnel Board (Board) that affirmed the investigatory suspension and termination of his employment by the Nebraska Department of Public Institutions (DPI). The district court affirmed the decision of the Board. For the reasons stated below, we reverse, and remand with directions.

II. FACTUAL BACKGROUND

Martin is a psychiatrist, who was employed with DPI beginning in 1989. At all times relevant to this case, Martin was the chief of service for the Forensic Mental Health Services at DPI.

On October 23, 1995, DPI gave Martin a "Personal Action Notification," stating that he was being placed on investigatory suspension. On this same date, Martin was also given a "Written Notice of Allegation(s)" (notice). The notice alleged that Martin had acted insubordinately in sending a memo on October 1 to certain superiors, stating that Bill Zinn, the chief executive officer for DPI, and Dr. Somasundaram Rajendran, the clinical director at the Lincoln Regional Center, who was Martin's supervisor, had committed " 'incompetent and reckless administrative acts.' " The notice also alleged that Martin had failed to fulfill basic job responsibilities as the chief of service

for the Forensic Mental Health Services, particularly by failing "to provide facilitative leadership and overall management" to the Forensic Mental Health Services. The notice advised Martin that the allegations could lead to disciplinary action being taken against him. The notice also provided the date and time, October 30 at 1 p.m., for a meeting with Dr. Steven Higgins, medical services director for DPI. As medical services director, Higgins is responsible for, among other things, appointing and removing for cause the heads of the administrative subdivisions within the Division of Medical Services. See Neb. Rev. Stat. § 83-1,149(2) (Reissue 1994).

Within a few days thereafter, a meeting was held with Martin, Martin's attorney, and Higgins. An investigator retained by DPI to conduct an independent investigation regarding the allegations against Martin was also present. Following the meeting, the investigator began her investigation, which included reviewing documents and interviewing DPI employees. Following her investigation, the investigator prepared a report setting forth her findings. After receiving the investigator's report, Higgins decided to dismiss Martin from his employment. In the notice of dismissal, Higgins stated that Martin's memorandum of October 1, 1995, was "insubordinate" and that Martin had failed to fulfill basic job responsibilities as the chief of service of the Forensic Mental Health Services. Higgins set out the evidence supporting his decision. Higgins' decision to terminate Martin's employment was based on both insubordination and failure to fulfill basic job responsibilities. Martin received the written notification of his dismissal on January 4, 1996.

Thereafter, Martin filed a grievance alleging that DPI lacked just cause to terminate his employment and that the process followed by DPI in terminating his employment was inadequate. The director of DPI denied Martin's grievance. Martin appealed the director's decision to the Board.

An evidentiary hearing was held before a hearing officer on April 30, 1996. In a detailed 13-page decision, the hearing officer ultimately concluded that termination of Martin's employment was not for just cause. She found insufficient evidence to support the allegation that Martin had failed to fulfill basic job

responsibilities. In addition, she found that Martin did not receive adequate due process regarding the insubordination allegation, because prior to his termination, Martin was not given an opportunity to respond to evidence gathered during the subsequent investigation on which Higgins relied in terminating Martin's employment. Nevertheless, she ultimately concluded that there was sufficient evidence to support the insubordination allegation. The hearing officer recommended that DPI's termination of Martin's employment be overruled; that DPI's finding of insubordination for statements in the October 1, 1995, memorandum be sustained; that Martin be placed back in his position of chief of service and receive backpay; and that appropriate discipline be imposed regarding the insubordination allegation.

The record shows that prior to the Board's meeting of August 16, 1996, at which time Martin's appeal was to be considered, the hearing officer's recommended decision, the parties' briefs, and Martin's "appeal form" were forwarded to the Board. At its August 16 meeting, the Board concluded, based upon its review of the record, that DPI had sufficiently proved the allegations of insubordination and failure to fulfill basic job responsibilities. The Board found that Martin had been dismissed for just cause. The Board "adopted [the recommended decision of the hearing officer] to the extent that it [was] consistent with [the Board's decision] and rejected [it] to the extent that it [was] inconsistent . . . ."

On August 29, 1996, Martin filed a petition for review in the district court pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994 & Cum. Supp. 1996). The district court affirmed the decision of the Board. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

Martin's assigned errors may be summarized and restated as follows: (1) The Board erroneously determined whether to accept or reject the recommendations of the hearing officer without examining the record; (2) the Board's order is inadequate, because it does not set forth specific findings regarding its decision to reject a portion of the hearing officer's recom-

mendations; and (3) Martin's termination from employment was unlawful, because he was not provided adequate due process of law prior to his termination.

IV. ANALYSIS

1. Standard of Review

[1-4] Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. § 84-917(5)(a); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995). 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. § 84-918(3); *Wolgamott, supra*; *Piska v. Nebraska Dept. of Soc. Servs.*, 252 Neb. 589, 567 N.W.2d 544 (1997). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Wolgamott, supra*; *George Rose & Sons, supra.* When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *J.C. Penney Co. v. Balka*, 254 Neb. 521, 577 N.W.2d 283 (1998); *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998).

2. The Board's Decision

Martin generally assigns and argues that the decision of the Board was deficient for two reasons: The decision was made without a review of the record of the hearing officer, and the Board did not adequately set forth its findings of fact and conclusions of law. We agree.

[5-7] Pursuant to § 84-915, every decision rendered by an agency in a contested case "shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." If an agency agrees with the recommended decision, the agency

may simply adopt or affirm it. 2 Am. Jur. 2d *Administrative Law* § 373 (1994); 73A C.J.S. *Public Administrative Law and Procedure* § 141 (1983). However, an agency must articulate reasons for its rejection of a recommended decision. 2 Am. Jur. 2d, *supra*, § 374; 73A C.J.S., *supra*. In addition, when an agency chooses not to adopt the findings and recommendations of its hearing officer, it must examine the record independently. In the absence of evidence to the contrary, it will be presumed that the deciding officials have so considered the record. 73A C.J.S., *supra*. See, also, *Cooper v. State Bd. of Medical Examiners*, 35 Cal. 2d 242, 217 P.2d 630 (1950); *Coggins v. Public Employee Relations Board*, 2 Kan. App. 2d 416, 581 P.2d 817 (1978).

We cannot conclude from the record before us that the Board examined the record prior to its decision. The record before us shows that the items forwarded to the Board prior to its decision at its meeting of August 16, 1996, included the hearing officer's recommended decision, the parties' briefs, and Martin's appeal form. It does not appear that the bill of exceptions from the proceedings before the hearing officer was forwarded to the Board. In fact, it appears the bill of exceptions was not even in existence at the time the Board made its decision. The certificate in the bill of exceptions certifying that the bill of exceptions was complete is dated September 26, 1996, which is over a month after the Board met and rendered its decision.

We also cannot conclude that the Board adequately set forth its findings of fact and conclusions of law as required by § 84-915. In her 13-page decision, the hearing officer found that there was insufficient evidence to support the allegation that Martin had failed to fulfill basic job responsibilities. In arriving at this finding, the hearing officer detailed the evidence regarding the progress of the Forensic Mental Health Services in implementing the recommendations of the "Ray" report and Martin's role in the implementation. (The Ray report is 13 recommendations for change issued in April 1995 and adopted by the Lincoln Regional Center management team.) In its decision, the Board concludes that there was sufficient evidence that Martin was insubordinate and that he had failed to fulfill basic job responsibilities. In addition, the Board's decision states:

"[T]he recommended decision of the Hearing Officer is adopted to the extent that it is consistent with this motion and rejected to the extent that it is inconsistent with the motion . . . ." The Board's decision fails to set forth findings of fact to support its conclusion, contrary to that of the hearing officer, that Martin had failed to fulfill basic job responsibilities.

In light of the Board's failure to review the record and the requirement that it provide findings of fact and conclusions of law, the Board's decision affirming DPI's dismissal of Martin does not conform to the law. Therefore, the Board erred in this regard.

3. Procedural Due Process

[8] Next, we address whether Martin was provided adequate due process of law prior to his termination from employment. Martin argues that the pretermination hearing was inadequate, because he was not provided with an explanation of the evidence gathered during the investigation or an opportunity to rebut this evidence. The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[9,10] The parties do not dispute that Martin had a property interest in his continued employment. See *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). As a prerequisite to terminating the employment of an employee with a property right in continued employment, the employer must provide notice and an opportunity for a hearing appropriate to the nature of the case. *Unland, supra*; *Ackerman v. Metropolitan Community College*, 6 Neb. App. 536, 575 N.W.2d 181 (1998). Before termination of employment, an employee with a property right in continued employment must be given oral or written notice of the basis for the termination, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. *Unland, supra*; *Ackerman, supra*. See, also, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The above pretermination procedures coupled with posttermination procedures for review provide an employee the process that is due. *Id.*

In *Gaines v. New York State Div. for Youth*, 213 A.D.2d 894, 623 N.Y.S.2d 936 (1995), the Appellate Division of the New York Supreme Court was confronted with an issue similar to that before us. In *Gaines*, an employee was notified that her employment would be terminated on a specified future date due to her being absent from work for 1 year on disability leave. After the employee advised that she was medically fit to return to work, the employer sent the employee for a medical examination. After the examination, the physician prepared a letter, which he forwarded to the employer, opining that the employee was not physically fit to return to work. The employee was not provided with a copy of this letter, and her employment was then terminated. The employee was also not provided a posttermination hearing. The *Gaines* court affirmed the lower court's conclusion that the employee was terminated from her employment without due process of law, because she was not provided pretermination notice and an opportunity to respond, or a posttermination hearing. The court stated: "[The employee], however, was denied an opportunity to respond to [the] letter to [the employer] . . . . Clearly [the employee] was denied an explanation and an opportunity to respond prior to discharge . . . ." 213 A.D.2d at 896, 623 N.Y.S.2d at 938.

In the case before us, an independent investigation of the charges was undertaken at the request of DPI. According to the record, the investigation occurred after a meeting was held during the last week of October 1996 with Martin, Martin's attorney, and Higgins. The district court found that another meeting was held November 17. However, there is nothing in the record to support the district court's finding. Even if such a meeting was held as found by the district court, the investigation was not completed on November 17. Information gathered during the investigation was relied upon in Higgins' determinations that Martin was insubordinate, that Martin had failed to fulfill basic job responsibilities, and that dismissal was the appropriate discipline. This information was unavailable to Martin prior to termination of his employment.

Based upon our review of the record, we conclude that Martin was not provided an adequate explanation of the evidence that was gathered in the investigation and relied upon by

Higgins or an opportunity to respond. Martin was denied due process, because the pretermination meeting was conducted prior to the investigation and because evidence learned during the investigation was used as part of the basis for Martin's termination from employment.

We must determine the effect of such a violation of pretermination due process. In *Loudermill, supra*, the U.S. Supreme Court affirmed the Court of Appeals' reversal of the district court's determination that Loudermill's due process rights had not been violated and remanded for further proceedings. We note that there is authority for the proposition that a failure to provide sufficient pretermination process may be corrected by a curative posttermination hearing in which due process is provided. See *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied* 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995). See, also, *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980); *City of North Pole v. Zabek*, 934 P.2d 1292 (Alaska 1997); *Maxwell v. Mayor &c. of the City of Savannah*, 226 Ga. App. 705, 487 S.E.2d 478 (1997); *Ross v. Medical Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997). These jurisdictions reason that a pretermination deprivation of procedural due process does not ripen or become complete unless the State refuses to make available a means to remedy the deprivation. *McKinney, supra*; *Maxwell, supra*.

Other jurisdictions conclude that if the employment of an employee is terminated in violation of the employee's due process rights, the availability of posttermination procedures does not cure the violation. See *Stallworth v. City of Evergreen*, 680 So. 2d 229 (Ala. 1996), *cert. denied* 519 U.S. 1007, 117 S. Ct. 509, 136 L. Ed. 2d 399. See, also, *Cotnoir v. University of Maine Systems*, 35 F.3d 6 (1994); *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984), *cert. denied* 467 U.S. 1242, 1045 S. Ct. 3513, 82 L. Ed. 2d 822; *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984); *Murray v. Dept. of Revenue & Taxation*, 543 So. 2d 1150 (La. App. 1989). These jurisdictions reason that if the employment of an employee is terminated without first providing the employee due process protections, the constitutional deprivation is complete. *Cotnoir, supra*; *Schultz, supra*.

[11,12] We find the authority providing that posttermination proceedings do not cure violations of pretermination due process to be better reasoned. As aptly stated by one court:

> To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity. Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pretermination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing.

Stallworth, 680 So. 2d at 235. Furthermore, the U.S. Supreme Court has made it clear that postdeprivation remedies do not provide due process if predeprivation remedies are practicable. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). Therefore, we conclude that the post-termination proceedings in this case which included a de novo review of the case in the district court, although procedurally adequate, did not cure the pretermination violation of Martin's right to procedural due process.

V. CONCLUSION

In the case before us, Martin's due process rights were violated, because he was not provided a full explanation of DPI's evidence and an opportunity to rebut the evidence gathered during the investigation prior to being terminated from his employment. As a result, termination of Martin's employment was improper, because his employment was terminated without due process of law in violation of the U.S. and Nebraska Constitutions. The decision by the Board to terminate Martin's employment must be reversed, and Martin is to be reinstated effective the date of his dismissal. The district court is hereby ordered to enter such an order. Our decision does not prevent DPI from initiating disciplinary proceedings that comply with the requirements of due process.

REVERSED AND REMANDED WITH DIRECTIONS.

BOOKER T. BRYSON, APPELLEE, V. VICKERS, INC., AND ITT HARTFORD, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES AND CROSS-APPELLANTS, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT AND CROSS-APPELLEE.

584 N.W.2d 44

Filed September 8, 1998. No. A-97-1213.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
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. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
5. **Workers' Compensation: Second Injury Fund: Proof.** The burden of proof necessary to establish apportionment under Neb. Rev. Stat. § 48-128 (Reissue 1993), the Second Injury Fund, is upon the employer who seeks the benefits of that statute.
6. **Workers' Compensation: Expert Witnesses.** An expert witness' good faith self-contradiction presents a question of fact to be resolved by the Workers' Compensation Court.
7. ____: ____. While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
8. **Workers' Compensation: Second Injury Fund: Liability.** The purpose of the Second Injury Fund is to assure employers that if they hire or retain individuals with preexisting disabilities, those employers will be liable only for those injuries which would have resulted had there been no preexisting disability.
9. **Workers' Compensation: Second Injury Fund: Liability: Records: Notice.** Written records intended to show that an employer had knowledge of a preexisting permanent disability at the time an employee was retained in employment, for purposes of imposing liability upon the Second Injury Fund, need not contain a precise statement of an employee's exact condition but must have put an employer on notice that the employee had an abnormal, permanent condition likely to be a hindrance in his or her employment.
10. **Workers' Compensation: Courts: Statutes.** The Workers' Compensation Court is a court of statutory creation, and its powers are limited to those delineated in the statutes.
11. **Workers' Compensation: Second Injury Fund: Liability.** The Workers' Compensation Court has no inherent power to order that an employer be reimbursed

by the Second Injury Fund for the difference between payments made pursuant to Neb. Rev. Stat. § 48-178.01 (Reissue 1993) and the amount for which an employer is ultimately held liable.

12. **Workers' Compensation: Second Injury Fund: Attorney Fees.** The Second Injury Fund is an employer for purposes of attorney fees awarded pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993).
13. **Workers' Compensation: Second Injury Fund: Attorney Fees: Appeal and Error.** If the Second Injury Fund brings an appeal and fails to obtain any reduction in the amount of the award, any award of attorney fees to the employee should be assessed against the Second Injury Fund.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Don Stenberg, Attorney General, and John R. Thompson for appellant.

Glenn A. Pettis, Jr., for appellee Bryson.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellees Vickers and ITT Hartford.

HANNON, IRWIN, and INBODY, Judges.

INBODY, Judge.

This is a workers' compensation case in which Booker T. Bryson was awarded benefits from his employer, Vickers, Inc., and its workers' compensation insurer (collectively referred to as "Vickers"). The State of Nebraska, Second Injury Fund (hereinafter SIF), was also ordered to pay benefits to Bryson pursuant to the Second Injury Fund statute, Neb. Rev. Stat. § 48-128 (Reissue 1993). SIF appeals, and Vickers cross-appeals. For the reasons set forth below, we affirm in part, and in part reverse, and remand with directions.

I. STATEMENT OF FACTS

This is a tale of two separate compensable injuries incurred while working for the same employer. Bryson originally injured his back while in the course and scope of his employment with Vickers on April 10, 1991. On July 8, Bryson underwent surgery at the L4 level of his spine. The surgery consisted of bilateral decompressive laminotomies with foraminotomies and

was performed by Dr. John L. Greene. Bryson entered a work hardening program beginning on November 11 and ending on December 23. On January 6, 1992, Dr. Greene released Bryson to return to work at Vickers, with a limitation of 40 hours work per week for at least 90 days, and Bryson did return. At that time, Dr. Greene assigned a permanent partial impairment of 10 percent to the body as a whole. On June 2, 1993, a "Functional Capacity Evaluation" was performed on Bryson, at the request of Vickers, at the Excel Work Performance Center. According to that evaluation, Bryson was restricted to no significant lifting from the floor level, with bending and squatting limited to 10- to 15-minute timeframes.

On January 4, 1994, Bryson again hurt his back while in the course and scope of his employment with Vickers. He returned to Dr. Greene on January 13, and Dr. Greene recommended additional surgery. Dr. Greene opined that Bryson had suffered an additional 5-percent permanent impairment as a result of the second injury, for a total bodily impairment of 15 percent. On January 21, Bryson sought a second opinion from Dr. Thomas Bush, who subsequently became Bryson's primary treating physician. Dr. Bush also recommended surgery, but Bryson refused the surgery. Dr. Bush concluded that Bryson had suffered a 35-percent whole body impairment as a result of the second injury.

II. PROCEDURAL BACKGROUND

Bryson filed his petition in the Workers' Compensation Court on January 4, 1996. Vickers filed a third-party petition impleading SIF on April 18. On March 31, 1997, a single judge of the compensation court found that Bryson's refusal to undergo surgery was reasonable and that he had reached maximum medical improvement as of August 8, 1994, the date that he told Dr. Bush he could not make up his mind whether to have the surgery. The court found that Bryson was permanently and totally disabled as a result of the combined result of the two injuries. Specifically, the court found that the 1994 injury itself imposed a 30-percent loss of earning power upon Bryson. The court also held that because Bryson had "sustained a loss of earning power in the range of 30 percent as a result of" the 1991

injury, the requirements of § 48-128 had been met, thus making SIF liable for a significant portion of Bryson's benefits. Specifically, the single judge ordered: "[SIF] should pay to the plaintiff disability benefits from and after August 9, 1994, for so long as the plaintiff remains permanently and totally disabled as a result of said accident and injury of January 4, 1994, subject to [adjustment for overlapping payments from Vickers]."

SIF applied for review. On October 31, 1997, the Workers' Compensation Court review panel affirmed. The review panel also ordered Vickers to pay Bryson $1,500 for attorney fees incurred as a result of the application for review. SIF timely appealed to this court, and Vickers cross-appealed.

III. ASSIGNMENTS OF ERROR

SIF asserts that the compensation court erred as a matter of fact and a matter of law in holding that SIF was liable for payments to Bryson pursuant to § 48-128. In its cross-appeal, Vickers argues that the compensation court erred in (1) failing to order SIF to reimburse it for benefits it allegedly overpaid and (2) assessing attorney fees against it when the application for review was filed by SIF and not by Vickers or its insurer.

IV. STANDARD OF REVIEW

A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (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. *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997).

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party. *Id.*

[4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997).

V. ANALYSIS

1. SIF APPEAL

(a) Apportionment of Injuries

[5] SIF first argues that the evidence adduced was insufficient to permit apportionment of the disability imposed by each of Bryson's injuries, thus making § 48-128 inapplicable. Section 48-128 provides, in relevant part:

> (1) If an employee who has a preexisting permanent partial disability . . . which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury *resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself*, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of . . . the Second Injury Fund . . . .

(Emphasis supplied.) The "combined disabilities" referred to in the statute are those from the preexisting condition and the subsequent compensable injury. *Eichorn v. Eichorn Trucking*, 3 Neb. App. 795, 532 N.W.2d 345 (1995). The burden of proof to establish apportionment under § 48-128 is on the employer. *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984).

> "To recover from the Second Injury Fund . . . a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability."

Sherard v. Bethphage Mission, Inc., 236 Neb. 900, 908, 464 N.W.2d 343, 348 (1991). Whether those factors are established is a question of fact, which will not be reversed unless clearly wrong. *Id.*

[6,7] SIF also argues that the compensation court erred in assigning a 30-percent disability to the second injury, because no evidence specifically apportioned the disability due to each injury or to the combination thereof. There was, however, testimony tending to show that Bryson had suffered a distinct injury in 1994 that had caused his condition to worsen. In exhibit 8, a letter of October 3, 1996, Dr. Bush opined that Bryson's condition could be apportioned, stating that "35% of his present disability is from his second injury, January 4, 1994." Dr. Bush later testified in his deposition that he could not necessarily apportion out the injuries; however, resolution of that apparent contradiction was within the province of the trial court. "[A]n expert witness' good faith self-contradiction presents a question of fact to be resolved by the Workers' Compensation Court." *Hohnstein v. W.C. Frank*, 237 Neb. 974, 984, 468 N.W.2d 597, 604 (1991). Moreover, Dr. Bush stated in his deposition that he was convinced the combined disability was substantially greater than would have existed from the second injury alone. Finally, we note that "[w]hile expert witness testimony may be neces-

sary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant." *Cords v. City of Lincoln*, 249 Neb. 748, 756, 545 N.W.2d 112, 118 (1996). Given our standard of review, the evidence in the record, and the acknowledged authority of the compensation court to make its own determinations of disability, we cannot say the compensation court erred on this issue.

(b) Notice to Vickers From Written Records

SIF next argues that the written records of Bryson's preexisting condition which had been provided to Vickers did not satisfy § 48-128(2). That section requires that prior to an order transferring liability for benefits payment to SIF, "the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability . . . at the time the employee was retained in employment after the employer acquired such knowledge." SIF concedes, and the record reflects, that prior to Bryson's second injury, Vickers had been provided with written records showing that Bryson had a preexisting condition. Among those written records was a letter from Dr. Greene, dated January 9, 1992, stating that Bryson had a 10-percent impairment to his body as a whole; a copy of the work hardening evaluation performed by Excel Work Performance Center, stating that Bryson was "currently functioning at a LIGHT physical demand level" and that "there does not appear to be any reason he should be unable to perform at somewhat higher levels if he were to increase his strength and endurance through a regular exercise program"; another letter from Dr. Greene, dated June 25, 1993, stating that Bryson "is functioning at a light physical demand level. I think he can be a valuable employee *if kept at this level.*" (Emphasis supplied.) Also, on February 2, 1994, Bryson submitted a claim for short-term disability, in which he stated that he had "on going [sic] pain from the back surgery I had on July of 1992 [sic] and continuing to get worst [sic]."

[8,9] SIF argues that those documents did not satisfy § 48-128(2), because they did not inform Vickers of the precise

extent of Bryson's preexisting condition. Because content of such written records is not specified in § 48-128(2), we must construe the statute. In doing so, we are guided by the principle that the Workers' Compensation Act is to be liberally construed so that technical refinements of interpretation will not be permitted to defeat it. *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997). The purpose of the Second Injury Fund is to assure employers that if they hire or retain individuals with preexisting disabilities, those employers will be liable only for those injuries which would have resulted had there been no preexisting disability. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987); *Eichorn v. Eichorn Trucking*, 3 Neb. App. 795, 532 N.W.2d 345 (1995). It seems clear that those records need not contain a precise statement of an employee's exact condition. See 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 59.33(c) at 10-501 through 10-509 (1998):

> An obvious question in states requiring actual employer knowledge is: How much must the employer have known about the actual nature of the prior injury?
>
> It is clear that the employer does not have to know exactly what the employee's prior condition is in medical terms. . . .
>
> . . . .
>
> Since the second injury principle applies only to preexisting permanent conditions, the employer would have to know, not just that the employee had some abnormal condition, but that the condition was permanent in character. . . .
>
> The knowledge that the employer must have of the nature of the injury also was held to include awareness that the condition was of a kind likely to be a hindrance to employment. . . .
>
> Finally . . . it is evident that the preexisting condition of which the employer knew must be the condition that figured in the final disability.

The written records provided to Vickers put it on sufficient notice that Bryson had an abnormal, permanent condition that was likely to be a hindrance in his employment, a condition that did, indeed, figure in his final total disability. To construe the

section as requiring more would defeat the purpose of the Workers' Compensation Court. Accordingly, the compensation court did not err in ordering SIF to assume liability for compensation benefits.

2. Cross-Appeal by Vickers

(a) Reimbursement by SIF

Vickers first argues that it is entitled to reimbursement from SIF for the difference between the $41,340 that Vickers paid prior to the compensation court award and the $26,515.57 the compensation court ultimately held was Vickers' obligation. Vickers seeks reimbursement under either of two theories: (1) Neb. Rev. Stat. § 48-178.01 (Reissue 1993) provides for such reimbursement, or (2) the compensation court has inherent authority to order such reimbursement.

Turning first to the argument that reimbursement is appropriate pursuant to § 48-178.01, we note that the statute provides, in its entirety:

> Whenever any petition is filed and the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer, a carrier, or a risk management pool or between two or more employers, carriers, or pools, the Nebraska Workers' Compensation Court may order payment of compensation to be made immediately by one or more of such employers, carriers, or pools. When the issue is finally resolved, an employer, carrier, or pool held not liable shall be reimbursed for any such payments by the employer, carrier, or risk management pool held liable.

The review panel found, and we agree, that this statute, by its own terms, is inapplicable. In contrast to our consideration of § 48-128(2), here, we are faced not with construction of a statute, but with simple application. The plain language of the statute provides that it applies only where the claimant's right to recovery was not in issue and the compensation court has entered an order of immediate payment. That is not the case here—Vickers had contested Bryson's right to recovery and thereby rendered § 48-178.01 irrelevant. That ends the inquiry; it is not within the province of this court to read a meaning into

a statute that is not there or to read anything direct and plain out of a statute. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

[10,11] Vickers alternatively argues that the Workers' Compensation Court has the "inherent power" to make this adjustment. Brief for appellee Vickers at 22. The compensation court is a court of statutory creation, and its powers are limited to those delineated in the statutes. *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995). The Workers' Compensation Court has no inherent power to order that an employer be reimbursed by the Second Injury Fund for the difference between payments made pursuant to § 48-178.01 and the amount for which an employer is ultimately held liable. The Legislature set out the terms under which reimbursement should occur, and this scenario is not one of them. Again, we will not read other circumstances into the plain words of the statute. See *Village of Winside, supra*. If this statutorily mandated result is inequitable, the solution lies with the Legislature and not with this court. The compensation court has no equitable powers. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). If the result appears unreasonable, that, again, is an issue for the Legislature. "While we may not understand the Legislature's motivation, we are bound to follow its statutory mandate." *In re Estate of Nelson*, 253 Neb. 414, 419, 571 N.W.2d 269, 273 (1997).

Finally, Vickers argues that this court has tacitly endorsed such orders of reimbursement because we did not reverse a compensation court order of reimbursement in *Lozier Corp. v. State*, 1 Neb. App. 567, 501 N.W.2d 313 (1993). That argument is not well taken in light of the fact, which Vickers candidly admits, that the issue of reimbursement was not raised by either party and was not necessary for disposition of the appeal. "It is axiomatic that a case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court." *Grammer v. Endicott Clay Products*, 252 Neb. 315, 319, 562 N.W.2d 332, 334 (1997). Now that the issue is squarely before this court, we hold that such reimbursement is not authorized. The Workers' Compensation Court's decision is accordingly affirmed on this issue.

(b) Attorney Fees Assessed Against Vickers

[12,13] Vickers next argues that the Workers' Compensation Court review panel erred in ordering it to pay $1,500 for Bryson's attorney fees incurred during SIF's unsuccessful application for review. Vickers argues alternatively either that the court had no authority to order it to pay fees or that any such fees should have been assessed against SIF rather than Vickers.

Neb. Rev. Stat. § 48-125 (Reissue 1993) provides:

> *If the employer* files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs *against the employer* for such review . . . .

(Emphasis supplied.) The Second Injury Fund is an employer for purposes of attorney fees awarded pursuant to § 48-125. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). Accordingly, we hold that the Workers' Compensation Court had statutory authority to impose attorney fees in this case. However, those fees should have been assessed against SIF, which filed the application for review. Compare *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982) (if SIF files an unsuccessful appeal in appellate courts, attorney fees are taxed against it and not against employer per se). The compensation court review panel accordingly erred in assessing attorney fees against Vickers. The matter is therefore remanded with directions that the court amend its order to provide for assessment of such fees against SIF instead of against Vickers.

VI. CONCLUSION

For the reasons set forth above, we affirm the Workers' Compensation Court on the issue of Second Injury Fund liability and on the issue of Vickers' demand for reimbursement by SIF. We reverse on the issue of attorney fees awarded against Vickers, and remand for entry of an order consistent with this opinion.

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

ANTHONY L. NICHOLS, APPELLANT, V.
COUNTY OF DOUGLAS, APPELLEE.
585 N.W. 2d 105

Filed September 15, 1998. No. A-96-1241.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.
4. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely in the province of the fact finder.
5. **Trial: Evidence: Videotapes: Appeal and Error.** Where the appellate court reviews videotaped testimony and evidence, and the standard of appellate review is not de novo, the appellate court is not free to substitute its view of the evidence for that of the trier of fact.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John K. Green for appellant.

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

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

MILLER-LERMAN, Chief Judge.

Anthony L. Nichols, a former inmate at the Douglas County Correctional Center (DCCC), brought an action under the Political Subdivisions Tort Claims Act against the County of Douglas, alleging that he suffered injuries after falling while attempting to get into his upper bunk bed at DCCC. In a bench trial, the district court for Douglas County found that DCCC was not liable to Nichols for his injuries. On appeal, Nichols essentially argues that the trial court erred in failing to determine that DCCC was negligent in designing, installing, main-

taining, and repairing the upper bunk in room 8 of module F prior to Nichols' fall from the upper bunk on January 3, 1991. Nichols also argues that DCCC knew or should have known that the upper bunk bed in his cell was in need of repair prior to his fall on January 3. For the reasons set forth below, we affirm.

BACKGROUND

On April 25, 1996, Nichols filed a second amended petition pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1987). In his petition, Nichols stated that he is currently residing in Georgia and that he is seeking damages for injuries he sustained on January 3, 1991, while housed at DCCC awaiting trial on criminal charges. Nichols alleged that he suffered injuries when his assigned bunk collapsed as he attempted to get into the bunk. Nichols alleged that his injuries were caused by DCCC's negligence and that DCCC had been negligent in failing to (1) properly inspect his bunk to ensure that it was in proper and safe working order, (2) ensure that his room was properly equipped and that his bunk was in useable condition, (3) properly repair and maintain the bunk in his room, (4) adequately design and construct the upper bunks, and (5) install an adequate method of ingressing and egressing the upper bunks. Further, Nichols alleged that DCCC knew or should have known that his bunk was not in proper and safe working order or useable condition. Nichols alleged that as a result of DCCC's negligence, he has suffered and will continue to suffer mental anguish and pain and suffering and that he must continue to undergo medical care and treatment. Nichols requested judgment against DCCC for general and special damages as well as interest and costs.

On April 30, 1996, DCCC filed a demurrer to Nichols' second amended petition, which after hearing, the district court denied in a journal entry dated May 14, 1996.

On May 23, 1996, Nichols filed a motion to bifurcate the action on the issues of liability and damages, which was subsequently granted by the district court.

On June 3, 1996, DCCC filed an answer to Nichols' second amended petition. In its answer, DCCC admitted that Nichols had fallen while getting into his bunk, but denied having any

knowledge of any alleged problem with Nichols' bunk or any of the bunks adjacent to the one in Nichols' room or notice of the same. DCCC denied that it had been negligent in any of the respects alleged by Nichols in his petition.

A trial on the issue of liability was set for July 15 and 16, 1996. At this bench trial, the evidence showed the following:

Initially, the cells at DCCC were single-occupancy cells. In the early 1980's, the cells at DCCC were converted to double-occupancy cells by the addition of 58 upper bunk beds. Although a bid was requested from a private professional contractor, Vince Bird Construction, DCCC did not accept this bid, and DCCC, in cooperation with the Douglas County Department of Public Properties, built the upper bunks on their own. The record shows that the county built the upper bunks based on the design submitted by the outside professional contractor.

The upper bunks were constructed of wood and attached to the wall with "all-threads," which are ⅝-inch or ¾-inch bolts that are 12 to 16 inches long. These bolts run through the concrete block walls of each cell into the upper bunk bed frame in both adjacent rooms. The frame of each bunk was enclosed in plywood, and the plywood was glued to the bunk bed frames with "PL400," an industrial-strength compound.

In most cells at DCCC, including room 8 of module F, in addition to the beds, there is a sink, a toilet, a desk, and a stool in front of the desk which is bolted to the floor. The upper bunk is approximately 53 to 54½ inches off the ground, while the lower bunk is approximately 19 to 20 inches high. Typically, the inmates use the bottom bunk, the desk, or the stool to access the upper bunk. The desks are 29 to 30 inches high, while the stools are 18 or 19 inches high. The stools are approximately 9 to 10 inches away from the bunk beds. Evidence produced at the hearing indicated that a faceplate was bolted either to the wall near the beds or to the beds themselves. The plate allows an inmate to step up on the edge of the plate toward the wall and get into the upper bunk with safety. The evidence showed that DCCC did not install stepladders or moveable stools in the cells to assist inmates in reaching the upper bunk for fear that the inmates would use such items as weapons or as a means to commit suicide.

William McPhillips, the deputy warden of administration at DCCC at the time of Nichols' accident, testified that he had been employed at the facility since 1978 and that since that time, an inmate had fallen from his bunk a couple of times at most. McPhillips stated that there had been no problems between inmates potentially caused by one inmate's using another inmate's lower bunk to gain access to his upper bunk.

The evidence shows that DCCC is inspected by the Jail Standards Board on a yearly basis and that DCCC was in full compliance during 1990 and 1991. The Jail Standards Board did not comment on the construction of bunk beds or require that the bunk beds be inspected on a routine basis. Specifically, regarding inspections of inmates' cells, the Standards for Jail Facilities, 81 Neb. Admin. Code, ch. 6, § 003.02A (1987) states, "Facility employees shall carefully inspect cells, cell doors, bars, windows, and doors leading into and out of housing areas daily to insure that all are in proper and safe working order."

Regarding the inspection of the windows, jail personnel testified that they would have to place their weight on the upper bunk to check the window. One corrections officer testified that it is not possible to reach the windows without placing some pressure on the top bunk. DCCC records show that the windows in Nichols' room were checked on December 29 and 31, 1990, and January 1, 1991.

Nichols testified that he had been incarcerated in DCCC as a pretrial detainee from August 24, 1990, to April 11, 1991. Nichols testified that initially he was housed in room 13 of module F and that around Thanksgiving weekend of 1990, he was transferred to room 8 of module F and assigned to the top bunk. Nichols testified that on January 3, 1991, at about 1:30 a.m., he got up to use the restroom and that when he attempted to get back into bed, he used the stool by the desk to pull himself up to the upper bunk. Specifically, Nichols testified that he stepped up on the stool, leaned forward, braced himself, turned, and attempted to place his "rear end onto the bunk," essentially doing a "sort of a half pirouette" to get into the bed. Nichols testified that as he did so, his bed gave way and he fell onto the ground. Nichols testified that he was knocked unconscious from the fall and that when he woke up in the hospital, he felt pain in

the left side of his head and the right side of his lower back. Nichols testified that during the approximately 5 weeks he used the top bunk, he never noticed that his bed was loose.

Nichols called an expert in design and renovation of correctional facilities, Randall Atlas, who testified on Nichols' behalf by videotape. The videotaped testimony and a transcription thereof are in the record on appeal. Atlas testified that the top bunks should have been constructed of steel or metal, not wood. In particular, Atlas testified that the fact that no lock washers were used when bolting the bed to the steel rod was substandard construction. Atlas stated that DCCC did not provide an adequate means for the inmates to access the upper bunks. Atlas discussed the advisability of alternate methods of access to bunk beds, including stools and ladders. Atlas also recommended that DCCC attach a "solid plate" or "something fairly comparable in wood" to either the lower bunk bed or to the wall for the inmates' use in getting to the upper bunk. He did not opine that the existing faceplate was inadequate, as he did not appear familiar with its existence. On cross-examination, Atlas acknowledged that although he had reviewed documents forwarded by Nichols' counsel, he had not personally viewed any of the cells at DCCC, inspected the bunk beds, or talked to any of DCCC's employees or to Nichols. Additionally, Atlas admitted that he did not know whether the stools by the desk were moveable or fixed. Atlas did not know how high the stools were or the height of the beds. Atlas hypothesized that the stools in the cells were 12 to 18 inches from the bed whereas the evidence shows that the stools are 9 to 10 inches away.

Ralph Hilt, the DCCC employee who repaired Nichols' bunk after Nichols' fall on January 3, 1991, testified that upon checking the upper bunk in room 8 of module F, the upper bunk looked fine, but that when pressure was applied to the bed, he found that the upper bunk was loose on the left corner, with approximately a ½-inch or ¾-inch movement on the left-hand side. Hilt testified that he was aware that two or three other bunks built like Nichols' had become loose and had required repair. Hilt was not asked whether any inmates had been injured because of the loose bunks. Specifically, the evidence shows that most recently, DCCC's employees had repaired the upper

bunk in room 1 of module D on December 9, 1990, because the top bunk had become loose from its mounting. However, unlike the upper bunk in room 8 of module F, the upper bunk in room 1 of module D is not connected to the bunks in the adjacent rooms, but, rather, connected only to one other upper bunk bed because room 1 of module D is at the end of a row.

Regarding room 8 of module F, Donald Howland, the inmate who was assigned to the upper bunk in room 8 of module F before Nichols, gave testimony in a deposition. Howland testified that while he resided in room 8 of module F, the upper bunk was very unstable and loose, not just on the left side, but on both the left-hand and the right-hand sides. Howland testified that he brought the condition of the upper bunk to the attention of the guards on several occasions and that DCCC engineers had inspected the bunk, but did not repair the upper bunk before he left the room. There was no evidence of Howland's complaints in any of DCCC's records, nor is there any record of any repair work done on the upper bunk in room 8 of module F prior to Nichols' accident. Evidence on this record indicates that as a general rule, maintenance personnel at DCCC did repair work in a timely manner, shortly after being notified of a maintenance problem.

In a seven-page order dated October 31, 1996, the district court dismissed Nichols' petition with prejudice. The district court concluded that DCCC was not liable because (1) the design and installation of the upper bunk beds met the standard of care for correctional facilities, (2) DCCC's inspection of the inmates' beds met or exceeded the standard of care for correctional facilities, (3) neither Nichols nor DCCC was aware of the fact that Nichols' bed was defective in any way, and (4) DCCC's decision not to place footstools or ladders on the bunk beds met or exceeded the standard of care applicable to correctional facilities. Nichols appeals.

ASSIGNMENTS OF ERROR

Essentially, Nichols argues that the trial court erred in failing to determine (1) that DCCC was negligent in designing, installing, maintaining, and repairing the upper bunk in room 8 of module F prior to Nichols' fall from the upper bunk on

January 3, 1991, and (2) that DCCC knew or should have known that Nichols' bunk bed was in need of repair prior to January 3.

STANDARD OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Wasiak v. Omaha Pub. Power Dist.*, 253 Neb. 46, 568 N.W.2d 229 (1997).

[2] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

ANALYSIS

On appeal, Nichols argues that the trial court erred in failing to determine that DCCC was negligent in designing, installing, maintaining, and repairing the upper bunk in room 8 of module F prior to Nichols' fall from the upper bunk on January 3, 1991, and that DCCC knew or should have known that Nichols' bunk bed was in need of repair prior to January 3. DCCC argues that the trial court's factual findings were not clearly wrong and that the district court's order should be affirmed. After considering the evidence in a light most favorable to DCCC and resolving every controverted fact in DCCC's favor, we find that the trial court's findings of fact were not clearly wrong and affirm the decision of the district court.

In its order dated October 31, 1996, the trial court made lengthy and detailed findings. The trial court summarized the testimony of the various witnesses. Thus, for example, with respect to Howland's testimony, the trial court summarized the evidence given by Howland and stated, inter alia, that the testimony of Howland was not useful regarding Nichols' issues. Similarly with respect to Nichols' expert, Atlas, the trial court summarized the opinions Atlas rendered regarding construction

and maintenance and Atlas' opinion that footstools or ladders should have been provided to the inmates. Atlas also recommended the attachment of a "solid plate" or "something fairly comparable in wood," but did not comment on whether or not the existing faceplate was inadequate. The trial court observed that Atlas did not mention any treatises or other scholarly works in connection with his opinions but did not reject Atlas' opinions on that basis. The trial court agreed with Atlas in observing that "no doubt . . . a stronger bed could have been constructed, [but] I cannot say that the DCCC was negligent in failing to install stronger frames in this instance." In summarizing other testimony, the trial court noted that the evidence presented by the county showed that "over a 15-year period, no structural failures had occurred."

A review of the record shows there is evidence that the bunk beds at DCCC were well constructed, were secured by connecting the bunk beds to other bunk beds in adjacent rooms, and were assembled using PL400, an industrial-strength compound, and that their design was based on the drawings submitted by outside professionals. Evidence shows that the inmates were provided several means to access their upper bunks, including the desk, the stool, the lower bunk, and a faceplate attached either to the wall near the beds or to the beds themselves. There is convincing evidence that DCCC did not install stepladders or moveable stools to access the beds for valid safety and security reasons.

Although Nichols contends that DCCC should have known that his bunk bed was loose, he testified that he never noticed that his bunk was loose prior to January 3, 1991. Although Atlas opined that fights might occur if an inmate used another inmate's bed as a stepping stool, evidence produced by DCCC shows that inmates routinely did so without creating problems. Similarly, although there is no specific rule mandating that DCCC inspect the bunk beds on a routine basis, the evidence shows that DCCC employees of necessity checked the inmates' beds and the beds' stability while checking the adjacent windows in the inmates' cells. In this regard, we note that DCCC employees testified that they were unable to check the windows without placing some force or some of their weight on the upper

bunk beds. The record shows that the windows in room 8 of module F were checked on December 29 and 31, 1990, and January 1, 1991. Additionally, since the upper bunk beds were installed in the early 1980's, very few accidents have occurred. McPhillips testified that at most, two inmates have fallen off their beds since he started to work at DCCC in 1978. McPhillips did not state the cause of these accidents.

[3-5] To the extent that expert testimony was required by Nichols to establish a lack of care by DCCC and without commenting on the required standard of care, Nichols produced Atlas, who was qualified as an expert and rendered opinions summarized above in this opinion. Taking the trial court's opinion in its entirety, it is clear from the trial court's findings and conclusions that the trial court did not credit Atlas' opinions and that his opinions were outweighed by other evidence presented by the county, inter alia, the testimony summarized above and the bunk bed design, which was based on the design submitted by the outside professional contractor. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997). Similarly, determining the weight that should be given expert testimony is uniquely in the province of the fact finder. *Id.* Under *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994), where the appellate court reviews videotaped testimony and evidence, and the standard of appellate review is not de novo, the appellate court is not free to substitute its view of the evidence for that of the trier of fact. Thus, in the instant case, regardless of whether or not the appellate court may have given the videotaped testimony of Atlas more weight than did the trial court, this court cannot say as a matter of law that the trial court's determination which, after reviewing all the evidence, fails to find Atlas' opinions persuasive, is clearly wrong.

CONCLUSION

Based on the evidence before it, the district court concluded Nichols did not establish liability. We find no reversible error.

AFFIRMED.

IRWIN, Judge, dissenting.

The first question which must be answered in this appeal is, What is the standard of care applicable to the design and installation, in a maximum security correctional facility, of a retrofitted top bunk hanging more than 4 feet above a concrete floor? The majority opinion fails to address this question. The majority states, "To the extent that expert testimony was required by Nichols to establish a lack of care by DCCC *and without commenting on the required standard of care*, Nichols produced Atlas . . . ." (Emphasis supplied.) The majority further states that "it is clear from the trial court's findings and conclusions that the trial court did not credit Atlas' opinions *and that his opinions were outweighed by other evidence presented by the county* . . . ." (Emphasis supplied.)

I think the majority makes an error that is not inconsequential in not "commenting on the required standard of care." I conclude this because the trial court used the wrong standard of care in rendering its decision and erroneously discounted the only expert opinion regarding the proper standard of care simply because Atlas did not state that he relied upon any particular treatise or book in rendering his opinions. The majority also incorrectly states that "[Atlas'] opinions were outweighed by other evidence presented by the county." It is undisputed that the county presented *no* expert testimony to rebut Atlas and, to borrow from the majority's language, "[t]o the extent that expert testimony was required," Nichols provided the only expert testimony in this record. The majority does not and cannot indicate what evidence was presented by the county to outweigh Atlas' opinions because there was none.

It is axiomatic that in order to succeed in an action based on negligence, the plaintiff must establish the defendant's duty not to injure the plaintiff, breach of that duty, proximate causation, and damages. *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997). The instant case was bifurcated, and therefore the sole issue to be decided at this point in the legal process is that of liability. Trial on the issue of liability involves the elements of duty not to injure the plaintiff and breach of that duty. See *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996). In a negligence case, the duty not to injure encompasses

the concept of standard of care. "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." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 at 356 (5th ed. 1984).

Expert testimony is necessary to establish the standard of care in cases in which the trier of fact is faced with matters requiring special knowledge or skill on subjects which are not within the realm of the ordinary experience of people. The necessity of such testimony "arises from the fact that the judicial system is called upon to make determinations which require specialized knowledge in fields in which the trier of fact is ignorant or relatively so." *Halligan v. Cotton*, 193 Neb. 331, 340, 227 N.W.2d 10, 15 (1975). It is interesting to note that in the present case, the county first contacted an architect to design these bunks but then elected to do the job itself. The law is clear that when a nonprofessional decides to perform services in professional areas, such as architecture or construction herein, that nonprofessional is required to exercise the same level of skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. Restatement (Second) of Torts § 299A (1965). Although there is an exception to this rule noted in the Restatement, it is not pertinent to the facts of this case. The county chose to perform the services of an architect and builder and was therefore bound to perform according to the standards applicable to such professions.

The trial judge, according to his multipage order, found the following proposition of law to be controlling on the issue of what standard of care is applicable here: " '[A] jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners.' Daniels v. Anders[e]n, 195 Neb. 95, 98, [237 N.W.2d 397, 400] (197[5]), quoting 60 Am.Jur.2d Penal and Correctional Institutions §17 [(1972)]; Restatement of Torts 2d §320 [(1965)]." In other words, the trial judge found that the standard of care to be applied to the design and installation issues in this case is one of ordinary reasonableness, capable of ascertainment without the assistance of expert testimony. As such, the trial court applied the wrong

standard of care in assessing Nichols' claim and proof, and was clearly wrong in concluding that Nichols failed to meet his burden of proof.

The *Daniels* case cited by the trial court involved a plaintiff-inmate who was attacked by a fellow inmate while locked in a "drunk tank." The negligence claim in *Daniels* was distinguishable from the issues dealt with in the case before us. I would agree that an act of negligence involving personal violence among inmates may not require expert testimony to establish the standard of care. However, the case at hand involves design and installation of a retrofitted top bunk that must be suspended from the wall of a jail. While regrettably we all may have some experience with physical assault, either actual or vicarious, few of us are familiar in any manner with designing and building furniture for a maximum security jail. I must respectfully disagree with the majority opinion which tacitly endorses the conclusion of the trial court that expert testimony was unnecessary.

The Nebraska Supreme Court has held on several occasions that in a claim for professional negligence, the standard of care must be established by expert testimony, and failing such expert testimony, a prima facie case of negligence has not been established. See, e.g., *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). Because the county was performing a professional service, in this case design and installation, the county is held to the same standard as a professional in the fields of architecture and construction. As such, this case should be treated like any other professional negligence case, and expert testimony is needed to establish the standard of care.

Nichols called Atlas via videotaped deposition to provide expert testimony on the standard of care. To determine whether Nichols, through Atlas' testimony, succeeded in setting forth a prima facie case, it is necessary to review Atlas' qualifications as an expert, as well as his testimony regarding the standard of care applicable to the design and installation of this bunk bed. Atlas has bachelor's degrees in architecture and criminal justice from the University of Florida and the University of South Florida, respectively. He has a master's degree in architecture from the University of Illinois. Atlas also earned a doctorate in criminology from Florida State University. The record is undis-

puted that these are the highest credentials in the country regarding design of correctional facilities.

As part of his architectural education and experience, Atlas studied design and construction of both new and remodeled correctional facilities. While in college, Atlas worked for and did an architectural internship at the Florida Department of Corrections. His work for the Florida Department of Corrections included the preparation of documents for retrofitting existing buildings and housing units. During this time, he gained experience planning and constructing inmate cells in correctional facilities.

After his college work, Atlas was employed by a national architectural firm, specializing in jail and prison construction. His position involved the design of large prison facilities in California and architectural programming of several new jails. Atlas next worked for an architectural firm in Coral Gables, Florida, that had recently obtained a commission for a $44 million correctional facility in Dade County, Florida. He worked with a team responsible for the architectural program and design for bunking within this 1,000-bed facility. Later, Atlas started his own company and began doing work for the National Institution of Corrections, which is part of the Department of Justice. He served as a technical consultant and participated as a trainer in a program for the planning of new institutions. Atlas also worked as an onsite technical assistant consultant where he was sent around the country to look at jails experiencing overcrowding. He assisted in planning architectural renovations to deal with overcrowding.

As part of his work, Atlas has instructed county officials and other correctional or jail administrators regarding their standard of care to be followed in their endeavors. He testified that the American Corrections Association was generally regarded as the "national industry standard." Atlas has also published papers on correctional architecture, taught at various universities regarding criminal justice issues, and testified as an expert witness in other cases.

In preparation for his testimony, Atlas reviewed various documents, including depositions, floor plans, cell designs and layouts, sketches, correspondence, and pleadings, all provided to

him by counsel. Atlas also testified that he reviewed the American Corrections Association Adult Detention Center standards.

Atlas concluded that the bunk bed in the present case was designed and constructed in such a manner that there existed unacceptable flexibility and movement and that the bed was anchored to the wall in a manner that did not provide sufficient rigidity to prevent working itself loose from the wall. He also felt it was substandard as a construction technique to fail to use "lock washers" when bolting the bed to the steel "all-threads." Specifically, he stated:

> [Nichols' counsel:] In terms of the wooden bunk itself, your criticism as to the way it's attached goes to the lack of a lock washer and the spacing that is exhibited and the failure to have a method of rigid attachment to the side walls such as a weld?
>
> [Atlas:] That is correct.
>
> . . . .
>
> . . . And in addition to that, that they didn't provide a proper anchoring device to anchor the bolts to the wood. We have a connection between two different materials of steel to wood, and they could have used a sleeve or some kind of device that would have allowed anchoring and transferring the weight from the steel rod to the wood in a better manner.
>
> [Nichols' counsel:] Then it is your opinion that eventually these bunks were going to come loose and that this was an accident waiting to happen?
>
> [Atlas:] Yes, sir.

Contrary to the majority's conclusion, the record does not establish that "a faceplate was bolted either to the wall near the beds or to the beds themselves [to reach] the upper bunk *with safety*." (Emphasis supplied.) The testimony relied upon by the majority in this regard, which was given by the coordinator of public properties, closely follows testimony by the same witness that "the planned method of ingress and egress from the upper bunk" was "[j]ust to step on the edge of the lower bunk." The witness indicated that there was a *faceplate* on the bed, not a plate designed *for use in getting to the upper bunks.*

Finally, Atlas testified that there was no adequate, safe means of ingress and egress to the upper bunk. Atlas specifically testified that using the lower bunk as a step was unsafe and that the stool was too far from the bunks to be used safely. Additionally, Atlas' failure to specifically "opine that the existing faceplate [on the bed] was inadequate [as a means of ingress and egress]," as noted by the majority, does not represent a tacit admission of the plate's adequacy. Rather, from my review of the record, it is a result of the fact that no one asked Atlas about the faceplate at trial. This is likely a direct result of the fact that no one has ever represented that the faceplate was to serve as a means of accessing the upper bunk.

The trial court's order stated that Atlas testified:

> [T]he design and maintenance of these bunks, and Nichols' bunk in particular, was below the standard of care for penal institutions. The wood frame construction was improper ("a Mom and Pop" job). (Stronger) Metal frames should have been used; and the frames should have been welded or lock washered to the walls. Foot stools, ladders or other access devices should have been provided.

The order went on to state:

> As to the design critique, Atlas did not name any architectural guide or structural authority, either within or without the correctional industry, which would, as a matter of due care, specify wood rather than metal construction. No treatise, scholarly work, or accepted source was mentioned in support of this criticism. . . . A similar observation applies to Atlas' complaint that the frames should have been welded or lock washered to the walls. While I have no doubt that a stronger bed could have been constructed, I cannot say that the DCCC was negligent in failing to install stronger frames in this instance.

The above-quoted language from the trial court's order is significant in two respects. First, it is apparent that the court concluded that Atlas' opinion was that the design and installation of the bunk did *not* meet acceptable professional standards. This is a factual conclusion of the trial court that, as the majority has noted, we are not free to dispute on appeal unless it is clearly erroneous. A review of the bill of exceptions shows that this fac-

tual determination of the judge is supported by the record, and we are obliged to accept it.

The second significant aspect of the trial court's language quoted above is the court's conclusion that because no treatise, book, publication, or guide was relied on by Atlas in forming his opinion, the court was free to totally disregard it. While oftentimes experts do rely on such sources for their opinion, nothing in statute or case law *requires* reliance on such materials in every instance. If such were the case, the author of the most learned treatise on a subject would be precluded from testifying until a publisher was first found to put the information in print. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Rev. Stat. § 27-702 (Reissue 1995). Atlas was qualified as an expert, he possessed a sufficient and proper foundation or factual basis for his opinion, and his testimony was necessary for the trier of fact to establish and evaluate the standard of care in this case.

Although expert testimony was necessary for Nichols to establish the standard of care in order to prove a prima facie case, the testimony of Atlas satisfied that requirement. The county presented absolutely no expert testimony to rebut the standard of care as ably presented by Atlas. The trial court was clearly wrong in finding Atlas' opinion was inadequate simply because it was not based on a treatise, a scholarly work, or an accepted source.

Having concluded that expert testimony was necessary to establish the standard of care owed to Nichols, that Nichols offered sufficient expert testimony to establish the standard of care, and that the county offered no expert testimony to rebut Atlas, the final question is whether the trial court erred in finding that Nichols did not establish liability. The answer is and must be "Yes." Not only did the county fail to rebut the standard of care as articulated by Atlas, it also failed to rebut the design and installation breaches laid out by him. These breaches include the failure to design and construct the bunk with sufficient rigidity to prevent the bed from working itself loose from

the wall, the failure to use lock washers when bolting the bed-frame to the "all-threads," and the failure to provide a safe means of access to the upper bunks. In fact, the county does not dispute that these deficiencies existed but contends that they simply do not fall below the standard of care of how a *reasonable* person would have designed and installed the retrofitted bunk. This stance by the county is as incorrect as the trial court's conclusion because it assumes a standard of care of ordinary reasonableness, rather than the applicable higher standard of care required of a professional. The law is clear that when a person decides to perform services in professional areas such as architecture or construction, that person is required to exercise the skill and knowledge normally possessed by members of that profession or trade.

The trial court's failure to use the appropriate standard of care renders its conclusions clearly wrong. The judgment should be reversed and the case remanded with directions to enter judgment in favor of Nichols on the issue of liability and proceed to trial on the issues of proximate cause and damages.

JOHN A. HOELCK, APPELLANT, V. ICI AMERICAS, INC., APPELLEE.
584 N.W.2d 52

Filed September 15, 1998. No. A-96-1268.

1. **Federal Acts: Claims.** Failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.
2. ____: ____. Packaging-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.
3. **Federal Acts: Claims: Proof.** A factual predicate to a successful defense that the Federal Insecticide, Fungicide, and Rodenticide Act preempts labeling- and packaging-based claims is proof that the label or package in question has been approved by the Environmental Protection Agency.
4. **Federal Acts: Claims.** The Federal Insecticide, Fungicide, and Rodenticide Act does not preempt claims based upon a manufacturer's failure to provide information to the Environmental Protection Agency.
5. **Federal Acts: Claims: Negligence.** The Federal Insecticide, Fungicide, and Rodenticide Act does not preempt claims based upon a manufacturer's negligent testing of a product.

6. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of those cases where there is no genuine claim or defense.
7. ____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, District Judge, Retired. Affirmed in part, and in part reversed and remanded.

Patrick M. Connealy and Laurice M. Margheim for appellant.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee.

SIEVERS, MUES, and INBODY, Judges.

MUES, Judge.

INTRODUCTION

Plaintiff, John A. Hoelck, a farm laborer, was allegedly injured when gases from bags which had contained an insecticide, Dyfonate 20-G, exploded and his clothing caught on fire. Hoelck filed a negligence and strict liability action against his employer and against the manufacturer of the insecticide, ICI Americas, Inc., now called ZENECA (hereafter ZENECA). The trial court granted ZENECA's first summary judgment motion, finding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 to 136y (1988), preempted the bulk of Hoelck's claim. A sole remaining allegation of negligence was dismissed on ZENECA's second motion for summary judgment. Hoelck appeals. The employer is not part of this appeal.

BACKGROUND

According to Hoelck's operative petition, on June 16, 1989, Hoelck's employer instructed him to burn some empty paper and plastic bags in which Dyfonate 20-G, a granular insecticide manufactured by ZENECA, had been sold. The label on the bags informed users that the insecticide was considered noncombustible and that once the bags were emptied they could be

disposed of by burning. The label warned users to stay out of the smoke because toxic materials could be given off. Hoelck ignited several Dyfonate 20-G bags in a barrel, and as the bags started to burn, gases from the bags exploded, igniting his clothing and causing severe burns.

Hoelck filed a lawsuit against his employer and ZENECA. In paragraph VIII of his amended petition, Hoelck alleged that ZENECA was negligent as follows:

> A. In misbranding by stating that Dyfonate 20-G is "considered noncombustible" when it is highly combustible under the conditions likely to occur during use by consumers.
>
> B. In recommending that the empty bags be destroyed by burning when it knew, or should have known, that gases given off when Dyfonate 20-G is heated are highly combustible.
>
> C. By failing to investigate and determine if Dyfonate 20-G bags could be safely burned as stated by [ZENECA] and as directed by [Hoelck's employer].
>
> D. In marketing a combustible insecticide when other reasonable alternatives were available to it.
>
> E. In packaging flammable chemicals in paper bags for sale to consumers.
>
> F. By failing to warn [Hoelck] that the residue in Dyfonate 20-G bags might be dangerously combustible.
>
> G. In failing to adequately warn of risks involved in burning Dyfonate 20-G bags.

In paragraph IX, Hoelck further alleged:

> Dyfonate 20-G, as manufactured and packaged by [ZENECA] was defective and unreasonably dangerous to users or consumers because:
>
> A. it is combustible material packaged in a flammable package;
>
> B. of defective and misleading labeling and misbranding of the container;
>
> C. [ZENECA] failed to warn of the danger inherent in burning any amount of Dyfonate 20-G.

ZENECA's answer alleged by way of defense that, inter alia, Hoelck's petition failed to state a cause of action because

> Dyfonate 20G is a pesticide regulated by the United States Government under the terms of [FIFRA], which act sets forth the only labeling requirements applicable to Dyfonate 20G and preempts, by virtue of 7 U.S.C. § 136v, any state laws or actions brought under state law based upon allegations of improper labeling and/or a failure to warn users of risks associated with use of Dyfonate 20G.

Prior to trial, ZENECA filed a motion for partial summary judgment. The motion is not included in our records, but presumably ZENECA alleged that all but one of Hoelck's claims were preempted by FIFRA. The trial court granted ZENECA's motion for partial summary judgment, stating that all of Hoelck's allegations of both negligence and strict liability, except those stated in paragraph VIII(D) of his petition, were barred because they were preempted by FIFRA.

ZENECA subsequently filed a second motion for summary judgment on the remaining allegation. The trial court granted ZENECA's motion, finding that there were no genuine issues of material fact and that ZENECA was entitled to judgment as a matter of law. Hoelck timely appeals.

ASSIGNMENTS OF ERROR

Hoelck alleges the trial court erred (1) in receiving and considering the affidavit of Andrew Davidson, a ZENECA employee; (2) in finding that FIFRA preempted Hoelck's claims; and (3) in granting ZENECA's second motion for summary judgment.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Marrs v. Keelan*, 254 Neb. 723, 578 N.W.2d 442 (1998); *Syracuse Rur. Fire Dist. v. Pletan*, 254 Neb. 393, 577 N.W.2d 527 (1998).

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of

law. *Marrs v. Keelan, supra*; *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

Regarding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court. *First Nat. Bank v. Daggett,* 242 Neb. 734, 497 N.W.2d 358 (1993).

FIRST MOTION FOR SUMMARY JUDGMENT

FIFRA Generally.

The evidence is clear that Dyfonate 20-G is a pesticide. Congress originally adopted FIFRA in 1947 as a pesticide labeling statute. *Wright v. Dow Chemical U.S.A.*, 845 F. Supp. 503 (M.D. Tenn. 1993). Under FIFRA, no pesticide may be sold or distributed unless it has been registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a(a).

> Since its initial passage in 1947, FIFRA has undergone several significant transformations, each reflecting dissatisfaction with existing mechanisms for limiting potential health risks posed by chemical pesticides. *See Burke v. Dow Chemical*, 797 F.Supp. 1128 (E.D.N.Y.1992). In its current form, FIFRA requires that EPA rely on manufacturers for information about the safety of their products. 7 U.S.C. § 136a(c). However, much of the information known to the manufacturer is withheld from the public; indeed, "[t]he production of data to support a pesticide registration is controlled by the registrant, and this data may be withheld from public scrutiny as a trade secret." *Burke*, 797 F.Supp. at 1134 (*quoting* Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 Vill.Envtl.L.J. 355, 363 (1990)).
>
> Unless alerted by the manufacturer to dangers or the need for special restrictions in the use of the product, it is unlikely that EPA will assume the burden of deciding whether a product should not be sold to the public. *Id.* at 1135. Although no insecticide may be sold in the United States unless registered with EPA, it is the applicants for registration who are responsible for submitting performance data and draft product labels to EPA. 7 U.S.C.

> § 136a([c]). The degree of specificity that must be submitted depends on the nature of the pesticide and its intended use. *See* 40 C.F.R. § 158.100-158.740.

Higgins v. Monsanto Co., 862 F. Supp. 751, 755 (N.D.N.Y. 1994).

> Although FIFRA does provide for individuals with standing to petition EPA to cancel or suspend registrations and also to seek judicial review of EPA decisions under 7 U.S.C. § 136n(a), because consumers will not ordinarily bring such petitions absent a catastrophe or voluntary action by the manufacturer, EPA oversight will not be nearly as protective of persons exposed to pesticides as state tort law.

862 F. Supp. at 756.

FIFRA Preemption.

"In deciding whether federal law preempts state law, courts must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.'" *Wright v. Dow Chemical U.S.A.*, 845 F. Supp. at 508 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). "When Congress provides a preemption clause, the presumption against preemption mandates courts to read such a clause narrowly." *Id.*

In pertinent part, 7 U.S.C. § 136v, the preemptive provision of FIFRA, provides:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

[1] In *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), a case decided after the district court decision here, the Nebraska Supreme Court had the opportunity to address the

preemptive effect of § 136v. In that case, the plaintiff was delivering the mail when he was exposed to an insecticide which was being sprayed by a crop duster on an adjacent cornfield. Upon being exposed, the plaintiff experienced nausea, shaking, diarrhea, and vomiting. The plaintiff subsequently experienced other physical ailments and was declared disabled from his job as a postal carrier.

The plaintiff sued the manufacturer of the pesticide, the defendant, alleging, inter alia, that the defendant had failed to warn or convey appropriate information regarding the insecticide to persons who were applying the insecticide. It was undisputed that the label involved had been approved by the EPA. The trial court determined that the plaintiff's claims were preempted by § 136v(b) and granted the defendant's motion for summary judgment. On appeal, the plaintiff argued that his claim should not be preempted, because § 136v(b) did not explicitly state that FIFRA preempts common-law causes of action concerning pesticide labeling. The Nebraska Supreme Court disagreed, stating:

> If [the plaintiff's] labeling-based cause of action against [the defendant] were allowed to proceed and be successful, [the defendant] would be stuck between the proverbial rock and hard place in that it would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was insufficient. This result would obviously run contrary to the intentions of Congress in passing FIFRA, namely, that labeling information will be regulated solely by the federal government.

Ackles v. Luttrell, 252 Neb. at 283, 561 N.W.2d at 579. See, also, *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993) (stating that "[b]ecause the language on the label was determined by the EPA to comply with the federal standards, to argue that the warnings on the label are inadequate is to seek to hold the label to a standard different from the federal one"); *Wright v. Dow Chemical U.S.A.*, 845 F. Supp. 503 (M.D. Tenn. 1993) (holding once label has been approved by EPA, manufacturer has fulfilled its duty to warn).

With these principles in mind, we turn to the allegations made in the present case to determine whether Hoelck's claims are preempted by FIFRA.

Failure-to-Warn, Inadequate-Labeling, and Packaging Claims.

Paragraphs VIII(B), (F), and (G) and IX(B) and (C) of Hoelck's operative petition expressly or by necessary implication challenge the warnings given on the label used by ZENECA and, under the reasoning of *Ackles, supra*, are clearly preempted by FIFRA if the label was approved by the EPA.

Paragraphs VIII(E) and IX(A) of Hoelck's petition essentially allege that ZENECA was, respectively, negligent and strictly liable for selling a combustible material in a flammable package. In other words, Hoelck alleges that the packages were negligently designed or were defective and unreasonably dangerous because of their design.

Regarding the packaging-based claim, the U.S. District Court has held:

> In contrast to the detailed statutory and regulatory regime concerning labeling and registration, the provisions for packaging are much less so. FIFRA provides only that
>
> "(c) . . . The Administrator, after notice and opportunity for hearing, is authorized—
>
> . . . .
>
> "(3) to establish standards . . . with respect to the package, container, or wrapping in which a pesticide or device is enclosed for use or consumption, in order to protect children and adults from serious injury or illness resulting from accidental ingestion or contact with pesticides or devices regulated by [FIFRA] as well as to accomplish the other purposes of [FIFRA.]"
>
> [7 U.S.C.] § 136w(c)(3). To the best of the court's knowledge, the only EPA packaging regulation concerns child-resistant packaging. 40 C.F.R. § 152.152 (1993).

Roberson v. E.I. DuPont de Nemours & Co., 863 F. Supp. 929, 931 (W.D. Ark. 1994). "Certainly, nothing in the text of § 136v indicates that court's [sic] should distinguish between FIFRA's pre-emptive effect on inadequate labeling claims and its pre-

emptive effect on inadequate packaging claims, although it is troublesome to pre-empt state law causes of action in an almost entirely unregulated field." 863 F. Supp. at 932.

[2] We agree that it is troubling to preempt state law causes of action in an almost entirely unregulated field; however, Congress has delegated the authority to control the design of pesticide containers to the EPA. See, e.g., 7 U.S.C. § 136q(e). In *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), the Nebraska Supreme Court did not address the issue of whether packaging-based claims were preempted; however, its reasoning provides guidance. In discussing whether the plaintiff's labeling-based cause of action was preempted, the Nebraska Supreme Court observed that if the plaintiff were to be successful, the defendant "would be stuck between the proverbial rock and hard place in that [the defendant] would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was not sufficient." *Ackles v. Luttrell*, 252 Neb. at 283, 561 N.W.2d at 579. This same rationale applies to packaging-based claims. Allowing Hoelck's packaging-based claims to go forward would place ZENECA in the position of using EPA-approved packaging yet being liable because the packaging was deficient. We conclude that Hoelck's packaging-based claims are preempted by FIFRA if the packaging has EPA approval. See, also, *Hawkins v. Leslie's Poolmart*, 965 F. Supp. 566 (D.N.J. 1997); *Allstate Ins. Co. v. Pooltime Products, Inc.*, 846 F. Supp. 499 (E.D. La. 1994). Contra *Lyall v. Leslie's Poolmart*, 984 F. Supp. 587 (E.D. Mich. 1997) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), and holding that negligent design and manufacturing claims relating to container were not preempted, because they did not conflict with statutory or regulatory guidelines, since only area of packaging for which EPA had established standards was child-resistant packaging).

EPA Approval.

Hoelck argues that the trial court prematurely granted summary judgment on these claims, because at this point, there is no competent evidence that the labels and packages were approved by the EPA.

ZENECA submitted no proof that the packages used in 1988 and 1989 were approved by the EPA. In support of its contention that the EPA had approved the labels, ZENECA submitted the affidavit of Davidson, a regulatory product manager for ZENECA. Davidson averred that he had been regulatory product manager for 5 years, that in his position he was "responsible for regulation and compliance with all formulations of Dyfonate," that he had "work[ed] on EPA related matters for 19 years," and that "[t]he labels on all packages of Dyfonate 20-G and Dyfonate 20-IIG which were sold or offered for sale during calendar years 1988 and 1989 were approved by the [EPA] in accordance with FIFRA."

At the hearing on the motion for summary judgment, Hoelck objected to the admission of the affidavit, arguing that it failed to establish that Davidson had any personal knowledge as to the facts set forth in the affidavit, it was not the best evidence, and it was hearsay.

Neb. Rev. Stat. § 25-1334 (Reissue 1995) in pertinent part provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

ZENECA contends:

> This is not a situation where an affiant is testifying as to his or her "belief" or "opinion," nor did this involve expert testimony by a lay witness. [Davidson's] competency to testify under oath as to the EPA registration and approval of the Dyfonate in question is well established by the fact that he had been the Regulatory Product Manager at [ZENECA] in charge of regulatory compliance for that very insecticide. Mr. Davidson would have been in a position to know whether the Dyfonate was submitted for registration under FIFRA or not. *Cf.* Kosowski v. City Betterment Corp., 197 Neb. 402, 249 N.W.2d 481, 483 (1977)(the "administrative manager" in charge of defend-

> ant's books and records was competent to testify in an affidavit under Neb. Rev. Stat. § 27-801 R.R.S. 1943 about those matters, and they were not hearsay).

Brief for appellee at 15.

Davidson's affidavit mentions no documentation from the EPA evidencing its approval of the Dyfonate label. Davidson does not expressly aver that he had personally inspected ZENECA's EPA approval documents regarding the labels being used in the relevant time periods, and his start of employment postdated those time periods. At most, there is an implication from his affidavit that he is "in charge" of such records, as ZENECA's argument suggests. The EPA approval records themselves were not separately offered into evidence, nor were they attached to the affidavit. Business records are hearsay and therefore are inadmissible in court unless they meet the requirements of one of the exceptions to the hearsay rule. *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995). See, also, Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Absent those records in evidence, Davidson's testimony regarding what the EPA said in such documents is clearly hearsay.

Neb. Rev. Stat. § 27-803(5) (Reissue 1995) provides an exception to the hearsay rule for business records kept in the ordinary course of business. In pertinent part, § 27-803(5) provides that the following are not excluded by the hearsay rule:

> 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 . . . .

The party seeking admission of a business record under this exception to the hearsay rule bears the burden of establishing the components of the following three-part test: First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. Second, the proponent must establish that the record was

made as part of a regular business practice at or near the time of the event recorded. Finally, the proponent must authenticate the record by a custodian or other qualified witness. *Misle v. Misle, supra.* Davidson's affidavit does not address any of these three requirements and accordingly does not set forth facts sufficient to establish the admissibility of the EPA approval records, if offered, and does not affirmatively show that Davidson is competent to testify to the EPA approval as stated therein. See § 25-1334.

Even had Davidson's affidavit contained the foundational predicates to admit ZENECA's EPA approval records as business records under § 27-803(5), we believe it was objectionable as proof of such approval for yet another reason. Hoelck's objection to Davidson's testimony was also based on the best evidence rule, that is, that his testimony was not the best evidence to establish that the EPA had approved the ZENECA label. See Neb. Rev. Stat. § 27-1002 (Reissue 1995).

> In *Equitable Life v. Starr*, 241 Neb. 609, 615, 489 N.W.2d 857, 862 (1992), the Supreme Court stated that the best evidence rule might more properly be called the rule for " 'production of an original writing or document.' " The court noted that in other jurisdictions, in the absence of a satisfactory explanation for nonproduction of an original document, the original-document rule bars admission of secondary evidence to prove the contents of the document.

State v. Ward, 1 Neb. App. 558, 565, 510 N.W.2d 320, 325 (1993).

Neb. Rev. Stat. § 27-1004 (Reissue 1995) provides that secondary evidence is admissible to show the contents of a document if the original is unavailable for reasons beyond the control of the proponent of the document. Davidson's affidavit gives no indication that the EPA approval documents are, for some reason, unavailable to ZENECA, and ZENECA does not so contend.

[3] For the reasons set forth above, we find that the trial court erred in admitting the affidavit of Davidson to the extent that it was offered as proof that the EPA had approved the label in issue. ZENECA did not submit any other evidence to support its contention that the label in question had been approved by the

EPA. Accordingly, we find that it was error for the trial court to grant ZENECA's first motion for summary judgment, because approval by the EPA is a factual predicate to the success of the entirety of ZENECA's motion.

While we must reverse the grant of ZENECA's first motion for summary judgment because its success was premised on competent evidence of the EPA's approval, for the sake of completeness we believe it is necessary to briefly address Hoelck's misbranding and negligent-testing claims.

Misbranding.

> [T]he preemption statute at issue, § 136v(b), does not reference state requirements relating to pesticides themselves, only to "labeling and packaging" requirements. . . . [T]his court is guided by the Supreme Court's admonition in *Cipollone* [*v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992),] that where Congress enacts a provision defining the preemptive reach of a statute, "matters beyond that reach are not preempted." 505 U.S. at 517, 112 S. Ct. at 2618. This court also is mindful that the Supreme Court has expressly ruled that through the enactment of FIFRA, Congress has not "occupied the field" to the exclusion of the States and FIFRA preemption is narrowly limited by § 136v. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-14, 111 S. Ct. 2476, 2482-87, 115 L. Ed. 2d 532 (1991).

Lyall v. Leslie's Poolmart, 984 F. Supp. 587, 595 (E.D. Mich. 1997).

In Hoelck's first claim of negligence, paragraph VIII(A), he alleges that ZENECA was negligent "[i]n misbranding by stating that Dyfonate 20-G is 'considered noncombustible' when it is highly combustible under the conditions likely to occur during use by consumers." The district court's order swept this allegation into its finding of preemption along with the labeling- and packaging-based claims.

ZENECA argues that "the claim of misbranding is the same as a claim that the label was inadequate." Brief for appellee at 27. ZENECA's argument is not unreasonable. However, in actions not involving extraordinary remedies, general pleadings

are to be liberally construed in favor of the pleader. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). We believe that Hoelck's allegation of "misbranding," liberally construed, could also be viewed as implicating ZENECA's failure to disclose to the EPA the known combustible effects of Dyfonate 20-G.

[4] Certainly, combustibility is an inherent characteristic of a product and presumably an element of the disclosure process. To the extent that Hoelck's claim of "misbranding" is, in substance, based upon ZENECA's failure to disclose relevant information to the EPA, it is not preempted. See, *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (holding state tort liability for failure to comply with federal standard not preempted); *Roberson v. E.I. DuPont de Nemours & Co.*, 863 F. Supp. 929, 933 (W.D. Ark. 1994) ("[i]f it turns out that material information was withheld from the EPA, then inadequate packaging or labeling claims based on those facts will not interfere with an EPA determination. [Such decision] will aid the EPA in guarding the integrity of the registration process by giving pesticide manufacturers an incentive to place all relevant facts before the EPA"); *Higgins v. Monsanto Co.*, 862 F. Supp. 751 (N.D.N.Y. 1994) (holding inadequate-labeling and failure-to-warn claims are preempted by FIFRA but plaintiff's claims based upon failure to disclose information to EPA are not preempted). See, also, *National Bank of Commerce v. Kimberly-Clark Corp.*, 38 F.3d 988 (8th Cir. 1994) (citing with approval reasoning of *Worm v. American Cyanamid Co., supra*). Contra *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) (holding "it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate").

Based upon the foregoing, to the extent Hoelck's claim found in paragraph VIII(A) intended to state an action for failing to disclose information to the EPA, it is not preempted by FIFRA. However, if it is labeling based, as discussed in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), it is preempted. Proper pleading requires a petition to state in logical and legal form the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform

the court of the real matter in dispute. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). In its current form, the petition does not sufficiently apprise ZENECA or the court as to what Hoelck's "misbranding" claim is based upon. However, ZENECA has not challenged the sufficiency of the pleadings. Therefore, on remand Hoelck shall be granted an opportunity to amend his petition to state a cause of action. See *Ackles v. Luttrell, supra.*

Negligent Testing.

[5] In Hoelck's final claim, found to be preempted, he alleged that ZENECA failed to investigate whether the Dyfonate 20-G bags could be burned safely. ZENECA contends that this claim is preempted because "at its core [it] is a failure-to-warn claim which questions the adequacy of the disposal statements 'by [ZENECA]' on the label." Brief for appellee at 29. Nearly every court that has had the opportunity to address this issue has determined that claims based upon negligent testing are not preempted. See, *Higgins v. Monsanto Co., supra* (holding claims for negligent testing, manufacturing, and formulating are not preempted by FIFRA); *Wright v. Dow Chemical U.S.A.*, 845 F. Supp. 503 (M.D. Tenn. 1993) (FIFRA does not preempt state law regarding nonlabeling claims for defective design and failure to properly test and study); *DerGazarian v. Dow Chemical Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993) (FIFRA does not preempt claims for failure to use ordinary care in formulation, inspection, and testing); *Williams v. State*, 640 So. 2d 365 (La. App. 1994).

We find that Hoelck's claim, to the extent it is based upon ZENECA's negligent testing of its product, is not preempted by FIFRA, even assuming EPA approval of the Dyfonate label.

SECOND MOTION FOR SUMMARY JUDGMENT

At the hearing on the second motion for summary judgment, ZENECA argued that Hoelck's final negligence claim, VIII(D), that ZENECA was negligent "in marketing a combustible insecticide when other reasonable alternatives were available to it," should be dismissed because Hoelck did not present any evi-

dence that reasonable alternatives were available. Although the trial court did not amplify its reasoning in concluding that there were no genuine issues of material fact as to this allegation, Hoelck argues that the court apparently dismissed his claim because he failed to present evidence of reasonable alternatives' being available. Citing *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), Hoelck contends that Nebraska no longer requires proof of the availability of an alternative design for a claimant to recover under this kind of claim and thus that the district court erred in granting summary judgment on this issue. Hoelck's argument is partially correct. In *Rahmig*, the Nebraska Supreme Court held that proof of alternative design is no longer necessary to recover under a claim of defective design. See, also, *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

One of the difficulties with addressing the grant of summary judgment as to this allegation of negligence is that it is far from clear exactly what it is based on. Hoelck has cited no authority, nor can we imagine any, for the proposition that "marketing a combustible" substance, be it an insecticide or some other product, is negligence per se. In apparent recognition of this fact, Hoelck added the phrase, "when other reasonable alternatives were available."

Perhaps Hoelck was attempting to allege a "defective-design claim" as was involved in *Rahmig* and *Kudlacek*. If so, he did not do so, and we must review the grant of a summary judgment on the pleadings presented, not on what a party on appeal contends he or she intended.

[6] Hoelck pleaded that ZENECA was negligent "in marketing a combustible insecticide when other reasonable alternatives were available to it." He now alleges the trial court committed error in requiring him to prove what he pleaded. A party cannot complain of error which the party has invited the court to commit. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). It is well settled that the primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of those cases where

there is no genuine claim or defense. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993).

In an interrogatory, ZENECA requested that Hoelck "set forth in the [sic] detail the factual basis for the allegation . . . that [ZENECA] was negligent in 'marketing a combustible insecticide when other reasonable alternatives were available to it,' including in your answer a specific statement of what 'other reasonable alternatives' are referred to in that allegation."

Hoelck responded:

> The factual basis for the allegation in the Amended Petition is that [Hoelck's] experts have proven that the insecticide marketed by [ZENECA] is in fact combustible. [Hoelck] does not purport to have the scientific resources necessary to develop a safer product and does not intend to attempt to prove specifically how a noncombustible insecticide should be manufactured.

At the hearing on the motion for summary judgment, counsel for Hoelck informed the court that this allegation of negligence "d[idn't] merit trial."

[7] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Marrs v. Keelan*, 254 Neb. 723, 578 N.W.2d 442 (1998). The record before us establishes that there is no factual basis for this allegation of negligence. Accordingly, the district court did not err in granting ZENECA's motion for summary judgment on this issue.

CONCLUSION

Ackles v. Luttrell, 252 Neb. 273, 561 N.W.2d 573 (1997), conclusively establishes that FIFRA preempts all labeling-based claims. Based on the rationale of *Ackles*, claims based on the defective design of packaging are presumably also preempted. But a precursor to successfully invoking the preemption for any such claims is a showing that the relevant label and package were approved by the EPA. In the present case, ZENECA failed to adduce competent evidence of such approval

and it was error for the trial court to grant ZENECA's first motion for summary judgment based on the preemption doctrine, and that order is reversed. The trial court did not err in granting ZENECA's second motion for summary judgment, and that order is affirmed. We remand this cause to the trial court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL MEEHAN, APPELLANT.

565 N.W.2d 459

Filed September 15, 1998. No. A-97-361.

1. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.
2. **Criminal Law: Entrapment.** Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and who induce criminal conduct in order to prosecute the criminal offense induced.
3. **Criminal Law: Entrapment: Intent.** Under the "origin of intent" test to determine whether a defendant was entrapped, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
4. ____: ____: ____. The ultimate focus of the "origin of intent" test to determine whether a defendant was entrapped is whether the defendant was predisposed to commit the crime.
5. **Entrapment: Evidence: Proof.** Entrapment is an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant.
6. ____: ____: ____. Once a defendant satisfies his or her burden of producing sufficient evidence to raise an entrapment defense, the ultimate burden of proof is on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
7. **Entrapment: Intent: Controlled Substances.** Under the "origin of intent" test to determine whether a defendant was entrapped, ready access to illicit drugs is a legitimate factor to consider on the question of predisposition to deal in such substances.
8. **Entrapment: Intent: Evidence.** A familiarity with and demonstrable orientation to a relevant illicit activity constitutes relevant evidence of predisposition under the "origin of intent" test to determine whether a defendant was entrapped.
9. **Perjury.** To be guilty of subornation of perjury, an individual must persuade, procure, or suborn another person to commit perjury.

10. **Perjury: Words and Phrases.** Perjury is a false statement made under oath in an official proceeding.
11. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
12. **Testimony: Words and Phrases.** The official proceedings specified in Neb. Rev. Stat. § 28-916.01(7) (Reissue 1995) are proceedings heard before any legislative, judicial, administrative, or other governmental agency or before an official authorized to take evidence under oath in connection with any such proceeding.
13. **Sentences: Evidence.** A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute.
14. ____: ____. A sentencing court in noncapital cases may consider a defendant's nonadjudicated misconduct in determining an appropriate sentence.
15. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

Appeal from the District Court for York County: JOHN C. WHITEHEAD and MICHAEL OWENS, Judges. Affirmed as modified.

Richard K. Watts, of Mills, Watts & Nicolas, for appellant.

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

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

MILLER-LERMAN, Chief Judge.

The State sought and was granted a rehearing before this court following the filing of our opinion found at *State v. Meehan*, 6 Neb. App. 616, 576 N.W.2d 483 (1998). Upon rehearing, the opinion found in that previous filing is withdrawn and superseded in its entirety by this opinion. The reversal of Michael Meehan's conviction for subornation of perjury found in that previous filing is expressly overruled by this opinion, and we hereby affirm all of the charges of which Meehan was convicted in the district court, including the charge of subornation of perjury.

Following a bench trial, Michael Meehan appeals from his convictions and sentences imposed by the district court for York County. For the reasons recited below, we affirm Meehan's convictions in their entirety, and modify and affirm the sentences imposed upon him.

PROCEDURAL BACKGROUND

On June 5, 1996, Meehan was charged by information with the following: count I, delivery of a controlled substance, in

violation of Neb. Rev. Stat. § 28-416 (Reissue 1995), a Class III felony; count II, conspiracy to deliver a controlled substance, in violation of Neb. Rev. Stat. § 28-202 (Reissue 1995) and § 28-416, a Class III felony; count III, bribery of a witness, in violation of Neb. Rev. Stat. § 28-918 (Reissue 1995), a Class IV felony; count IV, tampering with a witness, in violation of Neb. Rev. Stat. § 28-919 (Reissue 1995), a Class IV felony; count V, subornation of perjury, in violation of Neb. Rev. Stat. § 28-915 (Reissue 1995), a Class III felony; and count VI, theft by deception in an amount of more than $200 but less than $500, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1995), a Class I misdemeanor. Meehan pled not guilty to the charges.

On August 21, 1996, Meehan moved for an order electing separate trials on the various counts. Ultimately, two bench trials were had in this case: one trial, held September 11 and 12, 1996, on counts I and II; and a separate trial, held on February 5 and 6, 1997, on counts III through V. Meehan was convicted of counts I, III, IV, and V and appeals his convictions and sentences therefrom. Counts II and VI were dismissed and are not the subject of this appeal.

FACTUAL BACKGROUND

Delivery of Controlled Substance.

Carla Schreiber has been employed as a narcotics officer with the Nebraska State Patrol since July 1994, working with various undercover operations in rural areas in Nebraska. Prior to meeting Meehan, Schreiber had received information from local law enforcement officers regarding Meehan's involvement with drugs. Schreiber testified that she first met Meehan on October 18, 1994, when she went to Meehan's residence in Waco, Nebraska, with a confidential informant, Terry Edmunds, to purchase methamphetamine. No sale of methamphetamine took place at this time.

Schreiber next met with Meehan at his residence on October 24, 1994, and asked him about the possibility of "finding me some stuff." Schreiber testified that Meehan asked her if, when she talked about "stuff," she was referring to crank. When Schreiber stated that that was correct, Meehan indicated that he was "supposed to get an eight ball but only got two grams. That he also thought he had a quarter coming." Schreiber explained

that an "eight ball" was an eighth of an ounce of methamphetamine and stated that a "quarter" was a "quarter gram of methamphetamine." Schreiber stated that these were terms commonly referred to by persons involved in drug trafficking. Schreiber did not obtain drugs from Meehan at this time.

Schreiber again met with Meehan at his residence on November 4, 1994, at which time Meehan told Schreiber that he thought he could get her something. Schreiber could not recall who first brought up the subject of drugs at this meeting.

On the evening of November 9, 1994, Schreiber stopped by Meehan's residence but discovered that he was not home. Because Schreiber was aware that Meehan frequented a local bar known as Hunter's Lounge, she went there to see if she might find Meehan. Meehan eventually arrived at the lounge and approached Schreiber, who was at the bar. Schreiber testified that during their conversation, Meehan stated that he had gotten a quarter the previous night and then spoke of also getting an eight ball, of which there were a few grams left. Meehan also told Schreiber that he might be receiving methamphetamine later that evening from some people in York, Nebraska. Schreiber testified that they discussed fronting money for narcotics and talked about a "residence [sic]" in McCool Junction, Nebraska, being a supplier of cocaine. Schreiber said that Meehan spoke of being uncomfortable dealing with anyone that he had not known for 10 years, a statement which Schreiber described as having been made during a conversation about delivering methamphetamine to her or to other individuals. She testified that Meehan asked about going through Edmunds if Meehan felt uncomfortable about delivering to Schreiber. Schreiber said that the two conversed for about 2 hours, during which time she brought up the subject of Meehan's obtaining methamphetamine once or twice. Schreiber acknowledged that she told Meehan that she was working on her house and needed "motivation." Schreiber stated that Meehan may have brought up the subject of obtaining the drug numerous times during their conversation.

Later that evening, after the two had left the lounge, Schreiber arrived at Meehan's home. Schreiber testified that Meehan opened the door and said, "I got two lines together, I

scraped some bags," and indicated that Schreiber should follow him up the stairs. Schreiber explained that "two lines" referred to two lines of methamphetamine and that "scraped some bags" meant that Meehan had scraped the residue from a bag that had contained methamphetamine in the past. Schreiber stated that there were two lines of an off-white powdery substance on a granite-type block located upstairs in Meehan's house. Meehan suggested that Schreiber "snort" one line, and then he left to find some paper in which Schreiber could take home the other line. Schreiber testified that when Meehan left the room, she brushed one line onto the floor and that after Meehan returned with some paper, she brushed the other line into it, folded it up, and placed it in her pocket. Eventually, this substance was sent to the Nebraska State Patrol Criminalistic Laboratory and was determined to be methamphetamine. Schreiber testified that a number of people smoked marijuana at Meehan's house on the night she obtained the methamphetamine.

At trial, Meehan moved to dismiss count I, asserting the defense of entrapment. The trial court overruled Meehan's motion.

Subornation of Perjury.

On June 23, 1995, Dan Klimek and Dan Bartling, drug investigators with the Nebraska State Patrol, went to Meehan's house in Waco to serve a search warrant. Meehan was home at the time, as was Lee Smith, who was staying with Meehan. Smith was arrested after the officers found a white, powdery substance in a container in her purse. In a desk located in a bedroom, officers found, among other things, a spoon with a white powdery substance on it and two boxes of plastic baggies. Meehan and Smith were both arrested for and charged with possession of a controlled substance. It later became a subject of dispute as to whether the powdery substance on the spoon, later determined to be methamphetamine, belonged to Meehan or to Smith.

Schreiber testified that she spoke with Meehan on October 19, 1995. She stated that the impression she received from her conversation with Meehan was that Meehan's then-lawyer and Smith's lawyer had come up with a scheme whereby, with Meehan's cooperation, they would attempt to get evidence related to Smith suppressed and, in turn, Smith would testify at Meehan's trial that all of the drugs in Meehan's house were hers.

Gary Harre testified that Smith came to live with him after she posted bond following her arrest at Meehan's home. Harre stated that Meehan told Harre that Meehan wanted to speak with Smith about her taking responsibility for all of the drugs found at Meehan's residence.

Smith testified that she was jailed for approximately 30 days following her arrest before she was released on bail. She said that she stayed with Harre for several weeks and was then rearrested for violation of her bond. Smith testified that Meehan visited her while she was in jail and that he attempted to persuade her to say that all the drugs were hers. Smith testified that before she returned to jail, she visited with Meehan's lawyer, who explained to her that if the evidence in her case was suppressed, the charges against her would be dropped, and that if she later testified in Meehan's trial that the drugs were hers, no further charges could be brought against her, because double jeopardy would have attached.

Smith testified that on October 18, 1995, her court-appointed attorney visited her in jail and told her that Meehan's attorney was also at the jail with a court reporter. According to Smith, her lawyer told her that Meehan's lawyer had guaranteed that if she made a statement that the drugs were hers, she would be bonded out of jail within the hour. Smith's statement, made before a court reporter/general notary public, is part of the record in this case. The unsigned statement is 32 pages long. It is in the form of questions posed by the lawyers for Meehan and answered by Smith. There is no case caption on the statement. However, reference to both the criminal cases against Smith and Meehan is made in the statement. In the statement, Smith swore to tell the truth. In the statement, Smith stated, inter alia, that the methamphetamine found on the spoon in Meehan's house was hers.

Smith testified at trial that she was released from jail about one-half hour after giving her statement to Meehan's lawyer. She further testified that her statement that all the methamphetamine was hers was not true but that she had said it to get out of jail. Smith stated that in February 1996, she disclosed the scheme to Charles Campbell, the York County Attorney, during a meeting she had with Campbell regarding another case.

Meehan's mother, Charlene Meehan, testified that she did not know Smith but that Meehan's lawyer told Charlene and her husband that they should post a $2,000 bond for Smith. Charlene said that the lawyer told her and her husband that he planned to take a sworn statement from Smith the following day. Charlene testified that the lawyer told them he would call them when he had the statement and that he, in fact, did so. Charlene stated that on the lawyer's advice, they arranged for a third individual to actually post the bond with their money because the lawyer said that "it would look better this way."

At the time of trial, Meehan was represented by a different lawyer from the lawyer to whom reference is made above. Meehan's first lawyer, who was allegedly involved in the purported scheme, testified at Meehan's trial that there was no connection between the posting of Smith's bond and her statement given shortly beforehand. This lawyer denied being part of a plan to influence Smith's testimony by posting or arranging her bond.

Also testifying at Meehan's trial was the lawyer who defended Smith at the suppression hearing in the separate case against her. This lawyer testified that he could not recall meeting with Smith at the jail shortly before she gave her statement. However, he acknowledged that his signature appeared on the jail log of visitors for that day, and he testified he was present when Smith's statement was taken. The lawyer admitted that he knew that Meehan's lawyer wanted to obtain Smith's statement before a court reporter and that he knew that the statement to be made by Smith would be very damaging to her. Smith's lawyer denied telling Smith that Meehan's lawyer said that she would be bonded out of jail that day if she made the statement.

The trial court found Meehan guilty of counts III through V. In connection with these findings, the court stated, in part, that it was convinced that there was a scheme or plan pertaining to Smith's testimony and that while the court was convinced that Meehan did not devise the plan, he was a willing and active participant in it.

Sentencing.

The presentence investigation report contained a synopsis of a statement given to the Lincoln Police Department by Bob

Radar, an acquaintance of Meehan's. At the sentencing hearing, Meehan objected to that part of the report being included in the presentence investigation report because he was not familiar with anyone named in the report, because the report was not the basis for any charge ever filed, and because he had not had the opportunity to confront Radar.

Meehan was sentenced as follows: on count I, not less than 2 nor more than 4 years' imprisonment; on count III, not less than 4 nor more than 5 years' imprisonment; on count IV, not less than 4 nor more than 5 years' imprisonment; on count V, not less than 6 nor more than 8 years' imprisonment. The sentences imposed in counts III, IV, and V are to be served concurrently with one another but consecutively to the sentence in count I. Meehan appeals.

ASSIGNMENTS OF ERROR

Meehan claims that the trial court (1) erred in failing to find as a matter of law that the State failed to prove beyond a reasonable doubt that Meehan was predisposed to violate the law before the government induced him to do so; (2) erred in failing to find as a matter of law that the State failed to prove beyond a reasonable doubt that Meehan persuaded, procured, or suborned another person to make a false statement under oath or equivalent affirmation in an official proceeding; (3) abused its discretion in refusing to strike Radar's interview from Meehan's presentence investigation report and in considering the interview in connection with his sentencing; and (4) abused its discretion by imposing excessive sentences.

STANDARD OF REVIEW

On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997).

ANALYSIS

Entrapment.

With regard to count I, delivery of a controlled substance, Meehan argues that the trial court erred in not finding that he was entrapped by the government to break the law. Meehan

asserts that there was no evidence presented by Schreiber or Edmunds that Meehan had a predisposition to deliver illegal drugs prior to Meehan's first contact with Schreiber and Edmunds on October 18, 1994.

[1,2] In Nebraska jurisprudence, entrapment is " 'the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.' " *State v. Connely*, 243 Neb. 319, 330, 499 N.W.2d 65, 73 (1993), quoting *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and who induce criminal conduct in order to prosecute the criminal offense induced. *State v. Connely, supra.*

[3,4] Nebraska has adopted the "origin of intent" test to determine whether a defendant was entrapped. Under this test, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Connely, supra*; *State v. Stahl, supra.* The ultimate focus of the "origin of intent" test is whether the defendant was predisposed to commit the crime. State *v. Connely, supra*; *State v. Stahl, supra.*

[5,6] Entrapment is an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant. *State v. Connely, supra*; *State v. Stahl, supra.* Once a defendant satisfies his or her burden of producing sufficient evidence to raise an entrapment defense, the ultimate burden of proof is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *State v. Connely, supra*; *State v. Stahl, supra.*

In the present case, Meehan argues that in the course of Schreiber's contacts with him on October 18 and 24 and November 4, 1994, there is no evidence that Meehan expressed a willingness to deliver drugs to Schreiber or to Edmunds, and he notes that in fact, no drugs were delivered in the course of those contacts. On November 9, Schreiber searched for

Meehan, located him, and asked him one or two times whether he could obtain methamphetamine for her. Meehan asserts that he provided an extremely small amount of methamphetamine to Schreiber only after her repeated attempts to obtain the drug from him.

[7,8] The Nebraska Supreme Court has, on several occasions, considered what type of evidence is relevant to demonstrate the predisposition of the defendant to commit a crime. That court has noted that a defendant's readiness and willingness to enter into the illegal transaction when asked to may be used to show predisposition. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). The court has further noted that " 'ready access to illicit drugs is a legitimate factor . . . to consider on the question of predisposition.' " *State v. Connely*, 243 Neb. at 332, 499 N.W.2d at 74. " '[A] familiarity with and demonstrable orientation to the relevant activity also constitutes relevant evidence of predisposition.' " *Id.* In *Connely*, the defendant's knowledge of drug sale practices and command of the vernacular for the particular drug deal involved was also considered evidence of predisposition.

In the instant case, each of the above factors noted in *Parks* and *Connely* was present. There is evidence in the record that Meehan was ready and willing to enter into a drug transaction. He repeatedly assured Schreiber that he could obtain methamphetamine for her. Meehan spoke of drug contacts he had in York and of his knowledge of drug activity in the area, and he stated at one point that he had expected to get an eight ball but only got 2 grams. Schreiber observed people smoking marijuana at Meehan's house.

Meehan was clearly familiar with the traffic in methamphetamine and demonstrated familiarity with the drug sale practices and prices of the drug in the community. Meehan spoke in the vernacular of the drug trade. Based, inter alia, on the foregoing, there was adequate evidence upon which the district court could conclude that Meehan was predisposed to commit the crime for which he was charged and was not entrapped. Meehan's assignment of error is without merit.

Subornation of Perjury.

Meehan asserts that under the statutory language of § 28-915, he did not commit the offense of subornation of perjury.

Meehan's argument is that (1) because the statement given by Smith to Meehan's attorney on October 18, 1995, was not made in an official proceeding, it was not perjury and, therefore, Meehan did not suborn perjury and (2) because Smith retracted the false statement, it was not perjury and, therefore, Meehan did not suborn perjury.

Section 28-915, pertaining to perjury and subornation of perjury, provides:

> (1) A person is guilty of perjury, a Class III felony, if in any official proceeding he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he or she does not believe it to be true.
>
> (2) A person is guilty of subornation of perjury, a Class III felony, if he or she persuades, procures, or suborns any other person to commit perjury.
>
> . . . .
>
> (5) No person shall be guilty of an offense under this section if he or she retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

As to Meehan's argument that Smith's retraction precludes his conviction for subornation of perjury, such argument fails under the statute by giving meaning to both § 28-915(1) and (5). Smith's statement was perjurious under § 28-915(1), but she was spared prosecution under § 28-915(5).

Neb. Rev. Stat. § 28-916.01(7) (Reissue 1995) defines an "official proceeding" as "a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding."

The record shows without dispute that Smith's sworn statement was made at the York County jail in the presence of her attorney, Meehan's attorney, and the court reporter/general notary public. No representative of the State attended or was

notified that such a meeting was to take place. Although the statement itself does not bear a case caption, reference is made in the statement, inter alia, to the criminal case against Meehan. Following receipt of all the evidence, the trial court found that Smith's statement was made in "an official proceeding" as that term is used in §§ 28-915 and 28-916.01(7). Specifically, the trial court found that Meehan was an active participant in the plan to obtain the false statement of Smith for use in Meehan's pending criminal case. Where such finding is supported by the record as in the instant case, we will not substitute findings of fact for those of the trial court. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[9,10] To be guilty of subornation of perjury, an individual must persuade, procure, or suborn another person to commit perjury. § 28-915(2). Perjury is a false statement made under oath in an official proceeding. § 28-915(1). An "official proceeding" is "a proceeding . . . heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath . . . in connection with any such proceeding." § 28-916.01(7).

[11] Under a plain reading of the foregoing statutes taken together, it is clear that for a statement to amount to perjury it must be false, made under oath, and made before any legislative, judicial, administrative, or other governmental agency or made before an official authorized to take evidence under oath "in connection with any such proceeding" as specified in § 28-916.01(7). Statutory language is to be given its plain and ordinary meaning. *State v. Brown*, 5 Neb. App. 889, 567 N.W.2d 307 (1997).

[12] The proceedings specified in § 28-916.01(7) are listed as proceedings "heard before any legislative, judicial, administrative, or other governmental agency" or before an "official authorized to take evidence under oath . . . in connection with any such proceeding." The statement given by Smith was not made before any legislative, judicial, administrative, or other governmental agency. However, the statement given by Smith at the jail was sworn to before an individual authorized to take evidence under oath, and it was made in connection with a judicial proceeding, i.e., the pending criminal case filed against

Meehan. The trial court found the statement to be false, a finding amply supported by the record.

We note that a number of state statutes have liberalized, or even eliminated, the requirement that the false material sworn statement must be made in an official proceeding to amount to perjury. See, e.g., *Gargan v. State*, 805 P.2d 998, 999 (Alaska App. 1991) (referring to Alaska statutes "AS 11.56.200(a) and 11.31.110(a)"), *cert. denied* 501 U.S. 1209, 111 S. Ct. 2808, 115 L. Ed. 2d 981. However, in Nebraska, the official proceeding requirement for perjury remains the law in § 28-915(1).

It has been held, and we agree, that the "official proceeding" requirement must be affirmatively proved as an element of perjury. It has been stated:

> This construction of the statute [regarding official proceedings] is consistent with the realization that notaries public not only swear persons in connection with official proceedings but also notarize many sworn statements—affidavits, agreements, and the like—which are frequently not related to a pending legislative, judicial, administrative, or other government agency proceeding.

Nessmith v. State, 472 So. 2d 1248, 1253 (Fla. App. 1985). The Florida court continued: " '[A] proceeding is not made official by the formality with which it is conducted; instead, *its officiality depends on its purpose and the authority from which it derives*.' " (Emphasis in original.) *Id.* at 1254.

A review of the record in the instant case shows that the purpose for which Smith gave her statement was to state falsely under oath that all of the controlled substances found at Meehan's house were hers and that such statement was to be used in connection with the criminal proceedings pending against Meehan. A review of cases from other jurisdictions shows that where a false sworn statement is made for use in a pending judicial proceeding, it will be considered to have been given "in connection with" an official proceeding and, therefore, be considered perjurious. See, e.g., *State v. Jacobson*, 74 Wash. App. 715, 876 P.2d 916 (1994) (holding that affidavit containing false statement was made in official proceeding where affiant knew it would be used in pending litigation); *In re Drapp*, No. 93-L-069, 1994 WL 102237 at *5 (Ohio App. Mar.

4, 1994) (unpublished appellate opinion holding that false affidavit made to support new trial motion, although made in peripheral proceeding, was created "'in connection with'" ongoing judicial proceeding); *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *modified* 880 P.2d 749 (Colo. 1994) (holding that false interrogatory answers were made in official proceeding where case upon which interrogatories were based was pending). Where there is no pending case, false statements under oath are not necessarily deemed perjurious. See, e.g., *Commonwealth v. Dawson*, 399 Mass. 465, 467, 504 N.E.2d 1056, 1058 (1987) (false sworn statements given during police investigation were not given in "'proceeding in a course of justice'"); *State v. Adkins*, 553 So. 2d 294 (Fla. App. 1989) (holding in trafficking in stolen vehicles case that notarized statement prepared to obtain certificate of title for motor vehicle was not made in official proceeding and, therefore, not perjury); *Nessmith v. State, supra* (holding that where no claim for wage loss benefit had been filed in workers' compensation case at time sworn statement made in deposition, statement not made in official proceeding); *Schramm v. State*, 374 So. 2d 1043 (Fla. App. 1979) (holding that interrogation conducted by police at police station not conducted in official proceeding).

In the instant case, there was ample evidence to establish that the statement given by Smith was false, was material, and was intended to be used in connection with the criminal case pending against Meehan. Meehan's role in procuring the statement is supported by the record, as the trial court found.

Although the meeting which took place at the jail was not an official proceeding, the false statement made by Smith was made in connection with the criminal proceeding pending against Meehan, as the trial court found. Notwithstanding her recantation, Smith's statement was properly construed as perjury under § 28-915(1), and Meehan, in turn, suborned perjury. Accordingly, we affirm Meehan's conviction and sentence on count V, subornation of perjury.

Radar's Statement and Meehan's Sentences.

[13,14] Meehan objects to the inclusion of a statement by Radar, an acquaintance of Meehan's, in Meehan's presentence

investigation report. The report generally dealt with Radar's contact with Meehan prior to the instant case. A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute. *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997). It has specifically been held that a sentencing court in noncapital cases may consider a defendant's nonadjudicated misconduct in determining an appropriate sentence. *Id.* In any event, the record does not reflect that Meehan was prejudiced by the inclusion of Radar's statement. Meehan's assignment of error regarding Radar's statement is without merit.

Meehan was convicted of two Class III felonies, counts I and V, for which the penalty as to each is a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 1995). Counts III and IV are Class IV felonies, for which the penalty at the time of Meehan's conviction and sentencing by the trial court was a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no minimum punishment. See *id.* We note that § 28-105 was amended by the Legislature in 1997. Operative July 1, 1998, Class IV felonies are now punishable by a mandatory minimum term of 6 months' imprisonment; the maximum punishment has not been altered. Meehan was sentenced to 2 to 4 years' imprisonment on count I. Consecutive to count I, Meehan was sentenced to 4 to 5 years' imprisonment on count III, 4 to 5 years' imprisonment on count IV, and 6 to 8 years' imprisonment on count V, to be served concurrently with each other.

[15] The sentences imposed by the trial court were all within statutory limits in effect at the time of sentencing. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aguirre-Rojas*, 253 Neb. 477, 571 N.W.2d 70 (1997).

After Meehan was sentenced, amendments to some Nebraska statutes became operative which impact Meehan's sentences. When a criminal or penal statute is amended after the commission of a prohibited act but before a final judgment is rendered and the effect of the amendment is mitigation of the punish-

ment, the terms of the amendatory act control the punishment, unless the Legislature has specifically provided otherwise. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686. This rule applies when the statutory amendment becomes operative during the pendency of an appeal, because a sentence is not a final judgment until the entry of the final mandate of an appellate court. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

The amendment to Neb. Rev. Stat. § 29-2204 (Supp. 1997), which became operative July 1, 1998, necessitates our modification of Meehan's sentences for the Class IV felonies. As amended, § 29-2204(a)(i) provides, inter alia, that when an indeterminate sentence is imposed for a Class IV felony, the minimum term of incarceration fixed by the court "shall not be . . . more than one-third of the maximum term . . . ." Meehan was convicted of two Class IV felonies, and an indeterminate term of 4 to 5 years' imprisonment was imposed for each sentence. Following the amended terms of § 29-2204, the minimum portion of Meehan's sentence for each of these Class IV felonies must be modified so that, in each instance, it does not exceed one-third of the maximum term of imprisonment. Therefore, we modify the minimum term of each of these Class IV felonies, i.e., counts III and IV, to 20 months, which is one-third of the 5-year maximum term prescribed by statute and imposed by the trial court.

In sentencing Meehan, the trial judge focused on Meehan's prior criminal record and noted that his course of conduct dealt with the use and abuse of drugs and making drugs available to other people. Given the extent and history of Meehan's involvement as a supplier of controlled substances, not repeated here, the trial judge's comments and reasoning were appropriate. As modified, the sentences imposed are within the present statutory limits, and we find no abuse of discretion.

CONCLUSION

We affirm Meehan's convictions and modify his sentences.

AFFIRMED AS MODIFIED.

KAWASAKI MOTORS CORP., APPELLANT, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLEE.

584 N.W.2d 63

Filed September 15, 1998. No. A-97-773.

1. **Taxation: Final Orders: Appeal and Error.** Appellate review of a final decision of the Nebraska Tax Equalization and Review Commission is for error on the record of the commission.
2. ____: ____: ____. When reviewing an order of the Nebraska Tax Equalization and Review Commission for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Valuation: Equity: Evidence: Proof: Appeal and Error.** The Nebraska Tax Equalization and Review Commission shall hear appeals as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low.
4. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
5. ____: ____: ____: ____: ____. In rebutting the presumption that a board of equalization has performed its official duties faithfully and competently, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his or her property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
6. **Taxation: Valuation: Appeal and Error.** The Nebraska Tax Equalization and Review Commission should determine the reasonableness of a valuation fixed by a board of equalization, which becomes a question of fact for the commission.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Edward E. Embree II, of Neill, Scott, Terrill & Embree, L.L.C., for appellant.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellee.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

Kawasaki Motors Corp. (Kawasaki) appeals the order of the Nebraska Tax Equalization and Review Commission (Commission) which upheld the valuation by the Lancaster County Board of Equalization (Board), for property tax purposes, of $13,916,455 for Kawasaki's manufacturing plant. The Commission found the evidence did not show the Board's action to be arbitrary and capricious and affirmed the Board's decision. We find the evidence shows the Board's action was arbitrary because the property was valued on the basis of a previous agreement, but since the Commission also effectively found the evidence showed the value set by the Board was not unreasonable, we affirm the order of the Commission.

BACKGROUND

The Kawasaki facility is a large manufacturing plant located just northwest of the city of Lincoln in Lancaster County, Nebraska. The plant has between 910,000 and 924,395 square feet and is located on approximately 100 acres of land. The plant consists of three large industrial buildings which are connected, several smaller buildings which are also connected, and several freestanding industrial buildings.

Kawasaki appealed to the Commission after the Board adopted the assessor's value of $13,916,455. Kawasaki's reason for appealing was that "[m]arket value indication via the income approach and market data approach supports a value below the assessed value." Kawasaki requested a valuation of $8,475,000.

The hearing before the Commission was held on March 18, 1997. Kawasaki called Bernie Shaner, a licensed appraiser, to testify in support of his formal appraisal. The Board called Robin Hendricksen, also a licensed appraiser, to testify in support of his summary report, and John Layman, whose testimony was not received. The Commission received four exhibits, but we will describe and summarize only those facts relevant to this appeal.

Exhibit 1, offered by Kawasaki, is a real estate appraisal prepared by Shaner. In the appraisal, dated March 12, 1997, Shaner opines that the market value of the Kawasaki plant as of January 1, 1996, was $8,200,000. The appraisal is a multipage document containing photographs of the property and a separate section describing and analyzing the area, the site, the improvements, and the highest and best use of the property. In the appraisal, Shaner used only the sales comparison approach in analyzing the property. Shaner opined that neither a completed cost approach nor an income approach would be proper to use in this case. In his sales comparison approach, Shaner used price per square foot of gross building area as a "common denominator." Shaner compared the Kawasaki plant with "[s]ales of large industrial properties located throughout the midwest region."

Exhibit 2 is the "complete transcript of the records of the [Board] with respect to the protest and complaint of [Kawasaki]." Exclusive of notices, formal protests, et cetera, the exhibit contains the referee's report and the record of the Board's July 22 and 23, 1996, hearings at which the Board approved the referee's report.

The referee's report is a formal document prepared on a form and contains no information relevant to the value of the Kawasaki property except that in the section entitled "Action Taken by the Referee," boxes are checked which indicate that after inspecting the property, the referee agreed with the data, valuation premise, and final value estimated by the assessor's office and the referee determined that the data or information supplied by the owner was not conclusive and that therefore, no valuation change was recommended. The report contains a "Summary of Final Recommendations," in which the recommended total property value is $13,916,455 ($13,064,630 for improvements and $851,825 for land). The report is signed by Wayne Kubert as both referee and coordinator and dated July 15, 1996.

Exhibit 2 also contains the "Lancaster County Board of Equalization 1996 Rules and Procedures for Property Valuation Protests" and Kawasaki's "Property Valuation Protest." Kawasaki's protest states it was filed because "[t]he current

assessment is in excess of the market value. Comparable buildings in the region support a value below the one placed on this account."

Part of exhibit 2 is a three-page computer printout entitled "Lancaster County Commercial and Industrial Valuation," which contains rather cryptic information on the income approach, without explanation, and on the second page states, "Final Value for Parcel = $13,916,455 (Special Value)." Several computer printout sheets which must be intended to support the assessor's value follow the valuation. (No explanation of this cryptic information is provided by the exhibit or through testimony.) The printout also contains a narrative beginning September 7, 1992, which states some of the relevant characteristics of the property. Most significantly, this narrative contains information about the settlement of the dispute over the assessed value of the property for 1994 and 1995. The record relates that the dispute was settled in 1995 with a price per square foot value of $15.01, and with additional increases, that settlement was the basis of the assessor's value for 1996.

The computer printout continues for several pages and includes diagrams, descriptions of building dimensions, and other skeletal information and ends by showing a value of $13,916,455. Neither the document nor later testimony explains the significance of this information, and we thus find the information worthless. We note that the Commission also does not refer to such information in its analysis.

Exhibit 3 is Hendricksen's "limited scope summary report" of the Kawasaki plant. This report contains a cost approach summary and lists the total value of the plant at $16,700,000, adjusted for depreciation. The report also contains a comparable sales analysis, in which Hendricksen listed the comparables in terms of price per square foot. This report contains the usual information which is compiled and utilized to support an appraiser's opinion as contained in the report. The contents of the report were largely testified to by Hendricksen and therefore, will not be summarized here.

Shaner testified at the hearing before the Commission. He has been an appraiser since 1972, holds "the MAI designation from the appraisal institute" and is a certified appraiser in

Nebraska, Kansas, and Missouri. Shaner teaches appraisal courses and appraises all property except agricultural property. Shaner testified to explain and support his opinion and his appraisal which is contained in exhibit 1. The evidence shows Shaner is qualified as an appraiser and that his opinion is adequately supported. Under our standard of review, regardless of the outcome of this case, this court does not consider the adequacy of Shaner's testimony on value or compare it with the evidence that might be in opposition thereto. At most, we decide the adequacy of the evidence to support the value given to the facility by the Board and the Commission's action. For this reason, we are not summarizing Shaner's testimony or his opinion on value. We observe only that Shaner's appraisal is lower than the amount accepted by the Commission and of course could support any decision which might adopt it.

The Board called Hendricksen to testify. Since the adequacy of his testimony to support the Commission's decision is critical to the outcome of this appeal, we shall summarize it in considerable detail. Hendricksen testified that he is a licensed appraiser and has been the chief administrative deputy assessor for the Lancaster County assessor's office for the past 6 years. Kawasaki stipulated to his qualifications. Hendricksen was involved in the negotiation with Kawasaki which resulted in the value that was placed on the facility for 1994 and 1995. Hendricksen testified the 1996 value was based on the $15-per-square-foot value established for 1994 and 1995 by negotiation, with additional value for the new additions.

Hendricksen's report is "a summarial cost approach." Hendricksen testified that if he were going to do a complete cost approach, he would itemize each characteristic of the building individually; show the square footage of the area and square footage of site preparation; and actually go through, item by item, and allocate cost for each. Instead, Hendricksen prepared exhibit 3, which is a summary to see if the value established by the Board was reasonable. Hendricksen claims the correct square footage is 924,395. Hendricksen testified that he reconstructed the improvements using a replacement cost from the Marshall and Swift valuation service (M & S), and that he first computed the cost per square foot for vertical costs and

then "reduced that to a horizontal cost so I could apply it as a flat per square foot number in my recosting." Hendricksen used the M & S cost figures for an average quality building, but he testified his inspection showed the Kawasaki facility is in "average to good condition and like new." Hendricksen arrived at an average cost new per square foot of $25.09 and a total reproduction cost new of $26,964,914 for the facility.

To establish a percentage of physical depreciation, Hendricksen divided the building into areas according to the year of construction. Of the 924,000 square feet in the building, 241,000 feet were built since 1991. The percentage was based upon a life expectancy of 50 years, which he obtained from M & S. Since his inspection did not disclose a noticeable difference by annual increments, Hendricksen rounded the age up to the nearest 5-year increment and arrived at a reproduction cost new, less depreciation, of $16,031,309. This figure was reduced by "apparent or functional and external obsolescences." He testified that the only functional obsolescence he observed was the lack of a larger corridor for the movement of raw material from the main building to another building. Hendricksen did not find any external obsolescence, and he determined, by the use of M & S, the cost of curing the functional obsolescence problem to be $175,000. Hendricksen subtracted this figure from the reproduction cost new to result in a value for the improvements of $15,856,309. Adding the land value, Hendricksen arrived at $16,700,000 as the value of the facility by the cost approach.

Hendricksen disagreed with Shaner's opinion that the cost approach was not viable and cited the property assessment handbook, which provides that the cost approach is especially relevant for special use and industrial facilities. Hendricksen agreed that the cost approach would probably "tend to demonstrate the value — the upper end of value." Hendricksen testified the market approach was also strong. Hendricksen did not establish a value by the cost approach but gathered information from around the country regarding the market approach. Hendricksen prepared an array of 26 large property sales across the country, found a range of sale values from $4.07 to $32 per square foot, and opined the buildings in the array were inferior to and older than the Kawasaki facility.

Hendricksen testified that he did not intend to establish a value using the market approach but intended to show that the value established by the Board was reasonable. Hendricksen pointed to some sales in the array showing a value from $12.28 to $16.92 per square foot for buildings as large or larger than the Kawasaki facility, and this tends to support the Board's finding. The overall average of the sales was $14.69 per square foot, as compared to the $15 per square foot used by the Board.

Upon cross-examination, Hendricksen admitted he received the information about the sales from persons in the assessment and appraisal industry and that he did not verify them or adjust them. Hendricksen testified, "I haven't valued the property. The cost approach is included again simply to show that the valuation that was established by the Board of Equalization was not unreasonable. . . . The cost approach indicates that the upper limit of value might be $16,700,000." Hendricksen testified he would attempt to complete all three approaches if he were to appraise the property. Hendricksen testified that he agreed with Shaner that the income approach would be very difficult to substantiate for such a large property, that he thought the cost and sales approaches were of relative importance on this property, that he does not agree with Shaner's decision to not include the cost approach, that he disagreed with Shaner's opinion that the design or quality makes the Kawasaki facility inferior to the buildings in the sales array, and that he disputed Shaner's diagram of the main plant as showing the plant to be cluttered. Hendricksen opined that Shaner's attribution of a large amount of functional obsolescence was unfounded and that there was very little that would prevent the property from being converted into a distribution warehouse.

Hendricksen testified that the building permits in the assessor's office show that Kawasaki has spent $8.5 million dollars since 1989 to construct improvements on the property. Hendricksen opined that Kawasaki would not make such improvements on property that was functionally obsolete.

Hendricksen admitted that it was not his opinion that the value of the plant was $16,700,000. Instead, Hendricksen testified that "[t]he cost approach indicate[d] that the upper limit of value might be $16,700,000."

The Commission entered a several-page "Findings and Orders" (Order), which upheld the Board's determination of $851,855 for land and $13,064,600 for improvements, for a total value of $13,916,455. In the Order, the Commission discussed and considered the evidence presented. We will set forth the contents of the Order more fully when relevant.

ASSIGNMENTS OF ERROR

Kawasaki first alleges that the Board's decision was arbitrary and capricious because (1) the Board failed to follow its own rules in that the referee and the referee coordinator were the same person; (2) no recording of the hearing with the referee was made; (3) the referee's report failed to provide the Board with findings and recommendations as required by statute; (4) the Board failed to consider all "papers," findings, and recommendations of the referee relating to the protest as required by statute; and (5) the Board failed to prepare a report containing the information required by statute.

The failure to follow the prescribed procedures is likely to result in a preserved record which contains less information to support a county board of equalization's decision at the Commission's hearing, and similarly, upon appeal to this court, the record is less likely to be adequate. To that extent, failure to follow the full procedure carries its own penalty. However, Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides for a de novo hearing, and therefore, absent a specific claim of prejudice, after a hearing before the Commission the procedural error before the Board has no independent effect justifying a reversal on that ground alone. Furthermore, Kawasaki did not raise the issue before the Commission. More important, for other reasons we do decide that the action of the Board was arbitrary and capricious, and we need not make that determination twice. The first assignment of error therefore need not be discussed.

Kawasaki alleges that the Commission's decision failed to value the property as required by § 77-1511 and that the Commission erred in not finding that the Board's decision was arbitrary or capricious, as "there was no evidence presented or that exists anywhere in the record as to how the [Board] reached its decision."

STANDARD OF REVIEW

[1,2] Our review of a final decision of the Commission is for error on the record of the Commission. Neb. Rev. Stat. § 77-5019 (Reissue 1996); *Lancaster Cty. Bd. of Equal. v. Condev West, Inc., ante* p. 319, 581 N.W.2d 452 (1998); *J.C. Penney Co. v. Lancaster Cty. Bd. of Equal.*, 6 Neb. App. 838, 578 N.W.2d 465 (1998). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Condev West, Inc., supra*; *J.C. Penney Co., supra.*

ANALYSIS

Standard of Review.

As we have done in previous cases, we must discuss and consider the Commission's standard of review and the standard of review which the Commission used in the trial before it. See, *Condev West, Inc., supra*; *J.C. Penney Co., supra.* In its order, the Commission began its discussion of the standard of review with the same "boilerplate" language that was included in and commented on by this court in *Condev West, Inc., supra*, and *J.C. Penney Co., supra.* The Commission then added:

> [T]he Commission must affirm the decision of a county board of equalization unless that decision was determined by will or caprice or selected at random; or if the board's decision was made in disregard of facts and circumstances and without some basis which would lead a reasonable person to the same conclusion.

With this as the standard of review, the Commission concluded that "as a matter of law" the action of the Board should be affirmed. The Order cited *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996), which is a case involving water law and a review by a court of an action of a tribunal exercising legislative authority. We do not think that *Ponderosa Ridge LLC* is good authority for appeals from county boards of equalization, because such boards are established under a different statute for a purpose not related to any found in water litigation.

[3] We are concerned that by applying the wrong standard of review the Commission has deprived Kawasaki of the hearing to

which it was entitled. The statutory basis for the standard of review of the Board's determination is as provided in § 77-1511:

> The [Commission] shall hear appeals . . . as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The [Commission] shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.

See, *Condev West, Inc., supra*; *J.C. Penney Co., supra.*

[4] Before the Commission was established by 1995 Neb. Laws, L.B. 490, the district court had the same standard of review as § 77-1511 now gives to the Commission. See § 77-1511 (Reissue 1990). Therefore, as noted by this court in *Condev West, Inc., supra*, and *J.C. Penney Co., supra*, principles applicable to district court reviews in equalization matters maintain viability even though the Commission has taken over the district court's role. Before the Commission existed, the Nebraska Supreme Court announced the rule, as quoted in *Condev West, Inc., supra*, that in determining whether to affirm the decision of a county board of equalization,

> "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board."

Lancaster Cty. Bd. of Equal. v. Condev West, Inc., ante p. 319, 329, 581 N.W.2d 452, 459 (1998) (quoting *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989)).

[5] In rebutting the aforementioned presumption,

> "the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."

Id. at 330, 581 N.W.2d at 459-60 (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981)).

This standard, however, does not tell the Commission that it must affirm a board of equalization's decision unless it was determined by will or caprice or selected at random, although it is clear that a decision determined by will or caprice or at random would clearly be arbitrary and reversible under the proper standard. A board's decision made in disregard of facts and circumstances without some basis which would lead a reasonable person to the same conclusion would certainly be arbitrary. However, the above-quoted statute and the rules laid down by the Supreme Court do not establish such a harsh standard of review.

In one of its assignments of error, Kawasaki argues that the record contains no evidence showing how the Board reached its decision. We do not agree with that statement. The record shows, both by the county assessor's file and by Hendricksen's testimony, that the property was not appraised in any manner before the appeal to the Commission was initiated by Kawasaki. If the computer record of the county assessor's office contains a cryptic appraisal, the Board did not see fit to introduce evidence that the appraisal was explained to the Board or to the Commission so it could be relied upon in arriving at a value. The record clearly shows that the assessor valued the property on the basis of an agreement reached between the Board and Kawasaki in 1995 that settled litigation for tax years 1994 and 1995, but increased the valuation to reflect new construction. There is no evidence that that settlement was intended to include tax years after 1995. In the analysis portion of its order, the Commission found the Board's reliance on the previous agreement was wrong and not to be condoned. The Commission

noted in its decision that the agreement was given no weight. However, the Commission did not find that the Board's reliance upon that agreement made the Board's action arbitrary and capricious, which it clearly was, because at the time of its decision, the Board had only the agreement to support its value.

Because we have determined on the basis of undisputed evidence that the Board's method was arbitrary and capricious, it naturally follows that the Commission committed error on the record when it found otherwise. If the Commission had found that the Board had been arbitrary and capricious, the reasonableness of the valuation fixed by the Board would become a fact that would need to be determined based on all of the evidence presented. The Commission's announced standard of review tends to establish that it did not consider the reasonableness of the fixed value on the basis of all of the evidence. See, *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989); *J.C. Penney Co. v. Lancaster Cty. Bd. of Equal.*, 6 Neb. App. 838, 578 N.W.2d 465 (1998). However, the entire Order, particularly that part under the heading of "Analysis," shows otherwise.

In its analysis, the Commission considered the evidence presented by both Kawasaki and the Board in detail, listed and discussed sales relied upon by both appraisers, discussed some sales that it felt significant, considered principles and notions of arriving at value by appraisement, and cited relevant authority on appraisement. Most of its findings were formal and uncontested facts, but the Commission did find that the comparables used by Kawasaki's expert tended to skew "the resultant estimate of valuation." We think the "Analysis" portion of the Order is more revealing of the exercise performed and the conclusions made than the "Findings of Fact" portion of the Order.

Based on our study of the Order, we conclude that the Commission did consider all of the evidence presented and determined the reasonableness of the valuation fixed by the Board on the basis of all the evidence and that it determined that value to be reasonable.

Must Commission Make Specific Finding of Value?

[6] The Commission did not make a specific finding as to the value of the subject property, and Kawasaki contends that such

failure to "independently determine the value of the property in question" pursuant to § 77-1511 constitutes reversible error. Brief for appellant at 9. We can find no case which considers the question. It is true that § 77-1511 provides that the Commission shall determine anew all questions raised before the Board. However, the above-cited authority holds that the Commission should determine the reasonableness of the valuation fixed by the Board, which becomes a question of fact for the Commission. It seems clear that if the Commission determined the Board's value was reasonable, there is no need for further findings. The record supports this finding, and we therefore affirm the order of the Commission affirming the determination made by the Board.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF CAMDEN J. ELSASSER, APPELLEE, V. CHAD R. FOX, APPELLANT.
584 N.W.2d 832

Filed September 22, 1998. No. A-97-021.

1. **Modification of Decree: Visitation: Child Support: Appeal and Error.** Modification of a dissolution decree, child visitation, and amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Appeal and Error.** Although in conducting its de novo review of a modification of a decree an appellate court reaches a conclusion independent of the trial court, 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Child Support: Rules of the Supreme Court.** Paragraph C of the Nebraska Child Support Guidelines requires that all orders for child support, including modifications, must include a basic income and support calculation worksheet.
4. ____: ____. A court may deviate from the child support guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
5. ____: ____. Student loans are an appropriate deviation from the Nebraska Child Support Guidelines.

Appeal from the District Court for Saunders County: ALAN G. GLESS, Judge. Affirmed as modified.

Joseph H. Murray, of Germer, Murray & Johnson, and Gregory C. Damman for appellant.

Loren L. Lindahl, Deputy Saunders County Attorney, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

HANNON, Judge.

Chad R. Fox appeals from the order of the district court increasing his child support obligation for Camden J. Elsasser, arguing that the court erred in not deducting the monthly payment he is required to make on his student loan from his net monthly income in computing his obligation. We find that the court did not include a basic income and support calculation and wrongly ignored evidence of the income of Camden's mother, Dawn Elsasser. Moreover, we conclude that the court erred in failing to allow a deduction for Chad's monthly student loan payments. Accordingly, we affirm as modified.

FACTUAL BACKGROUND

The facts are undisputed. On December 29, 1994, the district court entered a consent decree establishing that Chad is the father of Camden, born January 14, and ordering Chad to pay child support to Dawn in the amount of $50 per month, commencing January 1, 1995. The court also ordered Chad to name Camden as a beneficiary under any health and medical insurance policy available to him through his employer and to make certain payments in connection with Camden's birth.

On May 15, 1996, under Neb. Rev. Stat. § 43-512.12 (Reissue 1993), the Saunders County Attorney, representing the State of Nebraska on behalf of Camden, filed an application to modify Chad's child support obligation and to establish medical insurance coverage. The application alleged that Chad's income had increased substantially and that Chad may have medical insurance available through his employer. In his responsive pleading, Chad admitted that he was capable of furnishing more support and alleged that he had already procured medical insurance and had provided Dawn with evidence thereof. In an amended pleading, he alleged that he was responsible for student loans in the principal amount of approximately $17,000, for which he

was obligated to make monthly payments in the amount of $178.09. Chad alleged that such loans should be taken into consideration in computing his child support obligation.

The trial on the modification issue was held on December 9, 1996. Dawn testified that although she had previously received aid from Aid to Families with Dependent Children, she had recently obtained full-time employment, earning $7.10 per hour for 40 hours per week. Her testimony gave every indication that the job was permanent employment. During Dawn's direct examination, the State's attorney offered into evidence a photographic copy of the first pay stub she received from her new employment, showing her gross pay and the amounts withheld for income tax, et cetera. Chad's attorney objected to the exhibit as irrelevant, and for reasons we do not understand, the judge sustained the objection. At the time of the hearing, Dawn's wages would have translated into a monthly gross income of $1,230.

Chad testified that he is 24 years of age, that at the time of the decree in December 1994 he was a full-time college student, and that he graduated therefrom in May 1996. The record reflects that Chad attended college with the aid of part-time employment, some scholarships, help from his parents, and a student loan. In September 1996, he obtained full-time employment as a teacher in a public school in a small town, with gross pay of $1,974.16 per month. The record also reflects that he had supplied Dawn with medical insurance information.

Chad testified that the student loan was necessary for him to obtain the education he attained. Chad testified that the term of the loan was 10 years, beginning January 1996. A loan statement, dated January 8, 1996, reveals that Chad's principal balance was $17,219.02, that his monthly payment was $178.09, and that he was current in his payments on that loan. Income tax returns from the years 1994 and 1995 show that Chad made several thousand dollars a year in various jobs, some of which appear to be related to the education profession and others of which are typical of those engaged in by college students.

The parties did not file or introduce a basic income and support calculation, and the court did not follow paragraph C of the Nebraska Child Support Guidelines, which requires "[a]ll orders for child support, including modifications, must include

a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3." We find in the transcript an unsigned journal entry wherein the court stated that since it sustained the objection to Dawn's evidence of income, it found her income to be $0 per month. Further, the court stated: "Under the circumstances of this case, I find it would not be reasonable [or] equitable to allow the deviation for student loan payments requested by [Chad]." The journal entry stated that the court adopted the "County Attorney's calculation B as the most appropriate calculation," and found that effective September 1, 1996, Chad's child support obligation should be increased to $319 per month.

The transcript also contains a formal order dated and filed on January 6, 1997, modifying the decree. In the order, the court found a "substantial change in circumstances" and, without disclosing any findings relative to either party's gross or net income, or allowable deductions, ordered Chad to pay $319 per month in child support, commencing September 1, 1996. The order also contains the usual directives regarding payment to the clerk, delinquent payments, medical insurance, et cetera.

ASSIGNMENT OF ERROR

Chad argues that the court erred in computing his child support obligation because the court failed to deviate from the child support guidelines to account for his student loan. Chad, however, admits that there is a change in circumstances justifying an increase in support.

STANDARD OF REVIEW

[1,2] Modification of a dissolution decree, child visitation, and amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997). Although in conducting its de novo review of such matters an appellate court reaches a conclusion independent of the trial court, 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

[3] As noted above, the parties did not see fit to file or introduce any worksheet disclosing their respective gross and net monthly incomes or the method of computing Chad's child support obligation under the guidelines. Paragraph C of the Nebraska Child Support Guidelines requires that all orders for child support, including modifications, must include a basic income and support calculation worksheet. See, also, *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994) (suggesting that such be incorporated into record). The court ignored this clear direction by failing to include such as part of its order. Such failures impose upon this court the unnecessary work of combing the record in order to determine the income and deductions mandated by the evidence, and thus the judicial resources of this state are wasted on needless duplication. The worksheets provide an efficient method of summarizing the findings or proposed findings from the evidence, as well as displaying computations, and the trial courts are required to use them under paragraph C. We do not understand why trial courts and litigants do not always use them. Furthermore, such worksheets enable efficient comparison of the arithmetic necessary in child support calculations.

As we were unable to view a worksheet, we did the necessary work and prepared our own worksheet. Unfortunately, we are unable to arrive at the exact amount of child support ordered by the trial court, even when we use what we understand to be the trial court's findings on Dawn's income and the nondeductibility of Chad's student loan payments. We find that the evidence on Chad's income and deductions, exclusive of the student loan payments, is not disputed and that a correct, although skeletal, worksheet is as follows:

Chad's gross monthly income:		$1,974.16
Less deductions:		
Income taxes	$ 291.53	
FICA taxes	143.77	
Health insurance	94.83	
Mandatory retirement	143.13	
Total deductions:		- 673.26
Monthly Net Income:		$1,300.90

At a 100-percent contribution level, Chad's monthly obligation is $313.22. Again, this figure does not include a deduction for Chad's student loan and assumes that Dawn has no income.

We fail to understand why the trial court sustained Chad's objection to the introduction of Dawn's pay stub, as we cannot see why Dawn's new income status should not be considered. If the inclusion of her income made a significant difference under the guidelines, we would probably have included it in our computation on the basis of plain error. However, the worksheet we have prepared, which includes Dawn's gross and net incomes as ascertained from her testimony and the improperly excluded document, reveals that the effect on Chad's obligation would be minimal.

Under the evidence in the record, and not including any deduction for Chad's student loan payments and treating Dawn's income as $0, Chad should not have to pay more than $313.22 per month in child support. But the principal issue of this appeal is whether Chad should be allowed a deduction of $178.09 for the monthly student loan payment he must make. If Chad is allowed the deduction, his resulting child support obligation is $271.02 per month.

First of all, under the evidence in this case, it is clear that Chad incurred his student loan in order to obtain the education necessary to gain employment as a teacher. By setting the initial child support at $50 per month, the trial court made it possible for Chad to obtain his present income. Most courts recognize that fostering further education of young parents in such a fashion benefits the child throughout the child's life. It seems undesirable to undermine that policy by ignoring the fact that such students must later repay the student loans they incurred in the process.

The obligation of a person who has obtained an education financed through a student loan, also known as an education loan, to repay the loan is very real. Under 20 U.S.C. § 1078(b)(1)(E)(ii) (1994), the loan must be repaid in not more than 10 years commencing at the beginning of the repayment period, the latter of which is determined under § 1078(b)(7). However, if such loans are consolidated, the time for repayment of principal and interest may be extended, depending on the amount of the consolidated loans. See 20 U.S.C. § 1078-3 (Supp. II 1996).

Furthermore, as 11 U.S.C. § 523 (1994) reveals, student loans are not easily dischargable in bankruptcy proceedings:

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless—
>
> (A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years . . . before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

Additionally, we observe that Congress has recently amended the Internal Revenue Code to provide that the interest paid on educational loans may be deducted in calculating income tax. 26 U.S.C.A. § 221 (West 1997).

The laws controlling the repayment of student loans are so crafted that students availing themselves must realize that their real income after graduation will in fact be their earnings less the required monthly payments upon their respective school loans. We see no reason why the courts should not recognize the reality of the situation of so many young parents who have utilized education loans to obtain an education beyond high school. Neb. Rev. Stat. § 42-364.16 (Cum. Supp. 1996) provides in significant part:

> Child support shall be established in accordance with such guidelines, which guidelines are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

"A judge may not satisfy his duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested guidelines." *Brandt v. Brandt*, 227 Neb. 325, 327,

417 N.W.2d 339, 341 (1988), *overruled on other grounds, Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991).

Child support under the guidelines is computed upon the basis of the net monthly income of the parents. In that process, deductions are allowed for fixed, nonavoidable obligations such as taxes, Social Security, health insurance, mandatory retirement, and child support for other children. Education loan payments are of the same nature as the deductions that are allowed, that is, they are fixed, legally unavoidable monthly payments, and they have the long-term effect of decreasing the former student's real income by the amount of the monthly payment. Unlike ordinary debts, an educational loan cannot, for most former students, be discharged in bankruptcy.

[4,5] A court may deviate from the child support guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C; *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). See, also, § 42-364.16. After a de novo review of the facts and circumstances of this case, we find that Chad's student loan should have been taken into account. It is undisputed that Chad was current in his child support payments and has complied with the terms of the consent decree. Moreover, Chad's student loan will unquestionably benefit Camden, both immediately and in the long run. Thus, we deduct Chad's monthly student loan payment of $178.09 from the net monthly income computed above of $1,300.90 to arrive at a net monthly income of $1,122.81. Chad's resulting child support obligation is $271.02, which we round to $271 per month.

CONCLUSION

We conclude that the trial court abused its discretion in failing to deviate from the child support guidelines to take Chad's monthly student loan payment into account. The district court is therefore directed to decrease Chad's support obligation to $271 per month for the term of the 10-year loan, effective September 1, 1996.

AFFIRMED AS MODIFIED.

IRWIN, Judge, dissenting.

I respectfully dissent from the decision of the majority holding that the district court committed an abuse of discretion by

not deviating from the Nebraska Child Support Guidelines and allowing Chad a deduction for his monthly student loan payments in computing his net monthly income. There is no precedent for such an allowance, and there is currently no case law which mandates such an allowance. Under these circumstances, I simply cannot find an abuse of discretion.

The majority cites no authority for granting a deduction for student loan payments in computing a parent's child support obligation. My research reveals that there is practically no authority for such action and that there is no authority in Nebraska. In *In re Marriage of Davis*, 287 Ill. App. 3d 846, 679 N.E.2d 110 (1997), the court did grant such an allowance. However, the Illinois child support guidelines provide that a party is to be granted a deduction for " '[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income . . . .' " (Emphasis omitted.) 287 Ill. App. 3d at 852, 679 N.E.2d at 114. In Nebraska, we have no such language in our child support guidelines, nor can any other language in our guidelines be construed as granting such an allowance.

The trial court in the present case made a specific finding that "[u]nder the circumstances of this case . . . it would not be reasonable [or] equitable to allow the deviation for student loan payments requested by [Chad]." In order to find an abuse of discretion, it is necessary that the trial court's decision be clearly untenable and deprive a litigant of a substantial right or a just result. The majority does not clarify how this standard is met in the present case, and I do not believe that it is. To hold that the trial court committed an abuse of discretion in this case is tantamount to suggesting that despite the fact that student loan payments are not enunciated in the guidelines as a specific basis for deviation, failure to grant a deviation and allow a deduction when the student loan is incurred to enable a parent to obtain employment which will ultimately benefit the child during his life is, by itself, an abuse of discretion. The majority sets a potentially far-reaching precedent in this case by its holding.

Despite the conceded facts that student loans are often a necessary expense for a parent to obtain an education and achieve meaningful employment, that the education received as a result

of incurring the loans will ultimately benefit the child, and that the loans must be repaid and are difficult, if not impossible, to discharge, I do not believe that a trial court's failure to grant a deviation to allow a deduction for the amount of the monthly loan payments is an abuse of discretion. See *Jensen v. Bowcut*, 892 P.2d 1053 (Utah App. 1995) (holding that lower court did not abuse discretion by failing to grant deduction for student loan payments). See, also, *CSEA v. Lozada*, 102 Ohio App. 3d 442, 657 N.E.2d 372 (1995) (holding that referee erred in granting deduction for student loan payments). Although I would acknowledge that in a proper case, a trial court may well be justified in concluding that such a deviation from the guidelines is necessary for a just or appropriate result, the trial court's failure to grant such a deviation in the present case is not an abuse of discretion. The trial court's decision not to grant the deviation was in compliance with the current child support guidelines, and absent some modification of the guidelines, I would not find an abuse of discretion and would not grant this deviation on appeal.

COUNTY OF SARPY, APPELLEE, V. JANSEN REAL ESTATE CO., APPELLANT, AND BANK OF PAPILLION, APPELLEE.

584 N.W.2d 824

Filed September 22, 1998. No. A-97-370.

1. **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, where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
3. **Taxes: Liens: Foreclosure: Time.** The inaction of a county official cannot release or divest a valid tax lien, but only payment or failure of the purchaser of such a lien to foreclose it within the required time cancels a tax lien.
4. **Taxes: Real Estate.** Neb. Rev. Stat. § 77-1303 (Reissue 1990) provides that the county assessor shall prepare a list, ledger, or computer file of all taxable lands in the county. This list shall include in one description all contiguous lots in the same tract or block which belong to one owner. The real estate tax list shall show the name of the owner and shall contain columns in which may be shown the number of acres, the

value of the land, the improvements, and the total value. The assessor shall transcribe the assessment into a suitable book. The book shall contain several specific columns, and among the columns is to be a number of columns for delinquent taxes of previous years.

5. **Taxes: Real Estate: Time.** No informality in the real estate tax list and no delay in the transmitting of the same after the time specified shall affect the validity of any taxes or sales, or other proceedings for the collection of taxes.
6. **Taxes: Real Estate.** As soon as the county treasurer receives the real estate tax lists, the treasurer shall enter the amount of unpaid taxes opposite each description.
7. **Taxes: Real Estate: Records.** The records for real estate in the same taxing district under the same owner are kept together as a unit.
8. **Taxes: Real Estate: Valuation: Liability.** Upon approval of an application under Neb. Rev. Stat. § 77-1344(1) (Reissue 1990), the county assessor shall value the land and shall also enter on the valuation the notation and potential additional tax liability until the land becomes disqualified for such valuation.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions to dismiss.

Dixon G. Adams, of Adams & Sullivan, for appellant.

Michael A. Smith, Deputy Sarpy County Attorney, for appellee County.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

Sarpy County filed this action to foreclose delinquent real estate taxes in 1989 and 1990 against three lots owned by Jansen Real Estate Co. (Jansen). The lots are located in Western Hills, a subdivision located in Sarpy County. The subdivision is a quarter section of real estate which until 1991 had been valued for agricultural purposes under Neb. Rev. Stat. §§ 77-1344 through 77-1348 (Reissue 1990). The taxes foreclosed against the lots were the additional taxes assessed when the quarter section ceased to qualify for the special value. The taxes were in the amount that would have been due for the quarter section had the special value not been elected before 1991. Sarpy County seeks to foreclose all the taxes against the three lots. Jansen resists the foreclosure on the basis that the county is estopped by errors and irregularities in levying and assessing the tax and misrepresentations relied upon by Jansen and that Sarpy County

seeks to foreclose all of the additional tax for the entire quarter section against the three lots. The trial court allowed foreclosure but apportioned the $23,755.51 additional taxes between the three lots and the remainder of the quarter section, thus allowing foreclosure of only $42.76 against each of the three lots. We conclude that the district court did not have the authority to apportion these taxes and that Sarpy County is not prevented from foreclosing the taxes for the reasons alleged, except that the taxes assessed against the entire quarter section cannot be foreclosed against the lots. We therefore reverse, and remand with directions to dismiss.

SUMMARY OF FACTS

The parties stipulated that prior to April 1, 1991, the northwest quarter of Section 22, Township 14 North, Range 12 East of the 6th P.M., in Sarpy County, was owned by Masonic Lodge No. 39 and St. Paul's Methodist Church, and was primarily used for agricultural purposes. On April 1, title was transferred to Western Hills, Inc. (Western Hills). On August 1, Western Hills filed a plat, which subdivided the quarter section into 176 lots of varying sizes and streets, in the Sarpy County register of deeds office. On July 2, the Sarpy County treasurer had certified that there were no regular or special taxes due on the quarter section. On December 28, 1993, Western Hills conveyed Lots 26, 29, and 32 in the subdivision to Jansen.

Before being transferred to Western Hills, the quarter section had been valued for agricultural purposes rather than a higher value for other purposes as provided in § 77-1344. Western Hills did not apply for special valuation. On November 1, 1991, the county assessor notified Western Hills that the quarter section was subject to recapture and proceeded to assess the recapture against the property as provided in § 77-1348. The amount due from the 1989 tax year was $13,606.15, and $10,149.36 was due from the 1990 tax year. Western Hills was sent notice of this action.

Steven Griesmer, a title insurance agent for the company which insured title to the real estate, testified that about May 6, 1991, he searched the county records with respect to taxes, both general and special, assessed against the real estate. Griesmer

testified that when a search of the records is made for the possibility of special assessment taxes, particularly "greenbelt taxes," searches are made in the county treasurer's office. (We note that during trial, the attorneys and witnesses frequently referred to the taxes that were or could be recovered when special valuation under § 77-1344 ceased as "greenbelt taxes." We find no statutory foundation for the term, and we did not find the term helpful in this opinion. We therefore use it only when quoting the parties or witnesses.) When Griesmer made the search, he found no indication of special use valuation having been used. Griesmer testified that since May 1991, he has made similar searches against the individual lots, and although the additional tax is indexed against the quarter section, there is no indication of the additional tax indexed under the individual lots.

Griesmer testified that the county treasurer's records appear on a computer screen. A printout of a computer screen for current taxes against the quarter section was introduced. The printout lists Western Hills as the owner and states "LEGAL DESC NW1/4 22-14-12 (155.78 AC) PAPILLION." The printout has six columns which were headed as follows: "YEAR," "SEQ—NO SPA RCPTUR TX—SAL," "TAX DUE ADV RECVD," "TAX RECVD INT RECVD," "TOTAL RECVD," and "BALANCE DUE." The printout contains lines for each year from 1982 to 1990 in descending order and shows the tax for 1988 and each prior year to be approximately $2,000 per year. The printout shows these taxes were paid. For 1989 and 1990, the printout shows taxes of $3,292.62 and $2,817.24, respectively, and that they were paid. Finally, the printout shows the taxes assessed by special use for 1989 and 1990 and the balance due to be $13,606.57 and $10,149.36.

Griesmer testified that when he searched for taxes on the northwest quarter of Section 22, nothing appeared on the screen until after November 1, 1991. When asked what he did at the assessor's office, Griesmer testified: "At that time we had to — we were not allowed to look at the information, we basically had to ask the employees there to tell us yes or no, was the property filed for greenbelt protection." Griesmer testified that in May 1991, he asked these employees and was told the property

was not filed for greenbelt protection. Griesmer also testified that there was no indication of any special agricultural assessment on the screen as to "each individual lot in the subdivision" and that up to the time of trial, the amount claimed to be due for the entire quarter section was not posted against individual lots, but only against the quarter section.

Richard Campbell, who is a real estate appraiser employed by the Sarpy County assessor's office and the coordinator of the greenbelt valuation, testified that after examining the Western Hills subdivision plat and the above-described computer printout, there was no way for him to determine the amount of these taxes that should be assessed against the three individual lots "without just taking the entire amount [and] dividing it by the lots" and that this would not have accounted for the streets shown on the plat. Campbell testified that the No. 1 in the column "SEQ—NO SPA RCPTUR TAX—SAL" of the printout would notify someone that the land was under special valuation. (There is a No. 1 in the column for the years 1989 and 1990.)

Campbell testified that that system did not exist in 1991 and that in 1991, the records which would have shown that special valuation was used were kept on a piece of paper in a folder designated for each piece of property. This file folder would have shown both the regular valuation and the special valuation and would have contained a notation that the property was valued at a special value. Campbell testified that these records were available to the public for inspection and that he could recall no time when anyone was denied access to these records. Campbell also testified that the taxes were divided when a piece of property was subdivided. To do this, the assessor's office checks the record for the previous 4 years to determine the type of soil for the parcel which will no longer be for agricultural use and allocates the value based upon that consideration. Campbell did not testify as to why the taxes in question were not divided by the assessor's office. Campbell testified there was nothing in the treasurer's records in 1991 to indicate the property was valued at a special valuation in 1991.

After a trial, the court made specific findings of fact. Among other findings, the court found: "He [Griesmer] made further inquiry at the Assessor's office and was advised by the

Assessor's personnel there [were no recovered taxes from special use]. There may have been a folder in the Assessor's Office, but abstracters were not allowed to see this file." The trial court also found that the Sarpy County agents were at fault, but other than the above quote, the court did not specify as to how or when the agents were at fault. The court also found that it would be inequitable to charge the three lots with the entire tax assessed against the quarter section. The court computed the square footage of the three lots from the plat and apportioned the recapture tax between the three lots and the remainder of the quarter section for each of the 2 years. The court computed that taxes of $42.76 were delinquent on each of the three lots for the years 1989 and 1990. The court also found that to charge interest before the decree would be inequitable but that the interest was to accrue at the rate of 14 percent after the decree. The court found a lien on each lot and ordered a foreclosure sale of the real estate to satisfy the taxes and interest due against the three lots.

ASSIGNMENTS OF ERROR

Jansen appeals, and we have reduced its six assigned errors to four. Jansen claims the trial court erred (1) in failing to find the conduct of the Sarpy County agents made it unjust and inequitable for Sarpy County to maintain this action, (2) in finding the additional tax was a lien on the lot, (3) in calculating the dimension of the lots, and (4) in basing its decree upon issues not raised by the petition and answer.

STANDARD OF REVIEW

[1] This is a foreclosure action and therefore an equitable action. 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, where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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. *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997); *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997).

[2] The most significant questions raised in this case are questions of law. When reviewing a question of law, an appel-

late court reaches a conclusion independent of the district court's ruling. *Board of Regents v. Pinzon*, 254 Neb. 145, 575 N.W.2d 365 (1998); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

ANALYSIS

Negligence and Misrepresentation.

Jansen argues that the negligence or misrepresentation of Sarpy County officials makes it inequitable to allow Sarpy County to foreclose the additional taxes. There is no evidence that any county official made any representation to any representative of Jansen or that Jansen in any way relied upon any records of Sarpy County to its detriment. There is no evidence that Griesmer's activity in checking the records in 1991 was for Jansen or that Jansen in any way relied upon his investigation. Therefore, there is no evidence that any conduct of a county official proximately caused any damage to Jansen. The record shows that the county assessor gave Western Hills notice of the extra assessment in November 1991. At most, the evidence shows that a buyer of lots in Western Hills subdivision might not have learned of the additional taxes if the buyer did not check the assessor's records. The evidence does not establish how this situation affected Jansen, who bought the property in 1993.

Jansen established the technique used by the title examiner for a particular title insurance company. Jansen seems to assume that since that technique did not disclose the information that a buyer of such property needed to protect itself, some county officials neglected a duty. We point out that assessment records are undoubtedly public records and that under Neb. Rev. Stat. § 84-711 (Reissue 1994), any person is entitled to access thereto. If the assessor's office denied Griesmer access to its records, the law was violated. Griesmer might be entitled to redress, but not Jansen, because insofar as we know, Jansen did not seek access to the records. Campbell testified that the Sarpy County assessor's office had never denied people access to the assessment records; however, even if someone was denied access on one or several occasions, this fact would hardly justify canceling a tax levy, particularly for a taxpayer who did not seek access.

Jansen's position seems to assume that if the county does not keep the books and records that enable buyers of real estate to discover delinquent taxes, the county loses its lien for those taxes. We do not agree. The Legislature determines the duties of public officials and the records they must keep. From a review of the applicable statutes, it appears the Legislature long ago provided a system that allows buyers to learn of liens for unpaid taxes. Later in this opinion, we shall review the applicable statute in force from 1991 through 1993 which specified the record on the assessment, levy, and payment of real estate taxes which the Legislature has required public officials to keep. Some of these statutes have been changed, but these changes are updates that do not affect the provisions applicable to the issues of this case.

[3] In *Keenan v. McClure*, 127 Neb. 466, 255 N.W. 784 (1934), the landowner paid taxes on land with a check that was good at the time but was rendered uncollectible when the bank on which the check was drawn closed as insolvent before the treasurer presented the check for payment. The *Keenan* court held the taxes were deemed paid because the treasurer was negligent in presenting the check. Jansen relies on *Keenan* for the proposition that when the negligence of the public official prevents payment of taxes, equity requires the tax foreclosure action be dismissed. We do not agree that *Keenan* supports this proposition. In *Keenan*, the taxpayer would have actually lost the amount of the taxes paid because the treasurer failed to negotiate the check promptly. In the case at hand, there is no evidence Jansen lost anything, even if negligence on the part of some county official is assumed. There is no evidence showing that some act of a county official proximately caused Jansen any damage. The evidence does not show that Jansen, as opposed to Griesmer, relied on an act of a county official or any record kept by the county. The most the evidence in this case shows is that county officials might not have made a record available to Griesmer or might not have kept the records Jansen asserts they should have kept. The correct rule is that the inaction of a county official cannot release or divest a valid tax lien, but only payment or failure of the purchaser of such a lien to foreclose it within the required time cancels a tax lien. *Spiech v. Tierney*, 56 Neb. 514, 76 N.W. 1090 (1898).

In its amended answer, Jansen alleged Sarpy County is estopped from maintaining the action because of errors and irregularities in levying and assessing the tax. Jansen does not point out any errors or irregularities in assessing the additional tax. Insofar as we can discern from the evidence, the county assessor simply followed the statutory procedure in assessing the additional tax, and when that tax was assessed, the entire quarter section or all of the platted lots in Western Hills subdivision were in common ownership. The assessor, therefore, had no reason to assess the additional tax against the individual lots, and under the statutes discussed below, this procedure was sufficient until lots were sold. There is no evidence which would support a finding the additional tax assessed was not validly assessed.

The evidence establishes that on November 1, 1991, the county assessor notified Western Hills of the additional tax assessed against the quarter section due to the disqualification. We observe that as of that date, the quarter section was still under common ownership, notwithstanding the fact that a plat subdividing it had been filed on August 1. On about May 6, when Griesmer testified he checked the record to learn of the possible special use tax liability, the land had not yet been disqualified. We also observe that Jansen did not buy the three lots until December 23, 1993. None of these facts establish that any Sarpy County officials made any representations to Jansen or its representatives, and no officer from Jansen testified that Jansen relied upon any representation of any county official or that Jansen relied on any record of the county. There is no support for Jansen's defense on the basis of misrepresentations or unjust and inequitable conduct of any county official.

Statutory Procedure.

Jansen argues that the evidence shows there was and is no record in the Sarpy County treasurer's office showing the tax due against the individual lots and that at no time up to the time of trial could it have paid the taxes, because they were assessed against a quarter section and were not broken out for Jansen's property. Jansen does not allege that it requested the county assessor to break the taxes assessed against the quarter section

down against the individual lots. We conclude that if the statutes were followed, the Sarpy County records would have shown the amount of delinquent tax, that is, the additional tax assessed, against each of the three lots. In that event, Jansen could have paid the tax, and in the event of foreclosure, Sarpy County would have had the necessary evidence to foreclose the taxes actually due against the three lots rather than that which was due from the quarter section in which they are located.

[4-6] Neb. Rev. Stat. § 77-1303 (Reissue 1990) provides that a county assessor shall prepare a list, ledger, or computer file of all taxable lands in the county. The statute further provides that this list shall include in one description all contiguous lots in the same tract or block which belong to one owner. The real estate tax list shall show the name of the owner and shall contain columns in which may be shown the number of acres, the value of the land, the improvements, and the total value. Neb. Rev. Stat. § 77-1613 (Reissue 1990) provides that after the levy is made, the assessor shall transcribe the assessment into a suitable book. The book shall contain several specific columns, and among the columns is to be "a number of columns for delinquent taxes of previous years." Neb. Rev. Stat. § 77-1616 (Reissue 1990) provides that the real estate tax list shall be delivered to the county treasurer by December 1 of each year and further provides: "No informality therein, and no delay in the transmitting of the same after the time above specified, shall affect the validity of any taxes or sales, or other proceedings for the collection of taxes as provided for in this chapter." Neb. Rev. Stat. § 77-1618 (Reissue 1990) provides that as soon as the treasurer receives the tax lists, the treasurer shall enter the amount of unpaid taxes opposite each description. Neb. Rev. Stat. §§ 77-1853 and 77-1854 (Reissue 1990) together provide that any omission on any assessment book is only an irregularity which shall not in any manner invalidate a tax that was levied.

[7] Neb. Rev. Stat. § 77-1703 (Reissue 1990) provides in significant part:

> The treasurer shall receive taxes on part of any lot, piece or parcel of land charged with taxes, when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land shall remain

> unpaid, the treasurer shall enter such specification in his return so that the part on which the tax remains unpaid may be clearly known.

The above statutes provide a system whereby the records for real estate in the same taxing district under the same owner are kept together as a unit and subdivided when "specification[s] of the [tract are] furnished." This provision applies to contiguous lots.

Under the evidence in this case, the assessor should have kept the records under one name until a different owner acquired part of the tract, or at least until a request was made to have the taxes for a part of the land broken out and separated from the larger tract. Since § 77-1303 requires the tax list to be under the separate owner's name and after the levy is made, the list must show delinquent taxes, the assessor could not follow that statutory direction unless the additional taxes, then delinquent, were broken out and shown against each tract or lot which is not contiguous or under the same ownership. Under the statute, at least absent a request by the owner, this did not need to be done until Jansen acquired title to the three lots in 1993. However, we note that under § 77-1703, this was clearly required to be done at some point before this action was commenced on June 6, 1995.

The treasurer's record in the form of the computer printout is undated but contains a calculation of the interest due and states: "COMPUTATION DTE 29 January 97"; therefore, we presume the printout must be a record for on or after that date. This record is not in accord with the statutory directions because the information is given as to the entire quarter when the real estate had not been in common ownership for at least 5 years. The deputy county assessor's statement that he could not break the taxes out to the individual lots, if intended to imply such a breakout is impossible, is not acceptable. We refuse to believe the information necessary to divide the assessed taxes for a known area of bare farmland into lesser-included areas of any size is not available to the assessor.

[8] Section 77-1347 provides that "[u]pon approval of an application, the county assessor shall value the land as provided in subsection (1) of section 77-1344 and shall also enter on the valuation the notation and potential additional tax liability until

the land becomes disqualified for such valuation . . . ." The statute does not clearly state upon which record the assessor shall keep this information, but it can only mean that the potential tax liability shall be entered on the same record where the assessor enters the special use value. This would appear to be the real estate tax list.

If land becomes disqualified, § 77-1348 provides that the assessor shall notify the owner that "there shall be added to the tax extended against the land on the next general property tax roll, to be collected and distributed in the same manner as other taxes levied upon real estate." In what must be one of the most complex sentences ever written, the statute provides that the amount of tax to be added will be the amount that would have been collected during the past 3 years had the special valuation not been used, plus interest at 6 percent on that additional tax from the date it would have been collected. That statute also provides that when the special value is removed as a result of a sale or transfer, the lien for the additional tax attaches the day before the sale or transfer.

The assessor did not follow these statutes, in that the potential additional tax liability was not noted on the tax list, as required by § 77-1347. Also, after the quarter section was subdivided, the entry on the tax list for the individual lots no longer under the same ownership did not disclose the delinquent taxes generated by the recapture as required by the combined effect of §§ 77-1303 and 77-1616. Under §§ 77-1853 and 77-1854, the taxes assessed would not be canceled for failure to keep the required records, but without those entries on the tax records of Sarpy County, the owner of the lots does not have the information necessary to pay the taxes to be paid, and the county does not have the evidence necessary to prove a foreclosure case if they are not paid. A suit to foreclose the delinquent taxes due from the larger tract by foreclosure against the smaller tract is not the solution.

The trial court's solution seems sensible, and when the assessor breaks out the taxes as required, the amount assessed against the three lots will probably not be significantly different from that determined by the trial court. However, this result was not an issue under the pleadings in this case, and the evidence was

insufficient to do anything more than guess at the proper apportionment. We also find no authority for the district court's action when that particular function is undoubtedly a function of the county assessor under § 77-1703.

Since the trial court did not have the authority to apportion the taxes in this foreclosure action, the correct finding is that Sarpy County failed to prove its case and that it failed to prove the taxes it seeks to foreclose were a lien on the three lots. The petition must be dismissed. Accordingly, we reverse the decree of foreclosure entered by the trial court and direct it to dismiss the action without prejudice to the foreclosure of properly determined delinquent taxes.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

DEBRUCE GRAIN, INC., APPELLANT, V. OTOE COUNTY BOARD OF EQUALIZATION, APPELLEE.

584 N.W.2d 837

Filed September 22, 1998. No. A-98-001.

1. **Taxation: Final Orders: Appeal and Error.** Appellate review of a final decision of the Nebraska Tax Equalization and Review Commission is for error on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Valuation: Equity: Appeal and Error.** The Tax Equalization and Review Commission shall hear appeals as in equity and without a jury and determine anew all questions raised before a county board of equalization which relate to the liability of the property to assessment, or the amount thereof.
4. **Taxation: Valuation: Evidence: Proof: Appeal and Error.** The Tax Equalization and Review Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.
5. **Taxation: Valuation: Presumptions: Evidence.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented.

6. **Real Estate: Valuation: Witnesses.** An owner of a specific type of facility, who is familiar with the facility and the value of such facility, is undoubtedly qualified to render an opinion on the fair market value of the subject property.
7. **Real Estate: Taxation: Valuation: Evidence: Proof.** Recent and comparable sales of real estate may be admissible as evidence in condemnation cases for two different purposes. They may be admitted as substantive proof of value of the condemned property or as foundation and background for an expert's opinion of value. The rule on comparability is not as strict for foundational purposes as it is when the comparable is used as direct and independent proof of value.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Ronald L. Comes, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Max J. Kelch, Otoe County Attorney, for appellee.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

DeBruce Grain, Inc., appeals the order of the Nebraska Tax Equalization and Review Commission (Commission) which upheld the valuation by the Otoe County Board of Equalization (Board) of $1,113,895 for property tax purposes. We conclude that DeBruce Grain did not introduce sufficient relevant evidence to rebut the presumption the law accords the actions of the Board, and, therefore, we affirm the action of the Commission.

FACTUAL BACKGROUND

The property at issue here, the DeBruce Grain facility, is a grain elevator facility located along the Missouri River in Nebraska City, Otoe County, Nebraska. The facility consists of a concrete grain elevator, a metal drive-through, an office and scale, and a shower room, all of which were built in 1957. The facility also includes a service garage, a warehouse, a tank, and a barge loading facility. The facility receives and moves grain by both rail and barge. The elevator can load 25 railroad-car units simultaneously. The land has been assessed at $25,070 since 1985, and its valuation is not now in dispute. The elevator has a stipulated capacity of 970,000 bushels. In 1997, the Otoe County assessor's office raised the assessed value of the improvements by 5 percent from $1,036,975, its 1996 assessed

value, to $1,088,825. At that assessed value, the price per bushel of capacity is $1.12.

DeBruce Grain protested the proposed 1997 valuation of its grain elevator facility. There is no verbatim transcript of the hearing before the Board in the record on appeal, and this appeal proceeds on this basis. However, as reflected in the "Property Valuation Protest," filed June 30, 1997, DeBruce Grain requested a valuation of $25,070 for the land and $275,000 for the improvements, for a total value of $300,070. The handwritten stated reason was as follows: "Local elevators appraised at considerably lower value per bushel. Purchased Percival elevator for 18¢ per bushel." As also reflected on the protest, the county assessor recommended "[n]o change." The Board approved the assessor's recommendation of $1,113,895 ($1,088,825 for improvements and $25,070 for land) and denied DeBruce Grain's protest. DeBruce Grain then appealed to the Commission.

At the hearing before the Commission, Paul DeBruce represented his company. Only DeBruce and Robert Dickey, the Otoe County assessor, testified. Their testimony is summarized below. The documentary evidence consists of six exhibits. Exhibit 1 is a document entitled "Appeal to Tax Equalization and Review Commission." It contains the legal description of the property, and under a section headed "Reason for Appeal: Be Specific and attach exhibits" is a list of seven exhibits. That list and the attached exhibits refer to the sales and appraisals referred to in DeBruce's and Dickey's testimony. Exhibit 2 consists of "Points to Consider" and therefore amounts to argument. Exhibits 3 and 4 are the assessor's property record cards for the Farmers Co-ops located in Burr and Palmyra, respectively. Exhibit 5 is a "Cost Approach" worksheet on the subject property, and exhibit 6 is a similar worksheet on an additional building on the subject property.

DeBruce testified that he has worked around elevators all of his life and that in 1978 he started DeBruce Grain. He testified that the company has facilities in 12 locations in 4 or 5 states and that he has been involved in the acquisition of such facilities in the Midwest for the past 20 to 25 years. He specifically testified that he has "looked at probably 200 different facilities

in putting together the group of facilities that DeBruce Grain now has."

DeBruce testified that the overall market for grain elevators "continues to be marginal at best." DeBruce testified that a number of grain elevators have traded in the area of 6 to 22 cents per bushel. DeBruce offered exhibit 1, which included a document entitled "Comparable Sale Summary." The summary listed six different elevators (three in Nebraska, two in Kansas, and one in Iowa), their capacities, and their price per bushel. The capacities ranged from 83,764 bushels to 24 million bushels. The price per bushel ranged from 40 cents per bushel for the smallest facility to 5.8 cents per bushel for the largest facility. According to DeBruce, smaller facilities will trade at a higher cost per bushel due to the "inherent handling equipment."

Exhibit 1 also included a document entitled "Local Elevator Tax Appraisals." This document listed four other Nebraska City elevators with capacities ranging from 770,000 bushels to 1,080,000 bushels and appraised values ranging from $24,505 to $451,685. The appraised values per bushel ranged from 2.9 cents to 41.8 cents. DeBruce admitted that the capacity per bushel numbers were inflated because the appraised values included the value of the land and not just the value of the improvements.

At the hearing, DeBruce testified concerning some of the facilities mentioned in the above documents. DeBruce testified that "the best representation" of a comparable facility was either the Monroe or the Percival facility. These facilities, which had bushel capacities of 7,930,000 and 654,000, respectively, both traded at approximately 18 cents per bushel. However, DeBruce admitted that he bought the Percival facility at an auction and that it is an entirely steel storage facility. According to DeBruce, the cost of constructing a concrete building is significantly higher than the cost of constructing a steel building.

DeBruce also compared his facility to the High Plains Grain Company facility (Bartlett), which is also located in Nebraska City. This facility was included in DeBruce's local elevator tax appraisals list. According to DeBruce, the Bartlett elevator, which also had both rail and barge loading capabilities, has a capacity of 1,080,000 bushels and an appraised value of

$451,685, for an appraised value per bushel of 41.8 cents. However, DeBruce admitted that the concrete portion of the Bartlett elevator held only 150,000 bushels and that the remainder was contained in two steel tanks. DeBruce also admitted that the Bartlett facility did not have the capability to load 25 railroad cars at once.

With respect to recent sales, DeBruce testified that he had bought four elevators over the last "couple of years" and that he paid up to 40 cents per bushel for all concrete facilities. DeBruce further testified that within the last 6 months, his company had acquired a 100-percent concrete facility in Amarillo, Texas, for 18 to 19 cents per bushel. DeBruce testified that the facility could load and unload 100-car trains in under 15 hours. DeBruce further testified that 1½ years previously he had purchased an elevator in the Texas panhandle at approximately 45 cents per bushel.

Concerning his valuation of the DeBruce Grain elevator, DeBruce testified that his price per bushel figure was 30 cents. DeBruce explained that grain elevators are not like apartment buildings or houses, in that they are not easy to find comparables for. According to DeBruce,

> Grain elevators are — don't have any of those attributes. I could probably give you an argument that the flat building is worth less than — even less than 10 cents, but that didn't seem like a reasonable approach. Is this facility worth 35 cents instead of 30 cents? Those are difficult arguments.

Dickey, the Otoe County assessor, also testified at the hearing. Dickey testified that the assessed value for improvements for 1997 was done by John Fritz of Fritz Appraisal Company under the cost approach from the Marshall-Swift manual. Dickey admitted that the records that Fritz used in arriving at the 1997 value were those maintained as part of his business as the Otoe County assessor. Dickey testified that the concrete elevator had a 50-percent depreciation level, that the drive-through had a 65-percent depreciation level, that the shower room had an 80-percent depreciation level, that the warehouse had an 80-percent depreciation level, that the barge loading facility had a 65-percent depreciation level, and that the tank had a 20-percent depreciation level. Dickey further testified that the office had

been built in 1994 and that its only depreciation involved the basement — a 50-percent level. Dickey further testified that in arriving at these values, each element of the facility was measured and recorded in the assessor's business records.

When asked whether the Marshall-Swift manual identifies specific facility economic depreciation, Dickey testified that he did not think so but stated that such was "up to the appraiser." Additionally, the following conversation took place, apparently concerning the value at which Fritz appraised the DeBruce Grain facility:

> Q [DeBruce] Okay, so that was a very subjective — is it fair to say that was a very subjective number on the part of the appraiser?
>
> A [Dickey] Well, the appraiser, and their expertise and their line, their judgment, just like it is a referee on the football field or anybody else. It's part of their business.

Dickey admitted that he does not do appraisals.

When asked why there was an increase from the 1996 valuation to the 1997 valuation, Dickey testified: "All the commercial improvements were increased 5 percent to get us into the range of — to meet the state guidelines, 92 to 100 percent." Dickey admitted that such was an across-the-board increase. Dickey further testified that the value of the DeBruce Grain facility had increased in both 1995 and 1996 due to the addition of new facilities. When asked whether it was a professionally accepted appraisal practice to consider the valuation of properties strictly based on the appraised value per bushel, Dickey testified that "it would be quite confusing."

Concerning the Bartlett elevator, Dickey testified he had personally viewed both the DeBruce Grain and the Bartlett elevators. According to Dickey, the Bartlett elevator's steel tanks were "getting quite badly rusted," and "in [Dickey's] mind, it's of a lesser condition." Dickey also testified that he did not think that the Bartlett elevator had the capacity to load multiple railroad cars simultaneously. Dickey further testified that the Bartlett facility was 15 or 16 years older than the DeBruce Grain facility.

Dickey testified that the most comparable elevators were those located in Burr and Palmyra, and he offered the property record cards of such facilities, which DeBruce objected to on

the grounds that they had not previously been made available to him. The Burr facility, which has a capacity of approximately 661,000 bushels, had an assessed value on the improvements of $368,000, for a value of 55 cents per bushel. However, Dickey testified that the Burr facility did not have any rail facilities and that such was the reason for the difference between the assessed values of the Burr and DeBruce Grain facilities. Dickey testified that the Palmyra facility had a capacity of 143,900 bushels and an assessed value of $260,000, for a total value of $1.84 (actually, $1.81) per bushel. Dickey explained that it was a newer facility and that it has not had the amount of depreciation that other facilities have had. Dickey admitted that the Palmyra facility is about 10 years newer than the DeBruce Grain facility.

With one member dissenting, the Commission concluded "as a matter of law that [the decision appealed from] was neither unreasonable nor arbitrary" and affirmed the Board's decision. In its written decision, the Commission made specific findings of fact. Excluding the formal and procedural findings, the Commission found:

> IX. That the comparables chosen by the Taxpayer are not truly comparable to the subject property.
>
> X. That the assessed value of the subject property for tax year 1997 is supported by the evidence adduced by Appellee.
>
> XI. That no evidence has been adduced to establish that the decision of the Appellee was unreasonable or arbitrary.

DeBruce Grain now appeals.

ASSIGNMENTS OF ERROR

DeBruce Grain contends that the Commission erred (1) in determining that the assessed value of the property for the tax year 1997 was supported by the evidence adduced by the Board; (2) in determining that no evidence had been adduced to establish that the decision of the Board was unreasonable or arbitrary; (3) in determining that the comparables chosen by DeBruce were not truly comparable to the property; and (4) in allowing the introduction of the Burr and Palmyra property record cards, when such exhibits had not been timely exchanged in advance of the hearing as required by the Com-

mission's notice of hearing pursuant to 442 Neb. Admin. Code, ch. 5, § 004.08 et seq. (1996). Our resolution of this appeal combines the first three assignments of error and renders consideration of the last one unnecessary.

STANDARD OF REVIEW

[1,2] Our review of a final decision of the Commission is for error on the record of the Commission. Neb. Rev. Stat. § 77-5019 (Supp. 1997); *Lancaster Cty. Bd. of Equal. v. Condev West, Inc., ante* p. 319, 581 N.W.2d 452 (1998); *J.C. Penney Co. v. Lancaster Cty. Bd. of Equal.*, 6 Neb. App. 838, 578 N.W.2d 465 (1998). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Condev West, Inc., supra*; *J.C. Penney Co., supra.*

ANALYSIS

Commission's Standard of Review.

[3,4] We review the Commission's decision for error on the record, but the Commission's standard of review is determined by Neb. Rev. Stat. § 77-1511 (Reissue 1996), which provides:

> The . . . Commission shall hear appeals . . . as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.

Taxpayer's Burden.

[5] District court decisions made before the development of the Commission maintain viability now that the Commission has taken over the district court's role. *Condev West, Inc., supra*; *J.C. Penney Co., supra.* But before the Commission existed, the Nebraska Supreme Court announced the rule in determining whether to affirm the decision of a county board of equalization as follows:

> "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board."

Condev West, Inc., ante at 329, 581 N.W.2d at 459. Accord *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989).

Our analysis must start with the above presumption that the Board faithfully performed its duties and with the recognition that DeBruce Grain has the burden of persuasion. After several readings of the record, we are unable to find any opinion concluding that the subject property had a certain actual value, or any other opinion which would establish a basis for changing the assessed value of the subject property to some figure lower than that determined by the Board. We are not impressed with the Board's evidence, but absent valid evidence contradicting the Board's finding, the Commission and this court must give effect to the presumption.

[6] We reiterate that we are not impressed with the Board's evidence. From the record, it appears that DeBruce is a forthright man, who is very knowledgeable about the grain business and the value of grain handling facilities in the Midwest. An owner of a specific type of facility, who is familiar with the facility and the value of such facility, is undoubtedly qualified to render an opinion on the fair market value of the subject property. See, generally, *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). See, also, *Johnson's Apco Oil Co. v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979). Clearly, DeBruce is qualified to give such an opinion; however, he never rendered one. The closest he came was when he was asked, "And that is less than what you're asking for this

one to be at, or more than what you want this one to be at per bushel? What's your per bushel figure at?" And he answered, "My per bushel is about 30 cents."

[7] DeBruce chose to attempt to prove the value of the subject property by showing sales and appraisals of similar property. His testimony establishes that the comparables are not really comparable, and the Commission specifically, and correctly, found that the sales and appraisals were not truly comparable. We will turn to eminent domain case law for guidance and explanation.

> We recognize that recent and comparable sales of real estate may be admissible as evidence in condemnation cases for two different purposes. They may be admitted as substantive proof of value of the condemned property or as foundation and background for an expert's opinion of value. [Citation omitted.] The rule on comparability is not as strict for foundational purposes as it is when the comparable is used as direct and independent proof of value. However, there still must be a certain degree of similarity for both purposes . . . .

Clearwater Corp. v. City of Lincoln, 207 Neb. 750, 754, 301 N.W.2d 328, 330 (1981).

Because DeBruce did not give an opinion of the fair market value of the property, it follows that the sales he relied upon were introduced only as independent proof of value. The evidence at best shows that the sales relied upon were of grain handling facilities. There is no testimony that the property sold in the sales relied upon were similar to the subject property, although, upon cross-examination, there is considerable testimony about differences in the various property, as well as some similarities. It would probably be difficult to establish that improved property located at a distance from the subject property is sufficiently similar to be relevant as independent evidence of value. An expert using such sales as foundation for an opinion on value can frequently explain the similarities and differences and thus use such sales as background. However, the Commission was clearly not in error when it held that the sales were not comparables for purposes of independent proof.

We point out that some of the information adduced about other grain facilities was for the purpose of showing the ass

assessed values of similar properties, rather than the sale prices of those properties. Comparing assessed values of other properties with the subject property to determine actual value has the same inherent weakness as comparing sales of other properties with the subject property. The properties must be truly comparable. Therefore, we have not considered what relevancy, if any, evidence of other assessments would possess if the other facilities were shown to be similar to the subject property.

We therefore find no error on the record and affirm the decision of the Commission.

AFFIRMED.

CLINTEN LACKMAN, APPELLEE, V. ROGER ROUSSELLE AND VIRGINIA ROUSSELLE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, AND JACK LACKMAN, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

585 N.W.2d 469

Filed September 29, 1998. No. A-97-489.

1. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
3. **Directed Verdict: Waiver: Appeal and Error.** There is no waiver of any error in the ruling on a motion for directed verdict when such motion is renewed at the close of all evidence.
4. **Joint Ventures.** A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. There must be an agreement to enter into an undertaking; the parties must have a community of interest in the object of the undertaking and a common purpose in performance; each of the parties must have an equal voice in the manner of performance and control over the agencies used. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship. And there must be something more than mere sharing of profits; there must be some active participation in the enterprise and some control of the subject matter thereof or property engaged therein.
5. **Joint Ventures: Partnerships.** The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist.

6. **Joint Ventures.** The primary criterion for a joint venture is that the parties enter into an agreement as owners or principals in the endeavor. Therefore, even a close relationship between two parties does not create an implied joint venture.
7. **Joint Ventures: Evidence.** There must be evidence of a common pecuniary interest between parties alleged to be involved in a joint enterprise.
8. **Negligence: Marriage.** Generally, the mere existence of a marriage relationship does not have the effect of making the negligence of one spouse imputable to the other, but the existence of such a relationship will not preclude the negligence of one spouse from being imputed to the other.
9. **Negligence: Damages.** Contributory negligence chargeable to a claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, unless the contributory negligence is equal to or greater than the total negligence of all persons against whom recovery is sought.
10. **Negligence: Joint Ventures: Liability: Damages.** In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several. In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.
11. **Jury Instructions: Appeal and Error.** Whether requested to do so or not, a trial court has the duty of instructing on issues presented by the pleadings and the evidence, and the failure to do so constitutes prejudicial error.
12. **Appeal and Error.** Appellate courts reserve the right to note plain error which was not complained of at trial.
13. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
14. **Jury Instructions: Appeal and Error.** In instances of plain error, appellate courts will reach errors in jury instructions despite counsel's lack of objection to, request for, or tender of a proper instruction.
15. **Liability: Contribution.** The prerequisite for contribution is that the party seeking contribution and the party from whom it is sought must share a common liability.
16. ____: ____. Contribution is the sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.
17. ____: ____. A common liability to the same person must exist in order for there to be contribution.
18. **Jury Instructions: Negligence: Contribution.** A jury must be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence.
19. **Negligence: Tort-feasors: Liability.** A system of allocation of fault that ignores patently responsible tort-feasors is needlessly impractical if a single action can include and adjudicate all parties potentially liable for a plaintiff's injuries.

20. **Negligence: Tort-feasors: Contribution.** Efficient and equitable enforcement of contribution among multiple tort-feasors requires enforcement of contribution in the same proceeding.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellants.

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

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee Jack Lackman.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

This case stems from a low-speed collision of two pickup trucks on what is best described as a dirt road in a farm field. The appeal concerns whether a farmer husband and his homemaker wife are involved in a joint enterprise so as to impute the husband's negligence to the wife. Second, we discuss the failure to instruct the jury that it must separately assess any economic and noneconomic damages sustained by the plaintiff.

FACTUAL BACKGROUND

This accident occurred on June 29, 1992, when a 1979 blue Ford pickup owned by Roger Rousselle and Virginia Rousselle and driven by Roger collided with a 1979 maroon GMC pickup driven by Jack Lackman, the father of the plaintiff, Clinten Lackman, who was a passenger in his father's pickup. The Lackman pickup was traveling northbound, and the Rousselle pickup was headed south. Both drivers had an unobstructed view as they approached each other on this essentially flat dirt road located near the Nebraska-Wyoming border in a farm field 2 miles north and one-fourth mile west of Lyman, Nebraska. On the west side of the road was a cornfield with 2- to 3-foot-tall corn, and to the east was a beanfield with a gravity irrigation pipe running parallel to the road to irrigate the beanfield. We shall use the term "field road" as the most accurate description of the locale of the collision.

There was a headgate for the irrigation ditch approximately 100 to 200 feet south of the accident site. Jack and Clinten had been at the headgate and were northbound from there on the field road as Roger proceeded southbound toward the headgate. According to Roger, Clinten was on the passenger side looking straight ahead, and Jack was looking straight at Roger. Roger observed the Lackman vehicle slowing down, and he applied his brakes. The vehicles hit each other at a low-speed impact. Neither Roger nor Jack were injured, and both vehicles sustained damage only to their bumpers. The vehicles came together in an offset position, with the Lackman vehicle generally in the middle of the road and the Rousselle vehicle on the right side of the road. A postcrash photograph of the vehicles on the field road before they were moved is in the record. The offset was described by Roger as 21 inches off the center of the road. Three different experts testified as to the velocity at the time of impact and placed it at 6 m.p.h., 7 to 9 m.p.h., and 8.6 m.p.h. The testimony of the Lackmans was that they were checking the pipeline for leaks as they proceeded northbound and that Clinten was on the passenger side with his arm, head, and upper body out of the window looking for leaks in the pipe. Clinten testified that his father was driving slowly and close to the pipeline. Clinten testified that the vehicles could have actually passed on the road without hitting each other.

Jack testified that he was driving on the hill "[n]ot very fast." Jack testified that he was not looking down the road, rather, he was looking at the irrigation pipes and gates prior to impact. Jack testified he saw the Rousselle pickup out of the corner of his eye, looked up, and stopped prior to impact. Jack said that at impact, he was jarred back a little and that he had grabbed the steering wheel to brace himself.

At the time of the accident, Clinten was working for his father's farming operation doing such things as cutting and baling hay, cultivating corn, driving equipment, setting gravity irrigation tubes, and whatever else his father told him to do in the farming operation on a day-to-day basis. Clinten stated that he had been farming full time since the summer of 1989 after he graduated from high school but that he did not file an income tax return until 1995. Clinten has never been paid a wage, a

bonus, or a share in the crops. Instead, his father simply provided for his needs, including putting money in his checking account. Clinten claimed a personal injury from the accident in the nature of torn interspinous ligaments in his neck which would require a surgical procedure at the C6-7 level of the vertebrae. Clinten wore a cervical collar for 3 months after the accident, but he had continued to work for his father in the farming operation and did not miss any work.

The case was tried to a jury in Scotts Bluff County District Court in April 1997. Roger and Virginia brought Jack into the action as a third-party defendant. The jury returned a verdict in favor of Clinten and against both Roger and Virginia in the amount of $175,000. The jury imputed the negligence of Roger to Virginia under the joint enterprise doctrine. Under the court's instructions, the jury assessed the percentage of negligence of the parties as follows: 0 percent for Clinten; 90 percent for Roger; and for Jack, 10 percent. Using the jury's findings, the trial judge entered judgment against Roger and Virginia and in favor of Clinten in the amount of $175,000, plus taxable court costs, and a second judgment against Jack in favor of Roger and Virginia in the amount of $17,500, plus 10 percent of the taxable court costs. Motions for new trial were filed and overruled, and Roger and Virginia appealed to this court. Jack has cross-appealed with respect to whether the Rousselles are entitled to contribution from him and, if so, the extent of such contribution.

ASSIGNMENTS OF ERROR

Roger and Virginia assign seven separate errors as follows: The trial court erred (1) in failing to instruct the jury on the general standard of care by which Clinten's conduct was to be judged, "after having instructed the jury on the driver's standard of care"; (2) in failing to instruct the jury to make a separate finding as to the amount of economic and noneconomic damages in a case involving the allocation of negligence between alleged joint tort-feasors; (3) in giving an instruction on future loss of earning capacity; (4) in admitting without proper foundation hearsay evidence from a motor vehicle accident investigation report; (5) in submitting the question of imputing Roger's negligence to Virginia under the joint enterprise doc-

trine; (6) in failing to submit the question of imputing Jack's negligence to Clinten under the joint enterprise doctrine; and (7) in failing to grant the Rousselles' motions for a directed verdict, judgment notwithstanding the verdict, and new trial.

STANDARD OF REVIEW

[1,2] A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

ANALYSIS

Were Roger and Virginia Involved in Joint Enterprise?

Virginia was sued by Clinten. His claim was that Roger's negligence should be imputed to Virginia under the joint enterprise doctrine, thereby making her jointly and severally liable with Roger. At the close of Clinten's evidence, Roger and Virginia moved for a directed verdict in Virginia's favor on this issue, but the court overruled that motion and submitted the question of joint enterprise to the jury.

[3] Clinten asserts that Roger and Virginia waived any error in the trial court's ruling denying their motion for a directed verdict on this point at the close of Clinten's evidence, because they proceeded to introduce evidence thereafter. See *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996). However, our examination of the record shows that counsel for Roger and Virginia renewed the motion for directed verdict at the close of all evidence and that the motion was denied. There is no waiver of any error in the ruling on a motion for directed verdict when such motion is renewed at the close of all evidence. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). Other than this, Clinten's brief does not contain any argument on this point.

The trial court's instructions imposed the burden upon Clinten to establish four elements of joint enterprise:

> 1. That Roger and Virginia Rousselle had an expressed or implied agreement to engage in a business activity.
>
> 2. That they had a mutual interest in the profits or benefits of the business activity.
>
> 3. That they had equal authority to control the performance of the business activity, even if some of them g[a]ve up or never exercise[d] that authority.
>
> 4. That Roger Rousselle acted with the authority of Virginia Rousselle; or did the kind of thing the joint venture is in business to do; did it substantially within any authorized limits on time and place; and did it with at least the partial intention of furthering the interest of the joint venture.

[4-6] The Rousselles cite *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993), as setting forth the elements of a prima facie case against a defendant under the joint enterprise doctrine. The court in *Global Credit Servs.* held:

> A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. . . . There must be an agreement to enter into an undertaking; the parties must have a community of interest in the object of the undertaking and a common purpose in performance; each of the parties must have an equal voice in the manner of performance and control over the agencies used. . . . The mere pooling of property, money, assets, skill, or knowledge does not create the relationship. . . . And there must be something more than mere sharing of profits; there must be some active participation in the enterprise and some control of the subject matter thereof or property engaged therein. . . . The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist. . . . The primary criterion is that the parties enter into an agreement as owners or principals in the endeavor. . . . Therefore, even a close relationship between two parties does not create an implied joint venture.

(Citations omitted.) *Id.* at 690-91, 508 N.W.2d at 844.

[7] To the extent that it was not sufficiently delineated in earlier cases, *Winslow v. Hammer*, 247 Neb. 418, 426, 527 N.W.2d 631, 636 (1995), makes it clear that in addition to the foregoing elements of joint enterprise, there must be evidence "of a common pecuniary interest between the parties alleged to be involved in the joint enterprise." See *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989). *Winslow* states that the court "officially adopt[ed] the definition of joint enterprise" set forth in the Restatement (Second) of Torts, § 491, comment *c.* at 548 (1965). The Restatement provides that the four essential elements are

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

The question of imputing Roger's negligence, if any, to Virginia involves the imputation of a farmer husband's negligence to his homemaker wife. We do not find a Nebraska case factually on point. Nonetheless, in *Morse v. Gray*, 166 Neb. 557, 89 N.W.2d 842 (1958), the court said that the negligence of the husband cannot be imputed to the wife where there is nothing in the evidence adduced to show any joint enterprise between the wife and the husband. The court in *Morse* quoted from *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955): " 'The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her . . . .' " *Morse*, 166 Neb. at 566, 89 N.W.2d at 848.

[8] Here, Roger was alone in the vehicle, and any imputation of negligence must be premised on the alleged joint farming enterprise between Roger and Virginia. We have recited the instructions given by the court to the jury on this issue, as well as the four elements from the Restatement which must be proved. In examining the record in light of the four elements, we see two key issues: whether there was proof of an express or an implied agreement to enter into a joint enterprise between Roger and Virginia and whether there was proof that Roger and Virginia had equal authority to control the performance of the

farming operation. These are the first and fourth elements of the joint enterprise test. Generally, the mere existence of a marriage relationship does not have the effect of making the negligence of one spouse imputable to the other, but the existence of such a relationship will not preclude the negligence of one spouse from being imputed to the other. 65A C.J.S. *Negligence* § 159 (1966).

The Rousselle family had lived in San Jose, California, previously, where Virginia was employed as a registered nurse and Roger, who has a degree in electrical engineering, was a computer manager. Roger, who did not have a farm background, began farming when the family moved to Lyman. He farmed a piece of land owned by Virginia's mother, as well as land jointly owned with Virginia. The farming operation involved grain, as well as some cattle. Upon their move to the Lyman area in 1982, Virginia stopped working as a nurse because of a young and growing family. The Rousselles' four children, Melissa, Cara, Robert, and Ray, were ages 21, 19, 13, and 11, respectively, at the time of trial. Virginia testified that Roger was responsible for the day-to-day farming activities on their land, as well as her mother's land. She denied participating in any of the actual farming. Virginia testified that she never tilled the soil, prepared it for planting, drove a tractor, applied fertilizer or herbicides, cultivated, planted, or harvested. She admitted to setting irrigation tubes once when she went with her son who had been told by Roger to check water in a particular field. Virginia stated that she does not help Roger make decisions as to when or what crops are to be planted or what chemicals are to be used and that she does not know Roger's plans in the morning when he leaves the house unless he tells her. Virginia said she controls none of Roger's farming activities. Virginia testified that she did not make decisions about when to sell crops or to whom, nor did she know how much crops were sold for, nor did she check prices with the grain elevators.

Virginia's involvement in the farming operation can be summarized by stating that she pays the bills, both family- and farm-related, and on a very infrequent occasion, feeds cattle, sets an irrigation tube, or checks a headgate. All of the farm machinery and vehicles and land (other than her mother's land) is jointly

owned, she and Roger file joint income tax returns, and she signs the notes at the bank. However, her testimony was that "Roger goes in and talks to the banker without me, gets the note, and we sign it, and [he] takes it back in." Virginia's testimony reveals much about how the family operates:

> Q. So, you benefitted from the farming just as Roger did?
>
> A. Yes.
>
> Q. Did you ever tell Roger that you thought he should do something different to the farming?
>
> A. No.
>
> Q. Why not?
>
> A. He wouldn't have listened to me.
>
> Q. Why wouldn't he listen to you?
>
> A. I don't know nothin' [sic] about farming.
>
> Q. So, you delegate that — you give him that right to perform that part of your relationship?
>
> A. When we moved back to farm, that is what he was going to do to make a living was farm.
>
> Q. So, you delegate that to him and you take care of the household?
>
> A. No. That is our understanding. I didn't delegate.
>
> Q. It was your understanding that you would take care of the children and the house, and he would do the farming as your livelihood?
>
> A. Yes.
>
> Q. And you didn't do any more nursing?
>
> A. No.

Roger testified to nothing different about Virginia's involvement in the farming operation, nor was any other evidence offered by Clinten to show that Virginia had a different or more substantial role in the farming operation.

The most recent pronouncement of the Nebraska Supreme Court on joint enterprises is *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995). The court emphasized the element of "a community of pecuniary interest in the purpose among the members," citing *Maselli v. Ginner*, 119 Idaho 702, 809 P.2d 1181 (Idaho App. 1991), which in turn relied upon William L. Prosser, The Law of Torts § 72 (4th ed. 1971): " ' "By limiting the

application of the doctrine to an enterprise having a business or pecuniary purpose, we will be avoiding the imposition of a basically commercial concept to non-commercial situations which are more often matters of friendly or family cooperation and accommodation." '" *Winslow*, 247 Neb. at 425-26, 527 N.W.2d at 636.

We believe that this succinct reasoning is particularly applicable to the evidential record here, which really shows nothing more than a marriage between Virginia and Roger where each works: she runs a household with four children, and he provides the family's livelihood by farming. We find no evidence in the record to support the first and fourth elements of the test for joint enterprise. There is no evidence of an agreement, express or implied, that Roger and Virginia will jointly engage in the business of farming. The only thing resembling an agreement in the record is that which obviously and naturally occurs because of their shared interests as husband and wife working together to raise their family. In short, the evidence proves a family relationship, not a commercial one. Second, there is no evidence whatsoever that Virginia has the right of control or an equal voice in the farming operation. In fact, the evidence is abundantly clear that she has no knowledge, interest, control, or voice in how the farm will be run. The fact that she manages what can be described as the family checkbook and pays farming-related expenses at her husband's direction does not constitute an agreement to jointly engage in a common pecuniary enterprise with the right to equal control. We recognize that the element of control is not necessarily a matter of the exercise of control, but the right to do so. Nonetheless, there is no evidence here that Virginia had such a right concerning the farming operation, and certainly the record is undisputed that she in fact exercised no control over the farming operation.

The Iowa Supreme Court in *Farm Bureau Service Co. of Hardin Cty. v. Bavender*, 217 N.W.2d 560 (Iowa 1974), described a husband-and-wife farming operation similar to that evidenced in the record here, except that the wife did chores and fieldwork when needed, whereas the husband took care of the finances. The Iowa court there upheld the trial court's refusal to find that the husband and wife were engaged in a joint enter-

prise, using essentially the same tests we have previously outlined from Nebraska jurisprudence. The *Bavender* court held:

> The evidence in this case is totally lacking with regard to any voluntary agreement between the defendants to engage in a joint venture in the operation of their farming enterprise. Instead, the evidence demonstrates a typical joint ownership of property and the pooling of assets for common advantage between a husband and a wife. Certainly the evidence establishes the wife occasionally assisted with the chores and the field tasks, as did the children of the parties. However H. L. Bavender was not the employer of Helen Bavender, nor was he her business partner.

Id. at 563.

The *Bavender* court also stated: "We are not willing to impute the rule of joint venturer into the role of spouse. The evidence establishes conclusively to us that the activity of Helen Bavender was that traditionally associated with her role as a farm housewife." *Id.* at 564.

Some 24 years after *Bavender*, we are reluctant to label any marital relationship in the late 1990s as a "traditional" farm household. Nonetheless, we are convinced that the joint enterprise doctrine, in order to be applied to a husband and wife who happen to live on a family farm, must involve much more proof than that offered about the Rousselles on the central issues of the parties' agreement and the equality of control. In *Popejoy v. Steinle*, 820 P.2d 545 (Wyo. 1991), the Wyoming Supreme Court drew a distinction between joint enterprise, which is for the mutual benefit or pleasure of the parties, and joint venture, which are business ventures with commercial and profit motives, but the court declined to find joint venture in the wife's trip, during which an accident occurred, to purchase a calf for the daughter to raise, despite substantial evidence of joint venture between the husband and wife in a general ranching operation. The Wyoming court limited its analysis to whether the ranch couple was "engaged in a joint venture at the time of [the] accident." *Id.* at 551. In *G. R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 362 S.E.2d 807 (1987), the wife's use and enjoyment of profits from the former husband's farm business did not make the wife liable for the husband's business

farm debts, including an insurance policy on the husband's farm which she had procured prior to their divorce. The wife utilized the profits merely for living and subsistence purposes to which she, as the husband's wife, was entitled. See *Wood v. Claussen*, 207 S.W.2d 802 (Mo. App. 1948) (joint ownership of farm property without element of joint venture, i.e., joint carrying on of business enterprise for profit, prevents imputed liability from husband to wife).

Consequently, in the present case, in view of the evidence and the applicable law, the trial court should have granted the requested directed verdict in favor of Virginia, as there was inadequate proof as a matter of law of a joint enterprise. Thus, the district court is directed to dismiss the case as to Virginia.

Failure to Instruct Jury to Make Separate Findings for Economic and Noneconomic Damages.

[9,10] The date of this accident was June 29, 1992, which means that by virtue of Neb. Rev. Stat. § 25-21,185.07 (Reissue 1995), the newer rules with respect to contributory negligence and comparative negligence are applicable. Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) provides that the contributory negligence chargeable to a claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, unless the contributory negligence is equal to or greater than the total negligence of all persons against whom recovery is sought. In the instant case, the jury made an express finding that Clinten's negligence was 0 percent. Therefore, this statute does not apply to reduce Clinten's recovery. However, Roger argues that a related statute, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), does apply. This statute provides:

> In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.
>
> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for

> noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

[11-14] Clinten sought recovery for both economic and noneconomic damages, and both types of damages were submitted to the jury. Roger's argument is that notwithstanding that Jack was a third-party defendant, the jury should have determined the percentage of negligence attributable to each Jack and Roger and then the second paragraph of § 25-21,185.10 quoted above would determine the precise nature and extent of their liability. Roger argues that Roger's and Jack's liability would be joint and several for economic damages but that there would be only several liability for noneconomic damages. See Neb. Rev. Stat. § 25-21,185.08 (Reissue 1995) (defining economic damages as "monetary losses" and noneconomic damages as "subjective, nonmonetary losses"). The jury, as instructed, separately assessed the percentage of negligence chargeable to Roger and Jack. But the trial court failed to require the jury to separately determine Clinten's economic and noneconomic damages. Roger acknowledges that no party requested that the jury make such a finding, but he relies upon the rule that whether requested to do so or not, a trial court has the duty of instructing on issues presented by the pleadings and the evidence, and the failure to do so constitutes prejudicial error. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). Appellate courts reserve the right to note plain error which was not complained of at trial. *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995) (Lanphier, J., dissenting). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995). That appellate courts will reach errors in jury instructions despite the lack of objection to, request for, or tender of a proper instruction, cannot be doubted. See *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998).

[15-17] Roger sought contribution from Jack by alleging that Jack was also negligent, which negligence proximately contributed to any damages suffered by Clinten. The prerequisite for contribution is that the party seeking contribution and the party from whom it is sought must share a common liability. *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995). Contribution is the sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification. *Id.* A common liability to the same person must exist in order for there to be contribution. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982). In *Smith, supra*, we disapproved the use of NJI2d Civ. 3.42 entitled "Concurring Cause" in a contribution action, saying that instructing that one person may be responsible for the entire injury when the negligence of two people allegedly combined to proximately cause the injury is the antithesis of contribution.

With this background about contribution, we return to the assigned error. In the case at hand, there is no claim that Roger and Jack were engaged in a joint enterprise which would make them jointly and severally liable for both economic and noneconomic damages under § 25-21,185.10. Without a joint enterprise, the statute makes them jointly and severally liable for Clinten's economic damages, but only severally liable for his noneconomic damages. See § 25-21,185.10. When there are multiple defendants, the plain language of § 25-21,185.10 requires that the trial court instruct the jury to make separate findings as to the amount of economic and noneconomic damages, which are defined in § 25-21,185.08, assuming, of course, that the evidence justifies the submission of either type of damage. This must be done in order for the statute to be correctly applied. Such findings determine the amount for which defendants such as Roger and Jack will be jointly and severally liable and the amount for which they will be only severally liable. The trial court erred in failing to instruct the jury to determine the amount of Clinten's economic and noneconomic damages.

[18] And, of course, the actual amount of the individual's liability is directly dependent on how the jury divides the 100 percentage points of negligence between Clinten, Roger, and Jack, because § 25-21,185.10 requires proportionality. The Nebraska

Supreme Court recently held that it is plain error not to instruct the jury on the effects of their allocation of negligence. *Wheeler, supra.* In *Wheeler*, the court said that § 25-21,185.09 contains a clear mandate from the Nebraska Legislature that the jury be "fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence." *Wheeler*, 254 Neb. at 238, 575 N.W.2d at 619. See, also, *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998) (reversing and remanding for new trial where jury was not instructed on effect of its allocation of negligence). In *Fiscel*, the need for such an instruction was described as "mandatory." *Id.* at 684, 578 N.W.2d at 57. *Wheeler* requires that the instruction on the effect of allocation be given when the cause of action arises after February 8, 1992, and "in which contributory negligence is a defense." *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620. Both conditions are satisfied here. Therefore, under *Wheeler* and *Fiscel*, the trial court in the instant case also erred in not instructing the jury about the effect of the allocation of negligence. In both *Wheeler* and *Fiscel*, the court found plain error from such failure, as we do here.

[19,20] While we recognize that *Wheeler* and *Fiscel* are the most basic "plaintiff against defendant" cases, whereas this case involves a third-party claim by Roger against Jack, we do not see this difference as mandating a different outcome. The heart of the rationale of *Wheeler* is that the jury should not stumble blindly about trying to guess what effect its percentage allocation of negligence will have, nor should the jury try to "adjust" its damage award for the allocation without accurate information. That rationale carries just as much weight when the jury is allocating among multiple defendants, as in the present case. As pointed out in 3 Arthur Best, Comparative Negligence Law and Practice § 19.10(3)(c)(i) (1998), a system of allocation of fault that ignores patently responsible tort-feasors is needlessly impractical if a single action can include and adjudicate all parties potentially liable for a plaintiff's injuries. Efficient and equitable enforcement of contribution among multiple tort-feasors requires enforcement of contribution in the same proceeding. *Id.* Thus, the fact that Jack is a third-party defendant is of no consequence. That Jack is in the case via a third-party peti-

tion rather than sued originally by Clinten is a distinction without a difference.

Although we have already addressed two grounds for reversal, further problems are presented in the record because of how the trial court entered judgment on the jury's verdict. Obviously, the court could not enter a proper judgment because economic and noneconomic damages had not been separately assessed by the jury. Nonetheless, we think it is of some benefit in future trials to discuss the trial court's entry of judgment. The trial court entered a judgment against Roger for $175,000, or 100 percent of the total damages assessed by the jury, despite the jury's finding that Roger was only 90-percent negligent. But apparently as a form of "offset," the trial court then gave Roger a judgment against Jack for $17,500, or 10 percent of that amount. The trial judge's thought may have been to give Roger a chance to recoup 10 percent (the jury's assessment of Jack's negligence) from Jack of what Roger was to pay Clinten. But whether such judgment would actually serve to hold Roger's liability to 90 percent of the total damages is a function of whether Roger can collect $17,500 from Jack.

But most importantly, an offsetting judgment is not the result intended or required by the statute. We see § 25-21,185.10 as protecting a marginally or less culpable tort-feasor from the burden of joint and several liability for the entirety of the plaintiff's damages. This occurs under the new statute, because as between defendants, joint and several liability applies only to economic damages, when in many tort cases the greatest damages may well be noneconomic, e.g., for pain and suffering. With respect to amount of noneconomic damages, "[e]ach defendant shall be liable *only* for the amount of noneconomic damages allocated to that defendant in *direct proportion to that defendant's percentage of negligence*, and a separate judgment shall be rendered against that defendant for that amount." (Emphasis supplied.) § 25-21,185.10.

Thus, the third error was that when the trial court entered judgments upon the jury's verdict, it did not enter "a separate judgment . . . against" Roger and Jack, as the statute contemplates, for their proportional allocation of the noneconomic damages. The trial court's error in failing to require the jury to sepa-

rate economic and noneconomic damages inevitably led to the errors in the judgments entered upon the jury's verdict. Perhaps an example, in the context of this case, of how the statute should be applied will be of benefit to the trial bench and the bar.

Assuming, for illustration, that the jury had been instructed to separately assess Clinten's economic and noneconomic damages and did so at $10,000 and $165,000 respectively and using the percentages of negligence for Jack (10 percent) and Roger (90 percent) found by the jury, then the following result obtains under § 25-21,185.10. A judgment for $10,000 for economic damages should have been entered in Clinten's favor against Roger and Jack jointly and severally. A separate judgment in Clinten's favor against Roger for 90 percent of $165,000 (the noneconomic damages), or $148,500, should have been entered. Finally, a separate judgment in the amount of $16,500, or 10 percent of the noneconomic damages, should have been entered against Jack and in favor of Clinten.

Notwithstanding the absence of a request to instruct in accordance with § 25-21,185.10, the trial court must still properly instruct on material or relevant issues presented by the pleadings and the evidence. *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988). The instructions were wrong in a number of ways, and thus the verdict must be reversed and the matter remanded for a new trial.

Extent of Remand.

To this point, we have decided a number of issues. First, the trial court should have sustained Virginia's motion for a directed verdict and dismissed her from the litigation. After a complete presentation of evidence on whether Roger and Virginia were involved in a joint enterprise, so as to allow the imputation of Roger's negligence to her, there was a failure of proof. As a matter of law, there was no joint enterprise between Virginia and Roger. Accordingly, the district court is directed to dismiss Virginia from the case.

Second, the district court erred in failing to have the jury separately determine Clinten's economic and noneconomic damages and in failing to advise the jury of the effect of its allocation of negligence. Finally, the court erred in entering an offsetting judgment in Roger's favor against Jack rather than

following the procedure for joint and several liability, had economic damages been assessed, including a proportional and separate judgment for Clinten's noneconomic damages. Thus, a new trial is required.

Although not briefed by the parties, the issue now naturally arises as to whether the jury's determination that Clinten was 0-percent negligent, that Roger was 90-percent negligent, and that Jack was 10-percent negligent is binding so that the only issue on retrial is the amount of economic and noneconomic damages. The answer to that question is provided by *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), where the court held that the language from § 25-21,185.09, "[t]he jury shall be instructed on the effects of the allocation of negligence," means that the jury should be fully aware of the ramifications of its allocation of negligence "so that it may make a careful and considered determination regarding the apportionment of liability." *Wheeler*, 254 Neb. at 241-42, 575 N.W.2d at 621. Consequently, the court in *Wheeler* remanded the cause for a new trial on both damages and liability because the instruction, which was not given, affects the jury in its determination of liability and its attendant allocation of negligence. We read *Wheeler* as clear authority for the proposition that the present case must be retried on both liability and damages under proper instruction, which we believe may be found in *Wheeler, supra*; in *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998); and in this opinion. Thus, the end result is a new trial, but without Virginia.

Roger also has an evidentiary assignment of error dealing with the admission of the motor vehicle accident report prepared by a deputy sheriff. An initial objection to exhibit 7 on foundation and relevance was overruled, and the document was received into evidence. Then, a second objection was made on hearsay grounds, but the court ruled: "I have already received it now." Given that the court's ruling appears to be a matter of the timing of the objection and a retrial has been ordered, no further comment on this evidentiary point is needed.

Loss of Earning Capacity in Future.

Roger assigns error to the trial court's submission to the jury as an element of Clinten's potential damage "[t]he reasonable

value of the earning capacity plaintiff is reasonably certain to lose in the future." Roger argues that the jury was allowed to engage in speculation and conjecture as to any future loss of earning capacity, citing *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). The evidence in *Uryasz* was that the injured plaintiff had recovered about 90 percent; continued to have pain and numbness in her leg; and was unable to return to work and if she did, she would not work in a drugstore, as she could not stand on her legs that long and do a good job. An economist testified that Uryasz' future loss of earning capacity was $215,280. The Nebraska Supreme Court in *Uryasz* found that the economist's testimony concerning the plaintiff's diminution of earning capacity and its present worth was speculative and confusing to the jury. Nonetheless, the court found that the evidence, if believed, showed that the plaintiff had an injury and an impairment, in some indefinite degree, to her future earning capacity. However, relating the extent and permanency of that injury to Uryasz' job performance under the record would require the jury to engage in speculation and conjecture. In reversing the jury's verdict, the court held that the evidence "fails to prove with reasonable certainty the impairment of plaintiff's future earning capacity." *Id.* at 335, 431 N.W.2d at 625.

Examination of the record in the instant case reveals medical testimony that Clinten has sustained an injury to his cervical spine which will likely require surgical intervention. Dr. Terry Mark Himes testified with reasonable medical certainty that Clinten should have surgery to correct the motion between the C6-7 vertebrae, and the doctor described several different possible techniques. Dr. Himes described various adverse consequences of that surgery, including an accelerated rate of degenerative arthritic change. Dr. Himes gave an opinion that Clinten had suffered a 20-percent partial impairment of the whole body, that his activities would be limited, and that he would continue to experience limitations significant enough to restrict his activities in the area of farm work.

Roger relies upon *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964), to argue that the submission of loss of future earning capacity was error. In *Schwab*, the plaintiff, a

teacher, received injuries to a leg and was assigned a 10- to 15-percent disability, which was, according to the evidence, an inconvenience when she resumed teaching. The court found that there was a failure to prove with reasonable certainty that the injury impaired Schwab's earning capacity.

In dealing with the instant assignment of error, we remember that a new trial has been ordered on both liability and damages. Thus, we believe the only pronouncement we need make is that on the record before us, we cannot say that the trial court erred in submitting this element of damage to the jury on this record. But the trial court will once again need to evaluate this issue in light of the evidence at the retrial.

Cross-Appeal.

Jack has cross-appealed and assigns error to the trial court's conclusions that the Rousselles were entitled to contribution from him and that the Rousselles "were entitled to relief based on apportionment of fault." Jack also asserts that the trial court erred in failing to determine that the Rousselles were barred from recovering anything from Jack by Roger's negligence. We believe that our resolution of Roger's assignments of error dealing with the failure to instruct the jury on separate economic and noneconomic damages, as well as our commentary about the manner in which judgment was entered in this case, largely resolves the cross-appeal. However, we do take this opportunity to respond to the assertion made in brief by Jack that "two actions [were] being tried in this case, i.e., the case of Clinten Lackman against the Rousselles and the case of the Rousselles against Jack Lackman . . . each independently subject to the terms and requirements of the Nebraska Comparative Negligence Statute, to-wit, §25-21,185.07 [et seq.]" Brief for cross-appellant at 18.

We have already indicated our disagreement with this concept. In this instance, it is only the fact that Clinten sued only Roger, who then brought Jack in as a third-party defendant, which caused the parties to be lined up as plaintiff (Clinten) versus defendant and third-party plaintiff (Roger) versus third-party defendant (Jack). Procedural twists aside, this case is still a negligence action against two parties, Roger and Jack, who

are alleged to have each been negligent and a proximate cause of Clinten's damages. The basic job of the jury in this case was to determine if there was negligence, and if so by whom, and in what proportion. The jury's next task was to determine damages, separating economic from noneconomic, and then to apportion the damages according to the law of comparative negligence. To the extent feasible, we have tried to provide guidance for the retrial of this action which, as said, we do not see as two independent cases. Beyond this, no further comment is needed upon the cross-appeal. The cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MUES, Judge, dissenting.

I respectfully dissent. I disagree with that portion of the majority's decision which finds error in the failure to instruct the jury to separately determine economic and noneconomic damages and in the manner in which the trial court entered judgment. If Clinten had sued both Roger and Jack as joint tort-feasors, I would wholeheartedly agree with the majority's conclusions. But Clinten did not sue *both* Roger and Jack—Clinten sued only Roger, seeking 100 percent of his recovery.

Joinder of Tort-Feasors.

It has long been the rule in this state that a plaintiff need not join all tort-feasors as defendants in an action for damages. See *Fick v. Herman*, 161 Neb. 110, 72 N.W.2d 598 (1955). The Nebraska Supreme Court has recently reaffirmed that rule in a suit by a bank for tortious conversion where the defendant argued a third party was necessary or indispensable. In finding that the bank was not required to join all possible joint tort-feasors, the Supreme Court stated: "A plaintiff need not join all tort-feasors as defendants in an action for damages. Every joint tort-feasor is liable for all damages to which his conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person." *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 512, 571 N.W.2d 294, 301 (1997).

It has also been said that a defendant may not tender a substitute defendant to the plaintiff by pleading that the cause of

the plaintiff's injury was the act of the third-party defendant and not of the original defendant, since a person may be brought in as a third party only if he is secondarily liable to the third person, rather than directly liable to the original plaintiff. 67A C.J.S. *Parties* § 98 (1978).

Third-Party Practice.

Neb. Rev. Stat. § 25-331 (Reissue 1995) is Nebraska's impleader statute. Impleader is a procedural device which does not create substantive rights but merely accelerates the accrual of the right to assert a claim of liability over. See 67A C.J.S. *Parties* § 95 (1978). Thus, § 25-331 provides a procedure by which a defendant, "as a third-party plaintiff," may bring into an action a party who is or may be liable for all or part of the plaintiff's claim. Leave of court is required, and when authorized, the person brought in is called the "third-party defendant."

Of significance to my dissent is that impleader is not mandatory, nor is the plaintiff compelled to assert any claim against the third-party defendant, even one arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the original defendant. § 25-331. The court or any party may move to strike the third-party claim or for its severance or separate trial if the third-party claim should delay trial, might tend to confuse a jury, or in any way jeopardizes the rights of the plaintiff. *Id.*

A third-party claim under § 25-331 may be asserted when a third party's liability is in some way dependent upon the outcome of the main claim or when the third party is secondarily liable to the defendant. *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986). The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. *Id.* The granting of leave to file a third-party complaint is within the discretion of the trial judge. *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972).

Contribution.

There is no dispute that Jack's involvement in this case is as a third-party defendant sued by Roger on a theory of contribu-

tion. Clinten asserted no claim against Jack after the impleader was allowed, nor was he compelled to do so under § 25-331. I believe any verdict for Clinten under a typical case prior to the passage of § 25-21,185.10 could only have been against Roger, the person Clinten sued. In turn, Roger would have been entitled to a judgment against Jack to shift a part of the common liability on the premise that Roger, in facing Clinten's judgment, would be discharging more than his fair share of the common liability. See, e.g., *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995).

Generally, the method of contribution among joint tort-feasors varies. In some jurisdictions, it is pro rata or proportionate, based upon the number of tort-feasors. In others, each tort-feasor bears the loss in proportion to his fault. See 18 C.J.S. *Contribution* § 8 (1990). To my knowledge, Nebraska's method of apportioning loss between joint tort-feasors for purposes of contribution before § 25-21,185.10 has never been specifically defined by the Supreme Court.

Statutory Construction.

Statutory language is to be given its plain and ordinary meaning. This court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997). The majority essentially concludes that there is no rational distinction between Jack's status as a third-party defendant as opposed to that of an original defendant, when assessing the applicability of § 25-21,185.10. To reach that conclusion, the majority implicitly construes the term "defendant" in § 25-21,185.10 to include "third-party defendant," a term used only in § 25-331. The majority has read into the statute language which is not there, and I believe the construction it places on this section leads to several unjust results.

The first is that Clinten, not Roger, is forced to bear the risk of the collectibility of a judgment against Jack. As stated, in a third-party proceeding seeking contribution under § 25-331, the judgment would normally be in favor of the third-party plaintiff, Roger, as the trial court determined here. Next, it seems fundamentally wrong that a judgment be entered against someone and

in favor of another who has not sought it. Such a result defies basic pleading rules. Moreover, it contradicts the rule in *Fick v. Herman*, 161 Neb. 110, 72 N.W.2d 598 (1955), that a plaintiff cannot be forced to join all tort-feasors and the language of § 25-331 that a plaintiff is not compelled to assert a claim against the third-party defendant. By treating the third-party defendant, Jack, as if he were an original defendant sued by Clinten, the majority has effectively "joined" Jack as a tort-feasor for Clinten. If the intent of the Legislature in enacting § 25-21,185.10 was to abrogate the *Fick* rule and alter long-standing rules of procedure on necessary and indispensable parties, it seems it could have easily said so.

Moreover, although perhaps not "unjust," the majority's reasoning, if correct, accentuates yet another significant change brought about by § 25-21,185.10. The effect of the majority's conclusion is that the substantive common law of contribution between joint tort-feasors has been replaced by the provisions of § 25-21,185.10, a statute which, on its face, ostensibly applies only when a plaintiff seeks relief, not when a defendant seeks contribution from another tort-feasor.

While construing the formula of § 25-21,185.10 to be applicable to Roger's suit for contribution is an ingenious way to clarify a subject heretofore uncertain in this state, Nebraska's common law of allocating damages for contribution purposes was arguably much different than the legislatively imposed formula of § 25-21,185.10. See, e.g., 18 C.J.S. *Contribution* § 8 (methods of contribution vary, in some instances it being pro rata based upon number of tort-feasors). See, also, *Smith v. Kellerman, supra.*

Section 25-21,185.10 clearly evidences the Legislature's intent to limit a tort-feasor's liability to a plaintiff for noneconomic damages to a percentage of that tort-feasor's negligence when a plaintiff seeks to recover from more than one defendant. While I do not challenge the majority's logic in implying a similar intent as to third-party actions between tort-feasors for contribution, the statute does not address this topic, and it is one which I suspect is not normally associated with the statutory scheme which focuses on the liability of the defendants to the plaintiffs and not on the defendants' liability to one another.

In sum, I am not convinced that the issues raised by Roger are answered by the subject legislation. Surely, the majority's opinion is a well-reasoned attempt to balance § 25-21,185.10 with existing law. But in my view, the majority goes too far when it interprets the statute in ways that abrogate well-established principles—some statutory and some common law, some procedural and some substantive—without the Legislature's clear indication that such was the intended result. Based on current Nebraska law, the action below involved two separate proceedings which were tried together at the discretion of the trial court. There was no error in the jury's failure to determine Clinten's economic and noneconomic damages or to allocate negligence between Roger and Jack in Clinten's suit against Roger. Moreover, based on the pleadings, I believe the district court correctly entered judgment in favor of Clinten and against Roger for the full amount of Clinten's damages. Assuming arguendo that the suit by Roger against Jack required a determination of their respective percentages of negligence, it would have been solely for contribution purposes. While such results are not necessarily compatible with the majority's view of § 25-21,185.10, I believe they are the ones compelled by Nebraska's current jurisprudence. And compatible or not, I believe they are the results which must continue in such matters unless or until the Legislature specifically directs to the contrary.

STATE OF NEBRASKA, APPELLEE, V.
KEVIN V. JOHNSON, APPELLANT.
585 N.W.2d 486

Filed September 29, 1998. No. A-98-136.

1. **Habitual Criminals: Prior Convictions.** Two or more prior convictions arising out of the same set of circumstances may not be used to impose an enhanced penalty under Neb. Rev. Stat. § 29-2221 (Reissue 1995).
2. ____: ____. Where the sequence of prior convictions is an issue, the rule followed in the majority of jurisdictions is that each successive felony must be committed after the previous felony conviction in order to count toward habitual criminal status.

3. **Trial: Evidence: Waiver: Appeal and Error.** Errors in the admission of evidence are waived by failure to object at trial.
4. **Pleas.** A guilty plea admits all facts recited in open court by the State and all facts alleged in the information, including the time and place that the offense was committed.
5. ____. Before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists.
6. **Habitual Criminals.** The habitual criminal statute does not constitute a separate criminal offense, but, rather, serves as an enhancement of the penalty for the crime committed.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Sentence vacated, and cause remanded for resentencing.

William F. Eustice for appellant.

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

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

This matter is submitted for decision without oral argument because it is upon a guilty plea. This case presents issues involving a guilty plea to a habitual criminal charge and the extent to which a defendant may have waived errors in the State's presentation against him by his guilty plea.

On January 7, 1998, an information was filed in the district court for Pierce County, Nebraska, charging Kevin V. Johnson with unlawful possession of a controlled substance with intent to deliver, a Class III felony. That information also charged Johnson with operating a motor vehicle during a period of suspension, second offense, and with being a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995). The allegations of the habitual criminal count were that on July 10, 1995, Johnson was convicted by the district court for Madison County of possession of a controlled substance and sentenced to an indeterminate term of not less than 18 months' nor more than 3 years' incarceration. The second allegation of a previous conviction was that on that same date, Johnson was also convicted in the district court for Pierce County on a charge of possession

of a controlled substance with intent to deliver and sentenced to an indeterminate term of not less than 18 months' nor more than 3 years' incarceration.

As part of a plea agreement which came before the court on January 12, 1998, an amended information was filed that dropped the charge of driving while under suspension. The defendant was advised by the court of the nature of the charges and penalties and then informed of his rights. Johnson then stated that he wished to plead guilty to the possession charge as well as the charge of being a habitual criminal. With regard to the factual basis for the possession charge, Johnson stated that when he "was pulled over by a highway patrolman," Johnson "had a small amount of methamphetamine" in his pocket, and that he knew it was such because the person who gave it to him told him that. The State informed the court that two bags had been removed from Johnson's pocket and the contents were later tested as methamphetamine. One bag weighed 4.7 grams, and the other weighed 1 gram.

At this point, the State offered exhibits 1 and 2, certified copies of Johnson's two prior convictions, without objection from Johnson's counsel. Exhibits 1 and 2 were received by the court "for the purposes of determining whether or not the defendant is an habitual criminal." Exhibit 1 includes an information charging Johnson with possession of methamphetamine in Madison County on December 21, 1994, plus the district court's journal entry indicating that Johnson appeared in court with his counsel, was advised of his rights, and entered a plea of guilty to that charge. Johnson was sentenced, according to exhibit 1, on July 10, 1995, to an indeterminate term of not less than 18 months' nor more than 3 years' incarceration, said sentence to be served concurrent with the sentence in "Case No. 7137 in the District Court of Pierce County . . . ."

Exhibit 2 includes a journal entry from the aforementioned case No. 7137 from the district court for Pierce County, reciting that Johnson was before that court on May 8, 1995, charged with possession of a controlled substance. The journal entry recites that Johnson pleaded guilty, but it does not contain the factual basis for this plea or its acceptance by the district court. The journal entry set the conviction in case No. 7137 for sen-

tencing on July 10. Exhibit 2 also includes a second journal entry showing that Johnson was sentenced on July 10, 1995, for an indeterminate term of not less than 18 months' nor more than 3 years' incarceration. The information filed against Johnson in case No. 7137 is not included in exhibit 2, nor is it in the record before us. Thus, we are without knowledge as to *when* and *where* the offense occurred which led to the guilty plea reflected in exhibit 2.

After receiving exhibits 1 and 2 in this case, the trial court accepted Johnson's guilty plea on the habitual criminal charge. This subjected Johnson to a penalty of not less than 10 nor more than 60 years' incarceration on the underlying charge of possession of a controlled substance. The trial court sentenced Johnson to 10 years in prison.

Johnson timely appeals to this court.

ASSIGNMENT OF ERROR

Johnson alleges that the trial court erred "in enhancing sentence for conviction of possession of a controlled substance on [the] basis of finding that the conviction was third conviction of a felony."

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*, 250 Neb. 584, 550 N.W.2d 347 (1996).

ANALYSIS

[1] Johnson's argument is that under the habitual criminal statute, § 29-2221(1), the State failed to prove he was "twice convicted of a crime, sentenced, and committed to prison." Johnson argues that the evidence showed only that he was sentenced on the same day, July 10, 1995, in two separate counties to the same sentence of not less than 18 months' nor more than 3 years' incarceration, to run concurrently. Johnson asserts that the law is that two or more prior convictions arising out of the same set of circumstances may not be used to impose an enhanced penalty under § 29-2221, citing *State v. Lopez*, 215 Neb. 65, 337 N.W.2d 130 (1983). We agree with this assertion.

In *Lopez*, the defendant was convicted of second degree sexual assault and second degree assault. The trial court found that the conviction of second degree assault was a third conviction of a felony and thus found Lopez to be a habitual criminal. Citing *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), the Supreme Court in *Lopez* found that the sentence was erroneous because the holding in *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979) had been overruled. *Pierce* had held that where two prior convictions arose out of the same set of circumstances, they could be used to impose an enhanced penalty under the habitual criminal statute. This was changed by *Ellis, supra.*

While Johnson asserts that the two drug convictions used to enhance his sentence "emanate from the same series of events, i.e., drug trafficking and possession in Pierce County and Madison County," brief for appellant at 4, that assertion cannot be verified by the record. Exhibit 1 in the record shows that Johnson was charged and pled guilty on December 21, 1994, to possession of methamphetamine in Madison County. However, the record fails to show on what date Johnson's second felony conviction, possession of a controlled substance in Pierce County, occurred. The significance of this comes from the holding of *Ellis* that it is the commission of the second felony after conviction of the first and the commission of the third felony after conviction of the second which is deemed to make the defendant incorrigible and thus subject to the habitual criminal statute, citing *Coleman v. Commonwealth*, 276 Ky. 802, 125 S.W.2d 728 (1939).

[2] The *Ellis* court cites numerous cases for the general proposition that where the sequence of prior convictions is an issue, the rule followed in the majority of jurisdictions is that each successive felony must be committed after the previous felony conviction in order to count toward habitual criminal status. Thus, *Ellis* stated as follows:

> We . . . declare that in order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense.

214 Neb. at 176, 333 N.W.2d at 394. While *Ellis* was a 4-to-3 decision, it appears to remain the law. Thus, the applicable case law requires a certain order or time line for previous felony convictions which are later used under the habitual criminal statute.

[3] This record, therefore, does not allow us, or a trial judge for that matter, to conclude that Johnson's prior convictions were for successive crimes. Thus, on the face of the matter, it appears that the evidence, exhibits 1 and 2, although not objected to by Johnson, fail to prove the prerequisites for a finding that Johnson was a habitual criminal. The State argues that any problem in this regard is cured by the absence of a timely objection to exhibits 1 and 2 because errors in the admission of evidence are waived by failure to object at trial, citing *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). While the State's proposition of law is basically correct, the issue raised by Johnson is not the improper admission of exhibits 1 and 2, but whether they prove the elements necessary for a finding that Johnson is a habitual criminal. On their face, exhibits 1 and 2 do not prove the elements of the habitual criminal charge.

[4-6] The State also reminds us that Johnson pleaded guilty to being a habitual criminal. A guilty plea admits all facts recited in open court by the State and all facts alleged in the information, including the time and place that the offense was committed. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985). However, before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists. *Id.* The habitual criminal statute does not constitute a separate criminal offense, but, rather, serves as an enhancement of the penalty for the crime committed. *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982). Therefore, a guilty plea is only an admission of the truth of the allegations of the information by which habitual criminal status is alleged. But, in this case, the information did not contain sufficient factual allegations to satisfy the requirement that the two prior crimes be successive and not arising out of the same set of circumstances. Therefore, the guilty plea is not determinative here.

In *State v. Belmarez*, 254 Neb. 467, 474, 577 N.W.2d 264, 269 (1998), the Supreme Court detailed the rights of which a defendant must be advised and stated: "Additionally, the record

must establish that (1) there is a factual basis for the plea . . . ." Thus, the question becomes whether the trial judge, by looking at the evidence presented by the State, admitted without objection, could find that there was a factual basis for Johnson's plea of guilty to the habitual criminal charge and could thereby accept his plea. Given that *State v. Lopez*, 215 Neb. 65, 337 N.W.2d 130 (1983), holds that crimes arising out of the same set of circumstances cannot be used and *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), requires that the crimes be successive, our answer is in the negative. The result is that the guilty plea should not have been accepted. See *State v. Dodson*, 250 Neb. 584, 592, 550 N.W.2d 347, 354 (1996) (holding that State's reference to only "30th and Fowler Streets" did not establish necessary element of venue when nothing in record showed that this location was in Omaha or Douglas County and trial court abused its discretion in accepting guilty plea).

While it seems logical that Johnson could not possess contraband in Madison County and Pierce County without doing so successively, because a person cannot be in more than one place at a time, there is still the question of whether the crimes arose out of the same set of circumstances. Given that Johnson was sentenced on July 10, 1995, in both Pierce and Madison Counties and that the court imposed concurrent sentences, the stronger inference, to the extent that any inference is reasonable, is that the two convictions arose out of the same set of circumstances. Nonetheless, we do not premise our holding on that inference, but, rather, on the failure of exhibits 1 and 2 to establish that the two prior felonies were committed successive to each other, a necessary factual predicate for finding that Johnson was a habitual criminal. For that reason, the record does not show a factual basis for the court's finding that Johnson was a habitual criminal. Therefore, Johnson should not have been sentenced as a habitual criminal, and we vacate the sentence and remand the matter to the district court for resentencing. As far as remand is concerned, when the factual basis for a guilty plea was lacking in *Dodson, supra*, the Supreme Court vacated the sentences and convictions and granted the defendant a new trial. Here, we remand for a new enhancement hearing, and as a necessary adjunct thereto, Johnson must be

sentenced anew on the principal crime. However, the conviction on the principal charge stands.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

SANDRA J. HALOUSKA, APPELLEE, V. RONALD L. HALOUSKA, APPELLANT.

585 N.W.2d 490

Filed October 6, 1998. No. A-97-546.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Divorce: Property Division: Appeal and Error.** The division of a marital estate in a dissolution case is initially left to the discretion of the trial court and will be reviewed by an appellate court de novo on the record and affirmed absent an abuse of discretion.
3. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
4. ____: ____. If the evidence, as presented by the record, is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
6. **Child Support: Presumptions.** It is appropriate to consider overtime wages in setting child support only when overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income from working overtime.
7. **Child Support: Rules of the Supreme Court.** In determining the amount of child support to be paid by a parent, the court must consider the earning capacity of each parent and apply the Nebraska Child Support Guidelines adopted by the Nebraska Supreme Court.
8. ____: ____. The Nebraska Child Support Guidelines provide that in the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the amount of child support owed by each parent.

9. **Alimony: Appeal and Error.** A decision whether to award alimony must be made on the particular facts and equities of each individual case, and the court must consider all of the facts and equities, in addition to those factors specifically enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1993). The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an abuse of discretion.
10. ____: ____. In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
11. **Alimony.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1993), a court setting alimony is to consider the income and earning capacity of each party, as well as the general equities of each situation.
12. **Divorce: Property Division.** A marital estate is to be divided so that a spouse receives one-third to one-half. However, property division is not subject to a rigid mathematical formula, but, rather, turns upon the facts and circumstances of each individual case in light of the statutory factors found in Neb. Rev. Stat. § 42-365 (Reissue 1993).
13. ____: ____. In a dissolution action, the court will consider all pertinent facts in reaching an award that is just and equitable. The ultimate test for determining an appropriate division of marital property is one of reasonableness. The division must, most of all, be reasonable.
14. ____: ____. In cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally.
15. ____: ____. The debts of the parties should be considered in making a property division in a dissolution of marriage action.
16. ____: ____. The date upon which the marital estate is valued should be rationally related to the property composing the marital estate.
17. **Bankruptcy.** The dischargeability of a debt is a question of federal bankruptcy law.
18. **Bankruptcy: Alimony: Child Support.** Pursuant to 11 U.S.C. § 523(a)(5)(B) (1994), a designation of a debt by a state trial court as alimony, maintenance, or support to a spouse, former spouse, or child will render it nondischargeable only if such liability is actually in the nature of alimony, maintenance, or support.
19. ____: ____: ____. The critical issue in determining whether a debt constitutes alimony, maintenance, or support for purposes of the exception to discharge provided in 11 U.S.C. § 523(a)(5)(B) (1994) is the intent of the parties and the function the award was intended to serve at the time of the divorce.
20. ____: ____: ____. Although a trial court's designation of debts as support might be one indication of the function the award was intended to serve, it is not conclusive. A declaration that the debts are nondischargeable in bankruptcy is not binding on the bankruptcy court.
21. **Guardians Ad Litem: Fees: Appeal and Error.** The allowance, amount, and allocation of a guardian ad litem fee are matters within the initial discretion of the trial court, necessarily involve consideration of the equities and circumstances of each particular case, and will be set aside on appeal only when there appears to be an abuse of discretion by the trial court.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed as modified.

Michael E. Piccolo, of Clough, Dawson & Piccolo, for appellant.

Susan C. Williams for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MUES, Judge.

INTRODUCTION

This is an appeal from a decree dissolving the marriage of Ronald L. Halouska and Sandra J. Halouska. Ronald appeals on the grounds that the trial court erred in (1) computing the parties' net monthly incomes, (2) computing child support, (3) computing the amount and duration of alimony, (4) determining the values of marital assets and debts, (5) dividing the marital estate, (6) assessing all of the guardian ad litem fees to him, and (7) ordering that the debts assigned to him are nondischargeable in bankruptcy.

BACKGROUND

Ronald and Sandra were married on August 2, 1975. Two children were born of the marriage, Jody, age 21 at the time of trial, and Jill, age 13 at the time of trial. On July 3, 1996, Sandra filed for divorce, and an ex parte nonhypothecation order was entered ordering that Ronald "be restrained from selling, assigning, concealing, or liquidating any or all of the real estate or personal assets of the parties, individually or collectively, except in the usual course of business during the pendency of this action." On August 5, the court granted Sandra's motion that Ronald be excluded from the family home, granted a restraining order against him, and entered a temporary nonhypothecation order for the pendency of the divorce.

Trial was held on March 25, 1997. Ronald and Sandra were the only witnesses. The trial court awarded joint physical and legal custody of Jill to the parties, with physical custody to rotate every 6 months. Using the parties' 1996 incomes, the trial court ordered Ronald to pay child support of $142 per month until Jill reaches the age of majority, dies, becomes emancipated, marries,

or until further order of the court. The court also ordered Ronald to pay alimony of $400 for 120 months or until the death of either party or the remarriage of Sandra, attorney fees of $1,000, costs, and the entire guardian ad litem fee of $763.75. Sandra was awarded one-half of the value of Ronald's "Tier II Railroad Retirement" which accrued during their marriage.

In addition to the retirement account, according to the trial court's calculations Sandra was awarded property the value of which was $157,781.27 and debts of $97,691.89, for a total net award of $60,089.38 (51 percent); Ronald was awarded assets valued at $64,864.24 and debts of $6,538.85, for a total net award of $58,325.39 (49 percent). Included in Ronald's property award were a Pacific Brokerage Services account valued at $3,655.48 which he testified had been liquidated and used to pay marital debt; a Euro-Atlantic Securities account valued at $5,223.08 which he testified had been liquidated to pay real estate taxes on the parties' rental house in which he was living; five credit card accounts the balances of which were listed as "unknown" in the court's schedule awarding property; and two credit cards at balances which were substantially lower than those proposed by Ronald. All the debts assigned to Ronald were declared by the court to be in the nature of support and maintenance and thus, nondischargeable in bankruptcy.

ASSIGNMENTS OF ERROR

Ronald appeals to this court, asserting that the trial court erred in determining the parties' net monthly incomes, consequently erring in child support and alimony calculations; in determining or failing to determine the value of marital assets and debts and in dividing those assets and debts; in assessing all of the guardian ad litem fees to him; and in ordering that the debts assigned to him are nondischargeable in bankruptcy.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

[2-4] The division of a marital estate in a dissolution case is initially left to the discretion of the trial court and will be reviewed by an appellate court de novo on the record and affirmed absent an abuse of discretion. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Id.* If the evidence, as presented by the record, is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

An award of alimony is a matter entrusted to the discretion of the trial court, and on appeal, it will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. See *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996).

[5] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998).

ANALYSIS

Income and Child Support.

In determining what amount of child support to award, the trial court used the parties' 1996 incomes as reported on Ronald's W-2 form and Sandra's 1099 form. Ronald argues that the trial court overestimated his income and underestimated Sandra's and consequently erred in determining child support. In support of this contention, he alleges that the court should not have used the 1996 incomes of the parties, because they are not representative of present earning capacity.

Ronald asserts that the trial court overestimated his income by using his 1996 income rather than his projected 1997 income based on his earnings during the first 2 months of 1997. He testified that his employer, Union Pacific, made several changes in its staffing techniques in 1997, primarily due to budget con-

cerns, and alleges that these changes would decrease the amount of overtime he could work and also decreased the total amount of hours worked by vacation relief employees, of which he is one.

[6] It is true that it is appropriate to consider overtime wages in setting child support only when overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income from working overtime. See *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991). However, in the instant case, there is no evidence in our record which allows us to determine what portion, if any, of Ronald's previous year's income was attributable to overtime or during which months it was accrued. Thus, absent Ronald's bare assertion, we have no firm evidence that Ronald's 1997 income will be substantially lower than previous years'. It is also plausible that he has refused to work overtime in order to present evidence to the court of a lower income. Ronald's 1996 income of $41,191 is not dissimilar to his pretax income from previous years—$41,449 in 1993, $38,737 in 1994, and $46,767 in 1995. We conclude that the trial court did not abuse its discretion in using Ronald's 1996 income figures in determining his earnings for child support and alimony purposes. Therefore, the district court's determination that his monthly net earnings for child support purposes were $2,274.68 was not erroneous.

[7] Ronald argues that the trial court erred in using Sandra's 1996 income to determine child support and alimony because it does not accurately reflect her earning capacity. In determining the amount of child support to be paid by a parent, the court must consider the earning capacity of each parent and apply the Nebraska Child Support Guidelines adopted by the Nebraska Supreme Court. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). It is uncontested that Sandra did not work for several weeks in 1996 due to a health problem. Sandra admits that this may have affected her income for the year.

Sandra's reported income in the 3 years preceding 1996 was $61,233 less expenses of $19,049, for a gross income of $42,184 in 1993; $47,258 less expenses of $17,709, for a gross income of $29,549 in 1994; and $36,309 in gross income in

1995, a year for which the tax evidence in our record is limited. The 1996 "after expense" figure used by the trial court, $17,197, was based on Sandra's 1996 Form 1099 income of $33,837, after deducting actual office expense of $1,641 and estimated additional business expenses of $15,000. After deducting a flat 25 percent for income taxes, the monthly net income of $1,074.75 was arrived at. Using this figure and a net monthly income figure for Ronald of $2,274.68, the trial court determined by applying the basic net income and support calculation worksheet of the Nebraska Child Support Guidelines that Ronald owed Sandra $141.84 per month for child support.

In 1996, Sandra was off work for 6 weeks to 2 months for surgery and stated that "[i]t really did slow down this year. It really did." She admitted at trial that she currently had no health problems that would affect her ability to work and stated that she plans to continue working full time as a real estate agent. There was considerable testimony from her about the "feast or famine" general nature of a real estate career. However, she offered no testimony or documentation regarding whether actual listings or sales were currently below previous years'. It is clear that Sandra's 1996 income was an anomaly, and we find that the trial court abused its discretion in relying solely on it in determining Sandra's income for support purposes.

[8] The Nebraska Child Support Guidelines provide that in the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the amount of child support owed by each parent. See Nebraska Child Support Guidelines, worksheet 1 n.5. By averaging Sandra's pretax income for the years 1994 through 1996, we find that Sandra earned an average of $27,684 per year. Using the worksheet for joint physical custody and Sandra's average income with an estimated tax rate of 25 percent (a percentage which Sandra used below and which is unchallenged on appeal), we determine Sandra's net monthly income to be $1,730. Using Ronald's 1996 income and deductions as figured by the trial court to determine Ronald's net monthly income, $2,275, we determine that Ronald owes Sandra $65 per month in child support. Therefore, the trial court's award of $141 per month is modified as stated.

Alimony.

The trial court awarded Sandra alimony of $400 for 120 months. In doing so, the district court expressed that it was basing the alimony award on the same income figures as used in its child support calculations, which were essentially those found in Sandra's proffered worksheet. Ronald argues that the trial court should have considered the parties' earning capacity as well as the factors enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1993). He asserts that Sandra's earnings over a period of years should also be used to determine alimony, because her 1996 earnings were substantially lower than her earnings in the 3 years prior to her filing for divorce. He argues that her earning capacity would be a more accurate forecast to determine alimony and that when this is considered, their incomes are not significantly different and alimony is not appropriate in this case.

Section 42-365, relating to an award of alimony, provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

[9,10] A decision whether to award alimony must be made on the particular facts and equities of each individual case, and the court must consider all of the facts and equities, in addition to

those factors specifically enumerated in § 42-365. The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an abuse of discretion. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994). In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id.*

The record reflects that during the 21-year marriage, both parties worked outside the home, contributing their income to the marriage. Ronald worked continually for the railroad since early in the marriage. He now earns approximately $41,000 per year. Sandra worked for minimum wage during the majority of the marriage in a variety of jobs, some part time and some full time, including at the telephone company and at a jewelry store. Although she worked a variety of entry-level jobs, she did not present any evidence to show that she interrupted her education or a career to marry Ronald or raise their family. In fact, both parties testified that they were both actively involved in raising their children and managing the household.

In 1988, Sandra went to school for one semester. In 1989, she became a real estate agent and since that time has become quite successful, receiving numerous awards and incentives, including at least 10 trips to conferences and conventions for real estate agents, in places such as Puerto Vallarta, Bermuda, Puerto Rico, San Francisco, San Diego, New Orleans, Orlando, Dallas, and Las Vegas. Sandra has been the top real estate agent for 5 or 6 years in a row and during at least 1 year was the top listing agent. She has taken continuing education classes and is close to completing her Graduate Realtors Institute certification, which will assist her in out-of-town referrals and add distinction to her career.

[11] In addition to the specific criteria listed in § 42-365, a court setting alimony is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996). At the time of the divorce, Sandra was earning between $29,500 and $41,000 per year. Ronald earns approximately

$41,000 per year. Each party is gainfully employed and expects to continue such employment.

Based on the evidence before us, and as stated, it is quite apparent that Sandra's 1996 income was not representative of her earning capacity. Even averaging it with her 1994 and 1995 income and ignoring the higher 1993 income of $42,184, there is not a wide disparity in income between the parties. See *Kelly v. Kelly, supra* (noting that when wife had earning capacity of $34,000 and husband's was $100,000, alimony award of $1,500 per month for 120 months was not abuse of discretion as it, inter alia, tended to even out income disparity).

The parties share equal joint custody of their minor child, and both their careers offer flexibility and will not interfere with their child-rearing responsibilities or affect Jill's interests. Considering the facts and circumstances of this case, we conclude that the trial court abused its discretion in ordering alimony in the amount of $400 per month for 120 months. It is fairly apparent that viewing the figures as accepted by the district court, this award essentially equalized the parties' income. While it is acceptable to "even out" a disparity, see *Kelly v. Kelly, supra*, that is not the primary purpose of alimony, see, e.g., *Ainslie v. Ainslie, supra*; *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991); *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988).

Although Sandra did provide a list of monthly expenses which exceeded her 1996 net income by $3,305 per month, we note that these expenses included clothing, haircuts, allowance, and toiletries for Jill, which will be paid at least half of the time by Ronald, and rent and expenses for Jody, who is an adult child. Further, she includes in those expenses $1,000 per month for "business expenses," which are already taken into account in arriving at her net income for child support purposes. Consequently, we reduce the trial court's award of alimony to the sum of $200 per month for 36 months.

Value and Allocation of Certain Marital Assets.

[12-14] Ronald asserts that the trial court erred in dividing the marital estate. As a general proposition, the Nebraska

Supreme Court has frequently said that the marital estate is to be divided so that a spouse receives one-third to one-half. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). However, property division is not subject to a rigid mathematical formula, but, rather, turns upon the facts and circumstances of each individual case in light of the statutory factors found in § 42-365. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). The court will consider all pertinent facts in reaching an award that is just and equitable. *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). The ultimate test for determining an appropriate division of marital property is one of reasonableness. The division must, most of all, be reasonable. *Frost v. Frost*, 227 Neb. 414, 418 N.W.2d 220 (1988). In cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

According to the trial court's calculations, Sandra's net award was $60,089 (51 percent), while Ronald's was $58,325 (49 percent). But Ronald challenges these figures, claiming the district court included certain assets and failed to consider certain unsecured debt. His argument focuses on the value of a computer, a Pacific Brokerage Services account, a Euro-Atlantic Securities account, and the balances of certain credit card debts.

Credit Card Debts.

Ronald was allocated the debt related to five credit cards. The district court assigned "unknown" balances, and consequently Ronald's share of the property includes no deduction for such debts. These included a First Bank Visa card, another card designated solely as First Bank but bearing a different account number than the Visa, a Citibank Visa card, an American Express Optima card, and an MBNA card. The trial court also awarded Ronald the debt balance of the Discover card at $612, which Ronald testified had a balance of $3,200, and a NationsBank Visa at $3,226, which he testified had a balance of $6,500. Ronald argues that the trial court abused its discretion in failing to determine the actual balances of these accounts.

[15] It is true that the debts of the parties should be considered in making a property division in a dissolution of marriage action. See, e.g., *Preston v. Preston, supra*; *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991). However, Sandra alleges that the trial court was correct in not placing a value on these accounts, because Ronald refused to comply with discovery requests to present documentation as to the value of the accounts at the time of separation. It is undisputed that Ronald was in the best position to produce records regarding the credit card accounts. Sandra testified that there were still many documents that had been asked for that had not been turned over to her and that she had wanted these documents to determine the amount of debt at the time the divorce was filed. Ronald testified that he did not remember being asked for this specific documentation in earlier discovery requests, but did remember their being requested in a notice to take deposition served on him in March. The deposition was taken March 7, 1997. He testified that statements for these bills continued to be sent to the family residence even after he moved out on August 5, 1996, because he felt Sandra needed to be able to see the monthly payments. He stated that most of the bills were opened when she gave them to him but that there were only 1 or 2 months they were not forwarded to him in a timely manner. However, when asked if it was correct that Sandra's attorney still did not have records for those accounts, he stated, "I don't think I have received them, no, I do not."

Although the testimony is in conflict, one thing is clear: The record contains no documentation as to the balances of these accounts on July 3, 1996 (date of divorce filing), August 1 (date of valuation of marital estate by trial court), or August 5 (date of separation). The trial court was consistent in requiring documentation of debt balances or values where either were disputed. These credit card debts were disputed and the documentation provided by Ronald was incomplete regarding, inter alia, the dates of the respective balances. Exhibit 34, a copy of a First Bank Visa statement dated September 24, 1996, was not received into evidence after Sandra objected that it was not the best evidence, and the court sustained the objection, stating that the cut-off time should be the date of filing, or at the latest, the

date of separation. Prior to offering the exhibit, Ronald had exhibits 34 through 39 marked for identification. After exhibit 34 was rejected, no offer was made of the remaining exhibits, and they are not in our record. Ronald does not assign as error the rejection of this exhibit. As such, we do not address whether the trial court erred in failing to receive this evidence and will express no opinion about the propriety of such rejection.

[16] We note however that the date upon which the marital estate is valued should be rationally related to the property composing the marital estate. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). The trial court's decision to use August 1, 1996, as the cut-off date for the marital estate appears to be rationally related to the property composing the marital estate.

Ronald assigned balances to all of the disputed accounts except one on the joint property statement. He assigned the First Bank balance at $1,800, the Citibank at $5,800, the American Express at $5,100, the Discover at $3,200, the MBNA at $8,200, and the NationsBank at $6,500. Sandra offered exhibit 25, a May 10, 1996, statement for the Discover card, and exhibit 26, a May 21 statement for the NationsBank card, to show that the balances on these accounts were $612 and $3,226, respectively, on those dates. She listed the balances of the other accounts as "unknown."

Ronald testified that he had used the First Bank card "a little bit" since the separation but had not used the Citibank, the American Express Optima, the Discover, or the NationsBank cards during the pendency of the divorce. He explained the disparity in the Discover balance by stating that he believed it had been used a lot in May and June by both the parties. He testified that the American Express Optima account was opened in his name only but was used solely to buy Jody a computer in late 1995. Ronald maintained that he requested that no new charges could be placed on the Discover account after July or August or on the NationsBank account after August. However, he does not provide any documentation in this regard.

Ronald did not offer any documentation as to what had been charged on any of these accounts prior to or after the separation. Nor does he offer any explanation as to why the documentation

is not present, even though he testified that he received the mail from Sandra and it is quite clear that she asked him to produce this documentation during discovery. Although Ronald testified as to the balances "when I called them to see what the balances were," he did not testify concerning when he made these telephone calls. It could have been at the time of separation or the day before trial. We simply have no way of determining the date of the balances he testifies to, nor do we know what the balances were at the time of separation or on August 1, 1996, the date the court used to determine the value of the marital estate. Ronald's testimony also does not explain what the charges were made for, when they were made, or why the balances were so high, when he claims to have liquidated the Pacific Brokerage Services account to pay credit card debt. Thus, we have no way of determining if the debt was incurred for the benefit of both parties before separation or is primarily debt incurred for Ronald's benefit after separation.

Based on the evidence before us, we must agree with the trial judge when he explained that Ronald could have requested a payment history on these accounts back to the date of filing or the date of separation and that he had no way to determine if cash advances or charges had been made by Ronald after the separation. From the discovery requests, Ronald's deposition, and the joint property statement, Ronald's awareness that these debts were going to be contested is undisputable. Yet, he failed to present any documentary evidence to support his assigned balances or to offer any explanation of why he failed to disclose these items to Sandra. If the evidence, as presented by the record, is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). The decision to award these debts at an unknown balance or at a balance shown on an earlier statement involves a matter of credibility which is properly left to the discretion of the trial court. See *id.*

Computer.

Ronald argues that the trial court disregarded his testimony concerning the value of his computer and accepted Sandra's

offered appraisal even though it was performed by one of her former coworkers. However, a close examination of the record shows that in its award the trial court did not specifically assign a value to the computer. Rather, it awarded all household furnishings and equipment shown on the property statement which were in Ronald's possession, which included the computer, at a value of $3,050. This is $400 less than Ronald himself valued such property and $1,650 less than Sandra valued his property. The trial court's order simply does not support Ronald's allegation that it adopted Sandra's value on the computer.

Pacific Brokerage Services Account.

The Pacific Brokerage Services account was awarded to Ronald at a value of $3,655. On appeal, he argues that the court erred in awarding him the Pacific Brokerage Services account at that value, because at the time of trial the account had a $0 balance, and the money was used to pay marital debt.

Exhibit 16 shows the account balance to be $3,655 on August 30, 1996, approximately 3 weeks after the parties separated. At trial, Ronald testified that he had removed the funds from this account during the divorce proceeding because his income was not sufficient to pay the monthly bills. He explained that he felt this came within the "usual course of business" exception to the nonhypothecation order and offered exhibit 31 to show how he had used these funds to service the parties' credit card debts, to pay insurance premiums, and to purchase Jill's furniture. This exhibit is a computer printout generated by Ronald entitled "Check Register." It does not purport to list all of the checks written on whatever account is referenced, but it does show that Ronald spent approximately $3,675 servicing credit card debts, $486 on Jill's furniture, and $249 on automobile insurance. Ronald offered no canceled checks or credit card statements to reflect that he had, indeed, paid the amounts listed for the purposes shown on his exhibit 31.

Sandra argues that Ronald violated the nonhypothecation order when he liquidated this account and thus should be held responsible for his actions. She asserts that she was also paying substantial bills and yet did not have to liquidate an investment account to service her debt. She contends that charging Ronald

with the full value of the account at the time of separation is fair in light of the facts and circumstances. We agree.

The August 5, 1996, court order states, "Both the petitioner and respondent shall be restrained from selling, assigning, concealing, or liquidating any of the assets of the parties except in the usual course of business during the pendency of this action." The record shows that the account had a balance of $3,655 on August 30, and Ronald testified that he liquidated the account prior to trial. Nowhere in the record do we have indication, nor does Ronald suggest, that he petitioned the court for permission to liquidate the account to pay marital debt. Nor does he provide his monthly expenses to show why his monthly income was insufficient to service this debt. Apparently, the trial court either was not satisfied with the accounting Ronald gave at trial or did not believe the credit card debts paid per exhibit 31 were proper marital debts. Credibility seems to have played a significant role in this case. This, being a credibility issue, must be left to the discretion of the trial court absent an abuse of discretion. See *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). We cannot say that this was an abuse of discretion. The trial court's order is affirmed in this regard.

Euro-Atlantic Securities Account.

Ronald was also awarded the Euro-Atlantic Securities account at a value of $5,223. Exhibit 18 shows that a check for this amount was sent to Ronald at the parties' address on August 2, 1996, 3 days before he moved out of the family residence but approximately 1 month after the petition for divorce was filed and the ex parte nonhypothecation order was entered. Ronald testified that $2,000 of this sum was used to pay the property taxes on the parties' rental house, with the remainder placed in the parties' joint bank account, available to both of the parties. Again, Ronald offered no documentation to support either these expenses or the deposit. Sandra testified that to her knowledge she did not receive any of the money from this account.

In the decree, there is a parenthetical behind this award which states, "Cash disbursed to [Ronald] during the pendency of this action in violation of the non-hypothecation order issued by Judge Murphy on July 3, 1996." We note that the order entered on July 3 was an ex parte nonhypothecation order. Neb.

Rev. Stat. § 42-357 (Reissue 1993) provides, in pertinent part, that such an order shall remain in force for no more than 10 days or until a hearing is held thereon, whichever is earlier. We have nothing in our record which shows that a hearing was held until August 5. Thus, the ex parte nonhypothecation order expired on July 13, and the cash disbursement from the Euro-Atlantic Securities account which occurred on August 2 could not have been in violation of the July 3 ex parte nonhypothecation order. As such, the trial court erred in finding that Ronald violated the nonhypothecation order.

However, the trial court set an August 1, 1996, cut-off date for valuing the marital estate. On that date, the value of the Euro-Atlantic Securities account was $5,223. Although the liquidation of the account may not have violated a nonhypothecation order, inclusion of its value in the marital assets as of a given date is proper so long as that date is rationally related to the property composing the marital estate. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Such rational relationship exists here.

Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground than that assigned by the trial court, the appellate court will affirm. See *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996). The trial court's order awarding the Euro-Atlantic Securities account to Ronald at a value of $5,223 is affirmed, although we do not do so because its distribution violated a nonhypothecation order; rather, we affirm because we cannot say that the district court's rejection of Ronald's accounting was an abuse of discretion.

Debts as Nondischargeable in Bankruptcy.

The trial court ordered that "all of the debts assigned to [Ronald] are in the nature of support and maintenance for [Sandra] and shall be non-dischargeable in bankruptcy." On appeal, Ronald argues that such an order is not supported by the evidence and does not treat the parties equally, because it does not limit Sandra's ability to discharge her debt in bankruptcy.

The U.S. Bankruptcy Code excepts certain categories of debt from a debtor's discharge granted in certain enumerated

bankruptcies. Among the debts rendered nondischargeable are debts owed

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, *but not to the extent that—*
>
> (A) such debt is assigned to another entity . . .
>
> (B) *such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support*[.]

(Emphasis supplied.) 11 U.S.C. § 523(a)(5) (1994). Thus, under this section, if a debt is "actually in the nature of" alimony, maintenance, or support of a spouse, former spouse, or child of the debtor, it is nondischargeable in bankruptcy.

[17,18] The trial court's decision to designate the debts allocated to Ronald as support and maintenance was an obvious attempt to ensure that if Ronald does go into bankruptcy, he cannot discharge the debts assigned to him. However, the dischargeability of a debt is a question of federal bankruptcy law, and as emphasized above, § 523(a)(5)(B) expressly provides that a designation of a debt as alimony, maintenance, or support to a spouse, former spouse, or child will render it nondischargeable only if "such liability is actually in the nature of alimony, maintenance, or support."

[19] In *In re Moeder*, 220 B.R. 52 (B.A.P. 8th Cir. 1998), the U.S. Bankruptcy Appellate Panel of the Eighth Circuit, addressing, inter alia, the provisions of § 523(a)(5), observed that "whether a particular debt constitutes 'alimony, maintenance or support' or rather constitutes a property settlement is a question of federal bankruptcy law, not of state law." 220 B.R. at 55. The critical issue in determining whether a debt constitutes alimony, maintenance, or support for purposes of this exception to discharge is the intent of the parties and the function the award was intended to serve at the time of the divorce. *Id.*

> Factors to be considered by the courts in determining whether an award arising out of marital dissolution pro-

> ceedings was intended to serve as an award for alimony, maintenance or support, or whether it was intended to serve as a property settlement include, but are not limited to: the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments.

Id. at 55. The *In re Moeder* court concluded that the divorce court was concerned with balancing the income and earning capacities of the parties and providing proper care and support for the minor child when it ordered the husband to pay certain debts. Thus, it determined that the obligations at issue were nondischargeable.

[20] Although the trial court's designation of the debts as support might be one indication of the "function" the award was intended to serve, it is obviously not conclusive. And certainly a declaration that the debts are "nondischargeable in bankruptcy" is not binding on the bankruptcy court. Rather, as is clear from *In re Moeder*, a bankruptcy court will apply all of the principles enumerated above in determining whether an obligation is a support obligation or a nonsupport obligation merely disguised as one for support.

While not directly implicated by the trial court's decree in the present case, there is another category of debt incurred in the course of a divorce or separation that is nondischargeable. For completeness' sake, we mention it briefly. It is found at 11 U.S.C. § 523(a)(15) and was also at issue in *In re Moeder*. "Section 523(a)(15) excepts from discharge those debts arising out of marital dissolution proceedings that do not constitute nondischargeable alimony, maintenance or support under § 523(a)(5); i.e. property settlement awards." *In re Moeder*, 220 B.R. at 54. As noted by the *In re Moeder* court, this exception to discharge was added in 1994 and is itself subject to certain exceptions which we need not detail here. Suffice it to say that § 523(a)(15) renders such debts nondischargeable in bankruptcy even though they do not meet the criteria of § 523(a)(5), but

they will nevertheless be dischargeable if either of two enumerated exceptions apply. See *In re Moeder, supra.*

In sum, based upon the clear language of § 523 and the rationale of *In re Moeder, supra*, if and when the dischargeability of the relevant debts becomes an issue, a bankruptcy court will look beyond the designation in the award and determine the dischargeability of relevant debts based on federal bankruptcy law. Thus, the trial court's nonbinding declaration cannot be said to be an abuse of discretion.

Guardian Ad Litem Fees.

Ronald argues that considering the circumstances and general equities of this case, including the fact that the parties have joint legal and physical custody, the trial court erred in requiring him to pay the entire guardian ad litem fee of $763. He proposes that this fee should have been split evenly between the parties.

[21] The allowance, amount, and allocation of a guardian ad litem fee are matters within the initial discretion of the trial court, necessarily involve consideration of the equities and circumstances of each particular case, and will be set aside on appeal only when there appears to be an abuse of discretion by the trial court. *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994), citing *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). Although we may have ordered otherwise, it is not our prerogative to decide this issue anew. We cannot say that ordering Ronald to pay the entire $763 is untenable and unfairly deprives him of a substantial right or a just result. Therefore, we affirm that portion of the trial court's order.

CONCLUSION

Sandra's 1996 income was an anomaly and fails to reflect her true earning capacity. The trial court erred in considering only her 1996 income when it determined child support and alimony. As such, those awards are modified as set forth in this opinion. The trial court's division of the marital assets and debts does not constitute an abuse of discretion and is therefore affirmed. The court's attempt to make these debts nondischargeable was not an abuse of discretion, nor was its order requiring Ronald to pay

the entire guardian ad litem fee. We affirm as modified, as set forth herein.

AFFIRMED AS MODIFIED.

NORWEST BANK NEBRASKA, N.A., TRUSTEE, APPELLEE, V. BELLEVUE BRIDGE COMMISSION, A PUBLIC BODY CORPORATE AND POLITIC, APPELLANT.

585 N.W.2d 505

Filed October 13, 1998. No. A-97-162.

1. **Records: Appeal and Error.** Without a complete record, an appellate court cannot make a de novo review. Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment.
2. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
3. **Records: Appeal and Error.** In reviewing the decision of a lower court, an appellate court considers only evidence included within the record.
4. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
5. **Trial: Records.** It is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.
6. **Courts: Jurisdiction: Appeal and Error.** After an appeal has been perfected to an appellate court, the lower courts are divested of subject matter jurisdiction over that case.
7. **Courts: Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
8. **Pleadings.** A civil action must be commenced by filing of a petition in the office of the clerk of a proper court.
9. **Service of Process.** A summons shall be directed to the defendant or defendants, and contain the names of the parties and the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff.
10. **Receivers.** No receiver shall be appointed except in a suit actually commenced and pending.
11. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power 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 involved in the action before the court.
12. **Judgments: Jurisdiction.** A ruling made in the absence of subject matter jurisdiction is a nullity.

13. **Receivers.** A suit, which must be actually commenced and pending as a condition precedent to an appointment of a receiver, must be one in which the major relief sought is independent of the receivership. The latter is a purely ancillary remedy.
14. **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.
15. **Courts: Receivers: Equity.** The appointment of a receiver is a matter of discretion for the court. This discretion is equitable in nature.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and vacated.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

Gregory A. Pivovar for appellee.

SIEVERS and MUES, Judges, and HOWARD, District Judge, Retired.

SIEVERS, Judge.

INTRODUCTION

In this case, we explore fundamental jurisdictional issues, both personal and subject matter, which are involved in receiverships, and due to the district court's lack of jurisdiction, we vacate its order appointing a receiver.

BACKGROUND

On October 20, 1950, three men met at the city hall in Bellevue, Nebraska, and resolved to build a bridge. The three men composed the Bellevue Bridge Commission, and the bridge was to span the Missouri River between Bellevue and Mills County, Iowa. In accordance with a written resolution passed by the commission that day, the bridge was built and is commonly known today as the Bellevue Bridge.

The commission sold 2,800 bonds in order to raise money for the project. At $1,000 per bond, the money raised by the commission was enough to cover the estimated $2.8 million cost of building the bridge and readying it for operation. The bonds had a par value of $1,000, with interest coupons attached. Interest was to accrue at 4 percent annually, and the interest coupons could be cashed in every 6 months, on November 1 and May 1 of each year. The bonds were to mature in 1980. However, the

commission had the option of redeeming some or all of the bonds earlier. According to the resolution, if the bonds were redeemed early, the commission would pay the par value of the bond and accrued interest to the bondholder, plus a "premium" of 4 percent of the par value.

The interest and principal on the bonds were to be paid from money earned operating the bridge. This was to be the sole source of payment, and the commission made clear in the text of the resolution that no governmental body would be responsible for paying on the bonds. The commission was to levy "tolls, fares or other charges" for the use of the bridge, in order to earn the money to pay the bond investors. The money collected was to be deposited in a group of accounts or funds, with names like the "Bridge Revenue Fund," the "Sinking Fund," and the "Contingency Reserve Fund." Provisions were made to ensure that the operating costs of the bridge were paid and that adequate reserves were maintained. Additionally, provision was made for the method of paying bond investors. A portion of the resolution of October 20, 1950, provided:

> In the event that default shall be made in the payment of the interest on or the principal of any of the Bonds . . . and in the further event that any such default shall continue for a period of thirty days, any holder of such Bonds . . . shall be entitled as of right to the appointment of a receiver of said Bridge . . . .

On January 17, 1997, Norwest Bank Nebraska, N.A. (Norwest), filed a petition in the district court for Sarpy County. The petition alleged that Norwest was the owner of 762 of the bonds issued pursuant to the 1950 resolution and that the commission had defaulted for more than 30 days in paying interest and principal. Norwest requested that Jeffrey Renner, secretary of the commission, be appointed as receiver. No other relief was requested. There was no praecipe for summons filed as part of the petition, nor was there a certificate of service. On that same day, Norwest hand-delivered a separate pleading, entitled "Notice of Application for Appointment of Receiver," to Eugene Farley, the chairman of the commission, and to Renner. The notice informed both men that a hearing on the application for appointment of a receiver would be held January 24, in the

district court for Sarpy County. At that hearing, the court appointed Renner as receiver. The court's order of appointment of receiver, dated January 24, 1997, states that oral evidence and exhibits were received. That order does not indicate the presence at the hearing of any commission member or attorney representing the commission.

On February 12, 1997, the commission filed its notice of intention to appeal that order to this court. The appropriate fees were timely paid to the district court. The commission also filed a "Praecipe for Transcript" and a "Praecipe for Bill of Exceptions." Included in the praecipe for transcript was a request that the district court clerk produce any praecipe for summons, summons, and return of summons filed by Norwest in the district court. The transcript prepared and filed by the district court clerk does not include any of these three items. We have no bill of exceptions to consult on appeal because no recording was made of the January 24 hearing.

On May 15, 1997, Norwest filed a motion for order nunc pro tunc. A hearing on the motion was held May 23, and an order nunc pro tunc was entered on June 6. The order nunc pro tunc revised the court's order of January 24 regarding what transpired at the January 24 hearing. In the order nunc pro tunc, the court stated that Farley and Renner had been present at the January 24 hearing. The order nunc pro tunc further stated that at the January 24 hearing, the court "acknowledged" the "presence in court" of Farley and Renner, and "made inquiry as to whether there were any objections and was advised that there were none." It is unclear from the order nunc pro tunc what the topic of discussion was at the time Farley and Renner supposedly had no objections. The order nunc pro tunc also stated that there was a "dialogue" among the participants at the hearing. No further notice of appeal was filed, and the matter is before this court on the notice of appeal filed February 12.

ASSIGNMENTS OF ERROR

The commission assigns the following errors in this appeal: (1) The district court erred in exercising personal jurisdiction over the defendant and over the subject matter of this action when there had been no issuance or service of summons upon the commission; (2) the court erred in entering judgment when

the commission had not been served with summons or given the opportunity to appear and answer as required by law; (3) the court erred in failing to require a verbatim record of the proceedings to preserve the oral evidence and exhibits it received and considered in making its determination; (4) the court erred in failing to prepare, certify, and deliver to the clerk of the district court a bill of exceptions; and (5) the decision of the trial court is not supported by the evidence and is contrary to law.

STANDARD OF REVIEW

[1,2] Without a complete record, an appellate court cannot make a de novo review. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994). Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment. *Id.* Subject matter jurisdiction is a question of law for the court. *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

ANALYSIS

Record.

[3,4] In reviewing the decision of a lower court, an appellate court considers only evidence included within the record. *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997). Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). In this case, there is no record of what transpired at the January 24, 1997, hearing during which the district court appointed a receiver. Meaningful review therefore proves difficult.

[5] We note that the absence of a bill of exceptions from the district court hearing is not the commission's fault. The commission filed a praecipe for bill of exceptions on February 12, 1997. At that point, the responsibility for producing the record of a judicial proceeding shifts to the court. *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

> "[I]t is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to

> a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty."

Gerdes, 247 Neb. at 140-41, 525 N.W.2d at 221. See *Holman, supra.*

[6] Here, we have no bill of exceptions establishing what happened at the January 24, 1997, hearing. Additionally, we do not consider the order nunc pro tunc entered by the court on June 6, though for a different reason. The order nunc pro tunc was entered over 3 months after the commission filed its notice of appeal. Its entry violated the well-established rule that after an appeal has been perfected to an appellate court, the lower courts are divested of subject matter jurisdiction over that case. Neb. Rev. Stat. § 25-1912(3) (Reissue 1995); *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997). The commission's appeal was properly perfected, in that the commission timely filed its notice of intention to appeal and paid the costs associated with such notice. § 25-1912(3). Therefore, the district court order nunc pro tunc is not considered by us, nor is it effective for any purpose, as the district court clearly lacked jurisdiction to enter the order.

Personal Jurisdiction.

[7] The commission's first assigned error is that it was not subject to the personal jurisdiction of the court, because the commission was never served with a copy of Norwest's petition. Norwest contends that the district court acquired jurisdiction through a general appearance by the commission at the January 24 hearing. One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996).

However, Norwest's argument rests solely on the statements in the order nunc pro tunc that Farley and Renner of the commission were present at the January 24 hearing. Without the order nunc pro tunc and without any bill of exceptions, there is

no evidence of any appearance by the commission, let alone a general appearance, where the commission sought any action by the court. Thus, the court did not have personal jurisdiction over the commission unless the commission was properly served with process.

[8] Neb. Rev. Stat. § 25-501 (Reissue 1995) provides: "A civil action must be commenced by filing of a petition in the office of the clerk of a proper court." Neb. Rev. Stat. § 25-502.01 (Reissue 1995) provides: "The plaintiff shall file with the clerk of the court a praecipe for summons stating the name and address of each party to be served and the manner of service for each party. Upon written request of the plaintiff, separate or additional summonses shall be issued."

[9] Neb. Rev. Stat. § 25-503.01 (Reissue 1995) provides, in part:

> The summons shall be directed to the defendant or defendants, and contain the names of the parties and the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff. It shall notify defendant that in order to defend the lawsuit an appropriate written response must be filed with the court within thirty days after service, and that upon failure to do so the court may enter judgment for the relief demanded in the petition.

In this case, the petition did not include a praecipe for summons, there was not a separate praecipe, nor was there any other indicia that the petition was served upon the commission.

[10] The "Notice of Application for Appointment of Receiver," a pleading separate from the petition, did contain a certificate of service, indicating that it was served upon the chairman of the commission by hand delivery. However, the statutes governing appointment of receivers in Nebraska specifically state that appointment of a receiver is to occur within the context of an already existing case. Neb. Rev. Stat. § 25-1082 (Reissue 1995). "No receiver shall be appointed except in a suit actually commenced and pending . . . ." *Id.* See, also, *Gentsch, Inc. v. Burnett*, 173 Neb. 820, 115 N.W.2d 446 (1962). In *Gentsch, Inc.*, the appointment of a receiver was reversed on appeal because "[c]onditions of consequence here are that a suit must be actually commenced . . . . Of primary significance

within the meaning of the statute, there was no action pending which would extend to the court jurisdiction to appoint a receiver." *Id.* at 825, 115 N.W.2d at 449.

In this case, Norwest's own application seems to tacitly recognize this requirement. It states, "This application is made by the applicant's petition heretofore filed herein with all exhibits attached . . . ." Thus, Norwest seems to acknowledge that an appointment of receiver is dependent initially on the existence of a properly commenced and underlying case. Norwest did not accomplish service of its lawsuit on the commission, thereby putting the cart decidedly before the horse. Based on the pleadings, and in the absence of a bill of exceptions, the district court did not acquire personal jurisdiction over the commission.

Subject Matter Jurisdiction.

[11,12] The commission also contends that the district court had no subject matter jurisdiction. Subject matter jurisdiction is a court's power 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 involved in the action before the court. *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998). A ruling made in the absence of subject matter jurisdiction is a nullity. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

[13] In this case, the subject is the appointment of a receiver. Nebraska statutes are clear that "[n]o receiver shall be appointed except in a suit actually commenced and pending . . . ." § 25-1082. See, also, *Gentsch, Inc., supra*; *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222, 94 N.W. 136 (1903). We have already discussed *Gentsch, Inc.*, above. The *Vila* case further explains what is required of a lawsuit before a receiver may be appointed within that lawsuit. "Moreover, the suit which must be 'actually commenced and pending' as a condition precedent to an appointment of a receiver, must be one in which the major relief sought is independent of the receivership. The latter is a purely ancillary remedy." *Vila*, 68 Neb. at 225-26, 94 N.W. at 138.

In this case, Norwest's petition did not seek any relief independent of the appointment of a receiver. Norwest's request for

relief did not seek judgment for the amount allegedly due it in interest and principal, nor did it even mention any amount anywhere in its petition. There is nothing "ancillary" about Norwest's application for appointment of a receiver, and there was no underlying action in which the application was brought.

[14,15] Norwest states in its petition that it is "entitled to the appointment of a receiver as a matter of right in accordance with the terms of the Resolution which established the rights, duties and benefits of the parties." However, parties may not stipulate to subject matter jurisdiction. *Rice, supra.* "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." *Id.* at 225, 575 N.W.2d at 404. Further, the appointment of a receiver is a matter of discretion for the court. *Lackey v. Yekel*, 113 Neb. 382, 203 N.W. 542 (1925). This discretion is equitable in nature. *O'Neill Production Credit Assn. v. Putnam Ranches, Inc.*, 198 Neb. 145, 251 N.W.2d 884 (1977). In *Lackey*, the parties contractually stipulated to the appointment of a receiver in the event of nonpayment on a real estate mortgage. The Supreme Court held:

> The above provision for the appointment of a receiver neither adds to, nor detracts from, what the contract would be if such provision were omitted. Such a provision is simply declaratory of that which the law would imply without it. Whether or not a receiver should be appointed is a matter resting in the . . . discretion of the court under the conditions shown at the trial, and within the statutory limitations.

Lackey, 113 Neb. at 383, 203 N.W. at 542. In this case, then, the resolution drafted by the commission in 1950 does not operate to create subject matter jurisdiction when it does not otherwise exist.

After examining the pleadings, given the absence of a bill of exceptions, we conclude that the district court lacked subject matter jurisdiction to appoint a receiver. Norwest sought the ancillary remedy of receivership, but there was no underlying action in which some relief besides the appointment of a receiver was sought.

CONCLUSION

The district court lacked personal jurisdiction over the commission as well as being without subject matter jurisdiction. Because of this pending appeal, it was also without jurisdiction to enter its order nunc pro tunc. We reverse and vacate the district court's order appointing a receiver.

REVERSED AND VACATED.

ST. JOSEPH DEVELOPMENT CORPORATION, A KANSAS CORPORATION, APPELLANT, V. BERNADETTE SEQUENZIA, APPELLEE.
585 N.W.2d 511

Filed October 13, 1998. No. A-97-353.

1. **Judgments: Appeal and Error.** An appellate court is obligated to reach an independent conclusion upon questions of law.
2. ____: ____. A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.
3. **Actions: Judgments: Time.** If execution shall not be sued out within 5 years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if 5 years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.
4. **Stipulations: Parties.** There is no doubt that a party is bound by its stipulations.
5. **Appeal and Error.** Absent plain error, an appellate court will not consider an issue on appeal which was not presented to or passed upon by the trial court.

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

Scott A. Meyerson, of Hotz & Weaver, and W. Thomas Gilman, of Redmond & Nazar, L.L.P., for appellant.

Dennis J. Green, of Green & Bubak, for appellee.

SIEVERS and MUES, Judges, and HOWARD, District Judge, Retired.

SIEVERS, Judge.

This case involves enforcement of a Kansas judgment through the Nebraska courts. The district court for Douglas County agreed with the claim of the judgment debtor, Bernadette Sequenzia, that the judgment was dormant and unenforceable. The judgment creditor, St. Joseph Development Corporation (St. Joseph), appeals.

FACTUAL BACKGROUND

There was very brief oral testimony in the district court because the case was tried mainly on a stipulation of facts and exhibits. St. Joseph obtained a judgment against Sequenzia and her now deceased husband in the district court for Sedgwick County, Kansas, on May 8, 1990. The principal amount of the judgment was $11,281.41, and prejudgment interest as well as costs were awarded. Postjudgment interest has accrued, making the total judgment about $20,000, but the precise amount of the judgment is not pertinent to our decision. On May 12, 1992, Sequenzia filed a chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of Colorado, and St. Joseph was listed as an unsecured creditor. Notice of that filing was mailed to St. Joseph's Kansas attorney in Wichita, and Sequenzia's discharge was entered October 16. While these facts concerning the bankruptcy are in the factual stipulation, there is no claim in the briefs that the bankruptcy has any bearing on the outcome or that it discharged this debt. Thus, we do not discuss the bankruptcy any further.

The Kansas judgment was filed with the district court for Douglas County, and the parties expressly stipulated that "[t]he Kansas Judgment which was filed in the District Court of Douglas County on March 12, 1992, created a judgment lien on the Real Property upon being filed with the District Court."

The reference to real property was to a residence located at 1201 South 44th Street in Omaha, which was the home of Sequenzia's mother. The parties stipulated that Sequenzia along with Thomas C. Marotto and Mollie M. Marotto held title as joint tenants with the right of survivorship from and after January 5, 1979, pursuant to a survivorship warranty deed. On April 13, 1992, after the Kansas judgment created a judgment

lien on the South 44th Street property, as recited in the parties' stipulation, Sequenzia transferred her interest in that property to Thomas C. Marotto and Mollie M. Marotto via warranty deed. The parties stipulated that at the time of that transfer, "[St. Joseph's] lien on the Real Property was not satisfied prior to, or at the time of, the April 13, 1992 transfer." The real property on South 44th Street was later sold, and one-third of the proceeds, or $21,666.67, was placed in an escrow agreement with ATI Title Company (ATI) pursuant to a written escrow agreement signed by Sequenzia on May 6, 1996. That money is acknowledged by ATI to be Sequenzia's. The escrow agreement makes the disbursement of these funds dependent upon the outcome of this proceeding.

We note in passing that on May 31, 1996, St. Joseph filed a motion in the Kansas courts to determine dormancy of the judgment, and the Kansas trial court, on June 28, determined that the judgment against Sequenzia was not dormant under Kansas law. The parties have stipulated in this case that an appeal of that decision was pending before the Kansas Court of Appeals at the time the instant case was tried in the district court for Douglas County. On September 11, 1998, the Kansas Court of Appeals released its opinion holding that the judgment had not become dormant under Kansas law.

PROCEDURAL BACKGROUND

This case before us has its genesis in the filing by St. Joseph on October 17, 1996, of an affidavit of garnishment asserting that ATI was holding property of Sequenzia's. On October 23, ATI filed answers to interrogatories, in which it stated that it had $21,666.67 of Sequenzia's money in its possession. Sequenzia filed a request for hearing on October 25, using the preprinted form served with the garnishment. Sequenzia asserted in that form that the funds sought were exempt from garnishment. There are no other pleadings putting this case at issue, but when the matter came on for hearing before the district court for Douglas County, the court announced that it was a hearing on the "objection of the defendant to a garnishment." Counsel for Sequenzia, before the introduction of evidence, told the court that there were two arguments "in terms of these funds

not being garnishable. One is that the judgment is dormant. Now, intertwined with that is the fact that the defendant here filed bankruptcy and so I suppose if they had a valid judgment, that bankruptcy discharged the debt." Nothing more at the trial level, or in the briefs filed here, was said about the bankruptcy.

On February 21, 1997, the district court decided the case by an order which found that the Kansas judgment was filed in the district court for Douglas County on March 2, 1992, and that no action was taken to enforce the judgment in Nebraska until this garnishment action. The court found that the period of time required for a judgment to become dormant is "governed by the laws of the filing forum [i.e.,] Nebraska," which is 5 years. The court found that the 5 years ran from the time "the judgment is originally entered, and not from the time that the foreign judgment is registered." The court then found that "no action having been taken to execute on the judgment since January 10, 1991 until May 31, 1996, more than five years had elapsed and, therefore, the judgment had become dormant at the time this garnishment was filed." Consequently, the court found that the funds were not owed on the judgment and that the objection to the garnishment should be sustained.

Within 10 days of that decision, St. Joseph filed a "Motion for Reconsideration," requesting a new hearing on the grounds that the decision was not sustained by sufficient evidence, that it was contrary to the laws of the State of Nebraska, and that there was error of law. The district court held a hearing on the motion to reconsider, which is not part of the record, on March 7, 1997, and on March 10 the court's docket reflects: "Plaintiff's motion to reconsider is denied." The notice of appeal was filed March 28.

ASSIGNMENT OF ERROR

St. Joseph argues on appeal that the trial court erred in determining that under the Uniform Enforcement of Foreign Judgments Act (UEFJA), the time for determination of dormancy runs from the time that the judgment was originally entered in the foreign jurisdiction rather than from the time the foreign judgment was registered in Nebraska.

STANDARD OF REVIEW

[1] An appellate court is obligated to reach an independent conclusion upon questions of law. *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992).

JURISDICTION

[2] We are initially faced with a jurisdictional question which stems from the "Motion for Reconsideration" detailed above and the decision of the Nebraska Supreme Court in *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998). In *Bechtold*, the trial court had entered an order disqualifying the Creighton Legal Clinic from participation in the underlying lawsuit. A motion to reconsider was filed, supported with an affidavit which asserted that the applicable rule of law was being extended by the trial court beyond the parameters set forth in existing decisions. The appeal from the order of disqualification of May 6, 1996, was not filed until after the trial court's order on June 11 denying the motion to reconsider. Observing that few cases discuss whether a postjudgment motion labeled a "motion to reconsider" is indeed a motion for new trial, the court, citing *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990), held that "[a] motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment." *Bechtold*, 254 Neb. at 288, 576 N.W.2d at 189-90. *Russell, supra*, held that where a trial court acts as an intermediate court of appeals, a motion for new trial is not appropriate and does not toll the time for filing an appeal.

The Supreme Court in *Bechtold*, 254 Neb. at 288, 576 N.W.2d at 189, expressly "decline[d] to treat [the] 'Motion to Reconsider' " as a motion for new trial. Immediately before saying this, the opinion in *Bechtold* references our opinion in *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993), where we treated a motion labeled "motion for reconsideration" as a motion for new trial where, as here, it was based on an allegation that the decision of the court was not sustained by sufficient evidence and was contrary to law. *Horace Mann*

Cos. was not expressly overruled by *Bechtold*. Perhaps the *Bechtold* court intended to announce a concrete rule that a post-judgment pleading entitled "Motion for Reconsideration" never acquires the status or office of a motion for new trial so as to toll the running of the 30 days to perfect an appeal to a higher court. However, we are frankly uncertain if that was the intent. But, because *Bechtold* does not overrule *Horace Mann Cos.*, we do not extend the holding of *Bechtold* to a holding that jurisdiction was not perfected in the instant case. Accordingly, we have jurisdiction and now turn to the merits of this case.

ANALYSIS

[3] This case of apparent first impression in Nebraska involves the interface between the Nebraska dormancy of judgment statute and the UEFJA. The dormancy statute is found at Neb. Rev. Stat. § 25-1515 (Reissue 1995), and it provides:

> If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.

In short, if some sort of execution (defined as "legal process of enforcing the judgment," Black's Law Dictionary 568 (6th ed. 1990)) is not attempted within 5 years of the rendition of the judgment or 5 years pass between executions, the judgment becomes dormant and not enforceable as a lien on the judgment debtor's property. The case before us involves a garnishment, which we consider to be an execution to enforce a judgment within the meaning of § 25-1515. See *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985) (holding that through garnishment in aid of execution, garnishee becomes "stakeholder" of property belonging to one of proper parties to lawsuit for which execution is sought and that garnishment is ancillary procedure whereby judgment creditor seeks to collect judgment).

The UEFJA, in effect March 12, 1992, the date the Kansas judgment was filed in Nebraska in the instant case, can be found at Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1989). (We note that the Nebraska Uniform Enforcement of Foreign Judgments Act is now codified at Neb. Rev. Stat. §§ 25-1587.01 through 25-1587.09 (Reissue 1995).) The UEFJA defined a foreign judgment as any judgment, decree, or order of a court "which is entitled to full faith and credit in this state." See § 25-1587(1). Section 25-1589, in effect at the time of filing in the instant case, provided that a petition for registration could be filed in Nebraska if it contained a copy of the judgment to be registered, the date of its entry, and the record of any subsequent entries affecting it. Section 25-1589 also provided that the clerk of the registering court was to notify the clerk of the court which rendered the original judgment that petition for registration had been made.

The judgment in the instant case was obtained in Kansas on May 8, 1990, and filed in the district court for Douglas County, Nebraska, on March 12, 1992. In ruling upon Sequenzia's challenge to the garnishment, the district court reasoned, as a matter of law, that the time for determination of dormancy "runs from the time that the judgment is originally entered, and not from the time that the foreign judgment is registered." The district court then found that no action was taken to execute on the judgment from January 10, 1991, until May 31, 1996, a period of more than 5 years, which made the judgment dormant under § 25-1515. There is an inconsistency in the trial court's findings, because it ruled that dormancy runs from the time the judgment is originally rendered, but the trial court actually counted the time between attempts in Kansas to enforce the judgment, i.e., between January 10, 1991, when action to enforce the judgment was taken in Kansas, and May 21, 1996, when an order for aid in execution was issued in the Kansas court.

However, Sequenzia's argument here is not really in support of the trial judge's view that dormancy is determined by counting 5 years from when the judgment is originally entered in the other state rather than from when it was registered in Nebraska. Instead, Sequenzia argues that personal jurisdiction was never

obtained over her. She argues that under the UEFJA, in effect at the time of filing in Nebraska on March 12, 1992, she was entitled to have summons issued and served upon her in a manner provided for obtaining jurisdiction of the person, citing § 25-1590, a statute which has now been repealed.

[4] Sequenzia is correct that said statute provided for service of summons upon the judgment debtor "as in an action brought upon a foreign judgment, in the manner authorized by the law of this state for obtaining jurisdiction of the person." See § 25-1590. The first difficulty with Sequenzia's argument is that in the trial court, Sequenzia stipulated as follows: "The Kansas Judgment which was filed in the District Court of Douglas County on March 12, 1992, created a judgment lien on the Real Property upon being filed with the District Court." Sequenzia appears to have stipulated away any alleged lack of personal jurisdiction. There is no doubt that a party is bound by its stipulations. See *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

The next difficulty with Sequenzia's argument is that § 25-1592, which was in effect at the time the Kansas judgment was registered, provided:

> At any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments.

Additionally, *Sullivan v. Sullivan*, 168 Neb. 850, 854, 97 N.W.2d 348, 352 (1959), in speaking of a registered judgment and referencing § 25-1592, states that "[i]t [registered judgment] was therefore a judgment and required to be so regarded and recognized on and after registration." *Sullivan* also holds that once recognized as a judgment, which under *Sullivan* means upon registration, the judgment creditor has by right of levy the same rights as the holder of a "domestic judgment" with reference to the property of the judgment debtor. As a consequence, as soon as the Kansas judgment was registered, it was like a Nebraska judgment and St. Joseph could execute upon it. Service of process upon Sequenzia was not necessary.

[5] The next problem with Sequenzia's argument is that it is a position not taken in the trial court and not ruled upon by the trial court. It is a well-established rule of our jurisprudence that absent plain error, an appellate court will not consider an issue on appeal which was not presented to or passed upon by the trial court. *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

A judgment goes dormant under Nebraska law if 5 years pass without execution. The execution here began with the summons and garnishment filed October 17, 1996. Therefore, had 5 years passed without execution at the time of the garnishment? The answer of course depends upon what event one begins counting from. The district court found that the law was to begin counting from the date of the Kansas judgment. To the extent that there is law supporting that view, it is definitely a minority view, and the law is now rather well established, in jurisdictions which have decided the question, that the count for dormancy begins on the date that the foreign judgment is brought to a state and registered. In the instant case, this would be March 12, 1992, and of course 5 years had not passed from that date to the execution via garnishment filed October 17, 1996.

Our research reveals that there are three seminal cases on the subject which we find persuasive and controlling. We begin with *Warner v. Warner*, 9 Kan. App. 2d 6, 668 P.2d 193 (1983). On January 2, 1971, Charles Warner was ordered by a Missouri court to pay separate maintenance to Erna Warner in the amount of $600 per month. The Missouri court reduced the monthly payments to $300 per month on April 26, 1976. Erna registered the Missouri judgment in Johnson County, Kansas, as a foreign support order on November 16, 1976, alleging that there were past due payments of $26,000. Charles moved for a finding in the Kansas court that the payments which had accrued before October 1976, 5 years before an attempted Kansas execution in October 1981, had become dormant judgments. The Kansas court first determined several issues relating to the fact that the case involved a series of monthly amounts which were accruing, issues not pertinent here. The court then turned to the effect of the Kansas dormancy statute. The Kansas court referred to the general foreign judgments act, which provided that once a

foreign judgment is registered, it is to be treated as if it were a Kansas judgment. Like Nebraska law, Kansas law provided that a Kansas judgment becomes dormant 5 years after its effective date. Thus, the Kansas court asked what the effective date of a foreign judgment was for dormancy purposes. The court answered that it was the date it was registered, reasoning:

> Thus a foreign judgment four years and eleven months old when registered does not become dormant in Kansas a month later. Such a rule would defeat the purpose of the registration act and be totally inconsistent with the result achieved if the judgment holder sued on the foreign judgment, as permitted by K.S.A. 60-3006. Instead, registration of a foreign judgment which is enforceable when registered gives the judgment creditor a new and additional five years to execute, regardless of when the judgment was rendered in the foreign state.

Warner, 9 Kan. App. 2d at 8, 668 P.2d at 195.

The next case of consequence is *Pan Energy v. Martin*, 813 P.2d 1142 (Utah 1991), where the plaintiff obtained an Oklahoma judgment in September 1982 and registered it in Utah in August 1987 under that state's version of the UEFJA, the Utah Foreign Judgment Act. Under Oklahoma law, a judgment becomes unenforceable without execution within 5 years. As a result, the Oklahoma judgment became dormant in Oklahoma, the originating state, 1 month after the judgment creditor filed in Utah, which had an 8-year statute of limitations before dormancy. See Utah Code Annot. § 78-12-22 (1987). The Utah Foreign Judgment Act provided, like Kansas' general foreign judgments act, that the judgment, once registered in Utah, becomes "a judgment of a district court of this state . . . ." (Emphasis omitted.) *Pan Energy*, 813 P.2d at 1144. Accordingly, the Utah court held that because judgments properly filed in Utah become Utah judgments, the Utah statute of limitations applied to enforcement of the judgment in Utah.

The Utah court, in support of its holding, recited that the federal courts have taken a similar approach with respect to a similar federal registration statute. The Utah court cited Justice Blackmun's opinion, while he was on the 8th Circuit Court of Appeals, in *Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965). In

Stanford, the court allowed enforcement of a judgment in Missouri even though it was unenforceable in Mississippi, the state where it was rendered, because the Missouri statute of limitations had not yet expired. Justice Blackmun wrote: "We feel that registration provides, so far as enforcement is concerned, the equivalent of a new judgment of the registration court." *Utley*, 341 F.2d at 268. The Utah court adopted this view, holding that because the Oklahoma judgment was filed under the Utah Foreign Judgment Act, it could be enforced as a Utah judgment, irrespective of subsequent dormancy in the state of rendition. Finally, referencing the Full Faith and Credit Clause, the Utah court held that Utah may apply its own statute of limitations to the enforcement of a foreign judgment.

Finally, we turn to a case decided since the parties briefed this issue, *Drllevich Const., Inc. v. Stock*, 958 P.2d 1277 (Okla. 1998). The Oklahoma Supreme Court overruled its earlier decision to the contrary and held that an enforceable foreign judgment which was registered in Oklahoma under the Uniform Enforcement of Foreign Judgments Act is considered a new judgment for purposes of the Oklahoma 5-year dormancy statute. The Oklahoma court relied heavily on *Pan Energy, supra*, and *Warner, supra*, as well as reviewing other decided cases to conclude that a foreign judgment, if enforceable when registered, is then subject to the dormancy statute of the registering state.

In the case at hand, we note the stated effect of the UEFJA, which is that once registered, levy can be made on a foreign judgment as to any property of the judgment debtor subject to judicial process for the satisfaction of judgments. Nebraska judgments go dormant only if 5 years pass without execution thereupon. In this case, the judgment from Kansas became the functional equivalent of a Nebraska judgment in March 1992 and execution via garnishment was undertaken in October 1996. We note that § 25-1587.03 (Reissue 1995) now expressly provides that a registered foreign judgment shall be treated by the clerk in the same manner as a "judgment of a court of this state." Thus, 5 years had not passed between when the Kansas judgment became a Nebraska judgment and its execution via garnishment. When effect is given to the Nebraska dormancy

statute, it naturally follows that the judgment was not dormant under § 25-1515.

CONCLUSION

For the foregoing reasons, the district court was incorrect in counting the 5 years from either the date of last execution in Kansas or the date of the Kansas judgment and was incorrect in holding that the funds held by the garnishee, ATI, were not subject to garnishment.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
DWAYNE GREER, APPELLANT.
586 N.W. 2d 654

Filed October 13, 1998. No. A-97-596.

1. **Burglary.** A breaking is an essential element of burglary.
2. **Jury Instructions: Burglary.** When burglary is charged, a jury should be instructed that in addition to the use of physical force, however slight, the removal of an obstacle to entry is necessary to find a breaking.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial court's refusal to give a requested jury instruction, an appellant has the burden to establish that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, the question is whether, under the totality of the circumstances, the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.
5. ____: ____: ____: ____. An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
6. **Records: Appeal and Error.** It is the duty of 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.
7. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a

crime will be found in a particular place. The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.

8. **Search and Seizure: Search Warrants: Presumptions: Proof.** A search pursuant to a warrant is presumed to be valid, and if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
9. **Trial: Joinder: Proof: Appeal and Error.** A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant.
10. **Trial: Joinder: Proof.** A defendant has no constitutional right to a separate trial. The right is statutory and depends on a motion for a showing that prejudice will result from a joint trial.
11. **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.
12. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense.
13. **Double Jeopardy: Legislature.** The multiple punishment prong of the double jeopardy bar seeks to ensure that the total punishment imposed on a defendant does not exceed that authorized by the Legislature.
14. **Double Jeopardy: Lesser-Included Offenses: Convictions: Sentences.** When a defendant has been convicted of both a greater and a lesser-included offense, vacation of the sentence on the lesser charge cures the double jeopardy violation.
15. **Criminal Law: Statutes: Lesser-Included Offenses: Proof.** In determining what constitutes lesser-included offenses, the statutory elements approach involves a textual comparison of criminal statutes to determine if each statute contains at least one element not contained in the other statute. Thus, a lesser-included offense is one which is necessarily established by proof of the greater offense, or stated another way, to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense.
16. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
17. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, a defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
18. **Constitutional Law: Double Jeopardy: Statutes.** The constitutional prohibition against double jeopardy does not apply where two separate and distinct crimes are committed as the result of one and the same act, because the constitutional proscrip-

tion is directed to the identity of the offense and not to the act. Consequently, multiple punishments can be imposed for the same act without violating the double jeopardy provision of the state and federal Constitutions, where imposition of the multiple punishments is specifically authorized by state statute.

19. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
20. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, reversed and remanded in part for a new trial, and in part sentences vacated and remanded for resentencing.

Robin W. Hadfield, of Nebraska Commission on Public Advocacy, for appellant.

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

HANNON, IRWIN, and INBODY, Judges.

INBODY, Judge.

I. INTRODUCTION

Dwayne Greer appeals from his convictions for two counts of burglary; four counts of use of a weapon to commit a felony; and one count each of first degree sexual assault, second degree assault, and first degree false imprisonment. Greer also appeals the sentences imposed thereon.

II. STATEMENT OF FACTS

In the summer of 1995, A.L. was living at 1700 B Street, apartment No. 1, in Lincoln, Nebraska, with two other young women, H.S. and P.S. The apartment was located in an old house that had been converted into five apartments. A.L., H.S., and P.S.' apartment occupied part of the main floor and part of the basement of the converted house.

In the summer months, sometime before August 1995, A.L. and P.S. met Greer when he was helping some people move out of one of the other apartments in the converted house. In

August, Greer came to A.L., H.S., and P.S.' downstairs apartment door at 2 or 3 o'clock in the morning. P.S. and H.S. answered the door. Greer identified himself as "Dwayne" and asked where the girl with the maroon car was. P.S. and H.S. knew that Greer was asking for A.L., because she drove a small maroon car. H.S. and P.S. informed Greer that A.L. was not there, and Greer left. The next morning, P.S. and H.S. discovered that their apartment had been burglarized. A boom box stereo, cellular telephone, and wallet belonging to H.S. were missing. Between 11 p.m. and 2 a.m. the night after the burglary, Greer was outside of the apartment again.

On November 3, 1995, in the early morning hours, A.L. reported that she was awakened by an intruder who sexually assaulted her at knifepoint. A.L. was able to provide police with the following description of her assailant: a black male, medium to stocky build, wearing dark clothing, including a dark ski mask and a dark sweatshirt and lighter-colored cloth gloves. During the assault, A.L. was stabbed in the right thigh, and A.L.'s assailant left bloody shoe prints at the scene.

Just prior to the report of the sexual assault to police, at approximately 4:35 a.m., Lincoln police officer Chad Barrett observed a black male approximately 5'11" to 6'0" tall and weighing approximately 185 pounds running in the area of 10th and G Streets. This area is about 16 blocks away from 1700 B Street. The man was wearing a dark-colored hooded sweatshirt and dark-colored sweatpants or jeans. The male ran to an apartment complex at 919 G Street.

After police officers were dispatched to 1700 B Street to investigate the reported sexual assault, Officer Barrett was ordered to set a perimeter around the 919 G Street apartment complex to observe individuals entering or exiting the complex. Officer Barrett began contacting individuals living in the apartment complex, specifically apartment No. 1. Officers were informed that there were no black males living in the complex but that there was a black male who had lived across the alley in a complex located at 920 F Street, which was just south of 919 G Street. Upon learning this, officers contacted the party living in apartment No. 1 at 920 F Street, a black female named "Brenda Greer."

Officer Barrett continued to observe the complex at 920 F Street, and apartment No. 1 in particular, for another 45 minutes, at which time he was relieved by Investigator Charles Starr just prior to 7 a.m. Officer Starr had been watching the apartment for only a few minutes when he noticed the door to apartment No. 1 open and a female look out. Officer Starr observed a while longer, at which time he saw a black male look out the door. A few minutes later, the black male, whom Officer Starr identified as Greer, left the apartment. After Greer exited the apartment, Officer Starr made contact with him. At the time, Officer Starr was in plain clothes, but he did identify himself as a police officer. Officer Starr advised Greer that another officer wished to speak with him. Greer then left with a Sergeant Wright, who transported Greer to an interview room at the Lincoln Police Department. According to Det. Sgt. Larry Barksdale, Greer got into the police cruiser voluntarily and was free to leave.

Later on November 3, 1995, Officer Barksdale contacted Greer in the Lincoln Police Department interview room for the purpose of asking Greer if he would voluntarily give blood, saliva, and hair samples. Greer responded negatively. Officer Barksdale then obtained an order for identifying physical characteristics which required Greer to provide blood, saliva, and hair samples and transported Greer to Lincoln General Hospital, where the evidence was obtained.

Also on November 3, 1995, Det. Sgt. Richard Kohles obtained a search warrant for 920 F Street, apartment No. 1. The warrant was to search for evidence of the sexual assault: blood, clothes, knives. After obtaining the search warrant, Officer Kohles, Det. Sgt. Jim Breen, and Officer John Grubb conducted a search of the apartment at approximately 12:25 p.m. on November 3. As a result of this search, the officers seized, among other things, a Nokia cellular telephone, serial No. 16502550608; a ski mask; a pair of gray jeans; a pair of blue jeans; a pair of black Adidas brand tennis shoes; a black hooded sweatshirt with buttons down the front; another black sweatshirt; and a pair of black sweatpants.

The serial number of the cellular telephone seized from Greer's apartment matched the serial number on the cellular

telephone box which H.S. had provided to the police. Additionally, when the recall button was pressed, the last number called was displayed. The telephone number displayed was 475-0638. The Lincoln Police Department was able to determine that two people had given the 475-0638 telephone number to the police department as a result of some sort of police contact. One of those individuals was Greer, who had given police that number in June 1995.

In November 1995, Det. Sgt. Sandra Myers retrieved a black Sanyo CD boom box, model MCDZ22, serial No. 01012850, which had been pawned by Brenda Greer, from the BB&R Pawn Shop.

On December 11, 1995, an information was filed in Lancaster County District Court charging Greer with count I, burglary; count II, first degree sexual assault; count III, use of a weapon to commit a felony; count IV, burglary; count V, use of a weapon to commit a felony; count VI, second degree assault; count VII, use of a weapon to commit a felony; count VIII, first degree false imprisonment; and count IX, use of a weapon to commit a felony.

Pretrial motions and hearings included a motion by Greer to sever count I (burglary charge) from the remaining charges, which motion was subsequently overruled. Following a hearing, pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), regarding the admissibility of DNA evidence, the court entered an order finding that DNA evidence would be admissible at trial. Also, on March 31, 1997, Greer filed a motion to suppress, requesting exclusion of all physical evidence seized from Greer's residence. The trial court declined to set a separate hearing on the motion because defense counsel had failed to file the motion at least 10 days prior to trial. However, the court also stated:

> I think during the course of a trial the Court can always be cognizant of Constitutional issues. And I will do so in this case. But because of the 10-day rule, I'm not going to set at [sic] separate hearing on this motion. But it will be on file and you can argue these issues during the trial by objections to any particular evidence that may be offered.

Trial began on April 2, 1997. During trial, Dr. Reena Roy, a forensic serologist at the Nebraska State Patrol Criminalistics

Laboratory, testified that she performed forensic tests on items submitted to her in this case and that she prepared some items to be sent to Cellmark Diagnostics for DNA testing. Dr. Roy examined the pair of gray jeans, which had been seized from Greer's apartment, and determined that the jeans tested positive for human blood, type A. The significance of finding type A blood on the jeans is that the blood could not have come from Greer, but it could have come from A.L.

Dr. Roy found spermatozoa present on both the vaginal and rectal smear slides obtained from A.L., and semen was present on A.L.'s panties, as well as the vaginal and rectal swabs. Blood was also present on A.L.'s panties.

Karen Quandt, a senior molecular biologist for Cellmark Diagnostics, conducted tests on four items in this case: Greer's jeans, a vaginal swab, and blood samples from Greer and A.L. She obtained DNA from each of these items. Quandt testified that with regard to the jeans sample, Greer was excluded as being the source of DNA from that sample and that A.L.'s known DNA sample matched the sample from the jeans. Additionally, Greer's DNA sample matched the male fraction of the vaginal swab.

Lisa Forman, a population geneticist at Cellmark Diagnostics, testified that with regard to the DNA banding pattern that matched between the jeans and the bloodstain from A.L., the frequency would be approximately 1 in 30 million in the Caucasian population, 1 in 12 billion in the African-American population, and 1 in 310 million in the western Hispanic population. In other words, Forman testified that the likelihood that, by chance alone, the set of characteristics on the blue jeans would match those found in the blood of A.L. are approximately 1 in 30 million in Caucasian, 1 in 12 billion in African-Americans, and 1 in 310 million in western Hispanics.

With regard to the other set of DNA banding patterns obtained from the vaginal swabs which matched the DNA obtained from Greer's bloodstain, the frequency of a match would occur in approximately 1 in 26 trillion in the Caucasian population, 1 in 1.9 trillion in the African-American population, and 1 in 2.1 trillion in the western Hispanic population.

Mark Bohaty, a firearms and toolmark examiner in the Nebraska State Patrol crime laboratory, compared a piece of tile

from A.L.'s apartment to the Adidas brand tennis shoes seized from Greer's apartment. Bohaty testified that in his opinion to a reasonable degree of scientific certainty, the partial impression on the pieces of tile could have been produced by Greer's right Adidas shoe. However, due to a lack of individual observable random imperfections in the shoes, he could not positively identify them as being produced by that shoe, as another shoe similar in physical size, design, and shape could not be excluded from having produced the partial impressions.

On April 9, 1997, the jury returned a verdict finding Greer guilty on all nine counts. On May 7, Greer was sentenced as follows: count I, 2 to 5 years' imprisonment; count II, 25 to 50 years' imprisonment; count III, 3 to 10 years' imprisonment; count IV, 3 to 5 years' imprisonment; count V, 3 to 5 years' imprisonment; count VI, 4 to 5 years' imprisonment; count VII, 3 to 10 years' imprisonment; count VIII, 4 to 5 years' imprisonment; and count IX, 3 to 5 years' imprisonment. The sentences were ordered to be served consecutively, and Greer was given credit for 538 days already served. Greer then filed a timely notice of appeal to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Greer asserts that the trial court erred in (1) giving an erroneous burglary jury instruction; (2) failing to give his proposed jury instruction No. 1; (3) failing to suppress evidence; (4) failing to grant his motion to sever trial; (5) allowing evidence obtained from a sink drain trap in his apartment; (6) convicting him of burglary (count IV), which violated his constitutional right to freedom from double jeopardy; (7) providing ineffective assistance of counsel; (8) imposing an illegal sentence for use of a weapon to commit second degree assault; and (9) imposing excessive sentences.

IV. DISCUSSION

1. Jury Instruction Regarding Burglary

First, we address Greer's contention that the jury was inadequately instructed as to the burglary charges, because neither the burglary instruction nor the definition of "breaking and entering" instructed the jury that removal of an obstacle to entry is required for a burglary to occur.

[1] Neb. Rev. Stat. § 28-507 (Reissue 1995) provides that "[a] person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." It is well-settled law in Nebraska that a breaking is an essential element of burglary. *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994); *State v. Crispell*, 201 Neb. 759, 272 N.W.2d 51 (1978); *McGrath v. State*, 25 Neb. 780, 41 N.W. 780 (1889).

In *McDowell, supra*, the Nebraska Supreme Court considered whether climbing or jumping a fence constituted "breaking" within the definition of the burglary statute. In determining that climbing or jumping a fence does not constitute a "breaking" under the definition of the burglary statute, the court stated that

> force alone is not enough to constitute a breaking. It takes physical force to walk through an open door or to crawl through an open window, but no obstruction is removed; thus, there is no breaking. Although it undoubtedly took McDowell some measure of force to climb or jump the fence in the instant case, no obstruction was removed. McDowell merely entered through the open space above the fence. Thus, as a matter of law there was no breaking, and therefore no burglary.

McDowell, 246 Neb. at 700, 522 N.W.2d at 744.

[2] Further, the court considered McDowell's assigned errors concerning the jury instructions on burglary. The Nebraska Supreme Court noted that the trial court did not instruct the jury that breaking requires an obstruction to entering to have been removed. Specifically, the jury was instructed that the definition of breaking and entering was to enter any real estate or improvement thereon by any act of physical force, however slight, including opening a door or window. The Supreme Court stated:

> As discussed above, it is the law of Nebraska that breaking requires both the use of physical force, however slight, and the removal of an obstruction to entering. Also, it is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not,

> and an instruction or instructions which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous. [Citation omitted.] *When burglary is charged, a jury should be instructed that in addition to the use of physical force, however slight, the removal of an obstacle to entry is necessary to find a breaking.*

(Emphasis supplied.) *McDowell*, 246 Neb. at 701, 522 N.W.2d at 744.

In the instant case, the jury was instructed that regarding the charge of burglary (count I), the elements of the State's case were as follows:

> 1. That the defendant, Dwayne Greer, did willfully, maliciously and forcibly break and enter real estate or any improvements erected thereon, located at 1700 "B" Street, Lincoln, Lancaster County, Nebraska;
>
> 2. That the defendant did so with the intent to commit any felony or with the intent to steal property of any value; and
>
> 3. That the defendant did so on or about August 10, 1995.

Instruction No. 4. Additionally, with regard to the burglary charge embodied in count IV, the jury was instructed that the elements of the State's case were as follows:

> 1. That the defendant, Dwayne Greer, did willfully, maliciously and forcibly break and enter any real estate or any improvements erected thereon located at 1700 "B" Street in Lincoln, Lancaster County, Nebraska;
>
> 2. That the defendant did so with the intent to commit any felony or with the intent to steal property of any value; and
>
> 3. That the defendant did so on or about November 3, 1995.

Id. Further, the jury was instructed that "[b]reaking and entering" means "entering a building by any act of physical force, however slight, including opening a door or unhooking a door fastener." Instruction No. 9. This definition of "breaking and entering" is substantially similar to the one disapproved of in *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

It appears that even read together, the jury instructions given by the court did not instruct the jury that the removal of an obstacle to entry is necessary to find a breaking as is required by *McDowell, supra.* Furthermore, we cannot say that this error is harmless. In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997); *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

We cannot conclude that the jury would necessarily have found Greer guilty of burglary based on the evidence offered had it been properly instructed on what the State was required to prove. Therefore, it is necessary to reverse Greer's burglary convictions and vacate his sentences for counts I and IV and remand for a new trial on those charges. Likewise, we must reverse the conviction and vacate the sentence for the use of a weapon charge for count V corresponding to Greer's burglary conviction embodied in count IV and remand for a new trial on that charge also.

2. Trial Court's Failure to Give Appellant's Proposed Jury Instruction No. 1

Greer also assigned as error the district court's refusal to give his proposed jury instruction No. 1 regarding burglary. Because this is an issue likely to arise again during Greer's retrial on the burglary charges, we must address this issue. See *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990).

[3] To establish reversible error from a trial court's refusal to give a requested jury instruction, an appellant has the burden to establish 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. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Charles*, 4 Neb. App. 211, 541 N.W.2d 69 (1995).

Greer's proposed jury instruction No. 1 stated:

> Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary

> was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case for burglary. To sustain a conviction, the evidence must show beyond a reasonable doubt not only that the crime, as defined, was committed, but that the defendant was the person who committed it. State v. Sedlacek, 178 Neb. 32[2]; Henggler v. State, 173 Neb. 171.

We fail to see how Greer was prejudiced by the trial court's refusal to present his proposed jury instruction No. 1 to the jury. The jury instruction given by the court, although lacking with regard to the "breaking and entering" aspect, was sufficient to instruct the jury regarding the substance of Greer's proposed jury instruction No. 1. Therefore, this assigned error is without merit.

3. Court's Failure to Suppress Evidence Illegally Obtained

Greer next assigns as error the trial court's failure to suppress physical evidence (blood and saliva samples) which was obtained from his person in violation of his constitutional rights. It appears that Greer seeks to exclude the blood and saliva samples and evidence obtained as a result of the search of Greer's apartment because (1) the court order to produce physical characteristics and the search warrant for Greer's apartment were based upon insufficient affidavits and (2) as fruit of the poisonous tree, the evidence was based upon the allegedly illegal seizure of his person, i.e., officers did not have probable cause for arrest.

(a) Sufficiency of Affidavits

We interpret the first prong of Greer's argument objecting to the seizure, pursuant to warrant, of his blood and saliva samples and other physical evidence to be that the seizure was based upon insufficient affidavits.

[4,5] In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, Nebraska has adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). Under this standard, the ques-

tion is whether, under the totality of the circumstances, the issuing magistrate had a " 'substantial basis' " for finding that the affidavit established probable cause. *Id.* at 489, 544 N.W.2d at 88. See, also, *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987). An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. *Detweiler, supra.*

[6-8] The order for identifying physical characteristics and the supporting affidavit were not offered into evidence and are not in the record before this court. It is the duty of 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. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). The lack of the affidavit makes it impossible to review the court's determination to issue an order requiring Greer to produce identifying characteristics. Consequently, we must reject this portion of Greer's argument, and we turn next to the search warrant for Greer's apartment and the accompanying affidavit.

> A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.

State v. Nelson, 6 Neb. App. 519, 521-22, 574 N.W.2d 770, 772 (1998). A search pursuant to a warrant is presumed to be valid, and if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *Nelson, supra.*

The affidavit for a search warrant for Greer's apartment is included in the record before this court. We have reviewed its contents and find that a substantial basis existed for the judge's finding that the affidavit established probable cause to search Greer's apartment.

(b) Fruit of Poisonous Tree

We interpret the second prong of Greer's objection to the use of his blood and saliva samples at trial to be that Greer was seized in violation of his constitutional rights and that the blood and saliva samples were fruit of that poisonous tree and as such should have been excluded from evidence. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The difficulty that we have with this argument is that from the testimony at trial, it is uncontroverted that Greer voluntarily accompanied police to the police station to answer questions and that the blood and saliva samples were obtained pursuant to a court order. Therefore, we reject Greer's arguments concerning the suppression of evidence.

4. Failure to Sever Trial

Greer also assigns as error the trial court's failure to sever the burglary charge embodied in count I from the remainder of the charged offenses.

The consolidation of separate cases is governed by Neb. Rev. Stat. § 29-2002 (Reissue 1995), which provides as follows:

> (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 . . . .
>
> (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.

[9-11] A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). See *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). A defendant has no constitutional right to a separate trial. *Freeman, supra*; *Brunzo, supra*. The right is statutory and depends on a motion for a showing that prejudice will result from a joint trial. 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. *Freeman, supra*; *Brunzo, 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. *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989). The evidence of other crimes need not be identical to the act charged to be admissible under rule 404(2). The evidence will be admitted if it is similar to and reasonably related to the offending conduct and is presented in a manner in which the prejudice does not outweigh its probative value. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981).
>
> Pursuant to rule 404(2), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. Evidence of other crimes may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

Freeman, 253 Neb. at 398, 571 N.W.2d at 285.

Here the State alleged that Greer not only illegally entered apartment No. 1 on one occasion, but on two separate occasions. From our review of the record, we cannot say that it would have been an abuse of discretion for the trial court to allow the testimony regarding the first burglary into evidence at the trial regarding the second burglary, had the offenses been

tried separately, and vice versa. Further, since all of the charges which arose on the date of the second burglary were a direct consequence of the second burglary and are properly joined with count II, we cannot say that it was an abuse of discretion to allow all of the charged offenses to be tried together. Consequently, this assigned error is without merit.

5. Drain Trap Evidence

Greer next complains that the trial court erred in permitting evidence obtained from the drain trap from the sink of Greer's apartment to be presented to the jury, because the probative value of the evidence was outweighed by the danger of unfair prejudice. Even assuming that the drain trap evidence was erroneously admitted, a matter which we do not decide, such error, if any, was harmless, as the evidence of Greer's guilt regarding the first degree sexual assault was overwhelming.

No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred. Neb. Rev. Stat. § 29-2308 (Reissue 1995). Consequently, we reject this assignment of error.

6. Double Jeopardy

Greer contends that his convictions and sentences for first degree sexual assault and burglary were obtained in violation of the prohibitions against double jeopardy. Greer argues that the burglary charge embodied in count IV is a lesser-included offense of the first degree sexual assault charge and that consequently, the burglary charge merges into the first degree sexual assault charge. Thus, Greer claims that his conviction for burglary and the sentence imposed thereon violate double jeopardy principles and that both the conviction and sentence must be vacated. We specifically note that Greer does not contend that the offenses of first degree false imprisonment or second degree assault are lesser-included offenses of burglary.

[12-14] "[T]he constitutional prohibition against double jeopardy not only protects against a second prosecution for the

same offense after acquittal or conviction, but also protects against multiple punishments for the same offense." *State v. Nissen*, 252 Neb. 51, 82, 560 N.W.2d 157, 178 (1997). Accord, *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989). The multiple punishment prong of the double jeopardy bar seeks to ensure that the total punishment imposed on a defendant does not exceed that authorized by the Legislature. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). See, also, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). When a defendant has been convicted of both a greater and a lesser-included offense, vacation of the sentence on the lesser charge cures the double jeopardy violation. *Nissen, supra*; *McHenry, supra*; *Sardeson, supra*. "[H]owever . . . the constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one act, because the constitutional proscription is directed to the identity of the offense and not to the act." *Sardeson*, 231 Neb. at 594, 437 N.W.2d at 480. Accord *State v. Rice*, 231 Neb. 202, 435 N.W.2d 889 (1989).

> A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the legislature that designated the criminal statutory scheme intended that cumulative sentences be applied for conviction on both offenses. If the statute clearly and affirmatively indicates that the legislature intended that the defendant be punished cumulatively under both charges and the sentences for both charges are imposed in a single trial, the Double Jeopardy Clause is not offended.

McHenry, 250 at 635, 550 N.W.2d at 378. Accord *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997). Thus, multiple punishments may be imposed for the same act without violating double jeopardy principles where imposition of the multiple punishments is specifically authorized by state statute. *Rice, supra.*

[15] In determining what constitutes lesser-included offenses, Nebraska has adopted the statutory elements approach, which involves a textual comparison of criminal statutes to determine if each statute contains at least one ele-

ment not contained in the other statute. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Thus, a lesser-included offense is one which is necessarily established by proof of the greater offense, or stated another way, to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense. *Williams, supra*; *Sardeson, supra*. We proceed to consider whether first degree sexual assault and burglary are the "same offense" for purposes of double jeopardy analysis.

In support of his argument, Greer points to *McHenry, supra*, which he contends presents a similar situation to that found in the instant case. In *McHenry*, the defendant was convicted and sentenced for both felony murder (aiding and abetting first degree murder) and aiding and abetting attempted robbery. Noting that the Double Jeopardy Clause precludes multiple punishment for the same offense imposed in a single proceeding, the Nebraska Supreme Court held that a conviction for felony murder and the underlying felony in the same proceeding is a species of impermissible multiple punishment if the Legislature did not designate that multiple sentences should be applied for conviction on both offenses. The court held that there was no affirmative indication in either the felony murder statute or the robbery statute that the Legislature intended that a defendant should be punished independently for both felony murder and the underlying felony upon which it relies. Thus, in McHenry's case, the underlying felony of aiding and abetting attempted robbery merged into a felony murder conviction, and McHenry could not be punished separately. McHenry's sentence on the underlying felony of aiding and abetting robbery was vacated, thereby curing the double jeopardy violation.

Relying upon the court's analysis of Nebraska's felony murder statute, Greer contends that it is not possible to violate Nebraska's burglary statute without also committing the underlying felony. In Greer's case, he contends that the "underlying felony" was first degree assault. First degree sexual assault, as charged in the instant case, is committed by "[a]ny person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coer-

cion, or deception . . . ." Neb. Rev. Stat. § 28-319(1) (Cum. Supp. 1994).

We agree with Greer that under the felony murder statute, it is impossible for a trier of fact to find that a defendant committed felony murder without also finding that he or she committed the underlying offense. See *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). See, also, *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (to be lesser-included offense, elements of lesser offense must be such that it is impossible to commit greater offense without at same time having committed lesser offense). However, there are significant differences between Nebraska's felony murder statute and Nebraska's burglary statute.

A person commits burglary when he or she willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with the intent to commit any felony or with intent to steal property of any value. § 28-507. It is only the proscribed intent that is essential; no actual theft or asportation of property is required, *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989), nor is the commission of any other felony required. Thus, a violation of the burglary statute is possible without the actual commission of another felony or without the actual theft or asportation of property. The theft or other felony referred to in § 28-507, regardless of its nature, is not a lesser-included offense for purposes of double jeopardy analysis, and this assigned error is without merit.

7. Ineffective Assistance of Counsel

Greer contends that he was afforded ineffective assistance of counsel for the reasons that trial counsel failed to (1) file a motion to suppress until 3 days before trial; (2) object to the affidavit used to support the search warrant and the affidavit used to obtain the order for identifying physical characteristics; (3) challenge the admission of DNA evidence; (4) request a hearing into statements included in the search warrant affidavit as required by *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); and (5) object at trial when evidence which had been the subject of a motion in limine was introduced.

[16,17] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

> To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, a defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

Id. at 691-92, 539 N.W.2d at 24. Accord *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The record before this court is not sufficient for this court to adequately review the questions raised. Consequently, we decline to consider this assigned error.

8. Illegal Sentence

Next, Greer contends that the sentence imposed upon him for the use of a weapon to commit second degree assault conviction (count VII) violated the multiple punishment prohibition of the Double Jeopardy Clause, and as such, was an illegal sentence. Greer argues that because second degree assault, with which he was charged, required the jury to find that he "[i]ntentionally or knowingly cause[d] bodily injury to another person with a dangerous instrument," Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1995), the corresponding use of a weapon to commit a felony conviction and sentence punished him twice for the same act, i.e., using a dangerous instrument.

[18] The constitutional prohibition against double jeopardy does not apply where two separate and distinct crimes are committed as the result of one and the same act, because the constitutional proscription is directed to the identity of the offense and not to the act. *State v. Stewart*, 219 Neb. 347, 363 N.W.2d

368 (1985). Consequently, multiple punishments can be imposed for the same act without violating the double jeopardy provision of the state and federal Constitutions, where imposition of the multiple punishments is specifically authorized by state statute. *Id.* Therefore, Greer's convictions and sentences for second degree assault and use of a weapon in the commission of second degree assault are not violative of his right to be free from double jeopardy, and this assignment of error is without merit.

9. Excessive Sentence

Greer also contends that the sentences imposed upon him were excessive. Because we have reversed Greer's convictions and vacated his sentences for burglary (counts I and IV) and use of a weapon to commit burglary (count V), we need not address the claimed excessiveness of the sentences imposed for those convictions.

First degree sexual assault (count II) is a Class II felony punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1995); § 28-319. Greer was sentenced to 25 to 50 years' imprisonment.

Second degree assault (count VI) and first degree false imprisonment (count VIII) are Class IV felonies, each punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-314 (Reissue 1995); § 28-309; § 28-105. Greer was sentenced to 4 to 5 years' imprisonment each for the second degree assault conviction and the first degree false imprisonment conviction.

Use of a weapon to commit first degree sexual assault (count III), use of a weapon to commit second degree assault (count VII), and use of a weapon to commit first degree false imprisonment (count IX), as Greer was charged, are Class III felonies, each punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-1205(1) and (2)(a) (Reissue 1995); § 28-105. Greer was sentenced to 3 to 10 years' imprisonment each on the use of a weapon to commit first degree sexual assault conviction (count III) and the use of a weapon to commit second degree assault conviction (count VII). Greer was sentenced to an additional 3 to 5 years' imprisonment for the

use of a weapon to commit first degree false imprisonment conviction (count IX). All of Greer's sentences were ordered to run consecutively, and he was given credit for 538 days served.

[19] Although Greer concedes that each sentence imposed is within the statutory limits and, as such, will not be disturbed on appeal absent an abuse of discretion, see *State v. Earl,* 252 Neb. 127, 560 N.W.2d 491 (1997), he contends that the trial court abused its discretion in failing to order that the sentences be served concurrently, rather than consecutively. Although it is within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively, *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991), Nebraska's use of a weapon statute, § 28-1205, does not permit such discretion in sentencing. Section 28-1205(3) provides that "[t]he crimes defined in this section shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed."

The sentences imposed upon Greer with regard to first degree sexual assault (count II), use of a weapon to commit first degree sexual assault (count III), use of a weapon to commit second degree assault (count VII), and use of a weapon to commit first degree false imprisonment (count IX) are within the statutory limits, and except where consecutive sentences are statutorily mandated, it is within the trial court's discretion to impose consecutive sentences. We find no abuse of discretion in that these sentences were imposed upon Greer or that the sentences were ordered to run consecutively. Consequently, this assignment of error is without merit as to these counts.

However, second degree assault (count VI) and first degree false imprisonment (count VIII) are Class IV felonies. On June 17, 1997, 1997 Neb. Laws, L.B. 364, was signed by the Governor. See Neb. Rev. Stat. § 29-2204 (Supp. 1997). Section 29-2204, which became operative on July 1, 1998, provides as follows in significant part: "If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term . . . ."

[20] The law is well settled in Nebraska that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995); *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686; *State v. Bennett*, 2 Neb. App. 188, 508 N.W.2d 294 (1993).

When pronounced, Greer's sentences for second degree assault (count VI) and first degree false imprisonment (count VIII) were not an abuse of discretion by the trial court. However, Greer's sentences could not be final until the mandate of this appeal is issued. See *Bennett, supra*. Therefore, since L.B. 364 is now effective, it must be followed. Because the minimum of Greer's sentences for counts VI and VIII do not comply with L.B. 364, these sentences must be vacated, and we must remand for resentencing on those counts.

V. CONCLUSION

Because the jury was improperly instructed as to burglary, we reverse Greer's convictions on the two burglary counts (counts I and IV) and the corresponding use of a weapon charge (count V), vacate his sentences on these counts, and remand for a new trial on these counts. The sentences for second degree assault (count VI) and first degree false imprisonment (count VIII) are vacated and remanded to the district court for resentencing. Greer's remaining convictions and sentences are affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART FOR A NEW TRIAL, AND IN PART SENTENCES VACATED AND REMANDED FOR RESENTENCING.

DAVID W. CRAFTON, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.
DONALD R. BIMES, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

585 N.W.2d 115

Filed October 20, 1998. Nos. A-97-559, A-97-562.

1. **Federal Acts: Railroads: Claims: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
2. **Federal Acts: Railroads: Claims: Courts: Actions.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretative decisions of the federal courts construing the act.
3. **Jurisdiction.** Procedural matters are dictated by the law of the forum.
4. **Jurisdiction: Summary Judgment.** Whether a party is entitled to summary judgment is a matter of procedure controlled by the law of the forum.
5. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
6. ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
7. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
8. **Evidence.** Generally, the admissibility of evidence is a procedural matter governed by the law of the forum.
9. **Expert Witnesses: Appeal and Error.** A lower court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there is an abuse of discretion.
10. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
11. **Trial: Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.

12. ____: ____. Medical testimony must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between an accident and a disability.
13. ____: ____. A medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty or a reasonable probability."
14. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, employer railroad companies are liable in damages to any employee who suffers injury due to the employer railroad's negligence.
15. **Federal Acts: Railroads: Negligence: Proof.** To recover under the Federal Employers' Liability Act, a plaintiff must prove the common-law elements of negligence, including duty, breach, foreseeability, and causation.
16. **Federal Acts: Railroads.** Under the Federal Employers' Liability Act, an employer railroad has a duty to provide employees (1) a reasonably safe workplace, (2) safe equipment, (3) proper training, and (4) suitable methods to perform the assigned work.
17. **Federal Acts: Railroads: Liability: Proof.** The quantum of evidence required to establish liability in a Federal Employers' Liability Act action is lower than that required in an ordinary negligence action.
18. **Federal Acts: Railroads: Proximate Cause.** The common-law standard of proximate cause is not applicable to the Federal Employers' Liability Act.
19. **Federal Acts: Railroads: Negligence: Proof.** The test for causation under the Federal Employers' Liability Act is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing an injury.
20. **Federal Acts: Railroads: Negligence.** Under the theory of negligent assignment under the Federal Employers' Liability Act, an employer railroad has a duty to assign employees to work for which they are reasonably suited. An employer railroad breaches that duty if it negligently assigns an employee to perform work beyond his or her capacity.
21. ____: ____: ____. Under the Federal Employers' Liability Act, an employer railroad is negligent if it knew or should have known that its assignment exposed an employee to an unreasonable risk of harm. Whether the assignment is negligent is a question of fact.
22. **Federal Acts: Railroads: Notice.** Under the Federal Employers' Liability Act, notice of an employee's physical condition to any of the employee's supervisors constitutes notice to the employer railroad itself.
23. ____: ____: ____. Under the Federal Employers' Liability Act, complaints to a supervisor about problems at work may provide sufficient notice to an employer that an employee is assigned to a task which he or she is unable to safely perform.

Appeal from the District Court for Douglas County: GERALD E. MORAN and MICHAEL MCGILL, Judges. Reversed and remanded for further proceedings.

James D. McFarland and Robert W. Bosslet, Jr., for appellants.

Richard J. Hautzinger and Anne Marie O'Brien for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

These appeals involve Federal Employers' Liability Act (FELA) cases arising out of carpal tunnel syndrome (CTS) injuries sustained by Donald R. Bimes and David W. Crafton (together, the plaintiffs), which they allege they sustained as a result of their employment with the Union Pacific Railroad Company (UP). The plaintiffs each filed an action in the district court for Douglas County, claiming that UP negligently assigned him to work for which he was unsuited. In each case, the district court granted UP's motion for summary judgment and dismissed the case. The plaintiffs timely appealed to this court. Upon a motion to consolidate filed by UP, the cases were consolidated for the purposes of appeal. For the reasons stated below, we reverse, and remand for further proceedings.

II. FACTUAL BACKGROUND

1. BIMES' CASE

Bimes has been employed with UP since August 1973. In approximately 1989, he became a crew caller. His duties included keyboarding. In 1991, Bimes became a timekeeper, which also included keyboarding duties. His typing usually consisted of pressing one, two, or three different keys at a time to call up formatted computer screens pertaining to each crew member and then typing in lines of information. Bimes began to experience pain and tingling in his hands in approximately March 1993. He was ultimately diagnosed with CTS. When conservative treatment did not remedy the problem, surgeries were performed. Bimes did not work from February 24, 1995, until May 21, 1996. On January 16, 1996, Dr. Jerome Bashara, an orthopedic surgeon who was Bimes' treating physician, recommended that he not return to any repetitive activities and be retrained vocationally. According to Bashara, Bimes returned to work against Bashara's recommendation.

When Bimes returned to work on May 21, 1996, he was not experiencing any of the symptoms he attributed to CTS. For approximately the first 1½ months after his return, Bimes was

assigned to perform duties that did not involve keyboarding. During this time, his hands became tired but he did not experience CTS symptoms. By mid-August, Bimes was eased back into a full-time timekeeper position, which included approximately 2½ to 3 hours of keyboarding in each 8-hour shift. After returning to the timekeeper job, Bimes' CTS symptoms returned. Bimes told his supervisor of his problems. His supervisor did not respond to or address Bimes' concerns. Pursuant to Bashara's recommendations, Bimes stopped working on October 23.

2. Crafton's Case

Crafton was also a longtime employee of UP. In 1988, he began working as a crew dispatcher. According to Crafton, his duties include keyboarding for an average of approximately 3 to 4 hours intermittently over the course of each shift. Crafton began to experience pain in his hands and wrists in December 1991. He sought treatment from Dr. Peter Cimino, who told him the symptoms were related to work. At some point in November or December 1993, Nancy Hill, a casualty management representative at UP, requested that Crafton consult Dr. Richard P. Murphy. Murphy diagnosed CTS on the left side. In approximately May 1994, Murphy restricted Crafton to typing only 5 to 15 minutes per hour. In October 1994, Crafton was diagnosed with CTS on the right side.

Crafton did not work from January to November 1994. During this time, Crafton's symptoms lessened when he was not typing. According to Crafton, at Hill's request he attempted to type during the period he was not working. However, any typing would cause him to experience CTS symptoms. In October 1994, Murphy changed his restriction to 20 to 30 minutes of typing per hour and released him to return to work.

Crafton returned to work on November 1, 1994. Initially, he was in training. When he returned to a crew dispatcher position, which included keyboarding as detailed above, he immediately began to experience discomfort on his left side. When he informed his supervisor, his supervisor would relieve him for that shift but Crafton would have to return to work for his next shift. Crafton returned to see Murphy in December 1994 and

January 1995, at which times he informed Murphy of his problems at work. Murphy recommended that Crafton continue working. In January, Crafton went to Bashara for a second opinion. Bashara recommended that Crafton abstain from any repetitive movement. Crafton returned to work in June but pursuant to Bashara's orders has not worked since the end of July 1995.

III. PROCEDURAL BACKGROUND

The plaintiffs each commenced a FELA action against UP in district court. UP filed a motion for summary judgment in each case. At the hearing on the motion in each case, the evidence offered included Bimes' or Crafton's deposition, Bashara's deposition, and an affidavit and work study of Dr. Steven F. Wiker, a professor in the fields of "ergonomics, human factors and safety engineering." The district courts found Bashara's depositions to be inadmissible for the reason that they lacked proper foundation. The courts also concluded that the plaintiffs had not presented evidence to raise issues of fact to support their theory of negligent assignment. Therefore, in each case, the district court granted UP's motion for summary judgment and dismissed the case. Timely appeals followed.

IV. ASSIGNMENTS OF ERROR

Generally, the plaintiffs assign that the district courts erred in granting summary judgment. In particular, their assigned errors and supporting arguments may be restated as claiming that the district courts misapplied the summary judgment standard, misconstrued the doctrine of negligent assignment, and erred in determining Bashara's deposition in each case was inadmissible.

V. ANALYSIS

1. Standard of Review

[1-3] Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by FELA. *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). See 45 U.S.C. § 56 (1994). In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act

and interpretative decisions of the federal courts construing FELA. *Chapman, supra*; *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. 924, 552 N.W.2d 778 (1996). See, generally, Restatement (Second) of Conflict of Laws § 122 (1971). The Nebraska Supreme Court has stated that procedural matters are dictated by the law of the forum. *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996).

[4-7] Whether a party is entitled to summary judgment is a matter of procedure controlled by the law of the forum. *Id.* In Nebraska, summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998). On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997); *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998).

2. Admissibility of Depositions

At the outset, we address whether the district courts erred in determining that the deposition of Bashara offered in each case was inadmissible. We note that the depositions were offered by UP in each case and that no objections were raised as to the admissibility of the depositions. The courts concluded sua sponte that Bashara lacked a foundational base for his causation opinions. In Bimes' case, the district court stated that the particular grounds for its conclusion were that Bashara was unaware of the particulars about Bimes' job, that Bashara did not indicate that his opinion was "accepted by the relevant scientific community," and that Bashara did not rule out other potential causes for Bimes' CTS.

The cases cited by the court in Bimes' case in support of its determinations that Bashara's deposition was inadmissible and that summary judgment was proper are all cases in which the admissibility of evidence was controlled by the Federal Rules of Evidence. The federal courts have a standard different from Nebraska's for determining the admissibility of expert testimony. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (redefining standard for admission of expert testimony in federal courts to provide that pursuant to Fed. R. Evid. 702, expert testimony may be admitted if scientific or specialized knowledge will assist trier of fact and if witness is properly qualified as expert). The Nebraska Supreme Court has refused to adopt the above *Daubert* standard and has reaffirmed the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which provides for a general acceptance requirement for the admission of expert testimony. See *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). Therefore, the cases cited by the court in Bimes' case are not persuasive authority in Nebraska.

(a) Relevant Law

[8,9] Generally, the admissibility of evidence is a procedural matter governed by the law of the forum. See 16 Am. Jur. 2d *Conflict of Laws* § 168 (1998); Restatement (Second) of Conflict of Laws § 138 (1971); 15A C.J.S. *Conflict of Laws* § 22(9) and (10) (1967). In Nebraska, a lower court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there is an abuse of discretion. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997).

[10] In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible,

should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997); *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997).

(b) Application to Facts

Neither the parties nor the district courts dispute Bashara's qualifications as an orthopedic surgeon with many years' experience diagnosing and treating CTS. There is also no contention that the probative value of Bashara's opinion is outweighed by the danger of unfair prejudice. The courts' concern as to the admissibility of Bashara's opinion was whether it was of probative value and thus relevant.

[11] Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Childers, supra*; *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995).

Upon our review of the record in light of our standard of review for summary judgment, we conclude Bashara was in possession of such facts as to enable him to express a reasonably accurate conclusion as to causation of the plaintiffs' injuries. In making this determination, we analyze his opinion, the basis of his opinion, and the facts he possessed in the light most favorable to the plaintiffs and giving the plaintiffs all reasonable inferences deducible from the evidence. See *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998). Bashara testified that he had extensive knowledge and experience diagnosing and treating CTS and knowledge of the causes and results of CTS as it relates to certain occupations. He discussed how every individual has a different point at which repetitive motion may cause CTS. Bashara testified that keyboarding is an example of repetitive motion and can, therefore, cause CTS. According to Bashara, medical literature supports his opinion, including OSHA guidelines regarding ergonomic program management. Bashara testified that each of the plain-

tiffs had informed him that he did intermittent keyboarding at work. Bashara testified that he had knowledge of and had observed people keyboarding. Bashara's ultimate opinion was that the plaintiffs' jobs, which included keyboarding, caused their CTS injuries. Bashara rendered his causation opinions based on patient history; review of medical records, including nerve conduction tests; his 22 years of clinical experience; and the medical literature. We conclude, for summary judgment purposes, that Bashara's testimony was based on facts as would enable him to express a reasonably accurate conclusion.

It is true that Bashara did not rule out other causes for the plaintiffs' CTS injuries. However, as will be discussed at more length below, a plaintiff need only prove that his or her employer's negligence was *a proximate cause* of his or her injury in order to succeed in a FELA action. See *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). As a result, Bashara was not required to rule out other potential causes of injury. Bashara's testimony certainly provided that the plaintiffs' duties at work were a cause of their injuries.

[12,13] We also note that Bashara's opinion is not couched in the "magic words" that it was made within a reasonable degree of medical certainty. Medical testimony must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability. *Shahan v. Hilker*, 241 Neb. 482, 488 N.W.2d 577 (1992). However, "[a] medical expert's testimony need not be couched in the magic words ' "reasonable degree of medical certainty or a reasonable probability." ' " *Id.* at 486, 488 N.W.2d at 580. In *Shahan*, 241 Neb. at 486, 488 N.W.2d at 580, the Supreme Court held that a doctor's response that it " 'would be my opinion that it was the result of the effect of the medication, that he sensed no pain' " to a question as to what caused a fall was sufficiently definite and certain to present a question for the fact finder as to causation. Considered as a whole, we conclude, for summary judgment purposes, that Bashara's testimony was also sufficiently definite and certain to present an issue of material fact as to causation.

In summary, we conclude that Bashara's testimony had a sufficient factual basis and was sufficiently certain. His opinion

also had probative value. Finally, Bashara's depositions established that he was sufficiently qualified as an expert. For these reasons, we conclude that the district courts abused their discretion in excluding Bashara's depositions for summary judgment purposes.

3. Liability Under FELA

[14-16] Under FELA, railroad companies are liable in damages to any employee who suffers injury due to the railroad's negligence. 45 U.S.C. § 51 (1994). To recover under FELA, the plaintiffs must prove the common-law elements of negligence, including duty, breach, foreseeability, and causation. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 (6th Cir. 1996); *Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120 (7th Cir. 1994). Under FELA, a railroad has a duty to provide employees (1) a reasonably safe workplace, (2) safe equipment, (3) proper training, and (4) suitable methods to perform the assigned work. *Aparicio, supra*; *Dukes v. Illinois Cent. R. Co.*, 934 F. Supp. 939 (N.D. Ill. 1996); *Zarecki v. National RR. Passenger Corp.*, 914 F. Supp. 1566 (N.D. Ill. 1996).

[17-19] The quantum of evidence required to establish liability in a FELA action is lower than that required in an ordinary negligence action. *Fulk, supra.* The common-law standard of proximate cause is not applicable to FELA. *Crane v. Cedar Rapids & I. C. R. Co.*, 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969). The U.S. Supreme Court has described the test for causation under FELA as "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Rogers*, 352 U.S. at 506.

4. Negligent Assignment

[20,21] The parties agree that the theory upon which the plaintiffs proceeded was a theory of negligent assignment under FELA. Under this theory, UP has a duty to assign employees to work for which they are reasonably suited. A railroad breaches that duty if it negligently assigns an employee to perform work beyond his or her capacity. *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902 (1980); *Massimiani v. Monongahela Railway Co.*, 339 F. Supp. 832 (W.D. Pa. 1972). The railroad is negligent if it

knew or should have known that its assignment exposed the employee to an unreasonable risk of harm. *Fletcher, supra.* Whether the assignment is negligent is a question of fact. *Id.*

(a) Notice to Railroad

[22,23] The issue of whether the railroad breaches its duty to assign an employee to suitable work may be characterized as one of notice. Federal courts have held that notice of an employee's physical condition to any of the employee's supervisors constitutes notice to the railroad itself. *Empey v. Grand Trunk Western R. Co.*, 710 F. Supp. 653 (E.D. Mich. 1987); *Dunn v. Conemaugh & Black Lick Railroad*, 267 F.2d 571 (3d Cir. 1959). Complaints to a supervisor about problems at work may provide sufficient notice to an employer that an employee is assigned to a task which he or she is unable to safely perform. *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo. App. 1994).

In the case before us, the record, viewed in the light most favorable to the plaintiffs, shows that UP was aware that the plaintiffs had sustained CTS injuries and had been unable to work for a period of time due to these injuries. During the periods of time when the plaintiffs were not working, their symptoms resolved or lessened. Bimes returned to his old job against Bashara's recommendations. Crafton returned to work when Murphy released him to return to work with the restriction that he only type 20 to 30 minutes per hour. Thereafter, the plaintiffs each began to have recurrent CTS symptoms of which they informed their respective supervisors. Bimes' supervisor did not respond to or address Bimes' concerns. Crafton's supervisor would relieve him for the remainder of the particular shift but Crafton would have to report to work for his next shift. Following their return to work and the onset of CTS symptoms, the plaintiffs consulted Bashara, who removed them from work.

The evidence establishes an issue of material fact on the issue of UP's negligence. There is evidence that after leaves of absence due to CTS injuries, the plaintiffs complained to their supervisors about their pain when they returned to work that involved keyboarding. The evidence and inferences therefrom raise a question regarding whether UP had notice and knew or

should have known that the plaintiffs were unfit to perform the keyboarding tasks to which they were assigned.

(b) Causation

Next, we address whether an issue of material fact exists on the issue of causation. As discussed above, proof of causation under FELA requires only proof that the employer's negligence played any part, even the slightest, in producing the injury. See *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

We concluded above that Bashara's deposition testimony was admissible evidence of causation. In addition, based upon the plaintiffs' testimony, their CTS symptoms improved during the periods of time they were off work in response to rest and treatment. However, their symptoms returned each time they returned to work that included keyboarding. This testimony alone raises a genuine issue of fact regarding whether UP's assigning the plaintiffs to work that included keyboarding played a part in causing their present condition. See *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902 (1980) (holding that causation was sufficiently proved where plaintiff's back condition improved with rest and flared up when he returned to work as section hand).

(c) Foreseeability

There is also sufficient evidence on the issue of foreseeability. The plaintiffs' history, of which UP had knowledge, which includes prior CTS problems related to work, the resolution of symptoms with time off, and the return of symptoms with a return to work, also creates an issue of material fact as to whether it was reasonably foreseeable that UP's assignment of the plaintiffs to keyboarding duties would result in injury.

(d) Damages

The plaintiffs' testimony provided evidence that they had sustained damages as a result of being assigned to work involving keyboarding. Such damages include the recurrence of the CTS injuries.

(e) Resolution

We conclude that the evidence offered at the summary judgment hearings presented genuine issues of material fact on the

elements of duty, breach, causation, damage, and foreseeability, as is necessary to proceed on a FELA case in the face of a defendant's motion for summary judgment. Therefore, we conclude that in each case, the district court erred in granting UP's motion for summary judgment and dismissing the petition of Bimes or Crafton.

VI. CONCLUSION

We conclude that the district courts abused their discretion in excluding the deposition testimony of Bashara for the purposes of UP's summary judgment motions. We also conclude that in each case, the district court erred in granting UP's motion for summary judgment. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RAY AND VELDA COFFEY, APPELLEES AND CROSS-APPELLANTS, V. DON MANN, DOING BUSINESS AS MANN CUSTOM HOMES, INC., APPELLANT AND CROSS-APPELLEE.

585 N.W.2d 518

Filed October 20, 1998. No. A-97-569.

1. **Motions to Dismiss.** In ruling on a motion to dismiss, a trial court may sustain the motion only by resolving the controversy as a matter of law, and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. **Directed Verdict.** The party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every reasonable inference which can be drawn therefrom.
3. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of every proper inference deducible from the evidence.
4. **Contracts: Principal and Agent: Liability.** If a contract is made with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon.
5. **Judgments: Pleadings: Proof.** The pleadings and the proof must agree in order for a party to receive a judgment.

6. **Contracts: Proof.** In the absence of a statute requiring a signature or an agreement by the parties that a contract shall not be binding until it is signed, signatures of the parties are not essential for establishing a binding contract if manifestation of mutual assent is otherwise shown.
7. **Contracts.** Even if neither party signs a contract, it may still be binding if there has been mutual assent.
8. **Trial: Expert Witnesses.** The weight to be given to expert testimony, and the credibility of witnesses, is a fact question to be decided by the fact finder at trial.
9. **Motions for New Trial: Appeal and Error.** The decision of whether to grant or deny a motion for new trial is within the discretion of the trial court, and the court's decision in that regard will be upheld on appeal absent an abuse of discretion.

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

Alan L. Plessman, of Plessman Law Offices, for appellant.

David H. Hahn, of Hahn Law Office, for appellees.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Don Mann, doing business as Mann Custom Homes, Inc. (hereinafter referred to as "Mann"), appeals from an order of the district court granting Mann's motion for new trial, but denying his alternative motion for judgment notwithstanding the verdict in this breach of contract action, wherein the jury assessed damages of $71,361 against Mann. Ray and Velda Coffey cross-appeal from the court's order granting Mann a new trial. For the reasons stated herein, we affirm.

II. BACKGROUND

In 1987, the Coffeys purchased land between Lincoln and Hickman, Nebraska. In late 1988, the Coffeys entered into an agreement with Mann to have Mann build a new house on the property. Mann provided the Coffeys with a written contract setting out the terms of the parties' agreement. The evidence at trial indicated that no one ever signed the written contract, but that the parties agreed that the writing embodied the terms of their agreement. Mann constructed the house pursuant to the terms of the written contract.

After the Coffeys had been residing in the house for more than 1 year, they hired a contractor to finish the basement in the house. At that time, they discovered that several 2 by 4's composing the load-bearing wall in the basement had severely bowed and that Mann had used untreated lumber in making the sill plate on the foundation of the house.

On August 23, 1993, the Coffeys filed a petition against Mann. Mann filed an answer on September 24. The Coffeys filed an amended petition on October 5, 1995, upon which the case proceeded to trial. In the amended petition, the Coffeys alleged five causes of action. In essence, the Coffeys alleged that Mann breached the contract between the parties. The Coffeys alleged that the contract provided that Mann was to gain approval of the building plans from the city building department and that he failed to do so. The Coffeys alleged that had Mann gained such approval, proper construction of the load-bearing wall and the use of treated lumber for the sill plate of the foundation would have been ensured. Additionally, the Coffeys alleged that Mann's construction of the house constituted a breach of both a provision in the contract and an implied warranty for good, substantial, and "workmanlike" construction. A copy of the unsigned contract was attached to the petition.

At the conclusion of the trial, Mann moved to have the case dismissed or, in the alternative, to have a directed verdict entered in Mann's favor. The court overruled the motion. The jury returned a verdict in favor of the Coffeys in the amount of $71,361, which represents the cost of having the house raised and the load-bearing wall and sill plate replaced.

On March 3, 1997, Mann filed posttrial motions. Mann moved the court for a judgment notwithstanding the verdict or, in the alternative, a new trial. Mann listed 13 reasons for a new trial being granted, such as "[i]rregularity in the proceedings," "[i]rregularity in Orders of the court," "[m]isconduct of the jury and the opposing party(ies)," "[e]rror in the assessment of the amount of recovery," "[t]he verdict and decision are contrary to law," "[e]rror of law occurring at the trial," "[t]he Court's instructions to the jury were not supported by the evidence and did not constitute proper statements of the law," and "[t]he Court erred in overruling the undersigned party(ies) objec-

tions." Mann did not specify the basis for any of these "reasons" or indicate what specific actions of the court constituted "irregularity" or "error."

On April 17, 1997, the trial court granted the motion for new trial. In essence, the court determined that error had been committed in instructing and allowing the jury to determine the effect of a provision of the 1985 edition of the Uniform Building Code, which allowed the city of Lincoln to permit the use of untreated lumber for sill plates under certain circumstances. The court determined that the Uniform Building Code provision did allow such exemptions from the requirement of treated lumber being used and that the Coffeys had the burden to prove that treated lumber was required. As a result, the court felt a new trial was warranted because the jury should not have been allowed to decide that issue. In a minute entry on April 28, the court noted that in light of the ruling on the motion for new trial, the motion for judgment notwithstanding the verdict was overruled. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

In the direct appeal, Mann has assigned three errors. Mann asserts that the district court erred in overruling both the motion to dismiss and the motion for directed verdict at the end of the evidence, and in overruling the motion for judgment notwithstanding the verdict.

In the cross-appeal, the Coffeys have assigned one error. The Coffeys assert that the district court erred in sustaining Mann's motion for new trial.

IV. ANALYSIS

1. Direct Appeal

In the direct appeal, Mann has challenged the district court's order overruling Mann's motion to dismiss, motion for directed verdict, and motion for judgment notwithstanding the verdict. Mann has asserted that each ruling was erroneous for the same reasons. Mann asserts that each motion should have been sustained because (1) the Coffeys failed to properly plead the corporation, Mann Custom Homes, as a defendant; (2) the Coffeys pled that the case was based on a written contract, but proved

the existence only of an oral contract; (3) the Coffeys failed to properly plead the municipal ordinance upon which the alleged violations of the Uniform Building Code were based; and (4) the Coffeys failed to prove any violations of the Uniform Building Code.

We note that the record does not indicate that Mann made any of these arguments to the trial court, but, rather, made the various motions, which were overruled with argument.

[1] In ruling on a motion to dismiss, a trial court may sustain the motion only by resolving the controversy as a matter of law, and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); *Bonge v. County of Madison*, 5 Neb. App. 760, 567 N.W.2d 578 (1997), *rev'd on other grounds* 253 Neb. 903, 573 N.W.2d 448 (1998). In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and is entitled to have the benefit of every reasonable inference which can be drawn therefrom, and where the plaintiff's evidence has met the burden of proof and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Robinson v. Bleicher, supra.*

[2] 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 evidence, and the issues should be decided as a matter of law. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). The party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every reasonable inference which can be drawn therefrom. *Bahrs v. R M B R Wheels, Inc., supra.* See, also, *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997).

[3] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against

whom the motion is directed is entitled to the benefit of every proper inference deducible from the evidence. *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). In order to sustain such a motion, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Hulett v. Ranch Bowl of Omaha, supra*; *McWhirt v. Heavey, supra.*

(a) Pleading Corporation as Defendant

Mann first asserts that the amended petition states a cause of action against Mann personally, but not against the corporation, Mann Custom Homes. The parties agreed at trial that Mann dealt with the Coffeys as an agent of the corporation, and the Coffeys knew of his corporate identity at all relevant times. Mann asserts on appeal that because he was acting as an agent of the corporation, he cannot be held personally liable for any damages and that the Coffeys failed to properly plead the corporation as a defendant to secure a verdict against the corporation.

[4] It is true that a longstanding tenet of the law is that if a contract is made with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon. *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *State Securities Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961); *Micro/Mini Systems, Inc. v. Boyle*, 4 Neb. App. 841, 552 N.W.2d 302 (1996). It is apparent that the contract in the present case was between the Coffeys and Mann's corporation, Mann Custom Homes. As such, it is true that Mann cannot be held personally liable for any damages for breach of contract. The question then is whether the Coffeys pled their cause of action against the corporation or against Mann personally.

Mann did not raise in any motion or pretrial memorandum that there was an issue concerning the sufficiency of the pleadings to allege a cause of action against the corporation. In both the caption and the body of the amended petition, the Coffeys alleged their causes of action against "DON MANN, d/b/a

Mann Custom Homes, Inc." Additionally, the petition alleged that "Don Mann, d/b/a Mann Custom Homes, Inc., is, a private building construction contractor . . . ." The Coffeys attached a copy of the contract prepared by Mann, which provides that Mann Custom Homes is referred to in the contract as "the Contractor." The court instructed the jury that one of the parties was a corporation.

[5] It is true that the pleadings and the proof must agree in order for a party to receive a judgment. See, *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988); *One Pacific Place v. H.T.I. Corp.*, 6 Neb. App. 62, 569 N.W.2d 251 (1997). Contrary to Mann's assertions, however, we do not conclude that the Coffeys pled that the contract was with Mann personally but proved that the contract was with the corporation. On the facts of this case, we conclude that the Coffeys adequately pled the existence of the corporation as a defendant and that the contract was entered into with the corporation. The caption and body of the amended petition, in effect, indicated that the suit was brought against Mann doing business as a corporation. As such, we find no error by the trial court in denying Mann's motions for dismissal, directed verdict, or judgment notwithstanding the verdict.

(b) Written Contract Versus Oral Contract

Mann next asserts that the pleadings and proof in this case did not match because the Coffeys pled the existence of a written contract, while the proof at trial indicated that the parties had an oral contract. As noted above, Mann prepared and presented the Coffeys with a written contract. However, none of the parties signed the contract. Nonetheless, the parties agreed at trial that the writing comprised the terms of their agreement.

[6,7] We note that the Nebraska Supreme Court has held that in the absence of a statute requiring a signature or an agreement by the parties that a contract shall not be binding until it is signed, signatures of the parties are not essential for establishing a binding contract if manifestation of mutual assent is otherwise shown. *In re Estate of Mathews*, 134 Neb. 607, 279 N.W. 301 (1938). Other jurisdictions have similarly held. *Lynge v. Kunstmann*, 94 Ill. App. 3d 689, 418 N.E.2d 1140 (1981);

Serv. Emp. Intern., Etc. v. Cedar Rapids, Etc., 222 N.W.2d 403 (Iowa 1974); *McInnis v. Southeastern Automatic Sprinkler Co.*, 233 So. 2d 219 (Miss. 1970); *Ikovich v. Silver Bow Motor Co.*, 117 Mont. 268, 157 P.2d 785 (1945). See, also, 17 C.J.S. *Contracts* § 62 (1963). Even if neither party signs a contract, it may still be binding if there has been mutual assent. *Serv. Emp. Intern., Etc. v. Cedar Rapids, Etc., supra.*

The Iowa Supreme Court quoted Corbin on Contracts as follows:

> 1 Corbin on Contracts, section 31, p. 114 states:
>
> "If a written draft of an agreement is prepared, submitted to both parties, and each of them expresses his unconditional assent thereto, there is a written contract. So far as the common law is concerned, the making of a valid contract requires no writing whatever; and even if there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying that assent."

Serv. Emp. Intern., Etc. v. Cedar Rapids, Etc., 222 N.W.2d at 407-08.

In the present case, the parties do not dispute that the unsigned written contract comprised the terms of their agreement. Mann testified as such. Nonetheless, Mann asserts on appeal that the Coffeys proved at trial that there was an oral contract to follow the terms of the written document and that the proof therefore did not match the pleading of a written contract. We disagree.

The record in this case indicates that both parties expressed mutual assent to the terms of the unsigned written contract through their respective acceptance of benefits. The Coffeys accepted the house built according to the contract, and Mann accepted payment for the work he proceeded to do according to the contract. Additionally, we note that in the answer to the original petition, Mann did not dispute the existence of a written contract, but, rather, alleged that there had not been a breach of "any term or condition of the contract" and that Mann had "fully performed under the contract." Mann did not file an answer to the amended petition.

Mann testified at trial that the unsigned written contract set forth the understanding between the parties and that the house was constructed on the basis of the unsigned written contract. Because the parties unconditionally manifested their assent to the terms of the written contract, although they did not sign it, there was no fatal variance between the pleadings and the proof in this case. A written contract was pled, and a written contract was proved. As such, the district court did not commit error in denying Mann's motions for dismissal, directed verdict, or judgment notwithstanding the verdict on this basis.

(c) Pleading City Ordinance

Mann asserts in the direct appeal that the Coffeys failed to properly plead the existence and content of the building provisions of the Lincoln Municipal Code. At trial, the Coffeys established, and Mann admitted, that Mann represented to them that the house would be built according to the municipal building code. It was alleged at trial that the municipal building code would have required the use of treated lumber for the sill plate and would have required a more secure construction of the load-bearing wall in the basement. As alleged in the petition, approval of the building plans would have required compliance with these code provisions.

The evidence at trial indicated that the municipal building code did not apply to this property, which was located in a rural area on approximately 160 acres. Nonetheless, Mann testified that he told the Coffeys the house would be built in compliance with the municipal building code, that is, according to the same code as all houses constructed by Mann, and the same code as a house built "on A Street" in Lincoln.

The amended petition alleged that the "City Building Code requires use of treated lumber" and that the "City Building Department would have insured [sic] the plans and specifications of the structure called for treated lumber . . . and would have insured [sic] proper construction of the load bearing wall . . . ." We conclude that the Coffeys adequately pled the existence and general content of the relevant portion of the municipal building code. As such, the district court did not err in fail-

ing to sustain Mann's motions for dismissal, directed verdict, or judgment notwithstanding the verdict.

(d) Evidence of Violations of Uniform Building Code

Finally, Mann asserts that his motions should have been granted because the Coffeys failed to adduce adequate proof at trial that any provisions of the Uniform Building Code had been violated. According to the evidence at trial, the Lincoln Municipal Code adopted the Uniform Building Code. As noted above, the Coffeys based one of their causes of action on alleged violations of the municipal building code as one way in which Mann allegedly breached the contract. We note that the Coffeys also presented four other causes of action which were not based upon violations of the municipal building code but were based upon Mann allegedly failing to perform in a good, substantial, workmanlike manner.

The Coffeys presented testimony from King Little, a structural engineer. Little testified that at the time of trial, he was under an ongoing contract with the city of Lincoln, reviewing building plans to determine if they complied with the municipal building code. Little opined that the sill plate and the load-bearing wall both failed to comply with certain building code provisions. Little did acknowledge on cross-examination that there were certain qualifying exemptions to the requirement that treated lumber be used for sill plates, although he was not aware of whether any exemptions had been allowed during the time the Coffeys' house was being constructed.

Mann presented the testimony of Gary Sherwood, a former Lincoln building inspector. Sherwood testified that upon his inspection of the Coffeys' house, he saw no violations of the municipal building code. Sherwood did acknowledge on cross-examination, however, that there was a "problem" with the construction even though there were no code violations.

[8] Mann asserts on appeal that Sherwood was a more qualified expert to give testimony concerning compliance with the building code and that the trial court should have believed Sherwood's testimony "as a matter of law." Brief for appellant at 16. The weight to be given to expert testimony, and the credibility of witnesses, is a fact question to be decided by the fact

finder at trial. *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995); *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979). As a result, the district court did not commit error in denying Mann's motions for dismissal, directed verdict, or judgment notwithstanding the verdict on this basis.

2. Cross-Appeal

In the cross-appeal, the Coffeys assert that the district court should not have granted Mann's alternative motion for a new trial. As noted above, the district court granted the motion because of an error concerning admission of portions of the Uniform Building Code and submission of issues concerning the code to the jury.

[9] The Coffeys acknowledge that the exhibit containing the portions of the code were objectionable and not admissible. The Coffeys assert, however, that Mann made the wrong objection at trial and that Mann should have been deemed to have waived the error. It is true that if a party fails to make a proper objection to evidence, the party is deemed to have waived the right to challenge the admissibility of evidence on appeal. See, *Fales v. Books*, 5 Neb. App. 372, 558 N.W.2d 831 (1997); *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993), *rev'd on other grounds* 246 Neb. 834, 524 N.W.2d 39 (1994). However, the decision of whether to grant or deny a motion for new trial is within the discretion of the trial court, and the court's decision in that regard will be upheld on appeal absent an abuse of discretion. *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995).

Although it appears that Mann did make the wrong objection at trial, the district court was acting within its discretion in determining that the evidence should not have been admitted and that its erroneous admission and submission to the jury prejudiced the outcome of the trial. We do not find an abuse of discretion on the facts of this case. The cross-appeal is without merit.

V. CONCLUSION

Finding no merit to Mann's assertions on the direct appeal or to the Coffeys' assertion on the cross-appeal, we affirm.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V.
JAMES P. PATTERSON, APPELLANT.
585 N.W. 2d 625

Filed October 20, 1998. No. A-98-199.

1. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach its conclusion independent of the determination made by the court below.
3. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
4. **Convictions: Proof.** In order to convict someone of violating a protection order, the State must prove: (1) entry of the protection order pursuant to subsection (1) or (2) of that section, (2) service of the order on the defendant, and (3) knowing violation of the order.

Appeal from the District Court for Lancaster County, KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, JOHN V. HENDRY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

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

SIEVERS and MUES, Judges, and HOWARD, District Judge, Retired.

MUES, Judge.

INTRODUCTION

James P. Patterson appeals his conviction for violation of a protection order, claiming that the order was erroneously admitted into evidence. We disagree and affirm.

BACKGROUND

On January 2, 1997, Mindy Merrill filed an application and affidavit for a protection order and obtained an ex parte protection order against her ex-boyfriend, Patterson. The protection order was served on Patterson later that same day. The protec-

tion order advised Patterson that if he did not believe the allegations in the application to be true or if he wished to show cause why the order should not remain in effect for 1 year, he could appear at a hearing to be held January 8. Patterson did not appear at the hearing, and the court ordered that the protection order remain in full force and effect for a period of 1 year from the date it was issued.

On the evening of April 9, 1997, Patterson went to Merrill's residence to pick up his daughter. Merrill and Patterson got into an argument, and she asked him to leave. Patterson left, but returned seconds later. Merrill let Patterson back in, and they continued arguing. Merrill again requested that Patterson leave. Patterson left. Several minutes later, Merrill heard Patterson kicking her patio door and screaming at her. Merrill telephoned police, who subsequently arrested Patterson for violating the protection order.

A bench trial was held on June 19, 1997, in the Lancaster County Court, and Patterson was found guilty of the charges and sentenced to 1 year's probation. Patterson appealed to the district court, which affirmed the county court's judgment.

ASSIGNMENT OF ERROR

Patterson alleges the trial court erred in admitting the protection order into evidence. The State argues that we are precluded from addressing Patterson's assigned errors because they were not assigned in his appeal to the district court. See *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). In district court, Patterson's assigned errors were that (1) the county court had erred in admitting the protection order into evidence and (2) there was insufficient evidence to support the conviction. While Patterson has abandoned the latter assignment in this court, he retains the former, urging two specific grounds for the order's inadmissibility. The State's position is without merit.

STANDARD OF REVIEW

[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. McCurry*, 5 Neb. App. 526, 561 N.W.2d 244 (1997).

[2] As to questions of law, an appellate court has an obligation to reach its conclusion independent of the determination made by the court below. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998).

[3] The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997).

DISCUSSION

Patterson first alleges that the county court erred in admitting the protection order into evidence because the "prosecution failed to establish that the order had been served upon [Patterson] as required by law." Brief for appellant at 5.

The ex parte protection order served upon Patterson provides:

> The Petitioner has filed an application and affidavit for a Protection Order from the court, as allowed by law. On the information provided, the Court finds as follows:
>
> IT IS ORDERED that the Respondent be, *and hereby is*, prohibited, *for a period of one year* from the date of this Order, from:
>
> . . . .
>
> 2. Threatening, assaulting, molesting, attacking or otherwise disturbing the peace of the Petitioner.
>
> . . . .
>
> 4. Entering upon the premises occupied by the Petitioner as his/her residence.

(Emphasis supplied.)

The ex parte protection order also contains a section entitled "Notice of Hearing to Respondent," informing Patterson that a hearing was set for January 8, 1997, and stating, "You may appear before the court at that time, if you believe the allegations in the application are untrue or if you wish to show cause . . . [w]hy this Order should not remain in effect for one year from this date."

Patterson asks us to "carefully review the statute which authorizes the issuance of a protection order, and subsequent criminal prosecution for a violation of such order." Brief for

appellant at 5. We have. Neb. Rev. Stat. § 42-924(3) (Reissue 1993) in pertinent part provides that "any person who knowingly violates an order issued pursuant to subsection (1) or (2) of this section after service shall be guilty of a Class II misdemeanor."

Neb. Rev. Stat. § 42-925 (Reissue 1993) provides that any protection order issued under subsection (1) or (2) of § 42-924 may be issued ex parte without notice to the adverse party and, in that event, "the court shall cause immediate notice of the application and order to be given the adverse party stating that he or she may show cause, not less than five days after service upon him or her, why such order should not *remain* in effect." (Emphasis supplied.) The January 2, 1997, ex parte order in this case contains such notice and fully complies with the statutory requirements. In his brief, Patterson concedes that he was served with a copy of the ex parte protection order, and indeed a certified copy of process of service was received into evidence, reflecting that Patterson was served with a copy of the order on January 2.

The trial court's docket sheet, which was admitted into evidence, reflects that a hearing was held on January 8, 1997, that Patterson did not appear at the hearing, and that the protection order was to remain in full force and effect. Patterson's argument on this point, as we read it, is that the January 2 protection order should not have been admitted into evidence in the absence of the State's proving that he had been served with the January 8 order. We take this to be a foundational objection to the admission of the January 2 order. It is without merit.

[4] Patterson does not explain why service of the January 8, 1997, continuation order is a legal predicate to the admissibility of the protection order and cites no authority for that proposition. In order to convict someone of violating a protection order, the State must prove: (1) entry of the protection order pursuant to subsection (1) or (2) of that section, (2) service of the order on the defendant, and (3) knowing violation of the order. See § 42-924. There is no dispute that the protection order here was entered pursuant to subsections (1) and (2) of § 42-924 and was ex parte as allowed by § 42-925. There is no dispute that the order was served on Patterson before the alleged violation and was still in effect according to its terms. While Patterson may

well argue that he did not understand the order and thus did not knowingly violate it, that is a far different matter from successfully precluding the order's admission into evidence.

Citing *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995), Patterson next argues that the protection order was inadmissible because "the prosecution provided no evidence that the protection order possessed any indicia of reliability." Brief for appellant at 9.

In *Yelli*, the defendant was charged with two counts of criminal nonsupport. The defendant had previously been determined to be the father of the children in two separate paternity adjudications and had been ordered to pay support for the children. The paternity adjudications were offered as evidence at the defendant's criminal trial to prove that the defendant knew he had an obligation to support the two children. The defendant was convicted of nonsupport and appealed, alleging that it was error for the trial court to admit the paternity adjudications as proof that he knew he had an obligation to support the two children.

The Nebraska Supreme Court initially addressed the issue of whether the civil adjudications were res judicata in the criminal prosecution. The court observed that in a civil proceeding, paternity need only be proved by a preponderance of the evidence. Thus, the court held that the defendant was not estopped from denying paternity in the criminal proceeding, which required proof beyond a reasonable doubt.

The court next addressed whether the civil judgments could be admitted as evidence of paternity. The court recognized that civil judgments are technically hearsay but have nonetheless been admitted into evidence "when the prior judgment possessed the evidentiary reliability that the hearsay rule seeks to promote." 247 Neb. at 792, 530 N.W.2d at 255. The court recalled that in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), it had determined that an indigent defendant in a state-assisted paternity action has a constitutional right to the services of appointed counsel. Because the record did not affirmatively show that the defendant had been represented by counsel in the civil adjudications, the court found that the civil adjudications did not possess the evidentiary reliability that the hearsay rule seeks to promote.

As discussed, in the present case, the protection order was issued in compliance with the applicable statutes, and Patterson does not contend otherwise. The evidence established, and Patterson acknowledged, that he was served with a copy of the protection order. The order stated that it was effective for 1 year from the date of issue, and Patterson was given the opportunity to appear to contest the allegations and the continuance of the order. We know of no Nebraska Supreme Court case requiring that an adverse party is entitled to counsel before an ex parte protection order is entered, and of course, the notion is untenable when considering the nature of such proceedings. Thus, that aspect of "unreliability" found present in *Yelli* is not present here. Indeed, the reliability of the protection order here is enhanced by the evidence that Patterson failed to appear at the January 8, 1997, hearing to challenge it.

Moreover, in *Yelli* the civil adjudication was offered to prove necessary elements of the crime, i.e., the defendant was the father of the two children and had an obligation to support them. Here, the crime is a knowing violation of the protection order. The issues necessarily decided as a condition to the issuance of the order are not elements of the crime alleged here. Thus, we conclude that Patterson's *Yelli* objection to the admissibility of the protection order is without merit.

CONCLUSION

The district court's order affirming the county court's conviction and sentence was correct and is hereby affirmed.

AFFIRMED.

JANE ANN WARD, APPELLANT, V.
KENNETH CARL WARD, APPELLEE.
585 N.W.2d 551

Filed October 27, 1998. No. A-97-440.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.

2. **Visitation: Child Support: Appeal and Error.** Child visitation and the amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion.
3. **Judgments: Appeal and Error.** With respect to questions of law, an appellate court has an obligation to reach a conclusion independent of the determination made by the court below.
4. **Property Division: Alimony.** While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.
5. **Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. Property obtained through one or both spouses' employment, however, is not such an exception.
6. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
7. **Property Division: Appeal and Error.** It is not possible to judge the reasonableness of a property settlement without determining the amount of property each party brought into the marriage and its value, and the amount of property and its value that each party received pursuant to the decree.
8. **Divorce: Property Division.** An engagement ring given by a man to his fiance becomes unconditionally the wife's upon marriage, and is not marital property upon dissolution of that marriage.
9. **Workers' Compensation: Property Division.** A workers' compensation award is marital property only to the extent it recompenses for the couple's loss of income during the marriage.
10. **Child Support: Social Security.** A representative payee has a responsibility to use Social Security payments he or she receives for a child only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the federal guidelines.
11. ____: ____. For the purposes of determining child support, Social Security payments to a representative payee for a child are for the use and benefit of the beneficiary if used for the beneficiary's current maintenance, which includes the cost of food, shelter, clothing, medical care, and personal comfort items.
12. **Child Support: Rules of the Supreme Court: Presumptions.** Child support shall be established in accordance with the Nebraska Child Support Guidelines, which are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
13. **Child Support: Rules of the Supreme Court.** A judge may not satisfy his or her duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested child support guidelines.
14. ____: ____. A court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Diane B. Metz for appellant.

Jerome J. Ortman for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

HANNON, Judge.

Jane Ann Ward appeals from a dissolution decree, alleging the trial court erred (1) in the division of marital property because she was awarded very little property while Kenneth Carl Ward received substantial property and (2) in awarding child support for the parties' adopted child in view of the fact the Social Security Administration pays $691 per month for the benefit of the adopted child on behalf of the child's deceased mother. We conclude the trial court did not award Jane a reasonable amount of property in the division and that the Social Security benefits justified a deviation from the Nebraska Child Support Guidelines. We also remand the cause for a determination of which parent should provide health insurance. Therefore, we affirm in part as modified, and in part reverse, and remand with directions.

BACKGROUND

Jane and Kenneth were married on October 21, 1989, in Omaha. No children were born of the marriage, but Jane adopted Kenneth's 6-year-old daughter, Lindsey, who had been adopted by Kenneth and his now deceased former wife. In the final decree, the court awarded custody of Lindsey to Kenneth and ordered Jane to pay $358 per month in child support. Both parties were ordered to maintain health and accident insurance for Lindsey and to pay one-half of the unreimbursed medical, dental, orthodontic, and eyeglasses expenses. Jane contests the child support allowance on the basis that she and Lindsey failed to have a parent-child relationship and that Kenneth receives $691 per month in Lindsey's behalf from the Social Security Administration because Lindsey is the child of a deceased wage

earner. This issue will be considered later in a separate section. Also, to avoid duplication, we will discuss additional facts later in this opinion.

ASSIGNMENTS OF ERROR

Jane claims, restated, that the court (1) erred in its determination of the division of marital and separate property and (2) erred in including Social Security income received by Lindsey on behalf of her deceased mother as part of Kenneth's income for child support calculations.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998); *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches independent conclusions from those of the trial court. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). However, if evidence is in conflict, the appellate court 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. *Id.*

[2] Child visitation and the amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

[3] With respect to questions of law, an appellate court has an obligation to reach a conclusion independent of the determination made by the court below. *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1998).

ANALYSIS

Property Division.

A summary of the evidence is necessary before we discuss the trial court's division of property. When the parties were married in October 1989, Jane was working part time as a

salesclerk and attending school on a part-time basis. After the marriage, Jane continued her education and obtained an associate's degree in nursing in May 1994. Jane worked part time on an on-call basis until after the temporary hearing, when she began working full time. Kenneth's occupation as a fire investigator did not change during the marriage.

During the parties' marriage, Kenneth earned approximately $315,774 and Jane earned approximately $67,025. Kenneth seeks to use the disparity in their incomes, the cost of Jane's education, and the payments made on motor vehicles she drove during the marriage as justification for the court's distributing practically all of the marital property to him. The trial court made no findings of fact as to the property brought into the marriage, the value of such property, or the value of the property each of the parties was awarded by the decree. The court did not explain its rationale for the distribution ordered. In addition, the parties seek to buttress their respective positions by mixing items which tend to establish the value and ownership of property with those which tend to establish income and the cost of living or education. Such mixes are not helpful.

[4] We are admonished in Neb. Rev. Stat. § 42-365 (Reissue 1993) that "[w]hile the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately." The statute also provides the court may order alimony and the "division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities . . . ." The statute also provides the court may consider "the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party"; however, this phrase obviously applies only to alimony, which is not an issue in this case.

[5] Furthermore, the Nebraska Supreme Court has stated:

> As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the

> marital estate, unless it falls within an exception to the general rule. [Citations omitted.] Such exceptions include property accumulated and acquired through gift or inheritance [citation omitted], or property held in trust by a third person [citation omitted]. Property obtained through one or both spouses' employment, however, is not such an exception.

Davidson v. Davidson, 254 Neb. 656, 662-63, 578 N.W.2d 848, 855 (1998) (citing *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980), and *Shomaker v. Shomaker*, 166 Neb. 164, 88 N.W.2d 221 (1958)).

On the basis of the above authority, we do not consider Kenneth's earnings or the expenditures for Jane's education. We realize Jane's earning potential has increased because of the additional education she received during the marriage, but during the same period, Kenneth's income increased from $34,000 to $48,000. As is frequently the case, the yearly rate of income of a sufficiently educated or trained person frequently increases as much as or more than that of a person trying to establish an adequate educational basis. For instance, Jane testified she made over $20,000 per year when she worked as a supervisor before quitting to go to school, but the child support calculation shows her income to be $27,200 at the time of the decree.

The evidence shows that Jane cared for Lindsey and worked in Kenneth's fire-investigation business to a very small degree. Such work does not entitle Jane to an interest in Kenneth's business, but it does illustrate that in every marriage, there is give and take, benefit and detriment, and profit and loss. In family situations, intangibles are frequently held in higher regard than tangibles. Courts have not, and by the nature of things cannot, weigh, compare, and compensate divorcing partners for the benefits they may or may not think they have bestowed on each other. For these reasons, we will not attempt to summarize or weigh these incidental and noneconomic matters.

[6,7] The parties' principal asset is a home, which was awarded to Kenneth. Each of the parties devotes his or her arguments to attempting to justify his or her view of the correct division of that asset, without considering the overall marital estate and its source. The ultimate test in determining the appropriate-

ness of the division of property is fairness and reasonableness as determined by the facts of each case. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). We are convinced it is not possible to judge the reasonableness of a property settlement without determining the amount of property each party brought into the marriage and its value, and the amount of property and its value that each party received pursuant to the decree. The trial court made no such determinations, but we are constrained to do so as part of our de novo review because we believe such treatment is the only way of considering and determining a reasonable distribution of the marital estate. Much of the evidence is not in conflict, but as presented was difficult to organize.

[8] Prior to the marriage, Kenneth gave Jane an engagement ring costing $7,262. The evidence shows that Kenneth gave the ring to Jane before marriage and paid for it from his premarital savings. An engagement ring given by a man to his fiance becomes unconditionally the wife's upon marriage, and it is not marital property upon dissolution of that marriage. *Smith v. Smith*, 797 S.W.2d 879 (Mo. App. 1990); *Winer v. Winer*, 241 N.J. Super. 510, 575 A.2d 518 (1990). Therefore, the ring became Jane's at marriage and is her nonmarital property.

[9] Jane testified she brought a 1986 Honda automobile into the marriage. During the marriage, this car was destroyed in an accident, and as a result, Jane received $9,000 which she used to purchase an Explorer automobile. When the Explorer was sold, half of the proceeds were used to lease a Mazda and the remaining $3,329 was deposited into an account used to purchase the parties' home. Jane also suffered personal injuries in the automobile accident, and she testified without dispute that the $12,000 she received for those injuries went into the parties' home. Jane seeks to have this sum treated as a contribution by her to the marriage. This court has held that a workers' compensation award is marital property only to the extent it recompenses for the couple's loss of income during the marriage. *Gibson-Voss v. Voss*, 4 Neb. App. 236, 541 N.W.2d 74 (1995). To the extent that the award compensates for loss of premarriage or postdivorce earnings, the award is the injured person's separate property. *Id.* The burden of proof to show the property is nonmarital property is on the person making the claim. *Frost*

v. Frost, 227 Neb. 414, 418 N.W.2d 220 (1988). Jane did not introduce enough evidence to establish whether the personal injury recovery was marital or nonmarital property. Accordingly, we consider it as marital property. Therefore, Jane's contribution to the marital property is $3,329, and the only nonmarital property she possesses is the ring.

Kenneth brought an interest in a fire-investigation business into the marriage. There is no evidence that this business significantly increased in value during the marriage or that it was used to accumulate earnings. This interest is clearly Kenneth's nonmarital property. Kenneth valued the car he owned when he married as about equal to the debt against it. In addition, Kenneth brought a home into the marriage, from which $34,703 was realized, and this sum was used to help pay for the parties' home. Kenneth claimed he brought a savings account of $22,994.35 into the marriage but, upon cross-examination, admitted that all but $3,500 was spent before the marriage. Kenneth also held an account with a broker which was later redeemed for $9,600. At the time of the marriage, Kenneth owed approximately $4,500 for his deceased former wife's medical bills. From this evidence, we conclude Kenneth brought $47,803 into the marriage, less $4,500 in debts, for a total of $43,303.

Separate professional real estate appraisals introduced by Jane and Kenneth valued the parties' home at $197,000 and $180,000, respectively. Kenneth testified that, including work he did on it that he valued at $8,000, the house cost $193,646 to build, and while testifying, he stated the house was worth $200,000. Therefore, we value the house at $197,000.

At the time of the hearing, the home was subject to a first mortgage of $107,471.55 and a second mortgage or lien, called a line of credit by the parties, of $10,833. The evidence shows the second mortgage was incurred to finish paying the cost of building the home, although some of that debt may have been incurred for other expenses.

The court awarded each party the personal property in his or her possession and, with the exception of a picture which was awarded to Jane, described only the home and the automobiles. The property is not well identified in the decree, and the court

did not place a value on any asset or debt. To determine the reasonableness of the decree, we interpret the decree to have awarded the property as we show below. As part of our de novo review, we find the value of the assets and the amount of the debts to be as shown in the table below. Information about and the value of items not discussed above but listed in the table appear to be undisputed.

We conclude the trial court awarded the parties' marital assets and debts as follows:

		Kenneth	Jane
Assets			
1994 Suburban		$ 16,000	
1994 Mazda (leased)			0
Household goods		7,165	$1,600
Antiques			1,000
Retirement account		1,627	
Life insurance		4,132	
House value	$197,000		
1st mortgage	- 107,471		
2d mortgage	- 10,833		
Net value	$ 78,696	78,696	
Total value of assets awarded		$107,620	$2,600
Liabilities			
Credit card debts		5,220	
Medical bills		74	165
Net value of property received		$102,326	$2,435
Less value of property brought into marriage		43,303	3,329
Net after allowing for property brought into marriage		$ 59,023	- $ 894

Combined net value of marital estate is $58,129, or $29,064.50 each if equally distributed.

Jane received practically nothing from the marital estate, and we therefore find that the trial court abused its discretion. In this case, we find no valid reason for distributing more of the marital estate to one party than the other. The parties apparently agree that the home should be distributed to Kenneth. Since

both parties do not dispute the award of the specific assets, our only alternative is to require Kenneth to pay Jane a sufficient amount of money to equalize the property distribution.

Computation of Payment Necessary to Equalize Distribution

Net value of property received by Kenneth	$59,023.00
Amount of equal distribution	- 29,064.50
Amount owed by Kenneth to equalize	$29,958.50

In addition, the court ordered Jane to pay $137.50 to reimburse Kenneth for one-half the cost of preparing the parties' 1995 income tax return. Kenneth must pay Jane $29,958.50, less $137.50 if that sum has not been paid.

Social Security Income.

[10,11] By including Lindsey's Social Security benefits as part of Kenneth's income, the trial court in effect finds that such funds are Kenneth's. However, Kenneth merely receives such payments as representative payee for Lindsey. A representative payee has a responsibility to "[u]se the payments he or she receives *only for the use and benefit of the beneficiary* in a manner and for the purposes he or she determines, under the [federal] guidelines . . . to be in the best interests of the beneficiary." (Emphasis supplied.) 20 C.F.R. § 404.2035(a) (1998). Payments to a representative payee are for the use and benefit of the beneficiary if used for the beneficiary's current maintenance, which includes the cost of food, shelter, clothing, medical care, and personal comfort items. 20 C.F.R. § 404.2040(a)(1) (1998).

Furthermore, both Kenneth and Jane are Lindsey's adoptive parents. One has no greater claim on her than the other, and if custody were different, Jane would undoubtedly be entitled to receive the benefit of the Social Security payment. Thus, it is difficult to understand why, in the present situation, Kenneth should receive the benefit of the entitlement and Jane should not. This is particularly true in view of the fact that when Jane adopted Lindsey and agreed to incur the obligation to support her, she undoubtedly was aware of the Social Security benefits that were being paid in Lindsey's behalf. To not take the Social Security payment into consideration would merely give Kenneth a windfall to defray his costs of supporting the child he adopted.

[12,13] Even if the benefit is treated as his income, the rules for setting child support are based on Neb. Rev. Stat. § 42-364.16 (Cum. Supp. 1996), which provides in significant part:

> Child support shall be established in accordance with [the Nebraska Child Support Guidelines], which guidelines are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

The Supreme Court has said: "A judge may not satisfy his duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested guidelines." *Brandt v. Brandt*, 227 Neb. 325, 327, 417 N.W.2d 339, 341 (1988), *overruled on other grounds, Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991).

[14] Child support under the guidelines is computed upon the basis of the net monthly income of the parents. A court may deviate from the child support guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C; *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). See, also, § 42-364.16. After a de novo review of the facts and circumstances of this case, we find strict application of the guidelines will not result in a fair and equitable child support order.

The child support as allowed by the trial court treated the Social Security payment merely as Kenneth's income, which it is not. Without considering the Social Security payments, Jane's total monthly income is $2,267 and Kenneth's is $3,958. Jane's net monthly income is $1,764 and Kenneth's is $3,022, giving the parties a combined net monthly income of $4,786, of which 36.85 percent is Jane's and 63.15 percent is Kenneth's. At these income levels, the guidelines show total support of $1,034. Jane's share would be $381 and Kenneth's would be $653. By adding the Social Security benefits to the combined net income, the total net income of the family is increased to $5,477, and the combined support under the guidelines increases to $1,113, with Jane's net monthly income remaining $1,764 and Kenneth's increasing to $3,713. Using these figures, Jane's income would

be 32.2 percent of the total net monthly income and Kenneth's would be 67.8 percent of the total. Using these figures, Jane's share of the total support of $1,113 would be $358, or $23 less than she would pay if there were no Social Security benefits, and Kenneth's share would be $755. Since Kenneth receives the $691-per-month Social Security benefits to spend on support as he will, his support would effectively be $64.

The difficulty with computing support under the guidelines in the manner it was computed by the court is that the court's computation assumes the Social Security benefits are Kenneth's income, which they are not. It is simply not fair or reasonable to give Kenneth the benefit of the Social Security payments and thus shift most of the burden of supplying the unprovided support to the low-income noncustodial parent. The guidelines can still be used as a reliable guide in setting support if the Social Security benefits are considered as family income but not attributed to either parent, and if they are applied to the support computed under the guidelines for that income, with the balance prorated to the parties on the basis of their real incomes. In this way, the total support is increased in recognition that the family income is greater than the net monthly earnings of the parents, and the parent who has the legal obligation to support Lindsey receives the benefit of the government program intended to pay for the support of the child.

We therefore conclude that it is reasonable to compute the total support obligation as though the money was paid to both parties, and then compute the total support obligation to be $1,113 as above computed. Then, the $691 benefit should be subtracted from that sum, and the balance of $422 should be prorated between the parties in proportion to each's net monthly income. Jane's 36.85 percent of that figure is $155. We therefore conclude the child support obligation of $358 was an abuse of discretion and that the child support should be decreased to $155 per month.

Health Insurance.

On our own motion, we note that the court ordered each party, and not the parties jointly, to provide medical insurance for Lindsey. This is an obvious waste. Neb. Rev. Stat. § 42-369(2)

(Reissue 1993) requires the judge to direct which party shall provide health insurance. The record before us does not supply the information necessary for this court to make this determination. Therefore, upon remand, the court shall comply with § 42-369(2), consider if either party has health insurance available, and direct one of the parents to provide health insurance in light of the facts developed at a hearing held for that purpose.

CONCLUSION

We affirm the judgment of divorce but modify the property settlement to require Kenneth to pay Jane $29,958.50 with interest within 6 months of the date of this decree. Said sum shall draw interest at the judgment rate from the date of the decree, April 9, 1997, until paid. We also modify the decree to provide that Jane shall pay $155 per month child support rather than $358 per month, and we remand the cause for a determination of which parent should provide health insurance and under what conditions.

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

IN RE ESTATE OF EDWARD J. ROLENC, ALSO KNOWN AS EDWARD J. ROLENC, SR., DECEASED. EDWARD ROLENC ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD J. ROLENC, DECEASED, APPELLEES, V. MARY JO GABEL AND RITA HRUSKA, APPELLANTS.

585 N.W.2d 526

Filed October 27, 1998. No. A-97-544.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 1996), are reviewed for error on the record.
2. **Decedents' Estates: Good Cause: Time: Appeal and Error.** Neb. Rev. Stat. § 30-2437 (Reissue 1995) provides that for good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.
3. **Decedents' Estates: Good Cause: Words and Phrases.** Good cause as used within the provisions of Neb. Rev. Stat. § 30-2437 (Reissue 1995) means a logical reason or legal ground, based on fact or law, why an order should be modified or vacated.

4. **Decedents' Estates: Wills.** In determining whether to grant a motion to set aside an order admitting a will to probate, a court should consider whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order.
5. ____: ____. A movant must support a claim of meritorious objection or defense by good faith averment of facts, not simply legal conclusions.

Appeal from the County Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Richard K. Watts, of Mills, Watts & Reiter, for appellants.

Robert J. Bierbower for appellees.

SIEVERS and MUES, Judges, and HOWARD, District Judge, Retired.

MUES, Judge.

INTRODUCTION

Mary Jo Gabel and Rita Hruska appeal the judgment of the Butler County Court denying their motion to set aside its order admitting the will of Edward J. Rolenc, also known as Edward J. Rolenc, Sr. (the decedent), to probate.

BACKGROUND

On December 16, 1996, Edward Rolenc, Jean McGarry, and Bridget Wilson (hereinafter referred to as the proponents) filed a petition for formal probate of the will of the decedent. The proponents alleged that the decedent had died on December 10, that they were the nominated personal representatives, that no other personal representative had been appointed, and that to the best of their knowledge, they believed the will dated June 13, 1990, was validly executed. The petition further alleged that the will was either in the possession of the court or accompanied the petition. A copy of the will has not been included in our record.

A hearing on the petition was held January 9, 1997, at 11:30 a.m. At the hearing, the court inquired whether there were any objections to the admission of the will to probate. Gabel informed the court that she had not had an opportunity to review the will. She was given a copy of the will, and the court again inquired whether Gabel had any objections to it. Gabel asked

the court how long a time she had to contest the will. The court informed her, "Until 11:30 today." The court further stated that "[p]ublic notice was given on December 19th in the Banner Press that the petition for formal probate of the will was on file" and that "this will was on file with the court for review beginning on" that date.

Gabel informed the court that her attorney had called the previous day and requested a copy of the will be faxed to him and that he had again called that morning. The court explained that it was not ordinary practice to fax documents long distance but stated that a copy of the will had been faxed to Gabel's attorney at approximately 10 that morning. The court informed Gabel that it was going to grant the proponents' motion for formal probate of the will and stated that if Gabel had any objections, she would need to talk to her attorney and ask the court to set aside the order. The court recommended that it be done within the next 10 days.

On January 15, 1997, Gabel and Hruska (hereinafter referred to as the contestants) filed an objection to the petition for probate of the will, alleging that the will was not executed with the formalities required by Nebraska statutes, that the decedent did not have testamentary capacity at the time he executed the will, and that the will was the result of the undue influence of the proponents. As noted, a copy of the will has not been included in our record; however, according to an April 17 journal entry of the court, the contestants are daughters of the decedent and were expressly disinherited.

A hearing on the contestants' "objection" was held on March 6, 1997. At the hearing, counsel for the contestants requested that the objection be treated as a motion to set aside the order. Counsel explained that the contestants had misunderstood the court and were under the impression that they had 10 days to object to the petition for formal probate. The court took the matter under advisement and ultimately granted counsel's request, and hereafter we will treat the objection as a motion to vacate. In the court's order, filed March 18, the court noted:

> Neb. Rev.Stat. §30-2437 provides: "[f]or good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal."

> The Objections filed by Contestants do not provide the court with any information from which the court could conclude that good cause exists.

The court gave the contestants until March 31 "to provide a statement of good cause in support of the motion" and scheduled a hearing for April 10.

On March 31, 1997, the contestants filed a "Statement of Good Cause." The statement was sworn to by Gabel. In it, she averred that on December 24, 1996, counsel for the proponents mailed her a notice that the petition for formal probate had been filed and a hearing had been set; that Gabel did not receive said notice until December 27; and that Gabel was entertaining relatives until January 2, 1997. Gabel further averred that between the time of the decedent's death, December 10, 1996, and the holiday season, she had a "significant outbreak" of "shingles," which prevented her from leaving the house and operating a motor vehicle. Gabel stated that she had "reason to believe, based upon facts known to her, that the will offered for probate" was objectionable because it was not executed with the formalities required by Nebraska statutes, the decedent lacked testamentary capacity at the time he executed the will, and the will was the result of undue influence exercised upon the decedent by the proponents.

A hearing was held April 10, 1997. No evidence was offered at the hearing, and counsel for the contestants stated that he "would . . . submit [the matter] based upon the statement of good cause that's been filed with the Court." In a journal entry filed April 17, the court denied the motion, stating:

> The court concludes that the summary allegations of counsel in support of the motion to vacate do not constitute a demonstration of a meritorious objection. The court further concludes that no issues of law exist with respect to the execution of the Will, and that no facts were presented from which the court can conclude that a meritorious factual issue exists with respect to the execution of the Will. The motion to vacate is therefore denied.

The contestants have timely appealed.

ASSIGNMENTS OF ERROR

The contestants allege, restated, that the county court erred in finding that they had failed to show good cause why the order admitting the decedent's will to probate should be vacated.

STANDARD OF REVIEW

[1] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 1996), are reviewed for error on the record. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996); *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421 N.W.2d 463 (1988). 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. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *In re Guardianship of Zyla, supra.*

DISCUSSION

The county court determined that the will was in substantial conformity with the provisions of § 30-2329, which sets forth the requirements for execution of a self-proved will. The court concluded that "in order for the Contestants to prevail on their motion, they must demonstrate, by affidavit or evidence produced at the hearing, facts sufficient to warrant further hearing on their claims of undue influence and lack of capacity." Because the contestants offered no such evidence, the court found that the contestants had failed to show good cause why its order admitting the decedent's will to probate should be set aside.

[2] Section 30-2437 provides that for good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. In *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979), the Nebraska Supreme Court discussed the meaning of "good cause" in the context of § 30-2437. The court, analogizing the good cause requirement of § 30-2437 with the good cause requirement necessary to vacate a default judgment, stated:

> [T]he situation that existed here was no different than where default judgment is entered and a timely application . . . to vacate is filed together with a tendered defense — lack of testamentary capacity and undue influence — which, if true, would require the vacation of the decree admitting the will to probate. As stated in Steinberg v. Stahlnecker, 200 Neb. 466, 263 N. W. 2d 861 (1978) . . . "Our law is well settled. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable grounds sustain the motion and permit the cause to be heard on the merits."

DeVries v. Rix, 203 Neb. at 401-02, 279 N.W.2d at 94-95.

" 'A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.' " *Steinberg v. Stahlnecker*, 200 Neb. 466, 468, 263 N.W.2d 861, 862-63 (1978).

[3] "[G]ood cause as used within the provisions of section 30-2437 . . . means a logical reason or legal ground, based on fact or law, why an order should be modified or vacated." *DeVries v. Rix*, 203 Neb. at 403-04, 279 N.W.2d at 95.

[4] In *In re Estate of Christensen,* 221 Neb. 872, 381 N.W.2d 163 (1986), the Nebraska Supreme Court further expounded upon the meaning of good cause and adopted three criteria to be considered in determining whether to grant a motion to set aside an order admitting a will to probate: A court should consider whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order.

Quoting *Craig v. Rider*, 651 P.2d 397 (Colo. 1982), the Nebraska Supreme Court observed:

> "[A] rule of liberality is to be applied in evaluating promptly filed motions to set aside default judgments, and particularly orders of probate. We conclude that the burden of inquiry and promptness of decision that the trial court considered necessary do not comport with the excusable neglect standard, especially when considered in the light of the rule of liberality appropriate here. . . ."

In re Estate of Christensen, 221 Neb. at 876, 381 N.W.2d at 165.

It seems apparent that the county court's denial of the motion here was based on the contestants' failure to sufficiently demonstrate a meritorious objection. Timeliness of the motion was certainly not an issue, and no suggestion is made by the court that failure to file an objection earlier was inexcusable or prejudiced the proponents, the other two prongs of the criteria of *In re Estate of Christensen*. Without detailing the evidence, suffice it to say that we believe that the failure to file the objection on or before January 9, 1997, was excusable and that granting the motion would not unduly prejudice the proponents. Obviously, any interruption in the probate process would not be viewed as beneficial by the proponents, but the law clearly allows will contests and that alone cannot be viewed as prejudicial under *In re Estate of Christensen*.

Turning now to the meritorious objection prong, we note that the county court's decision was premised in large part upon the failure to adduce evidence. As stated, it was the county court's view that to prevail on the motion to vacate, the contestants must demonstrate "by affidavit or evidence produced at hearing" facts to warrant further hearing on their claims. We believe the trial court placed too heavy a burden on the contestants. We do not read Nebraska law to require the offer of evidence as a precondition to the grant of such a motion. *DeVries v. Rix*, 203 Neb. 392, 401, 279 N.W.2d 89, 94 (1979), speaks of a "timely application . . . with a *tendered* defense" (emphasis supplied), and *In re Estate of Christensen* talks of "allegations" of a meritorious objection.

While the offer of evidence in some form may be the preferred method to persuade a court to vacate its order under § 30-2437, it is not an absolute necessity. A successful motion to vacate grants the moving party an *opportunity* to prove the merits of his or her allegations. See *DeVries v. Rix, supra*. It would be nonsensical to require the movant to fully *prove* those allegations as a condition to a grant of such motion.

The contestants argue that evidence was offered through the statement of good cause. They are incorrect. The April 10, 1997, hearing was conducted telephonically, with the judge and

the contestants' attorney participating via telephone conference. This procedure apparently occurred without objection by any of the parties. The statement of good cause was not marked as an exhibit and offered into evidence, although the contestants' attorney did state the motion was being submitted "based upon" the statement. Therefore, the statement cannot be considered as evidence on this appeal. See *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997). Nevertheless, we see nothing to preclude consideration of the statement, as well as the original objection, as the contestants' "tender" of their objections or as their "allegation" of a defense to probate.

The proponents strongly urge that the decision of the trial court was correct because the motion and the statement of good cause were not factually specific but merely conclusory as to the alleged undue influence and lack of testamentary capacity. The proponents rely on the Colorado case *Craig v. Rider*, 651 P.2d 397 (Colo. 1982), quoted extensively by the Nebraska Supreme Court in *In re Estate of Christensen*. The Colorado Supreme Court in *Craig* stated:

> A movant must support a claim of meritorious defense by averments of fact, not simply legal conclusions. [Citations omitted.] The factual allegations must be set forth with sufficient fullness and particularity to show that a defense is "substantial, not technical; meritorious, not frivolous; and that [it] may change the result upon trial . . . ."

651 P.2d at 403.

The proponents further contend that Gabel's statement lacks the "fullness and particularity" to show that the defenses asserted are substantial and not frivolous. Brief for appellees at 11. They point to the case *Steinberg v. Stahlnecker*, 200 Neb. 466, 263 N.W.2d 861 (1978), where the denial of a motion to set aside a default judgment was affirmed. The Nebraska Supreme Court held that the statement of the defendant's attorney to the effect that the defendant had a " 'good and sufficient defense to the claim,' " *id.* at 468, 263 N.W.2d at 862, was not sufficient, alone, to merit setting aside the default.

It is true that the motion and Gabel's statement fail to state the factual basis for the conclusions that "based upon facts known to her," the will was executed without testamentary

capacity and was the result of undue influence by the proponents. We are mindful that the court in *In re Estate of Christensen*, 221 Neb. 872, 381 N.W.2d 163 (1986), did not expressly rely on the above language from *Craig* in resolving that appeal, but our Supreme Court was not addressing the merits of the objection as we are in the present case. And the allegations in the instant matter are more particular than those in *Steinberg*, but the lack of any factual allegation to support the absence of testamentary capacity and the presence of undue influence is similar to the attorney's conclusory statements in *Steinberg*, which were deemed insufficient to merit the setting aside of a default.

The contestants argue that it is unreasonable to expect that the full facts surrounding the decedent's execution of his will could be garnered and tendered so quickly after decedent's death. We do not totally disagree. But we recall that there was some opportunity between the filing of the motion to vacate on January 15, 1997, and the final hearing on April 10 to buttress the conclusions with factual support. As stated, good faith *allegations* are sufficient. And in other contexts, full-blown discovery is seldom completed before necessary allegations must be presented. In any event, the contestants sought no additional time to supplement the time given them by the trial court in its March 18 order. In this order, the trial court forewarned that the allegations of the contestants' initial pleading were not sufficient to make their showing of good cause. The subsequently filed statement of good cause and the hearing of April 10 failed to illuminate further the merit of the asserted defenses.

We note that the quoted language from *Craig* has a certain familiarity—it is reminiscent of the rules of this state associated with formal pleadings. See *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993) (proper pleading requires petition to state in logical and legal form facts which constitute cause of action, define issues to which defendant must respond at trial, and inform court of real matter in dispute). It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. *Id.*

[5] But we need not graft formal pleading rules or the language of *Craig* onto the meritorious objection branch of good

cause under § 30-2437 to resolve this appeal. It is sufficient for our purpose simply to say that a movant must support a claim of meritorious objection or defense by good faith averment of facts, not simply legal conclusions. That is a reasonable burden, given that the task of the trial court is to evaluate whether the objection has sufficient merit to justify reopening an issue already resolved—the will's admission to probate—thus subjecting the estate to potentially protracted estate litigation.

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. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998). Denying the contestants' motion to vacate based on bare, conclusory statements cannot be viewed as untenable and as unfairly depriving them of a substantial right and denying a just result. The trial court did not abuse its discretion by refusing to vacate its order when it was provided neither with particulars surrounding the decedent's alleged lack of testamentary capacity nor with the circumstances upon which the claim of undue influence was predicated. Accordingly, we affirm the order of the county court denying the contestants' motion to set aside the order admitting the will to probate.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. SCOTT A. HARROLD, APPELLANT.
585 N.W.2d 532

Filed October 27, 1998. No. A-97-1167.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those circumstances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Criminal Law: Appeal and Error.** In a criminal appeal from county court, appellate courts generally review for error on the record.
3. **Obscenity: Proof.** To regulate or prohibit publications, the State must prove all three parts of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

4. **Constitutional Law: Obscenity.** Obscene materials are not within the ambit of speech or press protected by the First Amendment to the federal Constitution or Neb. Const. art. 1, § 5.
5. **Obscenity.** In determining whether a work appeals to the prurient interest under the first prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), it must be judged as a whole, and not on the basis of isolated portions.
6. ____. The context in which sexual material is presented must be considered.
7. **Constitutional Law: Obscenity.** If a work's predominant appeal, considered in the context of the work's entirety, is to sexual interest that is not deviant, the work may be considered indecent rather than obscene and, thus, entitled to constitutional protection.
8. **Obscenity: Evidence: Expert Witnesses.** A person charged civilly or criminally with violating the Nebraska obscenity statutes is entitled to present evidence in his or her defense and in support of his or her theory of defense, including, but not limited to, expert witnesses, proof of financial interest or lack thereof in the allegedly obscene work, and evidence to support a claim that the challenged work has serious literary, artistic, or scientific merit.
9. **Criminal Law: Obscenity: Proof: Intent.** When charged as a criminal offense, each element of an obscenity-related crime, including the intentional nature of the crime charged, must be proved by the State beyond a reasonable doubt, just like other criminal charges.
10. **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.
11. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion.
12. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
13. **Evidence: Words and Phrases.** Materiality and probative value are the two components to relevancy.
14. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** 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.
15. **Criminal Law: Obscenity: Proof: Words and Phrases.** The word "obscene" is a legal term of art, and the prosecution must prove scienter to satisfy the elements of the crime of distributing obscene material.
16. **Criminal Law: Obscenity: Proof.** In a prosecution for obscenity, and with regard to scienter, the prosecution need prove only that the defendant knew the contents of the material and their character and nature.
17. **Trial: Evidence: Appeal and Error.** An appellate court must examine the sufficiency of the evidence presented against a defendant before it can order a new trial or dismiss the action.

18. **Convictions: Evidence: Appeal and Error.** Where the issue of sufficiency of evidence is raised on appeal, if it appears the evidence is sufficient to support the conviction, the cause may be remanded to a lower court for further proceedings; if the evidence is not sufficient, the cause must be dismissed.
19. **Obscenity: Juries.** A jury is not empowered with unfettered discretion to determine whether a questioned work is, in fact and at law, obscene.
20. **Constitutional Law: Obscenity: Judgments: Appeal and Error.** An appellate court ordinarily must reach an independent decision regarding the alleged obscenity of a work, because substantive constitutional limitations govern.
21. **Constitutional Law: Judgments: Appeal and Error.** The Nebraska appellate courts determine questions of constitutional dimension independent of conclusions reached by trial courts.
22. **Obscenity.** An object, book, magazine, or film can be judged obscene only after consideration of the allegedly objectionable aspects in the context of the entire work.
23. **Criminal Law: Obscenity.** The "taken as a whole" doctrine is a defendant's doctrine designed to protect against obscenity prosecutions based upon segments lifted out of the context of the entire work, which segments distort the thematic context of the work at issue.
24. **Criminal Law: Obscenity: Intent.** When considering the intent of a defendant charged with a crime of obscenity, if that intent is to convey a literary, artistic, political, or scientific idea, or to advocate a position, then the intent is serious.

Appeal 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 District Court reversed and dismissed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

A jury in the Lancaster County Court convicted Scott A. Harrold of producing or distributing obscene material, a Class I misdemeanor, in violation of Neb. Rev. Stat. § 28-813(1) (Reissue 1995). Harrold's sentence was a fine of $1,000. On appeal, the district court for Lancaster County affirmed Harrold's conviction and sentence. On further appeal, we address evidentiary rulings by the trial court and also the core question of whether Harrold's self-produced videotape was obscene.

FACTS

In late 1994, Harrold applied to TV Transmission, Inc., doing business as CableVision, for permission to broadcast "Cosmic Comedy," a television series he produced, on CableVision's public access channel. CableVision transmits cable television programming to its subscribers in and around Lincoln, Nebraska.

A copy of one of Harrold's written applications for permission to broadcast on CableVision was received in evidence at trial. In it, Harrold described "Cosmic Comedy" as an ongoing comedy series, with each episode 30 minutes in length, and he stated that he anticipated providing CableVision with four new episodes of the series each month. It is undisputed on the record that episodes of the series were generally 30 minutes in length. Harrold specifically noted in his application that the series depicted or described sexual or excretory activities or organs and that it also contained reviews of adult movies. Harrold requested that the series be broadcast at midnight.

CableVision granted Harrold's application, and in late 1994 or early 1995, he began providing CableVision with videotaped episodes of his series for broadcast on CableVision's public access channel. After Harrold completed production of each new episode, he delivered the videotaped episode to CableVision for broadcast. Harrold testified that he did not see CableVision's broadcasts of his series, because he did not subscribe to CableVision's service. Episodes of "Cosmic Comedy" were aired by CableVision on a regular basis until early 1997.

At trial, Harrold testified that he produced, directed, and often acted in the "Cosmic Comedy" episodes which he gave to CableVision for broadcast. Harrold explained that he designed the series to be an "experimental showcase," with a theme spoofing cheap science fiction films from the 1950's. Harrold stated that he had taken a course in "clowndom" at a local community college and that he had developed a cadre of a dozen or more clown characters who intermittently appeared on "Cosmic Comedy." These characters included clowns named "Cozblah" and "Crotchy," who appear in the episode at issue, and "Crappy," an older clown whom Harrold described as Crotchy's father.

On or about September 14, 1995, Harrold hand delivered a videotaped episode of the series to CableVision. This episode

was recorded on ¾-inch pneumatic videotape, a size and grade which is generally used only in professional broadcasting. The cover bore handwritten notations by Harrold that the videotape contained 20 minutes of material for broadcast during the "Cosmic Comedy" broadcast time period. A CableVision employee accepted the videotape from Harrold and gave it to David Grooman, CableVision's public access coordinator. Grooman watched this videotape, which at trial was labeled as exhibit 1. After viewing Harrold's videotape, Grooman made a copy of it on ½-inch videotape, which is the size of videotape used in most nonprofessional video cassette machines, and Grooman gave the copy to the Lincoln Police Department. This videotape was labeled at trial as exhibit 2. Harrold's original videotape, exhibit 1, was soon thereafter broadcast in its entirety by CableVision on its public access channel at least once, on or about September 24, 1995.

Exhibit 1, which was never seen by the jury, is 20 minutes in length. Exhibit 2, which was viewed by the jury, is only 16 minutes in length. It is undisputed that neither the credits nor program title were included in exhibit 2. There was little other testimony regarding any differences between exhibit 1 and exhibit 2. Exhibit 2 was the only videotape viewed by the jury, because the State and Harrold's counsel agreed that the jury would view exhibit 2 in making its determination. There is no evidence, or assertion by either party, that there are any differences between exhibit 1 and exhibit 2 which are of any consequence to our decision.

We have viewed all of exhibit 2, the first 14½ minutes of which shows a head-and-shoulders shot of Harrold in clown makeup, sunglasses, a false nose, and a close-fitting hat. Harrold appears to mouth words or sounds, and he grimaces and moves his head about in a writhing manner. The soundtrack accompanying these images contains mainly unintelligible distortions of Harrold's voice, and the content and meaning of his speech, if any, is incapable of determination.

Grooman found, as did we, that approximately the last 1½ minutes of Harrold's videotape is Harrold masturbating, while attired only in a clown face. In this part of the videotape, Harrold is shown alone, in a reclining position. He appears to be

nude, except for a pair of shiny sunglasses which cover his eyes, and his face is painted as a clown with a dark beard and white lips. The camera capturing these images was apparently positioned between Harrold's legs, so that the principal image framed by the camera is Harrold's hands stroking his erect penis, although his chest and face are visible. After 1½ minutes, Harrold simply stops masturbating, and it appears from exhibit 2 that he does not ejaculate. Very little sound accompanies the images of Harrold masturbating. Toward the end of this scene, Harrold makes several largely unintelligible comments, except that one can hear the phrases "left wing" and "for the ladies."

A police officer went to Harrold's home in late September 1995 and gave him a citation for distributing obscene material. In his conversation with the police officer, Harrold admitted that he was the person masturbating in the videotape provided by CableVision to the police. An amended charge of distributing obscene material under § 28-813(1)(a) and (b) was filed against Harrold in November 1996.

The amended charge against Harrold was tried to a county court jury on January 21 through 24, 1997. Before trial commenced, the trial court sustained several motions in limine by the State. Harrold was thereby prevented from introducing into evidence regulations of the Federal Communications Commission (FCC); CableVision's rules governing use of its public access channels, which rules include a protocol regarding distribution of indecent material; and the opinions of CableVision and its employees as to whether Harrold's videotape contained obscenity. The State also successfully moved in limine to prevent any evidence regarding whether CableVision was charged criminally for broadcasting Harrold's videotape. The State's basis for these motions, and upon which the trial court sustained them, was that such evidence was not relevant. Harrold twice made offers of proof regarding the excluded evidence, claiming that the evidence was relevant and went to his defense theory that the videotape was not obscene and that he did not knowingly produce or distribute obscene material.

Harrold testified that the content of the "Cosmic Comedy" series changed over time, based upon development of various characters and upon input from program viewers. Harrold also

stated that the series often included material which Harrold intended as political satire. Further, beginning in February 1995, some of the episodes included reviews of commercially produced X-rated movies obtained from various rental sources in Lincoln. The reviews were given by the clown character Crotchy, and they included segments excerpted from the reviewed films. The clips taken from the reviewed films always included images of fully nude women engaged in sexual acts and, over time, also included naked men. There was no evidence that any of these previous broadcasts had provoked criminal charges against Harrold.

Harrold testified that he rebroadcast the X-rated movie clips pursuant to a "fair usage" exception to copyright laws. Harrold stated that he voluntarily imposed a rating of "NC-17" (not for children under the age of 17) on "Cosmic Comedy" and that he made this rating designation known by visible or audible means on most episodes. Harrold testified that when selecting movies for review on "Cosmic Comedy," he specifically refused to use films which depicted sexual acts involving children, bestiality, torture, incest, or nonconsensual sexual relations.

Shortly before the broadcast of exhibit 1, the videotape which led to the charges against him, Harrold gave CableVision a different episode which contained a film excerpt depicting a woman stripping off her clothes and masturbating. Harrold was not prosecuted for the production or distribution of that episode. Harrold testified that he received favorable comments from male viewers about that episode, but at least one female viewer complained that Harrold's videotapes focused too much on female nudity and that they should include more male nudity. Harrold stated that he thereafter produced exhibit 1, a portion of which included himself nude and masturbating, "in response to audience input and . . . to entertain, make people laugh." Harrold testified that the clown character portrayed in the masturbation scene was Crotchy, who reviewed X-rated films in previous "Cosmic Comedy" episodes. Harrold did not deny at trial that he "produced [the videotape with the masturbation scene], directed, and the whole thing."

As noted above, exhibit 2 included a lengthy section before the masturbation scene which featured a clown's face and a

nearly incomprehensible soundtrack. Harrold testified that this character was Cozblah, who "lost his face in a capsule" and possessed a "beacon voice," which Harrold intentionally distorted so that Cozblah's speech was "screechy" and not readily understandable. Harrold stated on cross-examination that a viewer not familiar with "Cosmic Comedy" would not be able to identify this character as Cozblah or identify his whereabouts or activities based solely upon the images in exhibit 2. The change in scenes from Cozblah to the masturbating Crotchy is abrupt, without transition, and devoid of any indication of the impending shift in subject matter. The scene involving Crotchy likewise ends abruptly.

The county court jury convicted Harrold of producing or distributing obscene material, and he was fined $1,000. Harrold appealed the conviction to the Lancaster County District Court, which affirmed the conviction and the sentence. In its ruling, the district court stated that "[t]he [district] court does not believe it is required to make a decision independent of the jury determining whether the defendant's videotape is obscene or not obscene." Harrold thereafter timely filed his appeal with this court.

ASSIGNMENTS OF ERROR

Harrold claims on appeal that his conviction and sentence should be reversed, and he has designated 44 assignments of error. We have reduced these to seven as follows: (1) The trial court wrongly restricted voir dire of the jury panel and erroneously overruled Harrold's motion to quash the panel; (2) the trial court erred in refusing to allow him to introduce evidence of FCC and CableVision rules and regulations; (3) the trial court erred in refusing to allow evidence of the actions and opinions of CableVision employees regarding the alleged obscenity of Harrold's videotape and in refusing to allow evidence regarding whether CableVision was criminally charged for broadcasting Harrold's videotape; (4) the trial court, and the district court sitting as an appellate court, erred in failing to independently determine as a matter of law whether the work was obscene; (5) the trial court erred in refusing two jury instructions proposed by Harrold; (6) Harrold's conviction was

not supported by sufficient evidence; and (7) Harrold received an excessive sentence. We deal only with those assignments of error necessary to resolve this appeal.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those circumstances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998).

[2] In a criminal appeal from county court, appellate courts generally review for error on the record. See *State v. Rubek*, 7 Neb. App. 68, 578 N.W.2d 502 (1998).

ANALYSIS

Obscenity and Law.

Section 28-813(1) makes it a crime to knowingly prepare, produce, or distribute obscene material. This statute was promulgated after the U.S. Supreme Court issued its landmark ruling in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). *Miller* reinforced the States' power to regulate " 'the intractable obscenity problem.' " 413 U.S. at 16, quoting *Interstate Circuit v. Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968) (Harlan, J., concurring and dissenting).

The *Miller* majority provided the following basic guidelines (the *Miller* test) for the trier of fact to apply in determining if a given work is obscene:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24.

[3] To regulate or prohibit publications, the State must prove all three parts of the *Miller* test. *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983). Nebraska's present obscenity statutes are modeled largely after the *Miller*

test. See, e.g., Neb. Rev. Stat. § 28-807(10) and (15) (Reissue 1995).

[4] Obscene materials are not within the ambit of speech or press protected by the First Amendment to the federal Constitution or Neb. Const. art. 1, § 5. See, *Miller, supra*; *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975). Materials which are considered indecent, as opposed to obscene, are entitled to constitutional protection. *Manual Enterprises v. Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *U.S. v. M-K Enterprises, Inc.*, 719 F. Supp. 871 (D. Neb. 1989). The U.S. Supreme Court has characterized the distinction between indecent material entitled to constitutional protection and unprotected obscenity as a "dim and uncertain line." *Jacobellis v. Ohio*, 378 U.S. 184, 187, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964). Appeal to the prurient interest is a key component in determining if a work is obscene and therefore not constitutionally protected. *Miller, supra*. Material does not evoke a prurient interest unless it has a capacity to provoke "sexual responses over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Nudity is not necessarily obscene. *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974). Likewise, portrayals of sexual activity may not be per se obscene, see *Jacobellis, supra*; *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972); *M-K Enterprises, Inc., supra*, even if they are characterized by some as "dismally unpleasant, uncouth, and tawdry," *Manual Enterprises*, 370 U.S. at 490.

It is in this context that we use Judge Urbom's opinion in *M-K Enterprises, Inc., supra*, as a prime example of the principle that what most people would find offensive is not necessarily obscene from a constitutional viewpoint. In *M-K Enterprises, Inc.*, five counts of obscenity-related crimes were charged against individual and corporate defendants selling sexually explicit material in southeast Nebraska. The case was tried to the court, which found that three of the four works at issue were obscene. The fourth work, a commercially produced videotape entitled "The Event," contained images of heterosex-

ual sexual activity, including vaginal intercourse and fellatio between two men and a woman; homosexual anal intercourse and fellatio between two men; and cunnilingus between two women. The trial court applied its understanding of contemporary community standards of an average person in southeast Nebraska and found that "[i]t is unbridled sex, the eager, unabashed, no-holds-barred doing of raw sex—oral, manual, vaginal, anal, heterosexual and homosexual—in multiple positions and in wearisome repetition." 719 F. Supp. at 878. Despite the graphic nature of the videotape's representations, the trial court nonetheless found the videotape not obscene, holding that

> [the videotape] is a crude expression of a primitive passion, exaggerated by patently offensive full-screen close-ups of the sex parts in action. That is what it is, nothing more and nothing less.
>
> There is no force, no deliberate pain, no inanimate insertions, no bondage, no involvement of children or animals and no deception.

Id. The court found that despite the videotape's graphic nature, it did not appeal to the "darker side of sex," and that, therefore, the videotape was not illegally obscene. *Id.* Accord, *Manual Enterprises, supra*; *City of St. George v. Turner*, 860 P.2d 929 (Utah 1993); *People v. Correa*, 191 Ill. App. 3d 823, 548 N.E.2d 351 (1989).

[5,6] In determining whether a work appeals to the prurient interest under the first prong of the *Miller* test, it must be judged as a whole, and not on the basis of isolated portions. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). The context in which the sexual material is presented must also be considered. See *Kois, supra*. A leading scholar in this field has suggested that the *whole work* concept may well be identical to the *dominant theme* concept in *Roth, supra*. See Frederick F. Schauer, *The Law of Obscenity* (1976).

[7] If a work's predominant appeal, considered in the context of the work's entirety, is to sexual interest that is not deviant, the work may be considered indecent rather than obscene and, thus, entitled to constitutional protection. *Brockett, supra*; *Jenkins, supra*; *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676,

12 L. Ed. 2d 793 (1964); *U.S. v. M-K Enterprises, Inc.*, 719 F. Supp. 871 (D. Neb. 1989). We note, however, that indecent material may be subject to legitimate regulation as to the time, place, and manner of its publication. See, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978).

[8,9] A person charged civilly or criminally with violating the Nebraska obscenity statutes is entitled to present evidence in his or her defense and in support of his or her theory of defense, including, but not limited to, expert witnesses; proof of financial interest, or lack thereof, in the allegedly obscene work; and evidence to support a claim that the challenged work has serious literary, artistic, or scientific merit. Neb. Rev. Stat. §§ 28-814 and 28-815 (Reissue 1995); *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). When charged as a criminal offense, each element of an obscenity-related crime, including the intentional nature of the crime charged, must be proved by the State beyond a reasonable doubt, just like other criminal charges. See, e.g., *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

Exclusion of CableVision Rules from Evidence.

Harrold has assigned error to several evidentiary rulings by the trial court. We touch on these matters only briefly, because we are convinced that ultimately our duty in this case is to say whether 16 minutes of videotape, with approximately 90 seconds of Harrold masturbating, is obscene.

Harrold wanted to offer evidence (1) that there were CableVision rules in a handbook allowing the broadcast of indecent material between midnight and 1 a.m., (2) that obscene material could not be broadcast on the public access channel, (3) that questionable material was reviewed by the CableVision advisory board, and (4) that CableVision was not prosecuted for showing Harrold's videotape to the public. The trial court sustained the State's motions in limine on these matters. Thus, Harrold was foreclosed from the obvious defense (1) that his videotape could not have been obscene because it was broadcast by CableVision, and by its rules, CableVision did not broadcast obscene material; (2) that his videotape could not have been

obscene because it was not reviewed by the advisory board, whose job it was to review questionable programs; (3) that CableVision obviously "distributed" the videotape by broadcasting it but that neither CableVision nor its employees were prosecuted; and (4) that Harrold's submission was in accordance with the rules on indecent material and that thus he did not have the requisite criminal intent to distribute obscene material. Procedurally, Harrold preserved his right of appellate review on these evidentiary matters.

[10-12] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996), relying on Neb. Rev. Stat. § 27-401 (Reissue 1995). All relevant evidence normally is admissible, and conversely, evidence which is not relevant is not admissible. *McBride, supra.* The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Id.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995).

[13,14] Materiality and probative value are the two components to relevancy. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Materiality pertains to the relation between the proposition for which the evidence is offered and the issues in the case. *Id.* If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. *Id.* What is "'in issue'" within the litigated controversy is determined by the pleadings in the case, read in light of the rules of pleading and controlled by applicable substantive law. *Id.* at 844, 524 N.W.2d at 48. Probative value, the second prong of relevance, is a relative concept. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). It involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact

exists, and a measurement of the distance of the particular fact from the ultimate issues of the case. *Id.* 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).

The State's burden was to prove beyond a reasonable doubt that Harrold knowingly produced or distributed obscene material, thus putting his intent at issue. Harrold attempted to show that he did not knowingly violate § 28-813(1), because he complied with the CableVision rules handbook. Further, Harrold attempted to show that because the videotape was aired, it was only indecent and not obscene. The material excluded by the successful motions in limine would have been components of this intent-based defense.

[15,16] In *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), the U.S. Supreme Court reiterated its conclusion from earlier cases that the word "obscene," as it was used in that case to describe or categorize a criminal offense, is a legal term of art and that the prosecution must prove scienter to satisfy the elements of the crime of distributing obscene material. The law is the same in Nebraska. *State v. American Theatre Corp.*, 196 Neb. 461, 244 N.W.2d 56 (1976). In *Hamling*, the U.S. Supreme Court specifically declined to require proof of a defendant's actual knowledge of the legal status of the materials claimed to be obscene. Accord, *State v. Embassy Corp.*, 215 Neb. 631, 340 N.W.2d 160 (1983); *American Theatre Corp., supra* (holding that prosecution need prove only that defendant knew contents of material and their character and nature). As the Nebraska Supreme Court noted, quoting *Hamling*, " '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.' " *American Theatre Corp.*, 196 Neb. at 471, 244 N.W.2d at 62. But as the court in *American Theatre Corp.* observed, Nebraska statutes incorporate a requirement that the distribution be made " '*knowingly*.' " *Id.* at 470, 244 N.W.2d at 62. We take that to mean that the defendant knows the contents, nature, and character of the material at issue.

In one of his offers of proof, Harrold attempted to testify that he believed the videotape was indecent, but not obscene. Harrold and Grooman testified that during the 6-month period preceding this videotape's broadcast, numerous episodes of "Cosmic Comedy" contained explicit scenes of nude males and females engaged in graphic sexual acts, and Harrold testified that at least one episode depicted a female stripping off her clothes and masturbating. There is no evidence in the record that CableVision or any other entity questioned whether such images were obscene, submitted the prior programs to the advisory board, or attempted to prevent or otherwise suppress the broadcast of the videotapes.

Harrold stated, in an offer of proof, that he believed the X-rated movie excerpts which he included in previous "Cosmic Comedy" episodes, and which were broadcast without inquiry or complaint, were representative of the community standard referred to in the CableVision rules handbook upon which he relied generally and upon which he specifically relied as to the challenged material. We do not understand how the rules governing what CableVision would or would not broadcast could not be relevant. The rules tend to show, given Harrold's testimony and the fact that the videotape was broadcast, that his videotape was only indecent, and that he did not knowingly distribute obscene material. Harrold was entitled to have the jury consider the rules and the obvious inferences deducible therefrom in light of the fact that the videotape was broadcast, as was an earlier work showing a female disrobing and masturbating, without any prosecution. Such evidence also clearly goes to the issues of "contemporary community standards" and patent offensiveness, given that what CableVision decides to broadcast is both a measurement and source of community standards.

We also find that the State "opened the door" for the admission of the contested evidence by asking Harrold on cross-examination: "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?" Obviously constrained by the court's prior ruling excluding evidence of CableVision's rules, Harrold answered: "I couldn't answer that question 'cause I can't — I

can't tell who's gonna be watching what." The State further inquired: "You just asked to have it run after midnight because you like having it run after midnight, no other reason?"

At this point, Harrold's counsel objected and argued unsuccessfully that the State had "opened the door" to the definitions and regulatory content contained in the previously excluded CableVision rules and handbook, which included rules regarding the permissible time for broadcasting indecent material. Harrold's counsel made another offer of proof. The trial court again refused to allow Harrold to introduce such evidence. We hold that the trial court abused its discretion in preventing Harrold from offering evidence about CableVision's rules to respond to previously prohibited evidentiary topics broached by the State on cross-examination. The State asked Harrold why he wanted the videotape shown after midnight, and he should have been allowed to answer, using the CableVision rules.

Harrold admitted in his offer of proof that the work at issue was indecent, but he denied that it was obscene. As shown by his offers of proof, Harrold testified that he was familiar with the distinction between these terms as set forth in the CableVision rules and that he affirmatively sought to abide by these rules, including ensuring that "Cosmic Comedy" was broadcast only during such times as permitted by CableVision for indecent material. That evidence was relevant. Moreover, the State "opened the door" on the matter and magnified its importance to the jury by attacking Harrold's reasons for his requested time of broadcast.

Without the CableVision rules being admitted into evidence, the jury could have inferred from the State's cross-examination of Harrold that his request for late night broadcast time was indicative of his knowledge that the videotape was obscene and unfit to be seen. But had the rules been in evidence, the jury could have alternatively inferred that Harrold thought the material was merely indecent and therefore permissible for broadcast at certain hours and that Harrold's intent was only to distribute lawful, indecent material.

As a result of the trial court's rulings, the jury was likewise prevented from learning that Grooman, CableVision's public access coordinator, followed a particular procedure when

arguably obscene materials were submitted for broadcast but that he did not follow that process in connection with Harrold's work. Harrold could posit a favorable inference therefrom that Grooman had concluded that the material was not obscene, which goes to the issue of contemporary community standards. Had the jury known that Grooman had not submitted Harrold's material to the board, 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.

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). We cannot conclude that the trial court's error in refusing to admit the disputed evidence was harmless beyond a reasonable doubt. Therefore, the rulings on evidence would mandate, at a minimum, a reversal and a new trial.

Sufficiency of Evidence and Independent Appellate Review of Work.

[17] Although we would reverse Harrold's conviction based on a prejudicial evidentiary ruling, we must examine the sufficiency of the evidence presented against him before we can order a new trial. See, *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). See, also, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[18] In *Lee, supra*, the Nebraska Supreme Court stated that where the issue of sufficiency of evidence is raised on appeal, as in the instant case, "[i]f it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient . . . the cause must be dismissed." 227 Neb. at 283, 417 N.W.2d at 30. Additionally, we must speak to the scope of appellate review in an obscenity prosecution.

[19] On appeal to this court, Harrold claims that the district court erred in failing to make a determination independent of the jury's findings, whether the work was obscene as a matter of law, given the protections of the 1st and 14th Amendments to the

federal Constitution. Nebraska law provides that criminal prosecutions involving the ultimate issue of obscenity shall be tried to a jury, unless the defendant so charged waives the right to jury trial and opts for trial to the court. § 28-814(1). However, it has long been the law that a jury is not empowered with unfettered discretion to determine whether a questioned work is, in fact and at law, obscene. In *Jenkins v. Georgia*, 418 U.S. 153, 160, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974), the U.S. Supreme Court held:

> 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* [*v. California*] 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," . . . 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 . . . ."

[20] The constitutional duty of judicial review of allegedly obscene material, independent of a jury's conclusions, springs from "the inherent dangers of undertaking to regulate any form of expression." *Miller v. California*, 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). In *Jenkins, supra*, the U.S. Supreme Court reiterated the premise articulated in *Jacobellis v. Ohio*, 378 U.S. 184, 187-88, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), and relied upon in *Miller*:

> Application of an obscenity law to suppress a motion picture thus requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. . . . Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law.

Regardless of the jury's finding that a particular work is obscene, an appellate court ordinarily must reach an indepen-

dent decision regarding the alleged obscenity of the work, because *substantive constitutional limitations govern.* See *Miller, supra.* Accord, *Jenkins, supra*; *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972); *Jacobellis, supra.* The constitutional limitations involved in an obscenity case are issues of law.

[21] As a general rule, the Nebraska appellate courts determine questions of constitutional dimension independent of conclusions reached by trial courts. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). Relying on *Jacobellis*, the Nebraska Supreme Court adopted the practice of independent judicial review of allegedly obscene materials in *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975).

Following application of the *Miller* standards by the fact finder, the final measure of scrutiny comes in the form of appellate court assessment of the alleged obscenity of the work as a matter of law, a conclusion arrived at independent of the jury's findings. As expressed by Justice Harlan in his separate concurrence and dissent in *Roth v. United States*, 354 U.S. 476, 497, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957):

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppress[i]ble within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

In concluding that an appellate court is bound to conduct an independent review of the allegedly obscene material as a whole, we follow precedent set by federal courts and the Nebraska Supreme Court, as well as the practice of a multitude of other state courts. See, e.g., *People v. Correa*, 191 Ill. App. 3d 823, 548 N.E.2d 351 (1989); *Little Store, Inc. v. State*, 295 Md. 158, 453 A.2d 1215 (1983); *People v Austin*, 76 Mich. App. 455, 257 N.W.2d 120 (1977); *State v. Davidson*, 481 N.W.2d 51

(Minn. 1992); *McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975); *Urbana, ex rel. Newlin, v. Downing*, 43 Ohio St. 2d 109, 539 N.E.2d 140 (1989), *cert. denied* 493 U.S. 934, 110 S. Ct. 325, 107 L. Ed. 2d 315 (1989); *Rees v. State*, 909 S.W.2d 264 (Tex. App. 1995), *cert. denied* 519 U.S. 863, 117 S. Ct. 169, 136 L. Ed. 2d 111 (1996); *City of St. George v. Turner*, 860 P.2d 929 (Utah 1993). Compare, *City of Farmington v. Fawcett*, 114 N.M. 537, 843 P.2d 839 (N.M. App. 1992).

"Whole Work" Doctrine.

Under the test to determine obscenity articulated 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 incorporated into § 28-807, an appellate court is required to review the allegedly obscene work by considering the work as a whole. See § 28-807(10)(a). Specifically, in determining whether a work appeals to the prurient interest, it must be judged as a whole, and not on the basis of its isolated parts. *Miller, supra*; *Roth, supra*. Accord *State v. Jensen*, 226 Neb. 40, 409 N.W.2d 319 (1987). The context in which the sexual material is presented must also be considered. *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972). Compare, *Rees*, 909 S.W.2d at 268 (reviewing allegedly obscene material in "thematic units"). It has been held that failure to present and consider the challenged work in its entirety may be prejudicial error. See, e.g., *Cambist Films, Inc. v. Duggan*, 298 F. Supp. 1148 (W.D. Pa. 1969), *rev'd on other grounds* 420 F.2d 687 (3d Cir. 1969); *Deverell v. Com.*, 539 S.W.2d 301 (Ky. 1976). It is at this point that our dissenting colleague parts company with us. We disagree on what the whole work doctrine means in the context of this case, and because of its impact on the ultimate resolution of the appeal, we discuss the whole work doctrine at some length. This takes us back to exhibits 1 and 2.

It is clear that exhibit 2 is somewhat different from exhibit 1. Exhibit 1 is the original ¾-inch videotape actually produced by Harrold and broadcast by CableVision. Exhibit 2 does not contain a title, credits, or other information which identifies the episode. Exhibit 2 is 16 minutes in length, not 20 minutes as indicated on the jacket of exhibit 1. Exhibit 1 was offered into

evidence without objection, but not shown to the jury. Exhibit 2 was also offered into evidence. Harrold and the State agreed that exhibit 2, which is not the entire original work, would be shown to the jury in order to determine the issue. Neither side to the case asked that exhibit 1 be shown to the jury. Harrold did not claim at trial, nor does he now claim, that exhibit 1 contains material which proves that the work at issue is not obscene.

In summary, the trial record reveals that the State and Harrold were completely content to try the obscenity question by using only exhibit 2. As we understand the dissent of our esteemed colleague, it is that we as an appellate court must view exhibit 1, the original videotape, in order to determine whether the whole work is obscene, despite the absence of a claim by the State that it contains material which anyone could consider obscene. In contrast, we believe that the whole work doctrine is applied to ensure that an obscenity conviction, which represents governmental censorship, is not based on an unrepresentative piece of the whole, taken out of context, which piece distorts the theme of a work so that the work appears other than it really is. The doctrine also serves to ensure that triers of fact and appellate courts see the actual work at issue, as opposed to relying on someone else's description or characterization thereof. In the context of how this case was tried, we believe that the whole work doctrine does not require an appellate viewing of exhibit 1, *unless* we were prepared to say that the 90 seconds of Harrold stroking himself makes exhibit 2 obscene. In that instance, our colleague's view might be correct, despite the absence of a claim from Harrold that we must view exhibit 1.

In reaching the foregoing conclusion, we rely on the progression of the law of obscenity, illustrated by the U.S. Supreme Court's summary in *Roth v. United States*, 354 U.S. 476, 488-89, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), which recounts that the early legal standard of obscenity "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360." The *Roth* Court rejected the earlier *Hicklin* standard because judging obscenity by the effect of isolated passages upon susceptible persons could lead to the suppression of material legitimately dealing with sex, and such a standard consti-

tuted an unconstitutional restriction of the freedoms of speech and press. Thereafter, in *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), the Court held that for there to be a finding of obscenity, (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex, (2) the material is patently offensive because it offends contemporary community standards relating to the description or representation of sexual matters, and (3) the material is utterly without redeeming social value. While the third factor has been modified by *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (whether work taken as whole lacks serious literary, artistic, political, or scientific value), the first two factors retain their vitality.

[22] An isolated portion of a movie cannot be extracted out of the context of the whole, and the entire movie judged thereon. *La Rue v. State of California*, 326 F. Supp. 348 (1971). Put another way, the object, book, magazine, or film can be judged obscene only after consideration of the allegedly objectionable aspects in the context of the entire work. *Bryers v. State*, 480 S.W.2d 712 (Tex. 1972). In *United States v. Head*, 317 F. Supp. 1138, 1142 (E.D. La. 1970), the court interpreted the Supreme Court's obscenity pronouncements as "consistently unanimous on the proposition that material must be judged as a whole in order to determine whether it is obscene, before it can be suppressed because it contains offensive segments."

In *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979), the Supreme Court of Kansas saw the phrase "taken as a whole" as being used to eliminate segmented reviews of material, and the court quoted as follows from *Penthouse Intern., Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978):

> "First, the 'taken as a whole' standard of *Miller* is not really new . . . and simply reflects in essence the practical fact that an arguably obscene book or magazine is going to be published or banned as a discreet unit. . . . A magazine is a 'whole' within the meaning of *Miller* and it must be judged as such."

226 Kan. at 293, 597 P.2d at 1103.

[23] Based on the time-honored rejection by the *Roth* Court of the *Hicklin* test, we believe that the "taken as a whole" doctrine is a defendant's doctrine designed to protect against prosecutions based upon segments lifted out of the context of the entire work, which segments distort the thematic context of the work at issue.

We acknowledge the repeated "mantra" in the cases about reviewing the entire work or the whole work. But we have found neither authority nor a rationale for using the whole work doctrine to reverse a conviction but still allow further prosecution, as our colleague's dissent would do, simply because the record contains a piece of the work which neither prosecution nor defense thought material for the jury to convict or acquit. In short, we have found no case where an appellate court has reversed because it could not, or did not, watch a piece of film which neither prosecution nor defense thought the jury should see.

In reaching a conclusion on how the whole work doctrine should be applied, we rely on the fundamental role that the adversary system plays in trials. If exhibit 1 contained either incriminating or exculpatory information, one side or the other would have played the extra 4 minutes for the jury. And we cannot ignore the fact that neither side asks that we view exhibit 1. Therefore, we believe that the whole work doctrine, in the unusual context of this case, means that our independent appellate review of this case requires scrutiny only of the work which was played for the jury and which the State contends is obscene. That work, exhibit 2, was agreed by the State and the defense to be the work upon which Harrold's guilt or innocence would be decided. In short, both parties, by their conduct at trial and upon appeal, have made exhibit 2 the "whole work." Accordingly, we refrain from invoking our Neb. Ct. R. of Prac. 5B(7) (rev. 1996) making VHS the appellate standard videotape and providing that "[i]f any other videotape, e.g., Beta, is presented to the court," then the submitting party shall provide at his or her expense "the appropriate equipment for playback." As we believe viewing exhibit 1 is superfluous for purposes of our review, we now turn to the core of this case, which cannot be avoided. Do we, as the reviewing appellate court, find the work to be obscene?

Is Exhibit 2 Obscene?

Exhibit 2 contains 14½ minutes of a head-and-shoulders shot of Harrold in space traveler/clown makeup, bathed in a greenish light, with unintelligible noise in the background. Without warning or apparent reason, the videotape immediately switches to a shot of part of the legs, torso, and face of a nude Harrold, in clown face, stroking his erect penis. The masturbation lasts for 1½ minutes, and there is no ejaculation. The only intelligible statements we can discern are "left wing" and "for the ladies." Earlier in this opinion, we recounted Harrold's description of the videotape: It portrays one of his clown characters, Cozblah, traveling in space, and then another clown character, Crotchy, masturbating. The masturbation is allegedly in response to a viewer's complaint about Harrold's videotapes not showing enough male nudity. Testing the 16-minute videotape against the three prongs of the *Miller* test, and reminding ourselves that all three prongs must be proved by the State, see *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983), we conclude that Harrold's videotape is not obscene.

To a viewer who happened to stumble upon it, the first 14½ minutes would make absolutely no sense, and we have difficulty imagining anyone finding that portion educational, enlightening, humorous, or thought provoking. The last 1½ minutes do not improve the videotape or change any of the above observations. Perhaps a regular viewer of Harrold's "program," which the evidence indicates was broadcast over a rather lengthy period of time on the public access channel, might find some humor in the two "clowns" portrayed in different situations. However, any humor or other entertainment from the videotape could only have been appreciated by the regular and initiated viewer of Harrold's work. Whether there were any such people, we simply do not know.

[24] As was stated in *State v. Walden Book Co.*, 386 So. 2d 342, 345 (La. 1980), regarding the "serious value" of a work:

> The addition of the "serious" element allows the trier of fact to look to the intent upon which the insertion of literary, artistic, political, or scientific material is based. If that intent is to convey a literary, artistic, political, or scientific idea, or to advocate a position, then the intent is "serious."

Conveying humor is undoubtedly "serious" in that it is recognized as of general benefit to society, but we cannot find any humor in Harrold's videotape. The phrase "left wing" is spoken at the end of the videotape, and perhaps Harrold intended to convey some sort of "left wing" statement, but we discern no serious political ideas in the videotape. To us, the videotape is simply weird. We are unable to find that the work has serious literary, artistic, political, or scientific value, and therefore it fails the third prong of the *Miller* test.

The second prong of the *Miller* test is whether the work depicts in a patently offensive way sexual conduct specifically defined by the applicable state law. The first prong of the *Miller* test is whether the average person, applying contemporary community standards, would find that the work taken as a whole appeals to prurient interest. "Prurient interest" and "patently offensive" may, to some extent, be discussed together. In a footnote, the Supreme Court in *Roth v. United States*, 354 U.S. 476, 487 n.20, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), set forth a number of definitions of "prurient" and because of its significance, we quote verbatim:

> *I. e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:
>
> ". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."
>
> *Pruriency* is defined, in pertinent part, as follows:
>
> ". . . Quality of being prurient; lascivious desire or thought. . . ."
>
> See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U. S. 230, 242, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome [as] it may be, in their subjects, but a *prurient interest may be excited and appealed to*. . . ." (Emphasis added.)
>
> We perceive no significant difference between the meaning of obscenity developed in the case law and the

definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz.*:

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

This footnote in *Roth* has led one author to write:

[P]rurient appeal merely means sexually stimulating, and that seems to have been the purpose of the prurient-interest requirement. Not all discussions or pictures of sexual activity are necessarily stimulating sexually, so it is this narrowing that seems the purpose of the requirement. It is those materials that have potentially physical as opposed to intellectual effect that are to be within the ambit of the obscenity laws. This separation of the physical from the intellectual appears to explain the necessity of an appeal to the prurient interest.

Frederick F. Schauer, *The Law of Obscenity* § 5.1 at 98 (1976). Schauer also states that the prurient appeal requirement ensures that not every discussion or depiction of sex may be characterized as obscene. In *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), the Court said that whatever else may be necessary to give rise to the State's broad power to prohibit obscene expression, such expression must be, in some significant way, erotic.

In *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968), the Second Circuit Court of Appeals reversed a jury's finding that the motion picture "I Am Curious-Yellow" was obscene. The court concluded that although sexual conduct was undeniably an important aspect of the film, and may be one of its principal themes, it could not be said that " 'the dominant theme of the material taken as a whole appeals to a prurient interest in sex.' " *Id.* at 199.

Applying these notions to Harrold's work, we hold that exhibit 2, taken as a whole, does not appeal to a prurient interest, i.e., a shameful or morbid interest in sex. The videotape as

a whole is hardly erotic and cannot be said to appeal to and excite a prurient interest in sex. Certainly, it does not appeal to the "darker side of sex," in the words of *U.S. v. M-K Enterprises, Inc.*, 719 F. Supp. 871, 878 (D. Neb. 1989). The videotape does not show exploitive or violent sex; involves no children, animals, or objects; and shows only a brief and solitary act of incomplete self-gratification. Moreover, its dominant theme, if measured on a time basis, is not sexual. The great majority of the videotape shows Harrold's space traveler clown, Cozblah, depicted in a completely benign, albeit strange, way. Its theme, according to Harrold's testimony, is the humorous depiction of Harrold's clown characters. We cannot conclude that the average person, applying contemporary community standards of the late 1990's, would find that the 16 minutes of videotape in exhibit 2 appeals to a prurient interest in sex. Whom or what it appeals to is a much more difficult question, and one which we cannot answer.

Turning to the patently offensive prong, we again rely on Schauer's analysis:

> The development of the "patently offensive" standard also explains its meaning, for in each of the uses of the term prior to *Miller* it was equated with an affront to or surpassing of the current level of society's acceptance of sexual depictions or descriptions. Nowhere in the Supreme Court cases is there any reference to dictionary definitions of patent offensiveness, and it seems clear that the intent was for the trier of fact to gauge whether the material at issue exceeded that which society generally considers decent, or at least tolerates.

Schauer, *supra*, § 5.2 at 103-04.

Masturbation is obviously a sexual act, and Harrold's portrayal of it is graphic and has no seeming purpose. However, the clown character Crotchy is not particularly excited or stimulated while masturbating. His rather bland, tedious, and brief portrayal of this act of self-gratification has an air of disinterest about it. It does manage to be weird; however, the videotape, taken as a whole, cannot be described as focusing predominantly upon what is sexually morbid, grossly perverse and bizarre, and insulting to the human spirit and sexuality. See

State ex rel. Dowd v. Motion Picture "Pay the Baby Sitter," 31 Ohio Misc. 208, 287 N.E.2d 650 (1972).

Schauer states that the patent offensiveness standard is designed to ask the jury, " '[D]oes this material go too far?' " Schauer, *supra*, § 5.2 at 104. Going "too far" is a matter of whether the videotape exceeds the customary limits of candor in contemporary society. Without engaging in a lengthy discourse about what sexually explicit material is available and consumed in our late 1990's society, and avoiding commentary on the role sex plays in entertainment and advertising, we are constrained to hold that Harrold's videotape, while candid, does not go too far in its depiction of masturbation. We find that exhibit 2, which was displayed to the jury as evidence of his alleged crime, is not obscene.

CONCLUSION

The district court misperceived its duty with respect to independent appellate review of Harrold's videotape, and the county court made prejudicial errors concerning the evidence. However, we must still answer the question of whether exhibit 2, the videotape that both the State and Harrold agreed was at issue, is legally obscene. While the adjectives strange, weird, graphic, unnecessary, distasteful, indecent, and offensive are all applicable to Harrold's videotape, it is not legally obscene.

While we have written a fair amount here, we cannot help but see in this case the applicability of one of the most succinct and famous phrases ever written in an appellate opinion. Mr. Justice Stewart, in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), said that the 1st and 14th Amendments to the Constitution allowed the criminal law to regulate only "hard-core" pornography and that he would not attempt to define that term. Justice Stewart wondered if he could even succeed in intelligibly doing so. He then said the famous words: "But I know it when I see it." *Id.* Perhaps that helps sum up our opinion of Harrold's meaningless home movie: It is hard to define what the videotape says and what it means, if anything, but it is not hardcore pornography. Therefore, it is protected by the 1st and 14th Amendments. The evidence is not sufficient to sustain the conviction.

REVERSED AND DISMISSED.

MILLER-LERMAN, Chief Judge, concurring in part, and in part dissenting.

I respectfully concur in part and dissent in part.

I concur with the majority's conclusion that the exclusion of the CableVision rules and regulations was prejudicial error requiring reversal. However, I dissent with respect to the majority's analysis of the independent appellate task which this court is to and can undertake in this case. Specifically, as presented on appeal, I do not think this court can review exhibit 1, the work as a whole and, therefore, cannot opine on whether the work as a whole is or is not obscene. I would, therefore, reverse without direction rather than reverse and dismiss.

It is clear under the literature pertaining to obscenity that at the trial level, the jury's determination of whether the challenged work is or is not obscene is a question of fact. *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974). The State and Harrold stipulated, as they are free to do as trial strategy, that the jury could perform its function by viewing exhibit 2, less than the whole.

It is also clear under the statute and cases that on appeal, the appellate court must review the entire work in conducting its independent appellate review. Section 28-813; *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972). The duty of the appellate court is to review the work as a whole, and this issue is to be decided by the appellate court as a matter of law. *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975). The parties' trial stipulation regarding the jury's factfinding function does not alter the duty or task of the appellate court to review the entire work which was produced, distributed, and forms the basis of the charges against Harrold and to decide the obscenity issue as a matter of law. In this regard, the Nebraska Supreme Court has stated:

> [T]he 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.

(Emphasis supplied.) 194 Neb. at 89, 230 N.W.2d at 212-13.

In the instant case, exhibit 1, the whole work which gave rise to the charges against Harrold, was received in evidence. An independent appellate review of the entire work must be conducted by reviewing exhibit 1. However, exhibit 1, which is recorded on ¾-inch pneumatic videotape, a size and grade generally used in professional broadcasting, is not readable by this court on standard VHS equipment, and the parties have failed to provide the appropriate equipment for playback as required under Neb. Ct. R. of Prac. 5B(7) (rev. 1996). This court is, thus, denied the performance of its duty and in my view should refrain from evaluating the work as a whole by reviewing exhibit 2, which is less than the whole work.

In sum, Harrold stands convicted of the production or distribution of exhibit 1, the whole work. Our independent appellate function is to review the work as a whole and as a matter of law determine whether exhibit 1 is or is not obscene. Our independent appellate responsibility is dictated by the U.S. Supreme Court, the Nebraska Supreme Court, and statute, and not by a trial stipulation between the parties as to how the jury could perform its separate and distinct function. The inability of this court to review exhibit 1 due to the failure of the parties to supply appropriate equipment for playback precludes our evaluation of the work as a whole, and I believe our commenting on the obscenity of the work based on a review of a part of the work is not proper. I would, therefore, reverse without direction.

MUES, Judge, concurring.

From my personal viewpoint, Harrold's videotape was bizarre and disgusting. That it was indiscriminately offered to television viewers enhances its offensiveness to me, but I am mindful that *how* it was distributed does not, as a matter of law, change the crime or make obscene that which is legally not obscene.

The first 14½ minutes can best be described as unintelligible garble. It reminds me of a small child's making weird faces and sounds while peering in a mirror believing no one to be watch-

ing. Frankly, that anyone (with a choice) could sustain interest in the videotape long enough to get to the last 90 seconds would amaze me. But I digress.

The last 90 seconds of this videotape shows a male clown masturbating. Is this obscenity? Viewed from a dictionary's definition of the term, it may be, although "absurd" seems the more fitting description when viewing the work as a whole. However, it is arguably indecent, tawdry, and uncouth. Nonetheless, personal disgust and dictionary definitions are not the benchmarks of our standard of review, rather, we are bound by the First Amendment and the definitions and standards promulgated by the U.S. Supreme Court, the Nebraska Supreme Court, and the Nebraska Legislature.

Applying those standards and definitions, Harrold's videotape is not obscene. I therefore concur in the result reached by Judge Sievers' well-reasoned opinion.

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

587 N.W.2d 131

Filed November 3, 1998. Nos. A-97-1085, A-97-1086.

1. **Juvenile Courts: Final Orders: Appeal and Error.** An appellate court must decide a case involving termination of parental rights de novo on the record. An appellate court is required to reach a conclusion independent of the findings of the juvenile court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Evidence: Proof.** To terminate parental rights, the State must show that such termination is in the child's best interests and that at least one of the seven statutory grounds for termination of parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996) exists. The State must prove these elements by clear and convincing evidence, that is, by 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.
3. **Parental Rights: Abandonment.** Although parental rights may not be terminated solely because of a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated.
4. **Parental Rights.** While the fact of incarceration may well be involuntary on a parent's part, the illegal activities leading to his or her incarceration were voluntary.

5. ____. A parent's failure to change a lifestyle of chemical dependency may constitute neglect under Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 1996).
6. **Parental Rights: Evidence: Proof.** Evidence of a parent's lifestyle which includes frequent periods of incarceration and a pattern of illegal drug use and dependence may establish substantial and continuous or repeated neglect, justifying termination of parental rights.
7. **Jurisdiction: Appeal and Error.** An appellate court has the power and the duty to determine whether it has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record but the parties fail to raise it, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
8. **Juvenile Courts: Jurisdiction: Parental Rights.** Parental rights cannot be terminated unless a juvenile court has previously exercised its jurisdiction over the child in question through an adjudication proceeding pursuant to Neb. Rev. Stat. § 43-247 (Reissue 1993).
9. ____: ____: ____. An adjudication that a child in question is within the purview of the Nebraska Juvenile Code is a jurisdictional prerequisite to the dispositional phase, which includes proceedings to terminate parental rights.
10. ____: ____: ____. While a court need not hold a separate adjudication hearing, and while such a 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. Only after such an adjudication is made, either separately or in conjunction with related proceedings, may the court proceed to resolve the issue of termination of parental rights.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed in part, and in part vacated and remanded with directions to dismiss.

James A. Wagoner for appellant.

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

Brandi Bosselman, guardian ad litem.

HANNON, IRWIN, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Mitzi M. appeals the judgments of the county court for Hall County, sitting as a juvenile court, which terminated her parental rights to Joshua M., Jonathan M., Jasmine M., and Devon M. Case No. A-97-1085 involves Joshua, and case No. A-97-1086 involves Jonathan, Jasmine, and Devon. These cases were consolidated for trial and appeal. Generally, Mitzi con-

tends on appeal that the orders terminating her parental rights are not supported by sufficient evidence. For the reasons stated below, we affirm the order as it relates to Joshua, but we vacate the order as it relates to Jonathan, Jasmine, and Devon and remand the cause with directions to dismiss.

FACTUAL BACKGROUND

Mitzi is the natural mother of Jonathan, Joshua, Jasmine, and Devon. Although the record is unclear as to the precise birthdates of each child, it is clear that each child was under 12 years of age at all times relevant to this proceeding. Accordingly, we need not further address the matter of each child's minority. Neither the father of Jonathan nor the father of Joshua, Jasmine, and Devon was a party in the cases before us.

On April 11, 1995, Joshua's father took Joshua to the then Department of Social Services (DSS) and indicated that he could not care for Joshua and that Mitzi was unavailable to provide care. At the time Joshua was placed in the care of DSS, Mitzi was incarcerated. During the pendency of this case, Joshua has remained in foster care.

A juvenile petition regarding Joshua was filed August 25, 1995, requesting that the court exercise jurisdiction over Joshua, as he was a juvenile as defined under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). On November 7, 1995, Mitzi admitted that Joshua was without proper support, and the court found that Joshua was a child as defined under § 43-247(3)(a). Three case plans were adopted by the court during the pendency of Joshua's case. All three plans required, among other things, that Mitzi obtain a psychological evaluation and comply with the recommendations of the evaluator. Mitzi also agreed to submit to random drug testing as requested by DSS.

On October 18, 1996, when arrested, Mitzi voluntarily placed Jonathan, Jasmine, and Devon with DSS for 1 day. At that time, the children suffered from various infections and their immunizations were not up to date. When DSS learned that Mitzi had other outstanding warrants in Hall County for which she would be unable to post bond, the State filed a juvenile petition regarding Jonathan, Jasmine, and Devon, requesting that the juvenile court exercise its jurisdiction over these chil-

dren on the ground that they were juveniles as defined under § 43-247(3)(a). On October 18, DSS was granted temporary custody of the children. No adjudication hearing was held.

On March 14, 1997, motions to terminate Mitzi's parental rights were filed in both cases. The motion regarding Joshua requested that Mitzi's parental rights be terminated pursuant to subsections (2), (4), (6), and (7) of Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996). The motion regarding Jonathan, Jasmine, and Devon requested that Mitzi's parental rights be terminated pursuant to subsections (2) and (4) of § 43-292. The motions were consolidated for trial. A termination hearing was conducted on August 21. Witnesses included Mitzi, the DSS case manager assigned to the cases, two counselors who evaluated Mitzi, a Child Protective Services worker who had been assigned to the cases since May 1997, and Mitzi's mother.

The evidence presented generally established the following: Mitzi testified she has used "[c]rystal, meth and cocaine" since she was approximately 17 years old. While in prison from April to November 1995, Mitzi participated in a relapse prevention program. According to Mitzi, she has used drugs only twice since Joshua entered the juvenile court system. The record shows that Mitzi tested positive for drug use on three occasions: In December 1995, when she was arrested for driving under the influence of intoxicating liquor (DUI); in April 1996; and on June 16, 1997. Mitzi failed to appear for drug tests set up by DSS per the order of the juvenile court on at least three occasions.

According to Mark Nelson, a substance abuse counselor who evaluated Mitzi, Mitzi is dependent on methamphetamine. Nelson opined, based on her conduct and demeanor during his interview of Mitzi, that Mitzi was currently using drugs. Nelson and another counselor who evaluated Mitzi at her request both recommended either inpatient or intensive outpatient treatment. Mitzi had not completed any substance abuse treatment as of the termination hearing. However, Mitzi testified that she was enrolled in a relapse prevention program at the prison, but that the program had not yet begun.

Mitzi has been incarcerated numerous times since Joshua entered the juvenile system. 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; and for 2 days in March 1997. Mitzi was again arrested on March 31 and remained incarcerated until the termination hearing in these cases. Her projected release date was February 1998. During the pendency of Joshua's case, Mitzi had been charged with DUI, shoplifting, unauthorized use of credit cards, forgeries, possession of marijuana and methamphetamine, and unauthorized use of a vehicle.

After hearing the evidence, the juvenile court terminated Mitzi's parental rights to Joshua, Jonathan, Jasmine, and Devon. The juvenile court terminated Mitzi's parental rights to Joshua based on subsections (2), (4), (6), and (7) of § 43-292 and to Jonathan, Jasmine, and Devon based on subsections (2) and (4) of § 43-292. The juvenile court found that termination of Mitzi's parental rights was in the children's best interests. Other evidence necessary to the resolution of this case is set forth in the analysis below.

ASSIGNMENTS OF ERROR

Generally, Mitzi alleges that the evidence was insufficient to justify the termination of her parental rights. In particular, she contends that the juvenile court erred in finding that she was unfit by reason of habitual use of drugs, that she had neglected the children and refused to give them necessary parental care and protection, and that termination of her parental rights was in the children's best interests. As to Joshua only, she contends the juvenile court erred in finding that Joshua had been in out-of-home placement for 18 or more months, that she had failed to correct the conditions leading to such placement, and that reasonable efforts under the court's direction had failed to correct the conditions leading to the termination determination.

STANDARD OF REVIEW

[1] An appellate court must decide a case involving termination of parental rights de novo on the record. An appellate court is required to reach a conclusion independent of the findings of the juvenile court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial

court observed witnesses and accepted one version of the facts rather than another. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996).

ANALYSIS

JOSHUA'S CASE

[2] To terminate parental rights, the State must show that such termination is in the child's best interests and that at least one of the seven statutory grounds for termination of parental rights under § 43-292 exists. The State must prove these elements by clear and convincing evidence, that is, by 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. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993); *In re Interest of Theodore W., supra.*

We first address whether there was sufficient evidence to terminate Mitzi's parental rights regarding Joshua based upon § 43-292(2), which provides that parental rights may be terminated where the parent has "substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection." Mitzi argues that there was insufficient evidence to terminate her rights based on neglect because she had not served an "inordinate incarceration time." Brief for appellant at 9.

[3-5] Although parental rights may not be terminated solely because of a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of Theodore W., supra.* The Nebraska Supreme Court has also stated that although the fact of incarceration may well be involuntary on a parent's part, the illegal activities leading to his or her incarceration were voluntary. *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989). The Nebraska Supreme Court has also held that a parent's failure to change a lifestyle of chemical dependency may constitute neglect under § 43-292(2). See *In re Interest of H.P.A.*, 237 Neb. 410, 466 N.W.2d 90 (1991).

[6] It is clear from the case law that evidence of a parent's lifestyle which includes frequent periods of incarceration, see *In re Interest of L.V., supra*, and a pattern of illegal drug use and dependence, see *In re Interest of H.P.A., supra*, may establish substantial and continuous or repeated neglect, justifying termination of parental rights. Drug dependency as well as incarceration certainly impacts a parent's ability to provide necessary care and protection for his or her child and also prevents a parent from maintaining steady employment and providing a stable home. See, *In re Interest of L.V., supra*; *In re Interest of H.P.A., supra*.

In the consolidated case before us, the record shows that during the pendency of these cases, Mitzi has tested positive for the use of methamphetamine. In addition, it appears from the record that Mitzi has refused to acknowledge the extent of her drug dependency or to seek adequate treatment therefor. At the termination hearing, Mitzi testified, "I think I used to be a drug addict. I don't think I am anymore." The record also shows that over a period of approximately 2 years, Mitzi has been incarcerated on six occasions.

Although Mitzi claimed at trial that she was a good mother, the evidence establishes a pattern or cycle of conduct of Mitzi's putting her drug dependency needs before the needs of her children. As stated by the juvenile court:

> [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.

Over the 2 years preceding the termination hearing, Mitzi worked for only 1 day during the periods of time that she was not incarcerated. Nor does it appear from the record that Mitzi worked to build and maintain relationships with her children. She frequently missed or was late for visitation. Although the court ordered unsupervised visitations to cease until Mitzi obtained an alcohol and drug evaluation and sought treatment,

Mitzi did not seek treatment. The record also shows that DSS offered numerous services to assist Mitzi in regaining control of her life and her children.

Based upon our de novo review of the record, we conclude that the 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). Because the State need prove only one of seven statutory grounds set forth in § 43-292 to terminate parental rights, we need not review the other alleged bases for termination. See *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

Best Interests

Mitzi also argues that there was insufficient evidence that termination of her parental rights was in her children's best interests. 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.

Case of Jonathan, Jasmine, and Devon

[7] Before considering Mitzi's assigned errors as they relate to Jonathan, Jasmine, and Devon, we must first resolve a jurisdictional issue. An appellate court has the power and the duty to determine whether it has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record but the parties fail to raise it, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998). If the juvenile court lacked jurisdiction over the chil-

dren, then this court lacks jurisdiction to adjudicate the merits of the appeal. See *In re Interest of Joelyann H., supra.*

[8,9] In *In re Interest of Joelyann H.*, this court held that parental rights may not be terminated unless and until the juvenile court has adjudicated the minor in question to be subject to its jurisdiction pursuant to § 43-247. The proceedings in *In re Interest of Joelyann H.* began and ended with the termination of parental rights. At no point was there any allegation that the child was within the jurisdiction of the juvenile court. In that case, this court concluded that "[i]n the absence of an adjudication petition and hearing in compliance with § 43-247, the juvenile court lacked jurisdiction over Joelyann and could not entertain any effort to terminate [her natural mother's] parental rights in her." 6 Neb. App. at 476, 574 N.W.2d at 188. This court further held that "an adjudication that a child in question is within the purview of the juvenile code is a jurisdictional prerequisite to the dispositional phase," which includes proceedings to terminate parental rights. 6 Neb. App. at 476, 574 N.W.2d at 188.

Although, in this case, the State did file a petition requesting that the court exercise jurisdiction over Jonathan, Jasmine, and Devon, pursuant to § 43-247(3)(a), the State did not request a hearing on the children's status, and no separate adjudication hearing was held. Instead, the State filed a motion to terminate Mitzi's parental rights, and termination proceedings were commenced.

[10] When the court entered its order terminating Mitzi's parental rights, the court did not determine that Jonathan, Jasmine, and Devon were minor children as defined under § 43-247(3)(a), which had been requested by the original petition filed by the State on October 18, 1996. 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. Only after such an adjudication is made, either separately or in conjunction with related proceedings, may the juvenile court proceed to resolve the issue of termination of parental rights. Here, the juvenile court never determined that Jonathan, Jasmine, and Devon were

children within the definition of § 43-247(3)(a), as alleged in the State's petition.

Therefore, based upon the holding in *In re Interest of Joelyann H., supra*, we conclude that because the court had not adjudicated Jonathan, Jasmine, and Devon as required under the juvenile code, the court lacked jurisdiction to terminate Mitzi's parental rights in these children. Since the lower court lacked jurisdiction, this appellate court also lacks jurisdiction as to the termination of Mitzi's parental rights to Jonathan, Jasmine, and Devon. See *In re Interest of Joelyann H., supra.*

CONCLUSION

For the above-recited reasons, we conclude that the juvenile court properly terminated the parental rights of Mitzi as to Joshua in case No. A-97-1085. In case No. A-97-1086, we vacate the order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon and remand the cause with directions to dismiss.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS TO DISMISS.

IRWIN, Judge, concurring.

I disagree with the majority's conclusion that Mitzi's parental rights to Jonathan, Jasmine, and Devon were improperly terminated. Based upon a plain and ordinary reading of Nebraska statutes relating to the termination of parental rights, it seems clear that it is not necessary to adjudicate a juvenile prior to termination of parental rights under subsections (1) through (5) of Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996). However, as I recognize that *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998), is binding authority, see, also, Neb. Ct. R. of Prac. 2E(5) (rev. 1996), I must concur. I set forth the reasons for my disagreement with the majority's conclusion and the conclusion in *In re Interest of Joelyann H., supra.*

In holding that a previous adjudication is necessary prior to the termination of parental rights, the majority relies on *In re Interest of Joelyann H., supra*, which in turn relies on comments made by a state senator during the floor debate for recodification of the juvenile code. The majority also relies on

Nebraska Supreme Court cases that the majority contends require an adjudication prior to termination of parental rights, regardless of the statutory basis for the termination.

The Supreme Court cases on which the court relied in *In re Interest of Joelyann H., supra*, cannot be read to stand for the proposition that an adjudication is required in *all* cases prior to termination of parental rights. In *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), the court held that a juvenile court lacks jurisdiction to terminate parental rights if the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquirement of jurisdiction of a child. In that case, the child was adjudicated prior to the termination proceeding. In *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990), a petition was filed against a father, alleging that the child was within the definition of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) and § 43-292(1) in that the child had been abandoned. The court held that the father had been accorded due process because the "adjudication and the dispositional hearing were combined as permitted by statute . . . ." *In re Interest of K.M.S.*, 236 Neb. at 669, 463 N.W.2d at 590. In these cases, the court was not presented with and did not address the issue before us, namely, whether parental rights may be terminated in an original juvenile action.

I would conclude that the issue before us must be determined based upon the language in the termination statutes, in particular, Neb. Rev. Stat. § 43-291 (Reissue 1993) and § 43-292. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision reached by the court below. *In re Interest of Michael M.*, 6 Neb. App. 560, 574 N.W.2d 774 (1998); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998).

Section 43-291 provides in 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." (Emphasis supplied.) Under this section, a termination proceeding may be commenced by filing an "original petition." Such language is inconsistent with the majority's holding that parental rights may be terminated only when a juvenile action has been previously commenced in which a child has been adjudicated a juvenile within the meaning of § 43-247. To hold that termination of parental rights may occur only following an adjudication renders the "original petition" language in § 43-291 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 a 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); *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).

Section 43-292 sets forth the grounds for termination. It states that parental rights may be terminated when the court finds such action is in the best interests of the juvenile and 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.

Only subsections (6) and, arguably, (7) appear to require a prior determination under § 43-247. Subsection (6) explicitly requires a prior adjudication under § 43-247(3)(a) prior to termination for failure to correct the conditions leading to such an adjudication. Subsection (7) implicitly seems to require a prior adjudication based on the language regarding court-ordered services being provided to the parents. In contrast, subsections (1) through (5) do not refer, explicitly or implicitly, to the necessity of a prior adjudication.

As the meaning of the above statutes is unambiguous, we may not resort to statutory interpretation which would include a review of legislative history. The language of the unambiguous statute is controlling.

I do not believe that Nebraska statutes require an adjudication prior to the termination of parental rights under subsections (1) through (5) of § 43-292. Other states with similar statutes have held that an adjudication is not necessary in all cases prior to termination of parental rights. See, e.g., *Matter of R.J.W.*, 789 P.2d 233 (Okla. 1990); *State, Dept. of Human Services v. Ousley*, 102 N.M. 656, 699 P.2d 129 (N.M. App. 1985). There are situations, such as the one before us, where it is needless to

require that a juvenile be adjudicated prior to the termination of parental rights. It must be remembered that the paramount concern in this case is the best interests of the children. The requirement of a prior adjudication is a procedural hurdle not required by statute that forces the children to linger in the juvenile system for longer than is necessary.

In the case before us, I would conclude that regarding Jonathan, Jasmine, and Devon, the commencement of termination proceedings by the filing of an original petition seeking termination of parental rights under § 43-292(2) and (4) was proper. I would also conclude that there was sufficient evidence to terminate Mitzi's parental rights regarding Jonathan, Jasmine, and Devon pursuant to § 43-292(2) for the same reasons justifying the termination of parental rights as to Joshua, as set forth in the majority opinion. Mitzi's pattern of conduct is relevant as to all four children, although Jonathan and Jasmine were not in the juvenile system for the entire time and Devon was not born until August 16, 1996. See *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). There is no dispute that Mitzi's conduct justifies termination of her parental rights. The majority's holding merely delays the inevitable.

Absent the prior holding of this court in *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998), I would conclude that an adjudication was not necessary prior to the termination of Mitzi's parental rights pursuant to § 43-292(2). However, given the holding in *In re Interest of Joelyann H., supra*, I must concur.

BOBBI L. ZERR, APPELLEE, V. TIMOTHY A. ZERR, APPELLANT.
586 N.W.2d 465

Filed November 10, 1998. No. A-97-709.

1. **Divorce: Appeal and Error.** In an appeal of an action for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld absent an abuse of discretion.

2. **Courts: Judgments.** Absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute.
3. **Motions for New Trial: Appeal and Error.** An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion.
4. **Divorce: Property Settlement Agreements: Child Custody: Child Support.** To promote the amicable settlement of disputes between parties to a dissolution action, the parties may enter into a written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children. The terms of such an agreement, except for terms providing for the support and custody of minor children, are binding on the court unless it finds the agreement is unconscionable.
5. **Property Settlement Agreements: Evidence: Judges.** In determining whether a proposed settlement in a domestic case meets the statutory requirement of conscionability, a trial judge has discretion to request the production of further evidence, but the court is not obligated to do so.
6. **Attorney and Client: Evidence: Judges.** It is the duty of parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.
7. **Property Settlement Agreements: Fraud.** In reviewing a property settlement agreement entered into by the parties, the trial court is admonished not to regard the agreement lightly, but, rather, is required to carefully scrutinize the agreement in order to be sure that neither party takes an unconscionable advantage over the other through fraud.
8. **Child Support: Evidence: Stipulations.** The paramount concern in determining child support is the best interests of the child. Determination of the best interests of a child includes a judicial decision based upon evidence. Disposition of a question pertaining to a child's best interests is not governed exclusively by a parental stipulation.
9. **Child Support: Rules of the Supreme Court: Presumptions.** In determining the amount of a child support award, the trial court must consider the status, character, and situation of the parties and the estimated cost of support of their children. In doing so, the Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Brett McArthur and Stefanie Grimm for appellant.

No appearance for appellee.

SIEVERS and MUES, Judges, and HOWARD, District Judge, Retired.

MUES, Judge.

Timothy A. Zerr appeals from an order of the district court for Lancaster County denying his motion to vacate and for new trial. The motion sought to vacate the decree of dissolution filed May 16, 1997, which had approved the parties' property settlement agreement except for the agreed-upon child support amount. We reverse, and remand for further proceedings.

FACTS

Timothy A. Zerr and appellee, Bobbi L. Zerr, were married in Las Vegas, Nevada, on October 25, 1989. One child was born to Timothy and Bobbi during their marriage, their daughter, Ashley Nicole Zerr, who was born on May 15, 1990. In early 1996, Bobbi filed a petition in the district court for Lancaster County seeking dissolution of her marriage to Timothy, and Timothy soon thereafter entered his voluntary appearance in the case. There is no responsive pleading by Timothy contained in the record on appeal.

When Bobbi filed her dissolution petition, she was represented by counsel. For reasons not evident from the record, Bobbi's counsel withdrew at some point prior to the final hearing of May 8, 1997. When the matter came before the trial court, Timothy appeared with counsel and Bobbi appeared without legal representation.

At the May 8, 1997, hearing, the matter proceeded on Bobbi's petition, with Timothy's counsel calling Bobbi for that purpose and through her offering several exhibits, including a six-page document entitled "Stipulation and Property Settlement Agreement" (stipulation) signed by Bobbi and Timothy on April 2 and a child support worksheet. The stipulation provided, inter alia, that the parties agreed to joint legal custody of Ashley, with Bobbi having primary physical custody subject to defined visitation by Timothy; that the parties would forgo alimony from each other; and that Timothy would pay Bobbi $150 per month in child support plus all of the costs of child care, averaging approximately $120 per month. The stipulation further provided that "[e]ither the Respondent [Timothy] or the Petitioner [Bobbi] agrees to provide health insurance on the minor child depending upon the lower cost," and the parties agreed to divide equally the cost of health insurance for Ashley

if neither of them could feasibly obtain such insurance through his or her respective employment.

Under questioning by Timothy's counsel at the May 8, 1997, hearing, Bobbi testified that the stipulation was fair and equitable to both parties, and she asked that it be approved. No evidence, documentary or oral, was presented with regard to the personal property, real property, vehicles, bank accounts, pension plans, stocks and bonds, and debts which were also divided and allocated as part of the stipulation. In pertinent part, the stipulation also stated:

> 1. EFFECTIVE DATE.
>
> This agreement shall become binding upon the parties and their respective legal representatives, successors, and assigns immediately following the dissolution of their marriage in the pending proceedings, provided that the provisions of this agreement are approved by the Court. In the absence of the granting of a Decree of Dissolution by the Court and approval of [sic] this agreement shall have no force or effect.
>
> . . . .
>
> 18. APPROVAL OF THE DISTRICT COURT.
>
> This agreement shall be submitted for approval by the District Court in which the present proceedings for dissolution of marriage are pending, and if it is acceptable to the Court, it shall become a part of the decree. In the event that either the Court does not grant dissolution of the marriage herein or the Stipulation and Property Settlement Agreement is not approved by the Court, then the entire document shall be null and void and neither of the parties shall be obligated by any of the provisions herein.

Exhibit 1, the child support worksheet offered into evidence by Bobbi and affirmed by both her and Timothy as reflecting the truth, is unsupported by tax returns, wage receipts, or other independent means of wage verification. Timothy's counsel elicited no testimony from Bobbi regarding the parties' employment or the income reflected on exhibit 1, except for a perfunctory, is it "true and correct," to which Bobbi replied, "Yes." Similarly, no testimony was elicited from Timothy by his counsel to explain the figures on exhibit 1.

At the conclusion of each party's testimony, the trial court independently inquired of each of the parties regarding his or her employment and the worksheet, exhibit 1. At the time of the hearing, Bobbi was employed on a part-time basis at a child-care facility. Exhibit 1 shows Bobbi's monthly gross income to be $1,666 and her net income to be $1,361. Timothy's monthly gross income is shown to be $893 and his net $728. Upon the court's inquiry, Timothy testified that he was in the process of starting his own computer consulting business and that the figures for his income on exhibit 1 were only projections because of his company being in a "start-up" phase. He stated that in the year preceding the hearing, he had earned approximately $50,000 through October 1996 at Crete Carrier, where he had worked for 9 years in the computer department. He made approximately the same income in the year prior. He "hope[d]" that he would be at the same income level as at Crete Carrier in his new business in 2 or 3 years. At the conclusion of the hearing, the trial court took the case under advisement, stating: "So that the parties are aware, my concern is the amount of the child support. And based on the testimony here, I believe it to be inadequate."

The trial court's decree of dissolution was filed May 16, 1997. In it, the trial court approved the parties' stipulation, made it a part of the decree by reference, and expressly found that it was reasonable and not unconscionable. At the same time, the court ordered Timothy to pay $579 per month instead of the $150 per month stipulated to by the parties. Consistent with paragraph C of the Nebraska Child Support Guidelines, the trial court appended to its decree its own child support calculations reflecting Bobbi's net income of $1,338 and Timothy's of $2,469.

Timothy filed a motion to vacate judgment and for new trial on May 22, 1997, which was overruled on June 6. Timothy filed his notice of appeal on June 20.

ASSIGNMENTS OF ERROR

Restated and summarized, Timothy claims that the trial court erred in changing the amount of child support without disapproving the entire property settlement agreement and without

giving the parties a further opportunity to be heard. He also asserts error in the trial court's overruling his joint motion to vacate and for new trial.

STANDARD OF REVIEW

[1] In an appeal of an action for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld absent an abuse of discretion. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

[2] Our law is clear that absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. *Hyde v. Shapiro*, 216 Neb. 785, 346 N.W.2d 241 (1984).

[3] An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994).

ANALYSIS

Timothy claims that the trial court erred in changing the child support from the amount which the parties had stipulated to and, at the same time, entering a decree approving the balance of the parties' stipulation. He relies on paragraph 18, which Timothy contends should be read to mean that if the parties' agreement was not accepted in full by the trial court, then the entire agreement was null and void.

[4] To promote the amicable settlement of disputes between parties to a dissolution action, the parties may enter into a written "property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children." Neb. Rev. Stat. § 42-366(1) (Reissue 1993). The terms of such an agreement, except for terms providing for the support and custody of minor children, are binding on the court unless it finds the agreement is unconscionable. § 42-366(2).

[5-7] In determining whether a proposed settlement in a domestic case meets the statutory requirement of conscionabil-

ity, a trial judge has discretion to request the production of further evidence, but the court is not obligated to do so. See *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). See, also, § 42-366(2). " 'It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.' " *McWhirt*, 250 Neb. at 547, 550 N.W.2d at 335, quoting *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980). Nevertheless, in reviewing a property settlement agreement entered into by the parties, the trial court "is admonished not to regard the agreement lightly but, rather, is required to carefully scrutinize the agreement in order to be sure that neither party takes an unconscionable advantage over the other through fraud." *Colson v. Colson*, 215 Neb. 452, 454-55, 339 N.W.2d 280, 281-82 (1983).

[8] The paramount concern in determining child support is the best interests of the child. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). Determination of the best interests of a child includes a judicial decision based upon evidence. *Id.* Disposition of a question pertaining to a child's best interests is not governed exclusively by a parental stipulation. *Id.* See, also, *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Burns v. Burns*, 2 Neb. App. 795, 514 N.W.2d 848 (1994).

Thus, while agreements for child custody and support are not "binding" on the court, as are those involving matters other than child custody and support, even the latter are subject to independent court scrutiny and a finding of conscionability is a prerequisite to their binding effect.

[9] In determining the amount of a child support award, the trial court must consider the status, character, and situation of the parties and the estimated cost of support of their children. *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998). In doing so, the Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have pro-

duced sufficient evidence to rebut the presumption that the guidelines should be applied. *Id.*

Timothy readily acknowledges that the trial court was not compelled to accept the parties' stipulation and property settlement agreement. However, he argues that such agreements are the result of negotiated settlements and if a district court decides not to approve a provision in such an agreement, the paragraph

> proclaiming the entire agreement null and void operates to protect the parties and let them start negotiating again to form a new agreement, or in the alternative, go to trial. This type of provision keeps the court from being burdened with cases on the trial dockets and it encourages settlement.

Brief for appellant at 9.

It is beyond dispute that property settlement agreements are a matter of negotiation and that negotiation, by definition, is a "give and take" process. Moreover, experience and common sense suggest that all aspects of such agreements—property, debt, alimony, custody, and child support—are interconnected to some degree in the settlement process. Stated another way, the parties reach a compromise, with each part of the agreement being consideration for the other. The agreement here speaks to that concept: "13. ENFORCEMENT. This agreement and the provisions thereof rest upon valuable consideration moving from each of the parties to the other, and shall be binding upon each of the parties and shall be enforceable by either party in any Court or in any manner prescribed by law."

While paragraph 18 of the stipulation does not expressly provide that if any part is rejected, the whole is null and void, that is the only reasonable construction to place on it. Naturally, if any part is rejected, the stipulation is "not approved." And if not approved by the court, "the entire document shall be null and void." In contract parlance, the stipulation contemplates that its parts shall be common and interdependent, thus rendering it "entire" rather than "severable" or "divisible." See 17A C.J.S. *Contracts* § 331 (1963). Such provisions are not unusual to agreements generally or to property settlement agreements in particular. As to the latter, they do not interfere with the district court's duty to independently scrutinize the property, child cus-

tody, and child support issues. Indeed, it seems to us that restricting the use of this type of provision in property settlement agreements would unreasonably inhibit the parties' freedom to contract and adversely impact the resolution of divorce cases through the settlement process.

Bobbi appeared without counsel at the final hearing. The stipulation provides:

> 12. ATTORNEYS.
>
> A. Each of the parties expressly certifies that they have entered into this agreement upon mature consideration with sufficient opportunity to obtain the advice of counsel; that consent to the execution of this agreement has not been obtained by duress, fraud, or undue influence of any person; and that no representations of fact made by either party to the other have been relied upon except as expressly set forth herein.
>
> B. The parties agree that this Stipulation and Property Settlement Agreement is fair, reasonable, equitable and is not unconscionable.

The record made below does not disclose whether Bobbi, unrepresented at the May 8, 1997, hearing, obtained the advice of counsel before affixing her signature to the stipulation. Under these circumstances, the trial court properly scrutinized the agreement to determine that no unconscionable advantage was obtained by Timothy over Bobbi through fraud, intimidation, ignorance, passion, or improvidence. See *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995). But there is no indication in the record that any of those grounds caused the rejection of the child support agreed upon. Instead, the record suggests that the parties' child support figure was rejected because the court did not accept the projected income figures for Timothy.

Timothy is not challenging the trial court's authority to independently review the parties' child support figure and to reject it. Rather, his argument is that the court erred in rejecting a portion of the stipulation and, *at the same time*, accepting the rest of the stipulation and basing the decree on it.

If the disapproved portion of this agreement had involved alimony or a property-debt issue, few would question the merit

of Timothy's position. For example, if the court had taken the entire case under advisement and later entered a decree which rejected the parties' stipulation on waiving alimony and instead awarded Bobbi $1,000 per month alimony for 10 years, and approved everything else, the unfairness to Timothy would be patent. In that instance, whatever consideration Timothy gave Bobbi for her waiver of alimony would still flow to Bobbi. The consideration he was to receive—the waiver—would be denied to him. A more appropriate course in that circumstance, if the court deemed the alimony waiver to be unconscionable, would be to disapprove the entire agreement, notify the parties, and order or grant them an opportunity to adduce additional evidence on the issues presented or to present a new agreement. See § 42-366(3) (upon finding that parties' property settlement agreement is unconscionable court "may request the parties to submit a revised agreement or the court may make orders for the disposition of property, support, and maintenance"); § 42-366(8) ("[i]f the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate").

Admittedly, agreements for child custody and child support are treated somewhat differently than those for property and alimony issues under our divorce jurisprudence. However, a contract containing an "all or nothing" provision such as the one here also compels a course of action similar to the one stated above when an agreement on custody or support is rejected. When the court rejected Timothy and Bobbi's agreement on child support, it abused its discretion by deciding the rest of the issues based on the stipulation. The parties' stipulation, by its terms, became null and void when a portion of it was rejected. Because the record made for purposes of obtaining approval of the property settlement agreement was woefully inadequate to make any reasonable independent determination of alimony, division of property, or debt allocation issues, a decision upon all issues should have awaited the presentation of additional evidence or a new stipulation.

Here, the district court took the entire case under advisement at the conclusion of the May 8, 1997, hearing. Although there was concern expressed at the closing of the hearing over the

adequacy of child support, it was the court's decree that first advised of the finding of the court that the stipulation had been disapproved regarding the child support issue but enforced as to everything else. At that point, Timothy's obvious recourse was limited to seeking a vacation of the decree or new trial on the basis of paragraph 18 of the stipulation. This is the procedure he followed, and the court abused its discretion in not granting the motion.

CONCLUSION

The trial court abused its discretion in entering a decree based upon the parties' stipulation. The stipulation was conditioned upon its being approved in its entirety, and the court rejected a portion of it. Timothy's motion to vacate or for new trial should have been granted. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V.
JUNIPER D. HOPKINS, APPELLEE.
587 N.W.2d 408

Filed November 17, 1998. No. A-97-1102.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Courts: Judgments: Appeal and Error.** In cases where the district court sits as an intermediate appellate court, the district court reviews the county court judgment for error appearing on the record made in the county court.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. ____: ____. The power to impose a sentence for the commission of a crime against the State is entrusted to the sentencing court and not to an appellate court.

6. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
7. **Courts: Sentences.** Courts are well advised to rely upon the statutory guidelines for imposing sentences.
8. **Courts: Sentences: Appeal and Error.** Mitigating considerations are relevant when a sentence is appealed as excessive, but only on the question of whether the sentencing court abused its discretion and not as justification for a lesser sentence which the appellate court would have imposed.
9. ____: ____: ____. An appellate court may not vacate a sentence of imprisonment imposed by a trial court simply because the defendant possesses redeeming qualities which might lead other trial courts, or the appellate court, to render a more lenient sentence.
10. ____: ____: ____. An appellate court, including a district court reviewing a county court sentence, has extremely limited review of sentences.

Appeal from the District Court for Seward County, ALAN G. GLESS, Judge, on appeal thereto from the County Court for Seward County, GERALD E. ROUSE, Judge. Judgment of District Court reversed.

C. Jo Petersen, Seward County Attorney, for appellant.

Dorothy A. Walker, of Dorothy A. Walker, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

In this case, we discuss the role of the district court in reviewing sentences pronounced by the county court.

BACKGROUND

On April 5, 1997, 22-year-old Juniper D. Hopkins procured alcohol for her 20-year-old friend, Rhonda Hunn. Hopkins bought a six-pack of beer and a bottle of malt liquor, and she and Hunn drank some of the beer while at Hopkins' residence in Lincoln, Nebraska. Later, the two women went to Branched Oak Lake in Seward County in order to enjoy the warm night, and they drank more beer while at the lake. Upon attempting to return to Lincoln, Hopkins and Hunn became lost. As they drove through Seward County, searching for a road back to Lincoln, Hopkins was pulled over by a state trooper for failing to signal a turn. Hopkins passed blood alcohol tests administered by the state trooper. However, she was charged with a vio-

lation of Neb. Rev. Stat. § 53-180 (Reissue 1993), which prohibits procuring alcohol for a minor. Violation of § 53-180 is a Class I misdemeanor. The Nebraska Legislature has determined that Class I misdemeanors are punishable by up to 1 year in prison, a fine not to exceed $1,000, or both. See Neb. Rev. Stat. § 28-106 (Reissue 1995). There is no minimum sentence or punishment for a Class I misdemeanor.

On May 19, 1997, Hopkins appeared in the county court for Seward County, and pled guilty to violating § 53-180. On June 16, the county court sentenced Hopkins to 7 days in jail and a $500 fine. Hopkins appealed the county court's decision to the district court for Seward County. Hopkins' assignments of error to the district court included the claims that the county court erred in sentencing Hopkins to 7 days in jail rather than probation and that the jail sentence and fine were excessive and not warranted by the circumstances of the case.

The district court for Seward County heard the appeal on August 26, 1997. The judgment of conviction and the fine were affirmed, but the district court vacated the 7-day jail sentence. In its order of "Judgment on Appeal" entered September 19, the district court held, in part:

> Appellant was convicted of procuring alcoholic liquor for a minor, appellant's 20 years and 9 months old close friend. The county court sentenced appellant to 7 days in the county jail and a fine of $500.00. Appellant challenged the jail term as an abuse of discretion[.]
>
> Considering: the relationship between the minor and appellant; that the minor was only 3 months shy of the age of 21 years at the time; that only the minor and the appellant were involved; that no one was injured; that no other aggravating circumstances initiated by appellant surrounded the commission of the offense; that appellant's entire criminal record prior to the commission of this offense consisted of one 4 year old speeding conviction; that appellant is a full-time managerial employee; that appellant's attitude toward commission of this offense is one of repentance; that appellant is married and a member of the National Guard, I agree with appellant.

The State timely appealed to this court.

ASSIGNMENTS OF ERROR

The State assigns the following errors in this appeal: The district court erred (1) in modifying the county court's sentencing order and (2) in finding an abuse of discretion by the county court in sentencing Hopkins to 7 days in jail.

STANDARD OF REVIEW

[1] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Brooks*, 5 Neb. App. 5, 554 N.W.2d 168 (1996).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

ANALYSIS

Issues Before This Court.

We note that Hopkins' argument against the jail sentence focuses in part on whether the district court's vacation of the jail sentence had the effect of imposing an excessively lenient sentence. However, the issue of excessive leniency was not assigned as error by the State. Rather, the State focuses on the sentence ordered by the county court and whether that sentence was an abuse of discretion. Next, we note that the State's two assignments of error are essentially variations on the same theme, that the district court erred in vacating the county court's order of a 7-day jail sentence. Thus, we will address the two assignments of error simultaneously.

Abuse of Discretion in Sentencing.

[3-7] In cases where the district court sits as an intermediate appellate court, the district court reviews the county court judgment for error appearing on the record made in the county court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998). A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998); *State v. Pattno*, 254

Neb. 733, 579 N.W.2d 503 (1998). "Moreover, to the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion." *State v. Philipps*, 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993). 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.* Courts are well advised to rely upon the statutory guidelines for imposing sentences. *State v. Pattno, supra.*

In this case, the 7-day jail sentence imposed upon Hopkins by the county court is certainly much shorter than she might have received. The maximum sentence of imprisonment authorized under the statutory guidelines for a Class I misdemeanor is 1 year. See § 28-106. The fact that Hopkins' sentence by the county court falls well within the statutory guidelines and is in fact on the lenient side of those guidelines demonstrates that the sentence was not clearly untenable and did not unfairly deprive Hopkins of a substantial right and a just result. A sentence clearly within the statutory limits is generally not an abuse of discretion. *State v. Pattno, supra.*

[8] Hopkins, however, places importance on those circumstances surrounding the crime which appear favorable to her. Similarly, in its order of judgment on appeal, the district court listed factors which the district court felt justified a more lenient sentence, such as the fact that the minor for whom Hopkins provided alcohol was a friend and was almost 21 years old at the time of the crime. Such considerations are relevant for the trial court to whom the responsibility of sentencing is entrusted. But here, the district court was serving as an intermediate appellate court, not as a trial court. The mitigating considerations are also relevant when a sentence is appealed as excessive, but only on the question of whether the sentencing court abused its discretion and not as justification for a lesser sentence which the appellate court would have imposed.

A comparable situation involving a defendant sentenced to jail despite some substantial mitigating factors in her favor occurred in *State v. Philipps, supra.* In *Philipps*, the Nebraska

Supreme Court reversed the decision of this court to vacate a sentence of 1 year in jail for a woman who had embezzled $10,000 from her employer. As a result of a plea agreement, Philipps pled guilty to three Class I misdemeanors. She was sentenced to 1 year in jail for each charge, the sentences to run concurrently.

The crime was Philipps' first and was motivated, at least in part, by a desire to help pay family medical bills and for home repairs. Further, the stolen money was repaid with funds from Philipps' profit-sharing program. Phillips was in her late twenties, had two daughters and a stepson, and was pregnant. Considering those and other factors, this court believed that the sentence of jail time was excessive.

The Nebraska Supreme Court reversed this court's vacation of Philipps' jail sentence. The Supreme Court stated that excessiveness in sentencing is tightly linked to abuse of discretion. The court further stated:

> Indeed, the abuse of discretion standard was found to be intertwined with that of excessiveness at least as early as 1954 in *Taylor v. State*, 159 Neb. 210, 66 N.W.2d 514 (1954), wherein we wrote: "Contrary to defendant's contention, we find nothing in the record before us which could lawfully sustain a conclusion that the trial court abused its discretion and thereby imposed an excessive sentence upon defendant.". . .
>
> Nor is the fact that on occasion this court has referred to sentences imposed in other cases as a means of illustrating an abuse of discretion . . . to be interpreted as meaning that in a nondeath sentence an appellate court is to conduct a de novo review of the record to determine whether a sentence is proportionate and thus appropriate. . . . [T]he issue in reviewing a sentence is not whether someone else in a different case received a lesser sentence, but whether the defendant in the subject case received an appropriate one. Moreover, to the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion.

(Citations omitted.) *State v. Philipps,* 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993).

[9] Thus, an appellate court may not vacate a sentence of imprisonment imposed by a trial court simply because the defendant possesses redeeming qualities which might lead other trial courts, or the appellate court, to render a more lenient sentence. As previously discussed, there must be an abuse of discretion in order to merit such a vacation of sentence.

[10] On three separate occasions, this court has found a sentence to be excessive and made changes to the sentence, and on each of the three occasions, this court's finding was reversed. See, *State v. Philipps, supra*; *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993). The lesson from *Philipps*, *Riley*, and *Reynolds* is that an appellate court, including a district court reviewing a county court sentence, has an extremely limited review of sentences, and sentences within statutory limits are uniformly and routinely affirmed despite the appellate court's opinion of the sentence. Compare Neb. Rev. Stat. § 29-2308 (Reissue 1995), which states in part:

> In all criminal cases that now are or may hereafter be pending in the Court of Appeals or Supreme Court, the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.

Nonetheless, and as a consequence of the three decisions cited above, the district court's power and discretion when reviewing sentences imposed by the county court is limited by the abuse of discretion standard and the now well-established law that a sentence within the limits set by the Legislature generally is not an abuse of discretion. The sentence at issue was clearly on the lenient side of what the law allows to be imposed for this crime. Because of the limited review of sentences by the appellate courts of this state, including the district court when it sits as an appellate court, it serves no purpose for us to review the statutory sentencing conditions from Neb. Rev. Stat. § 29-2260 (Reissue 1995). The sentence that the district

court would have imposed or that we would have imposed is not relevant under *State v. Philipps, supra.* The county court's sentence was well within the statutory limits set by the Legislature and was, in fact, on the low end of what the Legislature allows. Therefore, there was no abuse of discretion by the sentencing court. We reverse the judgment of the district court and reinstate the county court's sentence.

REVERSED.

PIKE LEE OSBORNE, APPELLEE, V. ANGIE STANFIELD, APPELLANT.
586 N.W.2d 670

Filed November 17, 1998. No. A-98-144.

1. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdicton existing under the Nebraska Child Custody Jurisdiction Act should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record and will be upheld on appeal absent an abuse of discretion.
2. **Child Custody: Jurisdiction.** In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise that jurisdiction.
3. ____: ____. A child's physical presence in this state is sufficient by itself to confer jurisdiction on a court to make a child custody determination under the emergency provisions of Neb. Rev. Stat. § 43-1203(2) (Reissue 1993).
4. ____: ____. The Nebraska Child Custody Jurisdiction Act allows for conditional orders which impose just and proper conditions upon the transfer of the proceeding involving a child's custody and care to another state.
5. **Res Judicata: Judgments.** Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication when the former judgment was a final judgment.
6. **Judgments.** A judgment which is not final and does not adjudicate the rights in litigation in a conclusive and definitive manner cannot be set up in bar of a subsequent action.
7. **Child Custody: Judgments: Appeal and Error.** A conditional order, while not a final determination of child custody, is an appealable order, because it clearly affects a substantial right and is made in a special proceeding.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Jay B. Judds, of Lauritsen, Brownell, Brostrom, Stehlik & Thayer, for appellant.

Mark J. Young, of Anderson, Vipperman, Kovanda, Wetzel & Young, for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

This opinion addresses the consequences of a district court order which would have relinquished jurisdiction to the South Dakota courts upon the satisfaction of two conditions, neither of which occurred. Ultimately, we address the propriety of the Nebraska district court's decision to retain jurisdiction of the matter under the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993 & Cum. Supp. 1996).

BACKGROUND

On July 17, 1997, Pike Lee Osborne (Osborne) filed a paternity petition in the district court for Adams County, Nebraska, alleging that he was the biological father of Kyley Miles Osborne, born October 18, 1996. The petition also alleged that Angie Stanfield (Stanfield) was Kyley's natural mother and that Osborne and Stanfield had never been married to one another. Osborne prayed that the court enter an order determining him to be Kyley's natural father and that he be awarded custody. In an ex parte temporary custody order filed the same day, Osborne was awarded temporary custody of Kyley, who was 9 months old at the time.

On July 29, 1997, Stanfield filed a special appearance, objecting to the court's subject matter jurisdiction under the NCCJA. Stanfield alleged that jurisdiction in Nebraska was improper because South Dakota was Kyley's home state. On August 22, 1997, evidence and argument were submitted to the district court by both parties in the form of affidavits and briefs of counsel on the special appearance. Attached to Stanfield's affidavit, as exhibit A, was a copy of a complaint filed by Stanfield in the district court for Spink County, South Dakota, against Osborne. Stanfield requested custody of Kyley as well as child support from Osborne in the complaint.

In a journal entry filed September 16, 1997, the district court stated:

> [N]either Nebraska [n]or South Dakota is the home state of the child. The Court finds South Dakota to be a more appropriate forum due to the number of witnesses from that state. The Court will retain jurisdiction of this matter until South Dakota accepts jurisdiction over the matter on the conditions listed herein.
>
> The Court further finds that, based on the evidence received, neither party is a fit candidate for temporary custody of said minor child, and therefore places custody of the minor child with this court until a determination can be made that South Dakota will accept jurisdiction.
>
> This court will relinquish jurisdiction and custody of said minor child upon receipt of an appropriate order from the South Dakota Court: 1) accepting jurisdiction of the case, and 2) placing the minor child in an appropriate foster home or other suitable placement other than that of [Stanfield].

Osborne filed a motion for reconsideration on September 22, 1997, on the issue of parental fitness. Osborne alleged in the motion (1) that there was insufficient evidence for the court to "make a finding that [Osborne] is unfit" to have custody of Kyley and (2) that there existed no need to remove Kyley from his care. Stanfield filed a reply to the motion, arguing that Osborne had not been determined to be Kyley's biological father and, thus, that he had no standing to assert any claim to temporary custody. In his response to Stanfield's reply, Osborne stated:

> [T]he sole issue pending before the Court on [Osborne's] Motion for Reconsideration is the fitness of [Osborne] to have the temporary care, custody and control of the minor daughter until such time as the appropriate Court in South Dakota either accepts jurisdiction or denies the same, returning this matter to Nebraska.

In a journal entry and order filed October 30, 1997, the district court overruled the motion for reconsideration and ordered, "[I]f South Dakota has not accepted jurisdiction under the conditions stated in the order of September 16, 1997, by November 7, 1997 . . . jurisdiction shall remain in Adams County, Nebraska, until final hearing."

As far as the record reveals, nothing further happened in Nebraska until December 24, 1997, when Osborne filed a "Motion to Retain Jurisdiction," which alleged, in pertinent part:

> That as of December 23, 1997, the South Dakota Court has not yet assumed jurisdiction and a hearing has been set for January 23, 1998, to determine if South Dakota is the appropriate forum for hearing this matter.
>
> . . . .
>
> . . . That the child has been in Nebraska for approximately nine months. Those individuals who will have meaningful testimony concerning the child and the relationship of the parents to the child are in Nebraska. . . .
>
> . . . That there exist virtually no contacts between the child of the parties and the [S]tate of South Dakota. . . .
>
> WHEREFORE, [Osborne] prays that the Court retain jurisdiction . . . .

A hearing was held on the motion to retain jurisdiction on January 8, 1998. On January 22, the trial court ruled that the court would retain jurisdiction of the case. In its journal entry and order, the court stated in part:

> Originally this Court found neither South Dakota [n]or Nebraska to be the home state of the child but found South Dakota to be more appropriate due to the number of witnesses from that state. That order was entered on September 16, 1997. South Dakota did not accept jurisdiction until December 24, 1997, based on an ex parte affidavit from [Stanfield's] South Dakota counsel.
>
> The Court finds there has been a change in circumstances since the order of September 16, 1997. The child, age 15 months, has resided in Nebraska for 10 of those months.

The court determined that the requirements under § 43-1203(b), governing jurisdiction under the NCCJA, had been satisfied and found Nebraska to be the "more convenient" forum to hear the case. Stanfield filed her appeal to this court on February 19, 1998.

ASSIGNMENTS OF ERROR

Stanfield argues that the district court erred as a matter of law (1) by allowing a second trial to take place after the time for fil-

ing a motion for new trial or appeal had expired and (2) by allowing a second trial to take place when the court no longer had subject matter jurisdiction. Stanfield also argues that the issue of jurisdiction "was Res Judicata."

STANDARD OF REVIEW

[1] The question as to whether jurisdiction existing under the NCCJA should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to the trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998).

ANALYSIS

Stanfield argues that the January 8, 1998, hearing on Osborne's motion to retain jurisdiction, which she labels "a motion for new trial," brief for appellant at 12, should not have occurred, because the Nebraska court had previously determined, in an order filed September 16, 1997, that jurisdiction was appropriate in South Dakota.

[2] Stanfield's contention that South Dakota has jurisdiction in this case implicates the NCCJA, which governs child custody disputes having interstate implications. Because the jurisdictional requirements of the NCCJA are applicable, we must determine whether the district court properly exercised its jurisdiction, because when an appeal is taken from a court which lacked jurisdiction, the appellate court acquires no jurisdiction. *In re Complaints of McLeod Telemanagement et al.*, 255 Neb. 202, 583 N.W.2d 39 (1998). In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise that jurisdiction. *In re Interest of Floyd B., supra.*

We initially note that there had been no determination of Kyley's custody by another state. Thus, the district court was exercising initial jurisdiction over Kyley. The district court had jurisdiction to make a child custody determination by initial decree if one of the four following grounds of jurisdiction existed: (1) home state jurisdiction, (2) significant connection jurisdiction, (3) emergency jurisdiction, or (4) default jurisdic-

tion (when no other state would have jurisdiction or when another state has declined to exercise jurisdiction, and it is in the best interests of the child that the court assume jurisdiction). § 43-1203.

We first find that of the possible grounds for initial jurisdiction, home state jurisdiction was not initially applicable, because Kyley was born in South Dakota on October 18, 1996, and moved to Nebraska on or about April 1, 1997. Therefore, she had not been a resident of Nebraska exclusively and continuously for at least 6 consecutive months prior to the filing of the petition on July 17, as required by § 43-1202(5) for home state jurisdiction. Second, significant connection jurisdiction was most likely not present, because according to the affidavits submitted at the hearing on the petition, Kyley had lived in South Dakota for almost 6 months, her grandparents from each side of the family lived in South Dakota, and according to Stanfield, Kyley was only visiting Nebraska. Third, default jurisdiction was not present, as it is clear that South Dakota could have had jurisdiction over the action and had not declined to exercise it.

[3] However, with regard to the September 16, 1997, order, the district court had emergency jurisdiction over Kyley. The emergency jurisdiction provision of the NCCJA permits a court to assume jurisdiction of a child who is physically present in this state when (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected. § 43-1203(1)(c). A child's physical presence in this state is sufficient by itself to confer jurisdiction on a court to make a child custody determination under the emergency provisions of § 43-1203(2).

In the instant case, the child was physically present in Nebraska and the record reveals that it was necessary for the district court to take custody of Kyley in order to protect her from a possible kidnapping by Stanfield and possible mistreatment by Osborne. Indeed, Osborne's affidavit alleged that Stanfield intended to "abscond with the minor child to the State of South Dakota to be with a man by the name of Mike Stone, who is of unknown character." According to Stanfield's affidavit, her return to South Dakota was a means of escaping

Osborne's physical abuse of her and her children. Based on the affidavits submitted at the hearing on August 22, 1997, the district court properly exercised emergency jurisdiction over Kyley in its September 16 order because of the danger arguably posed by either parent to the child.

According to the NCCJA, a court which has jurisdiction to make an initial decree may decline to exercise its jurisdiction anytime prior to entering a decree if the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum. § 43-1207(1). To determine whether a court is an inconvenient forum, the court shall consider the following factors, among others, to determine if it is in the best interests of the child that another state assume jurisdiction: (1) Another state is or recently was the child's home state; (2) another state has a closer connection with the child and his or her family; (3) substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by a court of this state would contravene a purpose [of the NCCJA]. § 43-1207(3).

[4] After finding, on September 16, 1997, that neither South Dakota nor Nebraska was Kyley's home state, the district court determined that South Dakota was the more appropriate forum under the NCCJA due to the number of witnesses from that state. However, in making this determination, the district court made it clear that it was retaining jurisdiction of the case until such time as it received an appropriate order of a South Dakota court "1) accepting jurisdiction of the case, and 2) placing the minor child in an appropriate foster home or other suitable placement other than that of [Stanfield]." In other words, the district court entered an order which wisely avoided sending the child into "jurisdictional limbo." This order is of the type clearly contemplated by § 43-1207(5) of the NCCJA, which states:

> If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or *it may stay the proceedings upon condition that a custody proceeding be promptly*

> *commenced in another named state or upon any other conditions which may be just and proper*, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(Emphasis supplied.)

On October 30, 1997, the district court further conditioned its relinquishment of jurisdiction on South Dakota's accepting jurisdiction by November 7, which did not happen. On January 8, 1998, the district court held a hearing on Osborne's motion to retain jurisdiction. Stanfield argues that this was error for three reasons.

First, Stanfield alleges that the district court relinquished jurisdiction to South Dakota on September 16, 1997. Thus, she argues that because Osborne failed to file a motion for new trial or timely appeal this ruling, his motion to retain jurisdiction was a nullity. Stanfield relies upon the faulty premise that the Adams County District Court divested itself of jurisdiction on September 16 and was, therefore, without authority to make a determination with respect to Kyley's custody or paternity at any time thereafter. Stanfield simply misreads the order of September 16. The district court clearly retained jurisdiction unless and until the State of South Dakota satisfied the two conditions specified by the court's order. The argument that the Nebraska court relinquished jurisdiction fails.

Stanfield next asserts that the January 8, 1998, hearing was error because the district court no longer had subject matter jurisdiction, arguing that the court "already gave jurisdiction to South Dakota in his September 16, 1997, [order,] an order which became effective when South Dakota accepted jurisdiction in its December 24, 1997 order." Brief for appellant at 16. Once again, Stanfield's argument is premised on reading the September 16 order as a complete and total relinquishment of jurisdiction to South Dakota, which it clearly was not. Because South Dakota's acceptance of jurisdiction came after the conditioned date of November 7, the district court retained jurisdiction, and could continue to do so, on the ground that South Dakota had not satisfied its conditions, and Nebraska in the meantime had become the more appropriate forum under § 43-1207. The district court stated in its January 22, 1998, order:

> The Court finds there has been a change in circumstances since the order of September 16, 1997. The child, age 15 months, has resided in Nebraska for 10 of those months. Although there may be more witnesses in South Dakota, the witnesses most qualified to testify about the child's well-being reside in Nebraska. . . . The father of the child resides in Nebraska. The Court finds substantial evidence exists in this state concerning the child's present or future care, protection, training and personal relationships. Due to the passage of time, Nebraska has the most significant contacts and closest connection with the child. At this time it would be harmful to the well-being of the child to transport her to South Dakota.

[5,6] Finally, Stanfield argues that the January 8, 1998, hearing and the court's subsequent ruling retaining jurisdiction were in error because the issue of jurisdiction was res judicata. However, res judicata bars only relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if several conditions are satisfied, including that the former judgment was a final judgment. See *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). In order that a judgment be final for res judicata purposes, the order must be such as puts an end to the particular litigation or definitely puts the case out of court. 50 C.J.S. *Judgment* § 722 (1997). The September 16, 1997, order was not a final judgment concerning jurisdiction; rather, the district court stayed the proceedings pending specific action by the South Dakota court. A judgment which is not final and does not adjudicate the rights in litigation in a conclusive and definitive manner cannot be set up in bar of a subsequent action. *Iowa State Bank v. Trail*, 234 Neb. 59, 449 N.W.2d 520 (1989). Res judicata does not aid Stanfield's appeal.

[7] Stanfield's entire appeal rests on the premise that the district court relinquished jurisdiction of the case to South Dakota on September 16, 1997, but this is incorrect. Moreover, the NCCJA specifically allows the entry of a conditional order such as the district court's order of September 16. However, the September 16 conditional order, while not a final determination of custody, was an appealable order, because it clearly affected

a substantial right and it was made in a special proceeding. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997) (special proceeding includes every statutory remedy not in itself action); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (special proceeding means every civil statutory remedy not encompassed in Neb. Rev. Stat. ch. 25). Consequently, her appeal is without merit.

We affirm the decision of the district court retaining jurisdiction of the instant case.

AFFIRMED.

KHANKEO XAYASENG, APPELLANT,
V. CHIEF INDUSTRIES, INC., APPELLEE.
586 N.W.2d 472

Filed November 17, 1998. No. A-98-247.

1. **Workers' Compensation: Judgments: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. However, the findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong.
2. **Workers' Compensation.** Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability.
3. ____. In cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total and permanent disability shall be determined in accordance with the facts.
4. ____. For workers' compensation purposes, total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
5. ____. If a worker has a two-member injury, compensation shall be determined by the facts, and the existing or concurrent injury to another part of the body is one of these facts, even if that injury is not to a member as defined in Neb. Rev. Stat. § 48-121(3) (Reissue 1993).
6. **Workers' Compensation: Expert Witnesses.** Where claimed injuries are of such a character as to require skilled and professional persons to determine the cause and

extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.

7. ____: ____. Unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.

8. ____: ____. While expert witness testimony may be necessary to establish the cause of a claimed injury, the Nebraska Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Todd Bennett, of Rod Rehm, P.C., for appellant.

Timothy M. Welsh, of Berens & Tate, P.C., for appellee.

HANNON and MUES, Judges, and NORTON, District Judge, Retired.

HANNON, Judge.

This is a workers' compensation case brought by Khankeo Xayaseng against his former employer, Chief Industries, Inc. (Chief), to recover for injuries he received while in its employ. Xayaseng was injured while working as a welder, and the issue before the Workers' Compensation Court was whether he was permanently and totally disabled as a result of the injuries. The trial court found the injuries to his thumb and legs caused him to be permanently and totally disabled under Neb. Rev. Stat. § 48-121 (Reissue 1993). The workers' compensation review panel found the trial judge erred in considering loss of the physical function of the thumb in determining whether Xayaseng was permanently and totally disabled. The review panel remanded the matter to the trial judge to determine the disability Xayaseng had suffered from the injuries to his legs without regard to the injury to his thumb. We conclude that Xayaseng suffered a two-member injury under § 48-121(3) by the injuries to his legs and was, therefore, entitled to permanent and total disability determined in accordance with the facts, including injuries to parts of the body that are not members for purposes

of the two-member injury provision. Further, we cannot find that the trial judge was clearly wrong in his determination of the extent of injuries Xayaseng incurred. Accordingly, we reverse the order of the review panel and remand the cause with directions to reinstate the award of the trial judge.

SUMMARY OF EVIDENCE

Xayaseng worked as a welder for Chief. Xayaseng's employment required bending, kneeling, crawling, standing, and climbing ladders. On June 13, 1995, while in the scope of his employment, a steel beam weighing approximately 1,000 pounds fell and landed on Xayaseng's thighs and right thumb. As a result of the accident, Xayaseng was taken to the hospital and treated for bruised and swollen thighs and a sprained right thumb. Since the injury, Xayaseng has seen numerous doctors.

Xayaseng's family physician released Xayaseng to return to work on June 26, 1995. Xayaseng then saw Dr. Gordon Hrnicek, an internist, on June 29. Hrnicek noted broken skin on the right thigh and bruising on the left thigh, limited motion in the thighs, and an injury to the thumb. Hrnicek put Xayaseng on disability and ordered physical therapy. Hrnicek saw Xayaseng again on July 13 and 21. He noted Xayaseng was improving, but continued to keep Xayaseng on disability. Xayaseng visited Hrnicek on July 18 and complained of weakness and pain in his thumb. Hrnicek, however, cleared Xayaseng to return to work on August 1.

On August 8, 1995, Xayaseng returned to Hrnicek complaining of pain, tenderness, and swelling in his legs and thumb. Hrnicek treated Xayaseng's thumb with medication through the month of August. Xayaseng was ordered to perform only light tasks.

Xayaseng visited Dr. Robert Urban, an orthopedic surgeon, on September 15, 1995. Urban opined that Xayaseng sustained a 20-percent impairment to the thumb and a 10-percent impairment to each leg as a result of the accident. Urban also stated: "It is my opinion within a reasonable degree of medical certainty, that the injury to his thighs also was the injury which caused his chondromalacia [soft cartilage tissue in the knee] and the causal relationship is direct between the two."

Xayaseng next visited Hrnicek's partner, Dr. R. Allison, on September 26, 1995. Allison found marks across Xayaseng's quadriceps (thighs) secondary to the trauma of the beam landing on his legs. Allison prescribed that Xayaseng rest his muscles and continue physical therapy. Allison too suggested only light-duty work.

In October 1995, Xayaseng saw two new doctors, Dr. David Swift, a rheumatologist, and Dr. Balachandran Wariyar, a neurologist. Swift diagnosed Xayaseng with traumatic leg and thumb injury from the accident resulting in continued weakness and pain. Wariyar stated that it would be approximately 1 year after the accident before Xayaseng reached maximum medical improvement.

In November 1995, Hrnicek again examined Xayaseng and cleared Xayaseng to return to work on November 13. Hrnicek treated Xayaseng again on November 22, and again cleared him to return to work.

Xayaseng felt he was in too much pain to return to work. He asked Chief to place him on light duty, but Chief refused. Xayaseng failed to come in to work, and in early December 1995, Chief terminated Xayaseng's employment.

Xayaseng still complained of leg and thumb problems, and on January 6, 1996, Hrnicek filled out a workers' compensation medical report form for Xayaseng. In the report, Hrnicek stated that Xayaseng reached his maximum medical treatment on December 1, 1995, that no future medical treatment was necessary, and that Xayaseng had no limitations whatsoever.

On May 3, 1996, Grand Island Physical Therapy, P.C., performed a functional capacity evaluation. The therapist found Xayaseng improperly represented his present physical capabilities, which was based on Xayaseng's inconsistencies while he was being tested. The therapist was unable to draw significant conclusions.

Next, Xayaseng visited Dr. Kip Burkman on June 25, 1996. Burkman diagnosed Xayaseng with a 5-percent impairment in each leg and an 11-percent right upper body extremity impairment. Finally, Xayaseng visited Dr. D.M. Gammel, a fellow of the American Academy of Evaluating Physicians. Gammel diagnosed Xayaseng with a 10-percent impairment to his right

upper extremity and a 5-percent impairment to each leg caused by his injuries on June 13, 1995.

Two vocational specialists examined Xayaseng on April 12 and July 9, 1996. Both specialists determined that due to Xayaseng's injury, he could no longer perform manual labor, and that because of his limited education and English skills, Xayaseng would "not be employable."

After an April 21, 1997, hearing, a workers' compensation judge reviewed the evidence and found that Xayaseng cannot read or write English; that he has substantial loss of use of his hand because of the injury to his thumb; that he has substantial problems with both legs; that his only real training is as a welder; that a welder must use his or her dominant hand and must stand, squat, kneel, crawl, and climb; that Xayaseng can do none of these; that being a welder is an occupation which it is certain he can no longer do; and that he is permanently and totally disabled. The court made several other findings concerning the amount of the award to which Xayaseng is entitled, but since these findings are dependent upon the correctness of the disability finding and are not contested, we need not summarize them.

Chief applied for review by a three-judge panel on the grounds the trial judge erred in nine different respects, which the review panel summarized as claiming the trial judge erred in finding (1) that Xayaseng's thumb was enlarged at the metacarpophalangeal joint; (2) that Xayaseng has weakness in his right hand; and (3) that Xayaseng is permanently and totally disabled, particularly in view of findings that Xayaseng had substantial loss of use of his right hand because of the injury to his thumb.

After stating some of the evidence and reviewing *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 127 N.W.2d 186 (1964), the review panel concluded that the trial judge had considered the loss of function of Xayaseng's hand due to the thumb injury in determining that he suffered permanent and total disability under § 48-121(3). The court concluded this was improper under the *Runyan* case. In its opinion, the review panel stated, "The Runyan case makes it clear that the loss of fingers and toes is not to be considered in determining perma-

nent total disability." The review panel remanded the cause to the trial judge with directions to determine whether or not the alleged injuries to Xayaseng's legs produced permanent and total disability without regard to the thumb injury. The review panel further ordered the lower court to provide a reasoned decision based on findings with respect to the present condition of Xayaseng's legs, the cause of that condition, and the expert opinion upon which he relies in making his findings. The review panel affirmed the award except for the finding that Xayaseng has been permanently and totally disabled. Xayaseng now appeals to this court.

ASSIGNMENTS OF ERROR

Xayaseng argues the review panel erred by holding the trial court incorrectly considered Xayaseng's injury to his thumb in determining the degree of his disability and by failing to affirm the trial judge's determination that Xayaseng is permanently and totally disabled.

SCOPE OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. However, the findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998).

ANALYSIS

The review panel based its order reversing the trial judge's findings upon *Runyan, supra*. We will, therefore, start with a review of that case. In *Runyan,* the plaintiff lost the middle finger of his right hand and the middle and ring fingers of his left hand. The plaintiff's other five fingers were injured to the point where the medical evidence would support a finding that he lost the use of all eight fingers, but not his thumbs, and that he was incapacitated from performing any work similar to that which he performed before the accident.

[2] The court recognized that disability of a lesser part of the body is injurious to the function of the greater part, such as the loss of a finger is injurious to the function of the hand.

Nevertheless, the court held that the plaintiff's recovery was limited "to the schedule [compensation for] loss of . . . fingers as provided in subdivision (3) of section 48-121, R. R. S. 1943." *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 682, 127 N.W.2d 186, 190 (1964). The *Runyan* court cited several cases stating:

> Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability.

176 Neb. at 679, 127 N.W.2d at 189. The *Runyan* court determined that no extraordinary condition developed from that injury.

[3] The plaintiff in *Runyan* sought compensation under that part of subdivision (3) of § 48-121, which provided and still provides: "In all other cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total and permanent disability shall be determined in accordance with the facts."

The *Runyan* court rejected the notion that loss of a finger is injurious to the function of the hand or the body because workers' compensation law saw fit to make an arbitrary distinction between injuries to fingers and injuries to the hand and the arm. It further pointed out that total loss of a finger is not a member within the two-member injury provision, quoted above. Consequently, "benefits for the loss of a finger are limited to the schedule loss, unless the rule cited as to unusual and extraordinary injury to some other member, or the body as a whole, has application." *Runyan*, 176 Neb. at 679-80, 127 N.W.2d at 189. The *Runyan* court held the plaintiff's benefits were limited to the scheduled compensation for the loss of eight fingers.

Runyan is distinct from the case at hand in that it involved only injuries to fingers on both hands, and no other injury to the body. Fingers are not listed in the two-member injury section of subdivision (3), and the *Runyan* court refused to consider an injury to fingers as an injury to the hand absent some extraordinary injury to the hand through the fingers. Xayaseng's condi-

tion is different in that he clearly has injury to two members, that is, his legs.

[4] The case of *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984), is analogous to the case at hand. In *Krijan,* the plaintiff had injured his right arm and his right leg in a fall, and he had a preexisting permanent partial disability to his left hand. He sought total permanent disability, but a rehearing panel awarded an 11-percent permanent partial disability of his right arm and a 13-percent permanent partial disability to his right leg. The Nebraska Supreme Court reversed the rehearing panel's decision and held as a matter of law that the worker was permanently and totally disabled. In so doing, that court quoted extensively from subdivision (3) of § 48-121. It then stated that since the plaintiff had permanent partial loss of the use of one arm and one leg as a result of the accident, the issue was whether the plaintiff was in fact disabled as a result of these injuries. The *Krijan* court then stated:

> For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. [Citation omitted.] Total and permanent disability contemplates the inability of the workman to perform any work for which he has the experience or capacity to perform.

216 Neb. at 189, 342 N.W.2d at 664. See, also, *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

The *Krijan* court then reviewed the facts concerning the plaintiff's inability to work at his usual occupation of carpentry, foreign birth, eighth grade education, work history, physical limitations, and various functions he could not perform, such as heavy lifting, squatting, and prolonged standing. A rehabilitation consultant had opined that the plaintiff might be able to work as a security guard. The court concluded the plaintiff was totally disabled.

[5] In the case at hand, the trial judge did essentially the same analysis as the *Krijan* court except he specifically considered

the injuries to Xayaseng's thumb and the resulting weakness of his right hand. The review panel concluded that under *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 127 N.W.2d 186 (1964), this was an error. We do not agree. The trial judge specifically found Xayaseng suffered an injury to both legs, and the evidence clearly supports this finding. We understand subdivision (3) of § 48-121 to mean that if a worker has a two-member injury, compensation shall be determined by the facts, and the existing or concurrent injury to another part of the body is one of these facts, even if that injury is not to a member as defined in that same subdivision.

[6] Next, Chief argues even if the court properly considered the injuries to the legs, Xayaseng's proof does not support Chief's liability for any alleged disability, because Xayaseng failed to prove other evidence of any physical limitations. Chief contends none of the medical experts were willing to testify to the fact that Xayaseng's injuries prevented him from working nor would they put limits on his abilities. Further, Chief argues the trial judge erred in his determination of injury to Xayaseng's thumb by examining it. Chief also cites *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981), arguing that the necessary expert testimony is missing in this case. *Mack* states:

> "Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries."

209 Neb. at 370, 307 N.W.2d at 816.

[7] The Nebraska Supreme Court in *Hohnstein v. W.C. Frank*, 237 Neb. 974, 980, 468 N.W.2d 597, 602 (1991), appears to support Chief's argument by stating: "It is well established that 'unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury. [Citations omitted.]' " In this case, Xayaseng presented

expert opinion to establish causation and the extent of the injuries. Dr. Urban opined that Xayaseng sustained a 20-percent impairment to the thumb and a 10-percent impairment to each leg as a result of the accident. Dr. Swift diagnosed Xayaseng with traumatic leg and thumb injury from the accident resulting in continued weakness and pain. Dr. Gammel diagnosed Xayaseng with a 10-percent impairment to his right upper extremity and a 5-percent impairment to each leg caused by his injuries on June 13, 1995. Two vocational specialists, Carol Reddy and Gail Leonhardt, both opined Xayaseng was not employable after the accident.

In addition to expert opinion, the judge, in his determination of the extent of the injuries, cites Xayaseng's testimony that he had diminished grip strength. The issue is whether the judge may consider Xayaseng's testimony about the extent of his injury to his thumb. The Nebraska Supreme Court addressed this issue in *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

[8] In *Cords*, the plaintiff was a city employee who injured his lower back and ankle while on the job. Cords presented an expert medical witness who opined that Cords suffered a 2-percent partial impairment. Cords then personally testified that he continued to suffer from lower back pain and from numbness in the three smallest toes on his right foot. The city argued that Cords' testimony was insufficient. The court ruled: "While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant." *Cords*, 249 Neb. at 756, 545 N.W.2d at 118.

Similarly in this case, expert medical testimony from Urban, Swift, and Gammel established causation between the injury to Xayaseng's thumb and the accident. Expert witnesses are not required to establish the degree of disability, and the judge may apply the testimony of Xayaseng to determine the extent of the injuries.

The judge also personally examined Xayaseng's thumb and noticed swelling in the "MP" joint of the thumb. No objection was preserved at the time of the judge's observation. Chief

argues the judge does not possess the necessary scientific knowledge to diagnose injuries such as those alleged by Xayaseng. However, the same argument applies to the judge as to Xayaseng. Judges, as triers of fact, regularly view injuries to observe objective appearance. Expert witnesses are not required to establish degree of disability once causation has been developed. The trial judge, as the trier of fact, is the sole judge of the witnesses' credibility and may apply testimony he or she believes to be credible. This court is unable to say the judge was clearly wrong in this finding of the extent of the injury. Therefore, we reverse the order of the review panel and remand the cause with directions to reinstate the award of the trial judge.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CRYSTAL T. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JOHN T. AND AMY T., APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

586 N.W.2d 479

Filed November 24, 1998. Nos. A-97-1228, A-97-1229, A-97-1230.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach independent conclusions, irrespective of the determination made by the court below.
2. **Jurisdiction: Appeal and Error.** An appellate court has the power and duty to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Appeal and Error.** The proper and exclusive forum for review of a juvenile court's deviation from a case plan recommended by the Department of Health and Human Services is a juvenile review panel.
4. ____: ____. A party is entitled to expedited review by the juvenile review panel if two requirements are met: (1) The order must implement a different plan than that proposed by the Department of Health and Human Services and (2) there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile.
5. **Constitutional Law: Statutes: Courts.** The Nebraska Court of Appeals has no jurisdiction to consider the constitutionality of statutes, as that function is reserved to the Nebraska Supreme Court.
6. **Juvenile Courts.** The Nebraska Department of Health and Human Services shall have the authority, by and with the assent of the juvenile court, to determine the care,

placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

7. **Statutes: Juvenile Courts.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
8. **Juvenile Courts.** Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.
9. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
10. **Juvenile Courts: Statutes.** Neb. Rev. Stat. § 43-288 (Reissue 1993) gives the juvenile court explicit statutory authority to require the custodian of an adjudicated juvenile to eliminate the specified conditions contributing to the problems which led to juvenile court action and to require the custodian to give adequate supervision to the juvenile in the home.

Appeal from the County Court for Saunders County: GERALD E. ROUSE, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Beth Tallon, Special Assistant Attorney General, for appellant.

No appearance for appellees.

HANNON and MUES, Judges, and NORTON, District Judge, Retired.

HANNON, Judge.

The Department of Health and Human Services (Department) appeals a dispositional order entered by the county court sitting as a juvenile court in separate proceedings involving three juveniles from the same family, Crystal T., Dexter T., and Jessica T. After adjudication, the care and custody of the children was awarded to the Department. The court approved the initial case plan, which provided for custody of the children to be in the Department with the children's being placed in the home of their mother, Amy T. At a review hearing on October 31, 1997, the juvenile court approved a case plan submitted by the Department, which plan provided, in part, for the children to continue to live in Amy's home, with the eventual permanent return of the children to Amy's home as a goal. In an order approving the plan, the court provided, "The Department . . . shall conduct 10 to 12 visits prior to the next court review between the hours of 9:00 P.M. and 6:00 A.M. without warn-

ing." The Department appeals from that order, objecting to the quoted phrase and arguing that the statutes do not authorize such an order and that they are unconstitutional if they do. We conclude that the order is justified by the statutes and that this court does not have jurisdiction to consider the possible unconstitutionality of the statutes. We therefore affirm the juvenile court's order.

BACKGROUND

The children, ages 15, 10, and 9 years at the time of the hearing, had been adjudicated as juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on or before November 27, 1996. The children's mother, Amy, was incarcerated at the time, and the children were left in the care of Amy's boyfriend, who abused them. The children had been removed from the home and later allowed to return under the Department's supervision.

The record of the October 31, 1997, hearing consists of the testimony of Shirl Cadek, the Department case manager for the children, and Mary Casper, the children's guardian ad litem, and the following documents: an October 19 probation officer's report; the "Case Plan and Court Report" dated October 24, 1997; and a report of the guardian ad litem, including a letter from a third party.

The documents indicate that Crystal had been placed on intensive supervision probation with electronic monitoring on September 8, 1997. The probation officer's report states that Amy had enabled Crystal to violate the policies of the electronic monitoring system. Incidents occurred where the electronic monitoring of Crystal failed because a household member reportedly had accidentally caused the telephone to be "off-the-hook." Also, as a condition of her probation, Crystal was not allowed to have visitors at home unless they were first cleared through the probation office. However, Amy simply told the probation office that anyone coming to the house was her friend, not Crystal's, even when the visitors were in their midteens.

Cadek suspected, but could not verify, that there were males living at Amy's home. Cadek stated that on some of her visits, people were at the home but left upon her arrival. The record contains a letter, dated October 22, 1997, from the mother of a

young male who was a frequent visitor at Amy's home. The letter stated that there were several men living at Amy's home, including Crystal's boyfriend.

There was evidence that Dexter was also experiencing some difficulties in school and that homework sent home for Amy's signature had been signed by Crystal. Cadek testified that Amy had been under court order to submit to an alcohol evaluation, but had not yet done so. Despite the numerous difficulties in dealing with Amy, Cadek believed that the children should remain with Amy under the Department's supervision.

The case plan states many positive things about Amy and her effort to change. It also states that there have been concerns regarding males' being present in the home, that on two occasions males were present and left upon the arrival of the caseworker, and that on one occasion, at 8:30 a.m. a male answered the phone and said Amy was gone and that "the children had gotten themselves up for school and left already." The case manager indicated concern regarding who might be in Amy's home at different times. The case plan indicates that both announced and unannounced visits had been made.

The guardian ad litem report states one concern to be that "[n]on-family members were living in the [family] home during the summer," and the guardian ad litem stated that during visits, the children met her outside and told her they were instructed to let no one in the house.

The document indicates that visitors to the home, primarily young males, have not been a good influence in the home and that Amy might not have been home at times when she would be expected to be home with the children. The record would justify the trial court's concluding that unannounced visits during the night might be desirable as a means of assuring the desired results or at least to learn of Amy's failures. The court ordered: "The mother shall be required to open the door and allow into her home Health and Human Service workers at any time of the day or night and shall be subject to spot checks from time to time." The Department was ordered to conduct 10 to 12 visits without warning, between the hours of 9 p.m. and 6 a.m., prior to the next court review. The court also approved the case plan and ordered a review hearing for January 22, 1998.

ASSIGNMENT OF ERROR

The Department argues that the juvenile court erred in deciding that it had jurisdiction to order the Department to make "spot checks" without warning between 9 p.m. and 6 a.m. and to make 10 to 12 such visits prior to the next court review.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach independent conclusions, irrespective of the determination made by the court below. *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

ANALYSIS

Jurisdiction.

[2,3] An appellate court has the power and duty to determine whether it has jurisdiction over the matter before it. *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998). The juvenile court, although stating in its order that it approved the Department's case plan, effectively modified the plan when it imposed the additional requirements now complained of by the Department. Neb. Rev. Stat. § 43-287.03 (Cum. Supp. 1996) provides for the review of contested dispositional plans by a juvenile review panel

> when the court makes an order directing the implementation of a plan different from the plan prepared by the [Department] concerning the care, placement, or services to be provided to the juvenile and the department or any other party believes that the court's order is not in the best interests of the juvenile.

Such review must be sought from the review panel within 10 days after disposition by the court. Neb. Rev. Stat. § 43-287.04 (Cum. Supp. 1996). The proper and exclusive forum for review of a juvenile court's deviation from a case plan recommended by the Department is a juvenile review panel, and a failure to timely seek such review renders this court without jurisdiction to hear an appeal in the case. See *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998). At first blush, we are concerned about this court's jurisdiction because the appeal was perfected directly to this court.

[4] However, the Nebraska Supreme Court has held that a party is entitled to expedited review by the juvenile review panel if two requirements are met: "First, the order must implement a different plan than that proposed by the department. Second, there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile." *In re Interest of M.J.B.*, 242 Neb. 671, 674, 496 N.W.2d 495, 498 (1993).

In this case, the Department has not alleged that such additional requirements are not in the juveniles' best interests; rather, it argues the requirements appealed from represent an attempt by the juvenile court to improperly "micromanage" the Department. Consequently, the second prong of the test was not met. We therefore conclude that the provisions for expedited review by a juvenile review panel were not triggered and that this court has jurisdiction to hear the Department's appeal.

Validity of Court's Order.

[5] The Department argues that the complained of order seeks to manage the Department's custody of the children. It bases its position on two grounds: one, that the statutes correctly interpreted do not give the juvenile court the authority to enter the order directing it, and two, that if the statutes do so, they are unconstitutional because they are in violation of the separation of powers provisions, Neb. Const. art. II, § 1. This court has no jurisdiction to consider the constitutionality of statutes, as that function is reserved to the Nebraska Supreme Court. Neb. Const. art. V, § 2. We will therefore assume all statutes examined are constitutional without considering their constitutionality.

Neb. Rev. Stat. § 43-284 (Supp. 1997) provides that the juvenile court may permit a juvenile adjudged to be under § 43-247(3) to remain in his or her own home subject to supervision or may make an order committing the juvenile to the care of some suitable institution, reputable citizen, or suitable family or to the care and custody of the Department. The significance of the distinction of giving the Department "the care and custody" of such minors and giving only "the care" to other entities is not explained.

[6] The Department points out that Neb. Rev. Stat. § 43-285(1) (Cum. Supp. 1996) provides, in relevant part, that when a juvenile court awards a juvenile to the care of the Department in accordance with the Nebraska Juvenile Code, the Department "shall have the authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it."

At the time of the juvenile court's decision in *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988), the last-quoted phrase was not in § 43-285 (Reissue 1984), but § 43-284 (Reissue 1984) provided in significant part: "The [Department] shall have the authority to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each child committed to it." The court in *In re Interest of G.B., M.B., and T.B.* held that that phrase gave the Department the sole authority to determine the child's care and placement, and the court pointed out that if the juvenile court did not like the placement selected by the Department, it was free to remove the child from the custody of the Department. That provision has since been removed from § 43-284, and the similar phrase, quoted above, has found its way into § 43-285. The change clearly gave the court the power to assent and, by implication, to dissent from the placement and other decisions of the Department, as well as of other entities to whom the court might commit the care of a minor. Although we are not here concerned with the juveniles' care or placement, this change certainly indicates the Legislature's intent to remove the Department's complete control of a minor whose care is given to the Department under the Nebraska Juvenile Code.

[7,8] The Department argues that the court's order constitutes an improper attempt to "micromanag[e] the case that only [the Department] is authorized by law to handle." Brief for appellant at 5. We disagree. The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987). It is the law in this jurisdiction that juvenile courts have broad discretion to

accomplish the purpose of serving the best interests of the children involved. *Id.*

Neb. Rev. Stat. § 43-288 (Reissue 1993) provides, in significant part, as follows:

> If the court's order of disposition permits the juvenile to remain in his or her own home as provided by section 43-284 or 43-286, the court may, as a condition or conditions to the juvenile's continuing to remain in his or her own home, or in cases under such sections when the juvenile is placed or detained outside his or her home, as a condition of the court allowing the juvenile to return home, require the parent, guardian, or other custodian to:
>
> (1) Eliminate the specified conditions constituting or contributing to the problems which led to juvenile court action;
>
> . . . .
>
> (3) Give adequate supervision to the juvenile in the home;
>
> . . . .
>
> (6) Resume proper responsibility for the care and supervision of the juvenile.
>
> The terms and conditions imposed in any particular case shall relate to the acts or omissions of the juvenile, the parent, or other person responsible for the care of the juvenile which constituted or contributed to the problems which led to the juvenile court action in such case.

[9,10] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *In re Interest of G.B., M.B., and T.B., supra.* Section 43-288 gives the juvenile court explicit statutory authority to require the custodian of the juveniles to eliminate the specified conditions contributing to the problems which led to juvenile court action and to require the custodian to give adequate supervision to the juveniles in the home. In this case, the Department is the custodian, and therefore, the juvenile court may require it to give adequate supervision.

The situation in the case at hand is different from *In re Interest of David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997), where this court held that a juvenile court does not have the

authority to order the Office of Juvenile Services in its supervision of a juvenile. The statutes concerning juveniles committed to the Office of Juvenile Services have provisions different from those statutes providing for the granting of custody of juveniles to the Department.

The Department does not really argue that the court's order is not intended to provide adequate supervision, or that it is unreasonable or an abuse of discretion under the evidence and circumstances of this case. In fact, the case plan indicates the Department's case manager made unannounced visits without the benefit of such an order. We therefore conclude that the statutes authorized the juvenile court to issue the order complained of and that it was justified. We affirm the juvenile court's order.

AFFIRMED.

JAMES D. DARNELL, APPELLANT, V. KN ENERGY, INC., APPELLEE.
586 N.W.2d 484

Filed November 24, 1998. No. A-98-178.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
2. ____: ____. 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.
3. **Workers' Compensation.** A trip which has both business and pleasure purposes is within the course and scope of employment for workers' compensation law purposes when the work of the employee either creates the necessity for travel or is a concurrent cause of the trip.
4. ____. Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty or to a point where in the performance of duty he is required to be.
5. **Rules of the Supreme Court: Records: Appeal and Error.** A document entitled "bill of exceptions," but which is not prepared in accordance with the rules of the Nebraska Supreme Court, is not such a bill, and the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case being treated as if no bill had been filed.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

Jay L. Welch, of Welch & Wulff, for appellee.

HANNON and MUES, Judges, and NORTON, District Judge, Retired.

MUES, Judge.

INTRODUCTION

James D. Darnell appeals the decision of the Workers' Compensation Court finding that his injuries did not arise during the course and scope of his employment and dismissing his claim for workers' compensation.

BACKGROUND

James D. Darnell began working for KN Energy, Inc., in 1962. On the date in question, December 19, 1994, Darnell was the district manager of KN Energy's Hastings office. At about 3 p.m. on December 19, Darnell left the office to make a business deposit at City National Bank (CNB). CNB is located approximately three blocks directly west of the office.

After leaving CNB, Darnell traveled north approximately five blocks, intending to make a personal deposit at his bank, Norwest. Norwest is located on the west side of the street, and Darnell had to stop and wait for traffic before making his left-hand turn. While waiting for traffic, Darnell's vehicle, a company-owned car, was struck from behind, and he was injured.

Darnell filed a petition in the Workers' Compensation Court on December 17, 1996, alleging that his injuries occurred during the course and scope of his employment, and seeking to recover benefits under the Nebraska Workers' Compensation Act. See Neb. Rev. Stat. § 48-122 (Reissue 1993).

A hearing was held July 10, 1997, and on September 23, the trial court issued an order dismissing Darnell's petition. In its order, the court determined that Darnell's trip involved both a personal and business purpose. The court further determined that because the accident occurred during a deviation from the

business purpose, Darnell was not acting within the course and scope of his employment. The Workers' Compensation Court review panel affirmed the dismissal. Darnell timely appeals.

ASSIGNMENT OF ERROR

Darnell's sole assignment of error is that the trial court erred in failing to find that the accident occurred within the course and scope of his employment.

STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998).

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).

[2] 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. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998).

DISCUSSION

Dual Purpose Doctrine.

[3] The dual purpose doctrine was adopted by the Nebraska Supreme Court in *Jacobs v. Consolidated Tel. Co.*, 237 Neb. 772, 775, 467 N.W.2d 864, 866-67 (1991) (quoting *Matter of Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929)), where the court explained the doctrine, stating:

> [I]f an employee is injured in an accident while on a trip which serves both a business and a personal purpose, the injuries are compensable as arising out of the course and

> scope of employment provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey. . . .
>
> . . . "If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own . . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose though the business errand was undone, the travel is then personal, and personal the risk."

In the present case, the trial judge determined that "the overall trip in which [Darnell] was involved served both a business and personal purpose since the service to be performed on the employer['s] behalf occasioned the trip in the first place." The record supports this finding, and the parties do not dispute this finding. However, the determination that Darnell's accident occurred during a business trip does not end our inquiry. Once a trip is labeled as a business trip, it must be determined whether the accident in question occurred during a deviation from the business purpose. *Kraus v. Jones Automotive, Inc.*, 3 Neb. App. 577, 529 N.W.2d 108 (1995) (citing 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 19.10 (1994)).

Deviation From Business Trip.

> [4] " 'Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty, or to a point where in the performance of duty he is required to be. * * * Where an employee has returned to the point of deviation and engages in the duties of his employment, or engages in acts reasonably incidental to his employment, which, but for the deviation, would have been performed, although at an earlier time, he is within his employment and the coverage of the Workmen's Compensation Act.' "

Kraus v. Jones Automotive, Inc., 3 Neb. App. at 585, 529 N.W.2d at 114 (quoting *Murphy v. Hi-Way G.M.C. Sales & Service Corp.*, 178 Neb. 397, 133 N.W.2d 595 (1965)). See, also, *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990); *Gibb v. Highway G.M.C. Sales & Service Corp.*, 178 Neb. 127, 132 N.W.2d 297 (1964); *McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N.W. 517 (1935).

In his treatise on workers' compensation, Professor Arthur Larson stated: "When an employee deviates from the business route by taking a side-trip that is clearly identifiable as such, the employee is unquestionably beyond the course of employment while going away from the business route and toward the personal objective . . . ." 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 19.31 at 4-107 (1998).

Darnell concedes that he deviated from the business route but argues that it was a "minor" deviation and that thus the court erred in determining that he was outside the course and scope of his employment at the time of the accident. In support of this argument, Darnell directs our attention to testimony that he did not always take the most direct route back to the office. At trial, he was asked what route he would have taken back to the office if he had not gone to Norwest, his bank. He testified, "The bank, City Bank, to Burlington, from Burlington to Fourth, and, you know, sometimes to Seventh . . . ." The office is located on Third Street, a westbound one-way street, and is approximately three blocks east of Burlington Avenue, a main street running north and south. Fourth Street is an eastbound one-way street. CNB is located at Third Street and Burlington. Norwest is located on Burlington at approximately Eighth Street. This is the point where the accident occurred.

In its opinion, the trial court found that Darnell's testimony suggesting that he sometimes chose a route back to the office that took him close to the location of the accident in question was not credible. Accordingly, the trial court concluded that Darnell was outside the course and scope of his employment at the time of the accident because he had deviated from his business purpose and was on a clearly identifiable side trip. The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be

given their testimony. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Toombs v. Driver Mgmt. Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). The record supports the trial court's findings. Darnell's only purpose in proceeding to Norwest was to deposit a check in his personal account. The route Darnell had to take in order to make his personal deposit was approximately four blocks north of the most direct route to the office.

Darnell also relies heavily on *Jacobs v. Consolidated Tel. Co.*, 237 Neb. 772, 467 N.W.2d 864 (1991). There, the plaintiff, an employee of Consolidated Telephone Company, traveled from his home in Mullen, Nebraska, to conduct business in Lincoln, Nebraska. The plaintiff's route took him through Grand Island. After concluding his business in Lincoln, the plaintiff began his journey home. While passing through Grand Island, the plaintiff was injured in an automobile accident.

The plaintiff filed a claim for workers' compensation benefits. At the one-judge hearing, evidence was presented that the plaintiff had intended to stop in Grand Island to look at trucks for his employer, as well as to run a personal errand. The Workers' Compensation Court found in favor of the plaintiff, and the defendant appealed. On appeal, the Nebraska Supreme Court held: "While plaintiff did plan to stop in Grand Island with the intention of looking at trucks for his employer, as well as to run a personal errand, this cannot be characterized as a wide departure from the route whereon his employer's business was to be conducted." *Jacobs v. Consolidated Tel. Co.*, 237 Neb. at 778, 467 N.W.2d at 868.

Darnell relies heavily upon the Supreme Court's use of the phrase "cannot be characterized as a wide departure." We have carefully reviewed the entire opinion, and there is nothing in the Supreme Court's analysis that either expressly or implicitly overrules the cases discussed above which held that once an employee deviates from the business route, the employee is outside the course and scope of his or her employment.

For all of the foregoing reasons, we find that the trial judge's finding that Darnell was not acting within the course and scope of his employment when he deviated from the business trip to conduct personal business is not clearly wrong.

Practice Caution.

[5] The bill of exceptions in this case contained 41 exhibits. The exhibits, consisting of numerous pages of looseleaf paper, were tossed unbound into two envelopes and marked "Exhibit Volume II" and "Exhibit Volume III." Our rules require that exhibits be bound and placed in the bill of exceptions in the manner specified. See, Neb. Ct. R. of Prac. 5B(6)c (rev. 1996); *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991). Because the analysis required to resolve this present appeal did not require a detailed study of the exhibit portion of the bill of exceptions, it is unnecessary that we at this time take any action for the failure to have submitted a bill which complies with our rules. See *id.* However, we caution that a document entitled "bill of exceptions," but which is not prepared in accordance with our rules, is not such a bill and that the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case being treated as if no bill had been filed. See *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).

CONCLUSION

The evidence supports the trial court's findings that Darnell was on a personal deviation at the time the accident occurred. Accordingly, the decision of the trial court dismissing Darnell's petition for workers' compensation benefits is affirmed.

AFFIRMED.

DOUGLAS F. BAUGHMAN, SR., APPELLEE, V. UNITED-A.G. COOPERATIVE AND UNITED EMPLOYERS INSURANCE COMPANY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT.

586 N.W.2d 836

Filed November 24, 1998. No. A-98-259.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Second Injury Fund: Records.** The written records requirement of the Second Injury Fund statute need not be satisfied in the case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability.
3. ____: ____: ____. The actual knowledge exception of the written records requirement of the Second Injury Fund statute for the loss of a limb has never been extended to back injuries.
4. **Workers' Compensation: Evidence.** The rule of liberal construction of the Nebraska Workers' Compensation Act applies to the law but not to the evidence offered in support of a claim for benefits under the act.
5. **Workers' Compensation: Second Injury Fund: Liability.** The purpose of the Second Injury Fund is to assure employers that if they hire or retain individuals with preexisting disabilities, those employers will be liable only for those injuries which would have resulted had there been no preexisting disability.
6. **Workers' Compensation: Second Injury Fund.** The Second Injury Fund statute merely provides a means to shift and apportion benefits between the employer and the fund, which inures to the benefit of the employer.
7. ____: ____. The purpose of the Second Injury Fund statute is to encourage employers to hire those with permanent preexisting disabilities.
8. **Workers' Compensation: Second Injury Fund: Records.** Written records that were in the workers' compensation insurer's possession cannot be "imputed" to the employer for purposes of enabling it to meet the requirement of Neb. Rev. Stat. § 48-128(1)(b) (Supp. 1997).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Martin W. Swanson for appellant.

Glenn A. Pettis, Jr., for appellee Baughman.

Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees United-A.G. Cooperative and United Employers Insurance Company.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

In this workers' compensation case, Douglas F. Baughman, Sr., was awarded benefits from his employer, United-A.G. Cooperative (United-A.G.), and its workers' compensation insurer, United Employers Insurance Company. The State of Nebraska, Second Injury Fund (the Fund), was also ordered to pay a portion of the benefits due Baughman pursuant to Neb. Rev. Stat. § 48-128 (Supp. 1997). We address the "written records" requirement of the Second Injury Fund statute, as well as whether an insurer's knowledge about a worker's preexisting disability, by appropriate written records, inures to the benefit of the employer in order to satisfy the written records requirement.

FACTUAL BACKGROUND

On October 30, 1993, Baughman injured himself while performing his duties as a truckdriver for United-A.G. Baughman was injured when a milk dolly, carrying approximately 80 gallons of milk, smashed into the dolly he was pulling. In an attempt to stop the dolly, Baughman injured his back and left leg. X rays showed severe degenerative changes at multiple levels of Baughman's lumbar spine with spondylolisthesis. Baughman was examined by Dr. Douglas J. Long on November 4, 1993.

On November 12, 1993, Dr. Long performed surgery on Baughman consisting of a microlumbar diskectomy at L3-4. On February 9, 1994, after physical therapy, Dr. Long released Baughman to work with a restriction of no lifting greater than 100 pounds for 4 weeks and then no restrictions. Dr. Long concluded that Baughman would have a permanent impairment and anticipated maximum medical improvement in May.

Baughman returned to work on April 11, 1994. In a letter to United-A.G.'s workers' compensation insurer, dated April 19,

1994, Dr. Long rated Baughman's permanent impairment at 10 percent of the whole person. In August, Baughman had a recurrence of pain in his lower back and legs which led to a second surgery performed by Dr. Long on September 26. The second surgery was an L3 laminectomy, an L4 laminectomy, an L4 foraminotomy, and an L3-4 diskectomy on the left. In a letter to attorney Howard Kaiman, Dr. Long stated that "both surgical interventions are related to the original work related injury as described by Mr. Baughman to me."

On February 28, 1995, Dr. Long released Baughman to work on March 13 at "full capacity, without restrictions; see below." The "see below" was a restriction which provided for "little or no roller stops for 6 months; power jack when needed." It was Dr. Long's opinion that the second operation had created a 2-percent increase in Baughman's previous 10-percent whole body impairment rating.

On April 11, 1995, Baughman sustained another, separate, work-related injury to his lower back as a result of delivering and unloading cases of hams. On June 1, Baughman underwent a third surgery and approximately 3½ months later began physical therapy. However, Baughman continued to be "disabled by his pain." On May 24, 1996, Dr. Long advised Baughman that further surgery would not be of significant benefit. Dr. Long noted, "I do feel that Mr. Baughman is now completely disabled and is not able to return to his work or in any other capacity and would deem him 100 percent disabled at this time."

On January 16, 1997, Dr. Long answered a questionnaire regarding Baughman's injuries, medical treatment, and disability. Dr. Long stated that Baughman's injuries and disability were caused by a work-related accident on October 30, 1993, a recurrence of his first injury in June 1994, and a work-related injury on April 11, 1995. Dr. Long was of the opinion that Baughman suffered a 10-percent permanent partial disability to the whole body as a result of the first injury and surgery, a 2-percent increase in his whole body impairment as a result of the recurrence in June 1994 and surgery on September 26, and a 10-percent increase in whole body impairment as a result of the second injury of April 11, 1995, and surgery on June 1. Dr.

Long concluded that Baughman was permanently and totally disabled and that psychiatric care would be appropriate.

On February 10, 1997, Baughman was evaluated by Dr. Eugene C. Oliveto for depression and emotional problems. Dr. Oliveto stated that Baughman's depression stemmed from his work-related injuries, that Baughman had no preexisting mental or emotional impairment, and that Baughman was totally disabled by his psychiatric impairments alone. About May 22, Baughman underwent a vocational rehabilitation evaluation performed by Alfred J. Marchisio, Jr., a certified professional counselor. It was Marchisio's opinion that Baughman was presently and had been totally unemployable since the accident on April 11, 1995; that prospects for future employment were "virtually nonexistent"; and that Baughman had suffered a 55- to 60-percent loss of earning capacity prior to the last injury on April 11. In a letter to United-A.G.'s attorney, Marchisio stated: "It is my opinion that the percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, i.e., 4/11/95, considered alone and of itself."

PROCEDURAL BACKGROUND

Baughman filed his petition in the Workers' Compensation Court, and thereafter, United-A.G. filed a third-party petition impleading the Fund. On October 1, 1997, the Workers' Compensation Court trial judge found that Baughman was permanently and totally disabled as a combined result of the two injuries. The trial court determined that $86.25 of Baughman's weekly benefit of $178.57 for permanent and total disability would be paid by the Fund pursuant to § 48-128. The court also specifically found that United-A.G. had met the written records requirement of § 48-128(2).

The Fund sought further review, and on February 12, 1998, the three-judge review panel affirmed the trial judge's order. The review panel also ordered the Fund to pay Baughman $1,500 for attorney fees incurred as a result of the application for review. The Fund timely appealed to this court.

ASSIGNMENTS OF ERROR

The Fund asserts that the compensation court erred as a matter of law in (1) finding that all requirements of § 48-128 had been met; (2) finding that the Fund was liable for payments to Baughman; (3) failing to reimburse the Fund for certain expenses; (4) awarding compensation to Baughman from the Fund in excess of that to which he would otherwise be entitled from United-A.G.; (5) finding that United-A.G. had sufficient written records to satisfy § 48-128; and (6) not finding that the last injury, standing alone and of itself, was so disabling as to make Baughman permanently and totally disabled.

STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (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. *Bryson v. Vickers, Inc.*, 7 Neb. App. 595, 584 N.W.2d 44 (1998); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

ANALYSIS

We note at the outset that although the Fund assigns six errors on appeal, it makes three arguments in its brief: (1) United-A.G. did not have sufficient written records to satisfy § 48-128, (2) the last injury standing alone and by itself was disabling, and (3) Baughman's "injury" was not a hindrance or obstacle to his obtaining employment. Errors assigned but not argued will not be addressed. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Therefore, we review the workers' compensation award based on the three grounds argued in the Fund's brief as set forth above.

Written Records Requirement.

Section 48-128, the Second Injury Fund statute, provides in pertinent part:

> (1) For injuries occurring before December 1, 1997:
>
> (a) If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of . . . the Second Injury Fund . . . .

This section also provides that before liability for the "additional disability" may be imposed on the Fund, "the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability . . . at the time the employee was retained in employment after the employer required such knowledge." § 48-128(1)(b). Thus, to impose liability on the Fund under § 48-128(1)(b), an employer must prove by "written records" that it had actual knowledge of an employee's preexisting permanent partial disability.

In finding that United-A.G. had met the written records requirement of § 48-128, the workers' compensation trial judge reasoned:

> Exhibit 26 shows that United was aware of both surgeries resulting from the accident and injury of October 30, 1993 and received progress reports and statements of disability, including restrictions, from Dr. Long. In addition, United produced the testimony of John Treantos, the Director of Insurance for United at the time of said accident and injury

> of October 30, 1993. Mr. Treantos testified about his many discussions with Jan Reese, the adjuster for United Employers Insurance Company, regarding the plaintiff's surgeries and permanent disability ratings previously described.

The Fund contends the trial court erred as a matter of law in finding that "those documents and communications constituted written records." Brief for appellant at 9. Specifically, the Fund argues (1) that the trial court erred in relying upon oral statements as a substitute for written records and (2) that exhibit 26 failed to demonstrate the "permanency" of Baughman's disability after the first two surgeries. The Fund asserts: "Simply being aware of a surgery or of an injury cannot be treated the same under the law as [knowing] the extent and permanent nature of the injury." Brief for appellant at 11.

We hold that the trial judge was wrong as a matter of law in relying upon the oral communications between John Treantos, director of insurance for United-A.G., and Jan Reese, claims adjuster for United-A.G.'s workers' compensation insurer, as evidence that United-A.G. had satisfied the statutory requirement that it "establish by *written records* that the employer had knowledge of the preexisting . . . disability." (Emphasis supplied.) § 48-128(1)(b). To hold that conversations between a representative of the employer's workers' compensation insurer and the employer equate to a *written record* does substantial and unacceptable violence to the term "written records." Irrespective of the information imparted, conversations are the functional opposite of a written record.

[2,3] There is authority for the notion that the written records requirement need not be satisfied in the case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability. See *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981), supplemented by *Akins v. Happy Hour, Inc.*, 209 Neb. 748, 311 N.W.2d 518 (1981) (on issue of attorney fees) (where hired employee's preexisting injury was loss of arm at elbow). The actual knowledge exception for the loss of a limb from *Akins* has never been extended to back injuries. The obvious distinction is that uniform, consistent, and reliable

inferences about the existence of permanent disability cannot be drawn merely from the knowledge that the worker had previously injured his or her back. Thus, while there is evidence that United-A.G. had prior knowledge of Baughman's injuries and treatment, prior to keeping him on at United-A.G. as an employee, the well-known exception to the written records requirement from *Akins* does not apply. However, the trial court's reliance on exhibit 26 must also be examined.

This court recently addressed the written records requirement in *Bryson v. Vickers, Inc.*, 7 Neb. App. 595, 584 N.W.2d 44 (1998). Bryson was awarded benefits from his employer, Vickers, and its workers' compensation insurer. The court ordered the Fund to pay benefits to Bryson pursuant to § 48-128. The Fund argued that Vickers' written records of Bryson's preexisting condition did not satisfy the written records requirement contained in § 48-128.

Among the written records in evidence in *Bryson* were two letters from the physician who performed the surgery on Bryson after his first injury, which occurred on April 10, 1991. The first letter, dated January 9, 1992, stated that Bryson had a 10-percent permanent impairment to his body as a whole. The second letter, dated June 25, 1993, stated that Bryson " 'is functioning at a light physical demand level. I think he can be a valuable employee *if kept at this level.*' (Emphasis supplied.)" *Bryson*, 7 Neb. App. at 601, 584 N.W.2d at 50. Also introduced at trial was a copy of a work hardening evaluation stating that Bryson was " 'currently functioning at a LIGHT physical demand level' and that 'there does not appear to be any reason he should be unable to perform at somewhat higher levels if he were to increase his strength and endurance through a regular exercise program.' " *Id.* Also, on February 2, 1994, Bryson submitted a claim for short-term disability, in which he stated that he had " 'on going [sic] pain from the back surgery I had on July of 1992 [sic] and continuing to get worst [sic].' " *Id.* The Fund conceded on appeal that prior to Bryson's second injury, Vickers had been provided with written records showing that Bryson had a preexisting condition.

The Fund argued that the aforementioned documents did not satisfy the statute because they did not inform Vickers of the

precise extent of Bryson's preexisting condition. After noting that the Nebraska Workers' Compensation Act is to be liberally construed, we held that the records provided to Vickers put it on sufficient notice that Bryson had an abnormal, permanent condition that was likely to be a hindrance in his employment. We quoted 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 59.33(c) at 10-501 through 10-509 (1998), which states:

> It is clear that the employer does not have to know exactly what the employee's prior condition is in medical terms. . . .
>
> . . . .
>
> Since the second injury principle applies only to preexisting permanent conditions, the employer would have to know, not just that the employee had some abnormal condition, but that the condition was *permanent* in character.

(Emphasis supplied.)

In the instant case, Treantos, United-A.G.'s director of insurance, testified that exhibit 26 was a personnel file which combined Baughman's attendance records and workers' compensation records. With respect to this exhibit, Treantos was asked, "Can you show me, sir, on any of those documents, where it indicates permanent impairment ratings?" Treantos answered, "It doesn't indicate permanent ratings on these documents." Further testimony established that exhibit 26 did not state permanent impairment ratings.

No part of exhibit 26 demonstrates that Baughman's condition was one which *was permanent in character*. Page one of exhibit 26 is an attendance record which reveals that Baughman received *temporary* total disability payments from United-A.G.'s workers' compensation insurer. Pages two through four are progress notes from the Methodist WorkAbility Center regarding Baughman's physical therapy. There is no indication in these notes that Baughman's injuries are permanent. Page five is a "Statement of Disability" signed by Dr. Long which releases Baughman to work "without restrictions, full capacity," but assigns no permanency rating. Page six of exhibit 26 is an "Employment Confirmation Letter" which states that Baughman is allowed to work without restrictions. Page seven

is another "Statement of Disability" from Dr. Long which notes that Baughman will be released to work at "full capacity, without restrictions, see below." "See below" references the notation "little or no roller stops for 6 months; power jack when needed." Page eight, another employment confirmation letter, merely repeats the information found on page seven. The balance of exhibit 26 is titled "Job Analysis" and has no indication that Baughman's injuries are permanent. United-A.G. does not contend that there is any other document in evidence, besides exhibit 26, from which the written records requirement could be satisfied. After our examination of the record, we also conclude that the only possible evidence of United-A.G.'s actual knowledge of Baughman's disability, *as established by proper written records*, must come from exhibit 26.

[4] While exhibit 26, when viewed most favorably to Baughman (and United-A.G.), allows the conclusion that Baughman had two prior back injuries of some consequence which required treatment and caused him to miss time from work, the exhibit is devoid of any opinion by anyone that he was left with a permanent disability or impairment. We recognize that those with experience in this area, i.e., compensation court judges, claims managers, and employment managers, may well feel that some degree of permanent disability inevitably results when a worker sustains a back injury requiring surgical intervention. Such a conclusion is somewhere on a continuum between outright speculation and reasonable inference, depending on the quality of the information in the employee's record, for example, a precise diagnosis and the exact nature of the surgery, none of which are found in exhibit 26. But, such speculation or inference is not actual knowledge by the employer of a permanent disability, established by written records, which is what the plain language of the statute requires. To reach the opposite conclusion would require a very liberal interpretation of the evidence. However, the rule of liberal construction of the Nebraska Workers' Compensation Act applies to the law but not to the evidence offered in support of a claim for benefits under the act. *Smith v. Ruan Transport, Inc.*, 190 Neb. 509, 209 N.W.2d 146 (1973). Moreover, we are unwilling to extend the *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981),

exception to back injuries. Knowledge of a prior back injury does not inevitably mean that the employer has actual knowledge of a permanent disability as is true when the worker applies for work with an amputated hand, arm, or leg. Because exhibit 26 fails to "establish by written records that the employer had knowledge of the preexisting *permanent* partial disability" (emphasis supplied), § 48-128(1)(b), it was clearly wrong for the Workers' Compensation Court to find that the written records requirement had been satisfied, unless the information in the possession of the insurer can be imputed to the employer.

Baughman argues that "the employer, individually and through its insurer, did have precise knowledge of the plaintiff's pre-existing condition and this is established in the medical records received into evidence in Exhibits 8 and 9 submitted by the plaintiff." Brief for appellee Baughman at 14. However, under the controlling statute, the issue is not whether somebody at United-A.G. had actual knowledge of Baughman's preexisting permanent condition, but whether United-A.G. had written records establishing this knowledge.

Exhibits 8 and 9 were in the possession of United-A.G.'s workers' compensation insurer, and they say that Dr. Long was of the opinion that Baughman had a permanent impairment rating of 10 percent of the whole body after his first surgery and an additional 2-percent permanent impairment after his second surgery. However, to the extent that United-A.G. had knowledge of these permanency ratings from exhibits 8 and 9, it came only by oral communications between Reese, claims adjuster for the insurer, and Treantos, United-A.G.'s insurance director. During the direct examination of Treantos, he testified:

> A. Well, my recollection as to actually getting a physical copy of the report [on Baughman's disability rating], I'm not real clear on that. What I am clear on is that we discussed the case and we discussed the rating and we discussed the report.
>
> Q. And that was at the time the rating was issued?
>
> A. Right. One of the things that happened right around this time was the issue of medical records and privacy rules and this kind of thing, so we used to have a lot of data on our employees and their medical conditions. But

as time went on and the rules changed, we left a lot of data — really, we let it stay at the insurance carrier's offices and in their files.

Q. And having had those discussions with Ms. Reese, did you feel that you needed a hard copy of that report?

A. No.

Baughman appears to be arguing that because the workers' compensation insurer could establish its knowledge by written records that Baughman had a permanent preexisting injury, such knowledge should be imputed to the employer, United-A.G. Baughman's end result would be that United-A.G. would then be found to have established that it had knowledge of Baughman's preexisting permanent disability via written records, albeit written records in the possession of United-A.G.'s insurance carrier.

The Supreme Court of Alaska addressed a similar argument in *Alaska Intern. v. Second Injury Fund*, 755 P.2d 1090, 1091 n.1 (Alaska 1988), which involved the interpretation of Alaska's Second Injury Fund statute, "AS 23.30.205(c)," which provided:

> "In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge."

(Emphasis omitted.) The pertinent portions of the Alaska statute are identical to our § 48-128.

The facts in *Alaska Intern.* were that on February 9, 1983, Oscar Kinter injured his back while working for Alaska International. The Alaska Workers' Compensation Board (Board) ruled that Kinter was permanently totally disabled as a result of his back condition and that Alaska International had been paying him workers' compensation disability payments since the February 9 injury. Prior to this injury, Kinter had a history of back trouble. His first work injury occurred in 1975, with repeated injuries in 1976 and 1978. He had undergone two back surgeries: one in 1975 and one in 1979. Following the second surgery, Kinter's doctor estimated that he had a 40-percent partial impairment.

Kinter had been dispatched by his union to a welding job with Alaska International. The union had a contract with Alaska International whereby the union agreed to furnish all the qualified workers which Alaska International might require, and Alaska International agreed to exclusively use the services of the union's hiring hall. The union maintained certain records of its members. On the date it dispatched Kinter to the welding job, the union had in its possession a memo, dated June 19, 1980, stating that Kinter had fallen out of a truck while unloading iron and had injured his back. This document was, at all relevant times, in the union's possession.

Following Kinter's February 9 injury, Alaska International filed a petition for reimbursement from the Second Injury Fund. The fund administrator denied relief, and Alaska International petitioned the Board, which also denied relief based upon the written records requirement. The Board strictly construed AS 23.30.205(c) and ruled that the union records failed to show " 'knowledge of a qualifying permanent physical impairment.' " *Alaska Intern.*, 755 P.2d at 1092.

The issue on appeal was to be whether Alaska International had established its knowledge of Kinter's preexisting impairment by written records. But, before addressing this issue, the Supreme Court of Alaska stated: "However, the preliminary question is whether the union record can be considered at all. That record was in the union's, not Alaska International's, possession, and Alaska International does not claim to have ever seen the record before Kinter's injury." *Id.* It was argued that the union's *knowledge* of Kinter's qualifying disability, as evidenced by its written records, should be imputed to Alaska International for purposes of determining whether the employer had met the statutory requirements.

The Supreme Court of Alaska, in determining that the union records should not be imputed to Alaska International, stated:

> A union's primary purpose is to organize and secure for its members the most favorable conditions with respect to wages, hours, and other employment concerns. . . . "Generally, a union represents only its members and not their employer. . . ." A labor union's purpose is to further the interests of employees, not the interests of employers.

Alaska Intern. v. Second Injury Fund, 755 P.2d 1090, 1093 (Alaska 1988).

[5] The court recognized that since a union's purpose is to obtain jobs for its members, it does not have the disincentive to hiring impaired workers that the Second Injury Fund statute tries to counteract. The Alaska court concluded: "Thus, if the union's knowledge, as evidenced by its written records, is attributed to the employer, the [written records] statute's purposes will be frustrated." *Id.* We agree. The purpose of the Fund is to assure employers that if they hire or retain individuals with preexisting disabilities, those employers will be liable only for those injuries which would have resulted had there been no preexisting disability. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987).

[6,7] The purpose of the written records requirement is quite clearly to put in place a strictly limited method of proving a predicate fact before liability for benefits may be shifted to the Fund. We remember that the Second Injury Fund statute merely provides a means to shift and apportion benefits between the employer and the Fund, which inures to the benefit of the employer. See *Eichorn v. Eichorn Trucking*, 3 Neb. App. 795, 532 N.W.2d 345 (1995). The purpose of the Second Injury Fund statute is to encourage employers to hire those with permanent preexisting disabilities. See *Lozier Corp. v. State*, 1 Neb. App. 567, 501 N.W.2d 313 (1993). Therefore, an insurer is like the union in *Alaska Intern., supra*—neither entity is a "hirer" of workers (except its own employees) and thus what it knows about an employer's potential employee and his or her previous back injuries is not part of the equation as to whether the worker is hired or retained. Neither the union nor the insurance carrier makes that decision. The statute gives employers an incentive to hire the permanently disabled, but restricts the benefits from that action to those employers who do so with knowledge that they are doing a socially desirable thing. In other words, the hiring of the permanently disabled is to be a very purposeful thing before the employer gets the benefit of shifting liability. The purposefulness is insured, at least in theory, by the written records requirement. To impute knowledge where it did not actually exist would frustrate the policy that the benefit of the

Fund (the shifting of liability for benefits for a subsequent injury) goes only to those employers who consciously hire those they know to be suffering from prior permanent disabilities. Allowing the imputation of knowledge would completely frustrate that policy.

However, a separate issue is presented in that the statute requires that the employer can only prove that it had the knowledge by written records. The instant case may well show that limiting proof of knowledge to written records is arbitrary. Clearly, United-A.G. was aware of Baughman's previous injuries and extensive time off for surgery, yet they did what the Legislature has determined they should do—retained in their employment a person with significant previous injury, which was likely to produce a permanent disability, in their employment. Therefore, by virtually any measure of what is right and fair, United-A.G. should receive the benefit of the Second Injury Fund statute. But, the Legislature has mandated that the employer's knowledge be proved in a certain way, and we are not free to ignore that mandate for the sake of accomplishing what may well be a fair result. Whether the benefits of the Fund should be denied employers who do the right thing by employing the permanently disabled, but who do not secure and keep the right pieces of paper in their employee files, is a matter of public policy which is outside our realm.

CONCLUSION

[8] Written records that were in the workers' compensation insurer's possession cannot be "imputed" to United-A.G. for purposes of enabling it to meet the requirement of § 48-128(1)(b). Further, exhibit 26 is insufficient to prove that United-A.G. had knowledge of the permanency of Baughman's condition, a requirement under the same section. The trial judge was clearly wrong in finding otherwise. Thus, we reverse the decision of the review panel affirming the Workers' Compensation Court's decision to hold the Fund liable and direct that the award be modified to make United-A.G. solely liable for Baughman's benefits.

REVERSED AND REMANDED WITH DIRECTIONS.

EASTROADS, L.L.C., AND JACQUELINE A. SULLIVAN, TRUSTEE OF THE JACQUELINE A. SULLIVAN LIVING TRUST, DATED APRIL 29, 1994, APPELLANTS, V. OMAHA ZONING BOARD OF APPEALS ET AL., APPELLEES.

587 N.W.2d 413

Filed December 8, 1998. No. A-97-384.

1. **Summary Judgment: Declaratory Judgments: Affidavits: Claims.** A party seeking to recover in district court upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the filing of an answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
2. **Actions: Summary Judgment: Contracts.** Summary judgment is available only in the kinds of actions provided for by statute or court rule, and within limitations, such provisions usually extend to actions at law or equity and to causes based on contract.
3. **Summary Judgment: Appeal and Error.** Summary judgment is inappropriate in appeal proceedings to a district court.
4. **Zoning: Appeal and Error.** In reviewing an appeal from a district court under Neb. Rev. Stat. § 14-414 (Reissue 1997), a higher appellate court is to decide, in reviewing a decision of a zoning board of appeals, if the district court abused its discretion or made an error at law, and where competent evidence supports the district court's factual findings, a higher appellate court will not substitute its factual findings for those of the district court in the course of that court's deciding whether the decision of such zoning board of appeals was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
5. **Summary Judgment: Appeal and Error.** In reviewing a decision of a district court when it grants a summary judgment, a higher appellate court is to view the evidence in a light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences that are deducible from the evidence to see if the district court correctly decided that there is no material issue of fact and that the appellee is entitled to a judgment as a matter of law.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded.

Michael M. O'Brien, of Michael M. O'Brien, P.C., for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

HANNON, Judge.

TCLA, Inc., owns a 13.4-acre tract of land situated on 13th Street and Interstate 80 in Omaha, Nebraska. Eastroads, L.L.C., and Jacqueline A. Sullivan as trustee (for simplicity, we shall call these parties Eastroads) own five noncontiguous lots which are situated adjacent to, and partially surrounding, the property owned by TCLA. Except for the difference in ownership, Eastroads' and TCLA's properties would be considered one tract. However, Eastroads is zoned "R5-Urban Family Residential District," and as of May 1996, TCLA is zoned "CC-Community Commercial District" (CC Zone). The Omaha Municipal Code in evidence states that the purpose of a CC Zone is for commercial facilities to serve the needs of several neighborhoods. For purposes of this appeal, the significant requirement of property in a CC Zone is that the owner must maintain a 30-foot bufferyard from adjacent property zoned R5. TCLA applied for and received a waiver of that requirement with the Omaha Zoning Board of Appeals (Zoning Board). Eastroads appealed the decision to the district court, which dismissed the appeal upon summary judgment. We reverse, and remand, because summary judgment is inappropriate when a district court is acting as an appellate court.

The basis of the waiver is that the bufferyard around Eastroads' four noncontiguous lots presents a practical difficulty for development of the TCLA property and an unnecessary hardship. In support thereof, TCLA alleges that Eastroads' properties were vacant and highly unlikely to be developed in accordance with their existing residential zoning and, therefore, the waiver would not impact these properties and that TCLA's property is the site of a former rubble landfill, which makes normal development expensive. TCLA alleges that by utilizing the bufferyard property, the rubble landfill would not prevent development. The application for waiver of the bufferyard requirements came on for hearing before the Zoning Board on April 18, 1996, and a motion carried approving the request for a variance to the bufferyard requirements.

Pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414 (Reissue 1997), Eastroads filed a petition on appeal in the district court, alleging the action of the Zoning Board's decision was unsup-

ported by the evidence; was inequitable and contrary to law; was based in whole or in part on incompetent irrelevant evidence beyond the powers of the Zoning Board; and was arbitrary, unreasonable, clearly wrong, capricious, and illegal. The petition goes on to allege that the Zoning Board's hearing was held on April 18, 1996; that it was a rehearing; and that at the previous hearing on April 20, 1995, TCLA presented certain information to the Zoning Board. Eastroads goes on to allege that specific parts of that information were misleading for various and sundry reasons. Eastroads' allegations proceeded into considerable detail, such as the boundary of the "'Landfill Area'" was not shown correctly, the drawing of the "Buffer Yard Area's" tract was misleading, the soil test statement did not tell the full situation, and the buried rubble did not have the effect claimed by TCLA. Eastroads also alleged TCLA falsely represented to the Zoning Board statements about soil conditions and whether the elimination of the bufferyard would devalue Eastroads' lots and create runoff and other damages. Eastroads requested a reversal of the decision of the Zoning Board. The Zoning Board filed an answer, wherein it admitted certain formal allegations and admitted the actions of the Zoning Board, but denied the other allegations of the petition, and alleged that the petition failed to join TCLA as a party.

On January 30, 1997, the Zoning Board filed a motion for summary judgment, to which it attached an affidavit and the various and numerous documents and records apparently generated in the proceeding before the Zoning Board. It prayed for summary judgment in its favor, ordering the dismissal of Eastroads' petition with prejudice. The motion came on for hearing on February 12. The Zoning Board introduced exhibits 1 through 12, which were not objected to. The judge gave Eastroads additional time to introduce additional evidence. At a hearing held on March 5, Eastroads presented exhibits 13 through 22. Those exhibits were objected to because they were not served upon the Zoning Board's attorney prior to the day of hearing. One of those exhibits purports to be the testimony of an expert previously not identified by Eastroads in answers to interrogatories. Some of these exhibits were duplicates of those already offered by the Zoning Board.

The court reserved ruling on the objections. On March 7, 1997, the judge entered an order sustaining the Zoning Board's exceptions to exhibit 13, which consisted of an affidavit containing much argument and legal authority, and some statements which one of the appellants claimed to have made to the Zoning Board; exhibit 14, an affidavit by a purported expert regarding his inspection of the property; and exhibit 19, a photographic copy of some Nebraska statutes on drainage and some correspondence on that subject. The court overruled the exceptions as to exhibit 20, which was a part of the Omaha Municipal Code relative to setback and grading. The court found upon consideration of the pleadings, evidence adduced, and argument that there was no genuine issue of any material fact and that the Zoning Board was entitled to judgment under the law. The court entered a judgment of dismissal in accordance with that conclusion.

ASSIGNMENTS OF ERROR

Eastroads alleges the trial court erred in dismissing its cause of action and sustaining the Zoning Board's motion for summary judgment. Eastroads also alleges that its cause of action was well pled and valid, and gave the court jurisdiction.

DISCUSSION

[1] We are surprised by the Zoning Board's motion for summary judgment because the statutes do not seem to provide for a motion for summary judgment in an appeal proceeding. Neb. Rev. Stat. § 25-1330 (Reissue 1995) provides:

> A party seeking to recover in district court upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the filing of [an] answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

[2] In this action, Eastroads is not seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, but, rather, is simply seeking to appeal under a statutory procedure. The general rule is that "summary judgment is available only in the kinds of actions provided for by the statute

or court rule, and, within limitations, such provisions usually extend to actions at law or equity, and to causes based on contract." 49 C.J.S. *Judgments* § 249 (1997).

The procedure involved in this case is as provided in Neb. Rev. Stat. §§ 14-408 through 14-414 (Reissue 1997). Section 14-413 specifically provides for an appeal from the decision of a zoning board to a district court as follows:

> Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any officer, department, board or bureau of the municipality, may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of such illegality. Such petition must be presented to the court within thirty days after the filing of the decision in the office of the board.

Section 14-414 further provides:

> If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence . . . . *The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.* Costs shall not be allowed against the board . . . .

(Emphasis supplied.)

In the cases of *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), and *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993), the Nebraska Supreme Court analyzed these statutes and other related statutes for the purpose of determining the standard of review from a zoning board and from a somewhat related board of adjustment and held:

> "[A] district court may disturb a decision of such [zoning] board [of adjustment] only if . . . the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
>
> . . . .
>
> ". . . [A]n appellate court reviews the decision of the district court and . . . irrespective of whether the district

> court took additional evidence, the appellate court is to decide if, in reviewing a decision of the board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court."

Stratbucker Children's Trust, 243 Neb. at 71, 497 N.W.2d at 674.

The Nebraska Supreme Court had held that the term "claim" in § 25-1330 is broad enough to include injunctive relief or a declaratory action. See, *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961). We find no case where the decision of an intermediate court of appeals was disposed of by a summary judgment.

[3-5] Summary judgment is inappropriate in appeal proceedings to a district court, such as this case. First of all, the statutes providing for summary judgment do not provide for a summary judgment in cases of an appeal. Second, in reviewing an appeal from a district court under § 14-414, a higher appellate court is to decide, in reviewing a decision of a zoning board of appeals, if the district court abused its discretion or made an error at law, and where competent evidence supports the district court's factual findings, a higher appellate court will not substitute its factual findings for those of the district court in the course of that court's deciding whether the decision of such zoning board of appeals was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. Whereas, in reviewing a decision of a district court when it grants a summary judgment, a higher appellate court is to view the evidence in a light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences that are deducible from the evidence to see if the district court correctly decided that there is no material issue of fact and that the appellee is entitled to a judgment as a matter of law. *Horvath v. M.S.P. Resources, Inc.*, 246 Neb. 67, 517 N.W.2d 89 (1994); *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994). We believe it is impossible to reconcile these con-

flicting standards of review. Likewise, it is impossible for the district judge to reconcile that judge's duty upon review of the zoning board of appeal's decision with that judge's duty to review the evidence upon consideration of a motion for summary judgment.

Furthermore, we suspect that the mechanics of holding a hearing upon an appeal under § 14-414 would not be materially more burdensome than a similar hearing for a motion for summary judgment. Additionally, in reviewing the record before us, we found it impossible to tell which evidence or information was considered by the Zoning Board and, therefore, whether the district court should have received additional evidence and if the court did in fact receive additional evidence. In short, the granting of a summary judgment in this case on appeal is simply wrong, and the cause must be reversed so that the statutory procedure may be followed.

REVERSED AND REMANDED.

THOMAS YARPE, APPELLANT, V. LAWLESS DISTRIBUTING CO., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEE.

587 N.W. 2d 417

Filed December 8, 1998. No. A-98-191.

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. **Workers' Compensation: Evidence.** The sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court must be considered in the light most favorable to the successful party.
3. **Trial: Evidence: Testimony: Presumptions: Proof.** After the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest.
4. **Trial: Witnesses: Testimony: Proof.** A party's failure to call an available witness who the party purports at trial would possess information important to proving the

party's case could be considered when deciding the weight to be given to the party's testimony.

5. **Trial: Evidence: Witnesses.** The trier of fact is the sole judge of what probative force to give to the fact that a party has failed to call a witness or produce evidence.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

John W. Iliff, of Gross & Welch, P.C., for appellee Lawless Distributing Co.

Don Stenberg, Attorney General, John R. Thompson, and Hobart B. Rupe for appellee State.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Thomas Yarpe appeals from an order of the Workers' Compensation Court review panel affirming an order of the Workers' Compensation Court dismissing his petition for benefits. The court determined that Yarpe failed to establish the occurrence of an accident, and dismissed his petition. Because we find that the court's conclusions are supported by competent evidence in the record and the court's factual conclusions were not clearly erroneous, we affirm.

II. BACKGROUND

Yarpe was employed for approximately 5½ years by Lawless Distributing Co. (Lawless) and Lawless' predecessor company, Capitol Liquors Inc. (Capitol), as a warehouseman, loading trucks and operating a forklift. In 1992, while working for Capitol, he suffered a work-related injury to his lower back. Yarpe underwent surgery as a result of this injury. After the surgery, Yarpe returned to his employment, with a permanent lifting restriction. Ultimately, Yarpe entered into a lump-sum settlement regarding the 1992 injury.

Yarpe alleged that he suffered another work-related accident on September 6, 1995, while lifting cases of beer. Yarpe was seen by Drs. David W. Stamm and Daniel L. McKinney with

regard to his symptoms. Yarpe ultimately underwent surgery again. On November 30, Lawless apparently terminated Yarpe's employment because he was no longer physically able to perform his job requirements.

On December 22, 1995, Yarpe filed a petition in the Workers' Compensation Court seeking "temporary total disability benefits, medical bills, vocational rehabilitation, loss of earning power, waiting penalty, and attorney fees." Lawless filed a third-party petition against the Second Injury Fund. On October 11, 1996, the case was tried to the court. Yarpe was the only witness called to testify.

After the trial, the compensation court entered an order dismissing Yarpe's case. The court held that Yarpe failed to prove that he "suffered injury in a discrete event occurring on September 6, 1995." The court noted that the lump-sum settlement Yarpe entered into with regard to the 1992 injury barred recovery for any disability or expenses arising out of a degeneration of his condition as a result of the 1992 injury, and allowed further recovery only if Yarpe suffered a new accident. The court noted various inconsistencies in Yarpe's proof and also noted that Yarpe did not call any corroborating witnesses, despite testifying that he informed coemployees of the injury when it happened. The workers' compensation review panel affirmed the court's dismissal. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Yarpe assigns two errors on appeal. Yarpe alleges that there was not sufficient evidence to support the compensation court's findings and that the court's factual findings were clearly erroneous.

IV. ANALYSIS

1. Standard of Review

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the

order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998); *Sands v. School Dist. of City of Lincoln, ante* p. 28, 581 N.W.2d 894 (1998). The sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court must be considered in the light most favorable to the successful party. *Sands v. School Dist. of City of Lincoln, supra.*

In determining whether to affirm, modify, reverse, or set aside the judgment of the workers' compensation review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing. *Owen v. American Hydraulics, supra*; *Sands v. School Dist. of City of Lincoln, supra.* Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.*

2. Supporting Evidence

As noted above, Yarpe was the only witness to testify at trial. Both Yarpe and Lawless offered various exhibits, including medical reports and depositions, which were received by the compensation court.

According to his testimony, Yarpe suffered an accident while lifting cases of beer on September 6, 1995. Yarpe testified that he completed his shift and that he then told two coworkers about the injury. Yarpe testified that he called the personnel director the next morning and indicated that he would not be able to work because of the injury, and was referred to see Stamm.

According to Stamm's medical notes, he saw Yarpe on September 7, 1995, the day after the alleged incident. Stamm noted that "[t]he patient is here for evaluation of his low back. He has been having difficulties with it off and on for about the last two months on his most recent round. He reports that within the last couple of days he has been having a very severe back pain." Stamm's medical notes also indicate that Yarpe "has had no recent history of direct trauma, blows, injuries or falls." Finally, Stamm's medical notes indicate that Yarpe "states that [the pain] is not as bad as it previously has been." Stamm's medical

notes include an "Injury Notification" form, which includes a diagnosis of "back strain" and "recurrence of chronic condition." The form includes a section for information about the specific injury, but no information was included on the form concerning any incident on September 6. Stamm's medical notes do not include any reference to a specific incident on September 6.

On September 20, 1995, Yarpe was treated by McKinney, who was the doctor who performed the surgery in 1992. McKinney's medical notes indicate that Yarpe returned to McKinney's office on September 20, "stating that he was continuing to have a considerable amount of back pain." McKinney recorded that Yarpe "feels that over the past two years his condition has gradually become worse." McKinney stated in his notes that "I continue to believe that Mr. Yarpe's difficulties are secondary to a degenerative lumbar intervertebral disk." In office notes dated November 13, 1995, McKinney detailed a "history of present illness," but there is no mention of any incident on September 6. On November 29, McKinney authored a letter to Yarpe's attorney in which he indicated that "Mr. Yarpe has recently told me that this started after he was doing very heavy lifting at work on September 6, 1995. Prior to that, I did not have a specific injury date." McKinney performed a second surgery on Yarpe in June 1996.

On September 27, 1996, Yarpe was seen by Dr. Alan H. Fruin, who conducted an independent medical examination. Fruin concluded that the "surgery of June 1996 was the result of an ongoing disc problem at L4-L5 or a progression of that preexisting condition." The L4-5 disk is the portion of Yarpe's back which was operated on in both the 1992 and the 1996 surgeries. Fruin further concluded that "[b]ased on the medical records and especially those records of Dr. Stamm dated September 7, 1995, it is clear that there was not a specific work related incident on September 6th, but rather this problem gradually built up over time because of his general activities."

In a deposition taken on July 16, 1996, Yarpe testified that after the 1992 surgery, he had no experience of pain in his lower back until the alleged incident in September 1995. Medical records from McKinney's office, as well as Yarpe's testimony at

trial, however, indicated that Yarpe refilled a prescription for Darvocet, a painkiller, 8 to 10 times between May and September 1995. At trial, Yarpe explained this apparent inconsistency by testifying that he suffered from a "backache" throughout 1995, but that it was distinguishable from a sharp "pain" in his back, which is what he experienced after the alleged incident on September 6, 1995.

All of the above evidence would support the compensation court's conclusion that Yarpe did not suffer an accident in September 1995, but, rather, was experiencing the effects of continued degeneration resulting from the original injury in 1992. As such, there is sufficient evidence to support the court's findings, and we do not find the court's factual conclusions to be clearly erroneous.

3. Lack of Corroboration

In the order of dismissal, the compensation court noted that Yarpe testified that he had reported his injury to two coworkers on the same day it happened and that he had reported the injury to the personnel director the following day. However, Yarpe did not call any of these individuals to testify. The court noted that Yarpe "is not obliged to do so, but his failure to do so allows the Court to conclude that perhaps these witnesses would not corroborate the plaintiff's testimony with respect to his reporting of his accident."

[3] Yarpe argues on appeal that the compensation court really based its conclusion and dismissal on this fact. Yarpe argues that the court improperly applied the "adverse inference" rule of evidence in this case. Brief for appellant at 11. In support of his argument, Yarpe quotes the Nebraska Supreme Court's opinion in *First Nat. Bank v. First Cadco Corp.*, 189 Neb. 553, 203 N.W.2d 770 (1973). Specifically, Yarpe quotes the Supreme Court in holding that " 'after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest . . . .' " *Id.* at 573, 203 N.W.2d at 783. Yarpe then proceeds to explain why this rule is not properly applied in the present case.

[4,5] In the present case, the compensation court noted, as did the review panel, that Yarpe's failure to call an apparently available witness who Yarpe purported at trial would possess information important to proving Yarpe's case could be considered when deciding the weight to be given to Yarpe's testimony. The Supreme Court has held that in conjunction with the above-quoted proposition of law, the trier of fact is the sole judge of what probative force to give to the fact that a party has failed to call a witness or produce evidence. *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981); *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960). "[T]he relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact." *In re Estate of Schoch*, 209 Neb. at 818, 311 N.W.2d at 907. As such, we believe that the compensation court committed no error in considering Yarpe's failure to provide testimony from witnesses he suggested at trial would possess corroborating testimony.

V. CONCLUSION

Because there was sufficient evidence in the record to support the findings of the compensation court and because the court's factual findings were not clearly erroneous, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
v. MARK ALLAN MEYER, APPELLANT.
588 N.W. 2d 200

Filed December 15, 1998. No. A-98-481.

1. **Extradition and Detainer: Pretrial Procedure: Motions to Dismiss.** In ruling on a motion to dismiss with prejudice based on alleged violations of the interstate Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1995), it is proper for the trial court to hold a pretrial evidentiary hearing to determine whether a detainer was filed against the defendant and, if a detainer was filed, to determine whether the provisions of the agreement were violated.
2. **Extradition and Detainer: Pretrial Procedure: Appeal and Error.** When a trial court makes pretrial factual determinations regarding the application of provisions of

the interstate Agreement on Detainers, its findings of fact will not be disturbed on appeal unless clearly wrong.

3. **Extradition and Detainer.** The Agreement on Detainers, adopted by the State of Nebraska in 1963, was designed to encourage the expeditious and orderly disposition of charges filed in one jurisdiction against prisoners who are serving sentences in another jurisdiction.
4. ____. Article III of the Agreement on Detainers prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges.
5. **Extradition and Detainer: Time.** In determining the duration and expiration dates of the time periods provided in article III(a) of the Agreement on Detainers, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.
6. **Extradition and Detainer: Time: Words and Phrases.** The language "unable to stand trial" found in the tolling provision of Nebraska's Agreement on Detainers includes all those periods of delay occasioned by the defendant.
7. **Extradition and Detainer: Speedy Trial.** The jurisprudence under the Nebraska speedy trial statute is transferrable to the speedy trial portion of the interstate Agreement on Detainers.
8. **Extradition and Detainer: Time.** Following a defendant's failure to appear for his preliminary hearing, after he has requested prompt disposition under the Agreement on Detainers, the running of the 180 days under his request is tolled until he reappears in court, whether voluntarily or involuntarily, unless re-incarceration prevents his reappearance, in which case he must fully and completely advise the court and the prosecution of his exact whereabouts to restart the running of the 180 days for the State to bring him to trial.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Michael T. Levy for appellant.

Don Stenberg, Attorney General, and William L. Howland for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

In this opinion, we address the meaning of the phrase "unable to stand trial" found in article VI(a) of Nebraska's Agreement on Detainers (Agreement), Neb. Rev. Stat. § 29-759 (Reissue 1995). We consider whether the re-incarceration of a defendant in another state, which is unknown to the court and the prosecution, tolls the 180-day speedy trial provision con-

tained in article III(a) of the Agreement. We also consider the effect of the defendant's failure to appear for his preliminary hearing, after he has requested disposition under the Agreement of the charges pending against him.

BACKGROUND

On April 20, 1995, Mark Allan Meyer was charged by criminal complaint in the county court for Sarpy County, Nebraska, with one count of burglary, one count of theft by unlawful taking, and one count of criminal mischief. At the time this complaint was filed in Nebraska, Meyer was incarcerated at the Iowa Medical Classification Center (Center) on a separate offense. On July 27, the Sarpy County sheriff's office mailed to the Center a request for detainer on Meyer and a copy of the arrest warrant issued by the Sarpy County Court on the criminal complaint.

On December 6, 1996, a handwritten motion entitled "Motion for Speedy Trial" was filed in the Sarpy County Court. The motion requested "an order for the Sarpy County Attorney . . . to commence criminal proceeding [sic] in the matter of the criminal complaint" filed against Meyer. The motion was signed by Meyer and was notarized. On March 24, 1997, Meyer filed a pro se "Inmate's Notice of Place of Imprisonment and Request for [Final] Disposition of Indictments, Informations or Complaints" with the Sarpy County Court. The document stated that Meyer was imprisoned at the Iowa Men's Reformatory in Anamosa, Iowa, and requested final disposition of the criminal complaint filed against Meyer on April 20, 1995.

On March 25, 1997, after being granted parole in Iowa, Meyer was released from the Iowa Men's Reformatory into the custody of the Sarpy County sheriff on the Nebraska detainer and the following day was arraigned in the Sarpy County Court on the charges of burglary, theft by unlawful taking, and criminal mischief. A preliminary hearing was set for April 10, and Meyer was released on bond.

In a letter dated March 31, 1997, Thomas J. Garvey, Meyer's attorney, advised Meyer that he was scheduled for preliminary hearing on April 10 and noted, "YOU MUST BE IN ATTENDANCE AT THIS HEARING." Meyer was asked to call upon

receipt of the letter to schedule an appointment. The record reveals that Meyer's mother, Sheila Meyer, upon receipt of the above letter on April 8, 1997, handwrote at the bottom, "FYI - Mark Meyer is being held in Johnson County Jail in Iowa City, IA - will not be able to appear - Please call them for verification. Thank you, Sheila Meyer." Sheila Meyer then faxed the letter back to Garvey at the public defender's office.

On April 10, 1997, Meyer failed to appear at his preliminary hearing, and a capias was issued for his arrest. As it turns out, on March 28, Meyer had been taken into custody in Iowa on new charges of theft, flight to avoid prosecution, and parole violation. On October 15, Meyer was sentenced on the new Iowa charges and imprisoned at the Iowa Correctional Facility in Oakdale, Iowa. In a letter filed by the Sarpy County Court on December 22, 1997, and which was addressed to "Presiding Judge," Sheila Meyer requested that her son's motion for speedy trial, dated December 6, 1996, be given prompt attention. Moreover, the letter continued:

> This case has been in limbo too long. Mark is serving time in Iowa and cannot get into a program or work release until the detainer is removed. Mark wants this matter behind him and has contacted Mr. Garvey to get a court date set. . . .
>
> . . . [W]hat is the prosecutor waiting for? This matter needs someone's attention and you are next to my last resort.

Meyer remained incarcerated in Iowa until February 3, 1998. On this date, he was arrested by the Sarpy County sheriff and brought back to Nebraska for arraignment on the April 20, 1995, complaint. On February 19, 1998, Meyer waived preliminary hearing and was bound over to the district court for Sarpy County, Nebraska, for arraignment. On March 6, Meyer entered a plea of not guilty, and a trial date was set.

On April 8, 1998, Meyer filed a motion to dismiss and a request for evidentiary hearing in the district court. The motion stated that on or about March 19, 1997, Meyer delivered to the Sarpy County Court a request that final disposition be made of the complaint against him. We assume this to be the request for final disposition, which we earlier referenced as being filed on

March 24. The motion alleged that the request was made pursuant to articles III(a) and V(c) of the Agreement, which required that he be brought to trial within 180 days after delivery of the request. The motion concluded that because Meyer had not been brought to trial within 180 days of his request that he was entitled to a dismissal of all charges against him with prejudice.

On April 30, 1998, following an evidentiary hearing, the district court denied Meyer's motion to dismiss. The court noted that "[a] close reading of Exhibit #3 [Meyer's request for disposition] shows that the Defendant was out on parole when he appeared in the County Court on March 26, 1997." The court stated that although Garvey had been alerted to Meyer's reincarceration in Iowa, per Sheila Meyer's fax, there had been "no showing that the Court or the prosecution was aware of the Defendant's whereabouts after April 10, 1997, until his re-arrest on February 2, 1998." The district court then held, "The County Court does not have the authority to dispose of felony charges. The County Court does have the authority to determine probable cause, but without the Defendant's presence, the County Court may not proceed."

Meyer appeals the denial of his motion to dismiss to this court.

ASSIGNMENTS OF ERROR

Meyer argues on appeal that the district court erred (1) in failing to find that Meyer's right to be brought to trial within 180 days of the filing of his request for final disposition had been violated and (2) in denying Meyer's motion to dismiss pursuant to article III(a) and (d) of the Agreement. Meyer also asserts: "To the extent that it made a factual finding, the district court was clearly wrong in finding that the defendant was required to establish that the prosecution was aware of the whereabouts of the defendant between April 10, 1997 and February 2, 1998 and failed to do so."

STANDARD OF REVIEW

[1] In ruling on a motion to dismiss with prejudice based on alleged violations of the Agreement, it is proper for the trial court to hold a pretrial evidentiary hearing to determine whether

a detainer was filed against the defendant and, if a detainer was filed, to determine whether the provisions of the Agreement were violated. *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997).

[2] When a trial court makes pretrial factual determinations regarding the application of provisions of the Agreement, its findings of fact will not be disturbed on appeal unless clearly wrong. *Id.*

ANALYSIS

Meyer asserts that the trial court erred in failing to grant his motion to dismiss, because the State violated the 180-day speedy trial provision contained in article III of the Agreement. The State argues, however, that the speedy trial provision is "inherently tolled when the Appellant, seeking disposition, is unavailable for trial in the jurisdiction." Brief for appellee at 7.

[3-5] The Agreement, adopted by the State of Nebraska in 1963, was designed to encourage the expeditious and orderly disposition of charges filed in one jurisdiction against prisoners who are serving sentences in another jurisdiction. See *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). Article III of the Agreement prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges. *Reynolds, supra.* Article III(a) of the Agreement provides, in pertinent part:

> [W]henever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint[.]

In determining the duration and expiration dates of the time periods provided in article III(a), the running of said time periods "shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." Article VI(a) of the Agreement.

The fact that Meyer triggered the provisions of article III(a) on March 24, 1997, by filing his request for final disposition with the Sarpy County Court is not in dispute. In dispute, however, is whether the 180-day time limit, which began running on March 24, was tolled on April 10 when Meyer failed to appear at his preliminary hearing and, if so, when it began running again.

The determinative phrase in article VI(a) is "unable to stand trial." The Nebraska appellate courts have never interpreted this language. Thus, we turn to the federal courts and their interpretation of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. app. (1994), for guidance, because the IAD's tolling provision mirrors that found in article VI of Nebraska's Agreement.

The federal courts are somewhat divided as to the proper construction of the IAD's article VI tolling provision. The Fifth and Sixth Circuits have construed the provision narrowly, holding that the phrase "unable to stand trial" refers only to physical or mental incapacity of the defendant. See, *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993); *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied* 440 U.S. 940, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979). However, a majority of the federal courts have defined the "unable to stand trial" language as including within the article VI tolling provision " 'all those periods of delay occasioned by the defendant,' and specifically, 'the periods of delay occasioned by the . . . motions filed on behalf of the defendant . . . [.]' " *U.S. v. Dawn*, 900 F.2d 1132, 1136 (7th Cir. 1990), *cert. denied* 498 U.S. 949, 111 S. Ct. 368, 112 L. Ed. 2d 330. See, also, *U.S. v. Taylor*, 861 F.2d 316 (1st Cir. 1988); *United States v. Roy*, 771 F.2d 54 (2d Cir. 1985), *cert. denied* 475 U.S. 1110, 106 S. Ct. 1520, 89 L. Ed. 2d 918 (1986); *Young v. Mabry*, 596 F.2d 339 (8th Cir. 1979).

[6] In our opinion, the majority view, which broadly interprets the IAD's tolling provision, allocates responsibility for delay where it belongs when the party asserting a right to an absolute discharge due to a violation of the speedy trial provision has in fact caused the delay. Accordingly, we adopt the position of the federal courts which have construed the phrase "unable to stand trial" to include all those periods of delay occa-

sioned by the defendant. The running of the 180-day time limitation was tolled when Meyer failed to appear at his preliminary hearing on April 10, 1997, due to his re-incarceration. This is clearly an example of a " 'delay occasioned by the defendant.' " See *State v. Borland,* 3 Neb. App. 758, 532 N.W.2d 338 (1995) (holding defendant's failure to appear at scheduled docket call tolled running of allowable 180 days under Nebraska's speedy trial statute). If Meyer had appeared for his preliminary hearing, the process to bring him to trial on the charges filed April 20, 1995, would have been able to move forward. However, the record demonstrates that Meyer's failure to appear was his fault—being arrested in Iowa on Iowa charges which resulted in his re-incarceration. *Borland, supra,* also suggests that following Meyer's failure to appear for his preliminary hearing, the 180-day clock did not begin running until he appeared in court again.

[7,8] In *Borland,* the defendant failed to appear at a docket call, but upon hearing that there was a warrant for his arrest, he went to the police station to inquire and was told there was no warrant. But, we held in *Borland* that this effort did not excuse his failure to appear in court and the running of the 180 days under the Nebraska speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995), was tolled until he returned to court "willingly or unwillingly." *Borland,* 3 Neb. App. at 762, 532 N.W.2d at 341, citing *State v. McKenna,* 228 Neb. 29, 421 N.W.2d 19 (1988). The jurisprudence under the Nebraska speedy trial statute appears to be readily transferrable to the speedy trial portion of the Agreement. Thus, under *Borland, supra,* Meyer's claim would fail because he did not return to the Sarpy County Court until February 19, 1998, and as a result, the running of the 180 days would be tolled until then. However, we observe that the defendant in *Borland* was free and thereby able to return to court at will, whereas Meyer was incarcerated. Meyer's re-incarceration in Iowa would physically prevent him from getting back to the Sarpy County Court, presumably until his release from custody in Iowa. Consequently, this difference requires that we *soften* the application of *Borland, supra,* in these unique circumstances. It is apparent that Meyer could easily remedy his inability to reappear in the Sarpy County Court

by fully and completely advising the court and prosecution of his whereabouts, which would enable Sarpy County officials to "go get him" under his original request for final disposition under the Agreement. In summary, following his failure to appear for his preliminary hearing, the running of the 180 days under his first request is tolled until he reappears in court or, in the event he is unable to return to court on his own as would be the case in the event of a defendant's re-incarceration, until he fully and completely advises the court of his whereabouts. However, until he does one or the other, the running of the 180 days for speedy trial is tolled because he is "unable to stand trial" and he is the cause of the delay.

Meyer argues that because his mother notified his attorney and the public defender's office that he had been re-incarcerated in Iowa and would be unable to attend the preliminary hearing on April 10, 1997, the State was aware of his location and, thus, could have brought him to trial in Nebraska within 180 days. It is self-evident that notice to the lawyer for the accused is not notice to the prosecution and the court of the accused's whereabouts. However, the record shows that the Sarpy County Court became aware of Meyer's approximate whereabouts as of December 22, via a letter from Meyer's mother which read, "Mark is serving time in Iowa and cannot get into a program or work release until the [Nebraska] detainer is removed." The letter was filed by the clerk of the Sarpy County Court on December 22, 1997, and thus, on December 22, the court was advised of Meyer's *approximate* whereabouts following his disappearance.

However, we determine that Sheila Meyer's letter failed to fully and completely advise the court of Meyer's *exact* whereabouts. The letter is obviously indefinite on where Meyer is located within the Iowa prison system. From the letter, one cannot know whether he was in a county jail or a state facility. We refuse to put the burden on the court and the prosecution to investigate and determine precisely where within the various prisons, jails, and associated facilities in Iowa Meyer might be found so that the 180-day speedy trial provision in the Agreement can start running again. Clearly, the mother's letter did not completely and adequately advise the prosecution and

the court of Meyer's whereabouts. The purpose of the Agreement is to promote the orderly and expeditious disposition of outstanding charges against a prisoner. *State v. Reynolds,* 218 Neb. 753, 359 N.W.2d 93 (1984). The incomplete information in Sheila Meyer's letter did not accomplish these goals because Meyer's exact whereabouts were still unknown. Thus, Meyer was still "unable to stand trial" under the Agreement, notwithstanding his mother's letter of December 22, 1997, to the court.

Finally, to the extent that the district court's ruling against Meyer was premised upon the notion that Sheila Meyer's letter to the county court was inadequate because the "County Court does not have the authority to dispose of felony charges," we reject that rationale. First, as said, the letter was not sufficient for the court and the prosecution to know Meyer's whereabouts. Second, the county courts have jurisdiction to dispose of felony charges by not binding a defendant over to the district court for trial after a preliminary hearing. Moreover, Neb. Rev. Stat. § 29-760 (Reissue 1995) defines "appropriate court" under the Agreement as "any court with criminal jurisdiction in the matter involved." The last matter scheduled, and which was not completed because of Meyer's disappearance, was the preliminary hearing in county court. Thus, the county court clearly had jurisdiction. Nonetheless, a correct result will not be reversed for an incorrect rationale. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997).

Meyer's temporary disappearance without a reappearance in the Sarpy County Court; the lack of proof that the court and the prosecution were aware of his exact whereabouts after April 10, 1997; and his failure to fully advise of his whereabouts, which would incidentally explain his inability to voluntarily reappear in the Sarpy County Court, are all factors which are fatal to Meyer's claim that he is entitled to discharge because the 180 days to bring him to trial had run. The effect of each of these things, as well as when considered in combination with each other, is that the running of the 180 days was tolled because he was "unable to stand trial," because of a delay occasioned by Meyer. Any other holding would reward those who file requests for final disposition under article III of the Agreement and then

manage to disappear only to resurface after the 180 days has run.

CONCLUSION

The 180-day speedy trial provision of the Agreement ran without interruption from March 24 to April 10, 1997, a total of 18 days. However, on April 10, due to a delay occasioned by Meyer, i.e., his disappearance and unavailability for trial due to his re-incarceration without notice to the court and the prosecution, the 180-day period was tolled until his reappearance in court on February 19, 1998, when he waived a preliminary hearing. Forty-seven days later, Meyer filed his motion for discharge on April 8, which again tolled the running of the 180 days. The time during which the motion has been pending and under litigation is all chargeable to Meyer. See *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). Therefore, the 180 days is far from being used up, because Meyer filed his request for disposition under the Agreement and only a total of 65 of the allowable 180 days are chargeable to the State. Upon issuance of the mandate herein, the 180-day clock will begin running again. We affirm the decision of the district court denying Meyer's motion to dismiss.

AFFIRMED.

F & T, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CORNER BAR, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.
587 N.W.2d 700

Filed December 22, 1998. No. A-97-826.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the Nebraska Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. ____: ____. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
3. **Administrative Law: Due Process: Jurisdiction: Notice: Evidence: Appeal and Error.** A court reviewing an order of an administrative agency must determine

whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence.

4. **Statutes: Administrative Law.** Administrative agencies have only that authority explicitly granted by statute.
5. **Statutes: Appeal and Error.** Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Legislature: Statutes: Administrative Law.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has not taken any action to change such interpretation.
7. **Alcoholic Liquors: Sales.** The power of the state to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and the state may exercise large discretion as to the means employed in performing this power.
8. ____: ____. Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited.
9. **Administrative Law: Liquor Licenses.** The Nebraska Liquor Control Act empowers the Nebraska Liquor Control Commission to issue a license subject to certain restrictions or conditions so long as those restrictions and conditions are reasonably necessary to the protection of the health, safety, and welfare of the people of the State of Nebraska and to the promotion and fostering of temperance in the consumption of alcohol.
10. **Administrative Law: Evidence: Appeal and Error.** Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of relevant evidence contained in the record before the agency.

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

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellee.

HANNON and MUES, Judges, and NORTON, District Judge, Retired.

MUES, Judge.

INTRODUCTION

F & T, Inc., doing business as Corner Bar (F & T), filed a petition in error in Lancaster County District Court against the

Nebraska Liquor Control Commission (Commission). F & T sought review of the Commission's decision which conditioned its liquor license on employing a full-time manager and prohibiting Randall Trahan from working on the premises. The district court upheld the condition prohibiting Trahan from working at the bar and struck down the other condition as arbitrary and unreasonable. F & T appeals. For the reasons set forth below, we affirm.

BACKGROUND

Prior to 1987, Trahan owned 50 percent of F & T. In 1987, he was convicted of felony possession of a controlled substance and gambling. As a liquor establishment is not eligible for a liquor license if a convicted felon owns more than 25 percent of the business, Trahan transferred 75 percent of his stock to his mother and sister. However, Trahan continued to operate the bar on a daily basis. In 1993, F & T redeemed all outstanding stock other than that owned by Trahan, his mother, and his sister. At that point, the only shareholders were Trahan, who owned 25 percent; his mother, who owned 50 percent; and his sister, who owned 25 percent. The bar continued to be run by Trahan.

After a number of disturbance calls to the police in May or June 1996, F & T's liquor license was canceled by the Commission. This cancellation continued throughout the remainder of 1996 and into 1997. We have no records of the cancellation proceeding before us. However, the record does show that in October 1996, Robert Rayl took over the daily operation and management of the bar from Trahan. With permission from the Commission, F & T filed an application for a new liquor license on January 21, 1997. It also filed a formal application for Rayl to be its new corporate manager. At some point after these applications were filed, Trahan and his mother transferred their remaining stock to his sister, Theola Lundholm, who then became the sole shareholder.

On January 22, 1997, the Commission sent the city of Fremont a form seeking its recommendation regarding F & T being granted a liquor license. The record does not show when the city actually received this form, but it did have legal notice of a hearing concerning the license published on February 4.

The form was returned with the city's approval and received by the Commission on February 13.

On March 12, 1997, the Commission received a report from State Trooper Donald Littrell, the background investigator assigned to the Commission's request for an investigation. The report stated: "I strongly feel that should the Liquor Commission approve F & T Inc's current application for a liquor license that they should restrict Randy Trahan from working in the establishment due to his past problems with drugs and alcohol." On March 24, the Commission issued an order to show cause, stating, inter alia, that F & T was "to show cause as to whether or not there has been a change in ownership or if Randy Trahan is still involved, and if so, whether or not the application should be denied." A hearing was set for April 3, and the cancellation of the original license was extended to May 22.

At the hearing, Littrell testified that he prepared an investigative report which raised concerns about the involvement of Trahan in the operation of the bar. Littrell opined that "the past problems at the Corner Bar, I feel, fell back on the — Randy Trahan working in the establishment, running the establishment at that time." He determined that Trahan was still working in the bar and was still a part owner of the building even though all of his stock in the corporation had been transferred to Lundholm in late 1996 or early 1997. He did not see "a whole lot of difference" between the current operation of the bar and how it was operated before the ownership interests had changed. Littrell explained that the local police department had been called to only one or two disturbances at the bar since Rayl took over managing in October 1996.

Trahan did not testify. However, Lundholm testified about the stock transfer. She stated that Trahan gave her his stock and received nothing in return. F & T's attorney explained that when the stock was transferred, the old stock certificates were simply endorsed over to Lundholm. Notwithstanding her 100-percent ownership of F & T and the bar, Lundholm does not work at the bar as she is employed elsewhere full time.

Rayl, the new manager of the bar, testified that he works between 45 and 50 hours at a local restaurant and 20 to 30 hours at the bar. He testified that the bartender is in charge when he is

not at the bar and that he has a full-time day bartender who has been there for 12 years and is familiar with any problems that may arise. It is apparent from the Commission members' questions to Rayl that they were concerned over his ability to perform both jobs for any extended period of time. Rayl is paid $400 per week to manage the bar. His duties include supervising the employees and banking transactions, controlling the inventory, writing checks, and signing contracts.

Trahan is no longer authorized to sign checks for the bar, but works there three nights and two days a week, approximately 35 hours, and is paid a salary of $300 per week. Trahan successfully completed alcohol treatment at Valley Hope in October 1996 and continues to go to AA meetings. His wife also completed the program and no longer works at the bar. Trahan successfully completed probation for the 1987 felony conviction.

The Commission entered an order approving the license subject to two conditions: (1) The applicant gets an approved full-time manager, and (2) Trahan does not work in the licensed premises. F & T filed a petition in error in district court alleging that the evidence presented to the Commission established that the Corner Bar has a qualified full-time manager; that the order directing that Trahan not be allowed to work in the premises is contrary to the evidence and the law, and exceeds the Commission's authority; and that the Commission's decision was arbitrary and unreasonable. It asked the district court to reverse these two conditions to its license issuance.

The district court's hearing on the petition in error was held June 9, 1997. The bill of exceptions from the Commission hearing was admitted into evidence as exhibit 1, and the transcript was admitted as exhibit 2. The Commission's rules were also offered but were refused, the district court reasoning that it was without jurisdiction to receive evidence not offered at the Commission hearing. This ruling is not challenged on appeal.

On June 17, 1997, the district court entered its order. Noting the Commission's concerns that the manager arrangement was a " 'sham' " because Rayl also worked 45 to 50 hours as a manager at a local restaurant, the district court determined that the record did not support the finding that Rayl was not a " 'full time' " manager. It concluded that basing such a determination

upon a set number of hours was arbitrary and unreasonable. Thus, it ordered the condition of employing a "full time" manager deleted from the license requirements.

The district court further reasoned that Trahan was a convicted felon and that he had a past problem with alcohol, but had completed an inpatient treatment program in 1996 with his discharge. While observing that aftercare reports were somewhat "positive," the district court nonetheless determined that the condition prohibiting Trahan from working on the premises was not arbitrary and unreasonable. F & T timely appeals.

ASSIGNMENTS OF ERROR

F & T alleges (1) that the Commission was without jurisdiction to issue a show cause order and to require a hearing on its application; (2) that the Commission was without jurisdiction and authority to prohibit Trahan from working in the licensed premises; and (3) that prohibiting Trahan from working in the licensed premises as a condition of the issuance of the license was discriminatory, arbitrary, unreasonable, and not supported by the record. The Commission does not challenge the district court's decision to strike the Commission's license condition requiring a full-time manager.

STANDARD OF REVIEW

If F & T had appealed the decision of the Commission, the rule would be that " 'the district court may not disturb the decision of the [C]ommission unless it was arbitrary and unreasonable.' " See *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 65, 554 N.W.2d 778, 780 (1996). On appeal, decisions of the Commission are reviewed by an appellate court de novo on the record. *Id.* However, F & T filed a petition in error, and the scope of this court's review thus "varies significantly" from that accorded appeals. See *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 901, 492 N.W.2d 7, 9 (1992).

[1-3] In reviewing an administrative agency decision on a petition in error, both the district court and the Nebraska Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by suffi-

cient relevant evidence. *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). See, also, *Luet, Inc. v. City of Omaha*, 247 Neb. 831, 530 N.W.2d 633 (1995). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Ashby, supra.* A court reviewing an order of an administrative agency must determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence. *Id.*

DISCUSSION

Order to Show Cause and Hearing.

F & T argues that the license should have issued without a hearing because no objections were filed, no protests were timely filed by the Commission, and the Commission was without jurisdiction to issue the order to show cause. We agree that no objections were filed by the city or third persons. However, we conclude that the hearing resulted from a timely filed protest. Accordingly, we need not reach the issue of the authority of the Commission to issue a show cause order in the context of this case in the absence of such protest. See *Motor Club Ins. Assn. v. Fillman*, 5 Neb. App. 931, 568 N.W.2d 259 (1997) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

F & T contends that the objection which precipitated the show cause order and the hearing was untimely in that it was received more than 45 days after the license application was received by the city. F & T relies on Neb. Rev. Stat. § 53-133(1)(c) (Reissue 1984). We note that the State contends that due to subsequent amendments being declared unconstitutional, the issuance of this license is governed by § 53-133 and Neb. Rev. Stat. § 53-132 (Reissue 1984). F & T does not challenge that contention. Section 53-133 provides:

> (1) The Commission shall set for hearing before it any application for a retail license relative to which it has received:
>
> . . . .

> (c) Within forty-five days from the date of receipt of such application by the city, village, or county clerk, as the case may be, objections by the commission or any duly appointed employee of the commission, protesting the issuance of said license.

F & T's argument is premised on the fact that the city received the application on January 23, 1997, and on the fact that the order to show cause was issued on March 24, the latter being more than 45 days from the former and thus beyond the time limit of § 53-133(1)(c). F & T misconstrues the evidence and the law.

There is nothing in the record that shows when the city received the application. It shows that it was mailed from the Commission on January 22, 1997; that the city published legal notice of a hearing on the application on February 4; and that the Commission received it back from the city on February 13. Based on the record, the only concrete evidence of the date the city received it is February 4, when it had the legal notice published.

Moreover, F & T's assumption that the date of the show cause order is the date the protest was "received" for purposes of § 53-133 is simply a misreading of the plain language of the statute. Littrell filed his objection with the Commission on March 12, 1997. This date, not the date the show cause was issued, March 24, was the date the Commission received the objection for purposes of § 53-133(1)(c). Based on the evidence presented, an objection was filed by an employee of the Commission, Littrell, and received by the Commission within 45 days from the receipt of the application by the city.

In substance, the show cause order here was merely a means to notify the parties as to when the hearing would be held to address the issues raised by Littrell's objection. F & T's assignment of error that the Commission was without jurisdiction or authority to hold a hearing on the issuance of the license is totally without merit.

Authority for Issuance of Liquor License With Conditions.

F & T next contends that the Commission exceeded its authority in granting a license conditioned upon Trahan not

working in the licensed premises. F & T asserts that the proper procedure would have been to unconditionally grant the license and that if F & T thereafter employed a person who caused problems, then the Commission could issue a show cause order as to why the license should not be canceled, revoked, or suspended.

[4-6] Administrative agencies have only that authority explicitly granted by statute. See, e.g., *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998). Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has not taken any action to change such interpretation. *Id.* When a series or collection of statutes pertaining to a certain subject matter which is in pari materia are considered, the statutes may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Id.* Thus, we must determine whether the Nebraska Liquor Control Act (LCA), Neb. Rev. Stat. §§ 53-101 to 53-1,121 (Reissue 1993 & Cum. Supp. 1996), provides the Commission with authority to issue a license with conditions attached.

[7,8] The Nebraska Supreme Court has previously held that the power of the state to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and the state may exercise large discretion as to the means employed in performing this power. *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988) (discussing legislative classification of dual businesses in equal protection context). Furthermore, regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited. *Bali Hai', Inc. v. Nebraska Liquor Control*

Commission, 195 Neb. 1, 236 N.W.2d 614 (1975) (holding that city of Lincoln can revoke license for failure to open for business). The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations do not deprive persons of property without due process of law, violate the Privileges and Immunities Clause, the Due Process Clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as provided by the state and federal Constitutions. *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (1968) (amendment to LCA which did not allow retailer to purchase beer on credit upheld). See, also, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

[9] We conclude that the LCA empowers the Commission to issue a license subject to certain restrictions or conditions so long as those restrictions and conditions are reasonably necessary to the protection of the health, safety, and welfare of the people of the State of Nebraska and to the promotion and fostering of temperance in the consumption of alcohol. See § 53-101.05.

The Commission obviously construes the LCA as vesting it with authority to fix certain requirements and prescribe certain conditions upon a licensee as is evident from the license issued here. That construction will be given considerable weight. See *Cox Cable of Omaha, supra*. This assigned error is without merit.

Is There Sufficient Relevant Evidence to Support Decision?

F & T's final contention is that the Commission's condition precluding Trahan from working in the licensed premises is discriminatory, arbitrary, and unreasonable, and not supported by the record. It first asserts that prohibiting Trahan from being an employee of a licensee because of his felon status is arbitrary and unreasonable. We can see nothing in the record to support the argument that the license was conditioned as it was because of Trahan's felon status. Thus, we discuss this argument no further.

F & T also argues that if the condition was based on Trahan's past chemical dependency or alcoholism, it violates the Nebraska Fair Employment Practice Act (FEPA), Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1993). The argument is that alcoholism is a "disability" under the provisions of the FEPA, that the FEPA makes it unlawful to fail or refuse to hire or to discharge an individual because of a disability, and that thus F & T will be forced to violate the FEPA if it wants a liquor license. We note that the condition at issue does not prohibit Trahan's employment by F & T. It only prohibits Trahan's working "in the licensed premises." But, more importantly, as we hereafter discuss, F & T has not demonstrated that this restriction arose solely from Trahan's alcoholism, even if it is deemed a "disability" as contended by F & T.

The Commission asserts that F & T failed to satisfy the criteria for issuance of a liquor license pursuant to § 53-132 (Reissue 1984) and that the Commission was more than generous in granting the license subject to the conditions.

In order for a license to be issued under § 53-132, the licensee has the burden to prove that (1) it is fit, willing, and able to properly provide the service proposed; (2) that it can conform to all the provisions, requirements, rules, and regulations provided in the LCA; (3) it has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to ensure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the LCA; and (4) the issuance of the license is or will be required by the present or future public convenience and necessity. See § 53-132 and *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983). Thus, it was the burden of F & T to demonstrate, inter alia, that it would exercise the type of management and control over the Corner Bar sufficiently to ensure that the business could conform to the provisions, requirements, rules, and regulations of the LCA.

The issue before us, as it was before the district court, is whether the decision of the Commission in placing this condition on the issuance of the license is supported by sufficient relevant evidence. See *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992).

[10] Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of relevant evidence contained in the record before the agency. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

The proceedings before the Commission reflect that the Commission's primary concern with the license issuance was over Trahan's connection with the operation of the bar. Although the record does not contain the specifics of the Commission's "audit" and cancellation of F & T's original license, it is apparent they were triggered by repeated disturbances at the Corner Bar. In Littrell's opinion, Trahan was the main reason for the numerous police calls and complaints received on the Corner Bar. Littrell testified that past problems at the bar "fell back" on Trahan working at and managing the bar and that neither the change in stock ownership nor the hiring of Rayl as manager had appreciably changed the day-to-day operation of the bar, as Trahan worked at the bar more than Rayl did. F & T's response to Littrell's evidence was to offer evidence that Trahan had completed alcohol and drug treatment.

We recall that the precise nature of the prior bar disturbances, the police calls, the complaints, and importantly, Trahan's contribution to them is not disclosed by the record. However, F & T's original license was clearly canceled because of problems related to Trahan, and F & T did not challenge that cancellation. It is F & T's position that since Trahan has addressed his dependency problems, it has met its burden to demonstrate that Trahan's employment on the premises would no longer adversely affect the management and control of the premises. See § 53-132(3). The Commission obviously disagreed. In order for us to say that the Commission's decision lacks evidential support, we would have to find that the original cancellation of the license was due solely to Trahan's personal alcoholism and drug dependency and that it was no longer likely to impact his working on the premises. But, the record fails to establish either. While the parties are probably quite familiar with the nature and scope of all the "problems" that led to the license cancellation, they have failed to include them in the record. Based on our review of the record, we cannot say that

the condition imposed is arbitrary or that the record lacks relevant evidence to support it.

It was F & T's burden to persuade the Commission that the "control" of the bar would be such as to "insure" the business' conformity with liquor laws. See § 53-132(2). The attempt to extricate Trahan from corporate control by his transfer of stock ownership to his sister was obviously not accepted by the Commission as a relinquishment of his control over the bar itself. The Commission apparently concluded that Trahan's continued work at the premises represented an unreasonable risk to the business' ability to avoid the problems that led to the initial cancellation. We believe the Commission could reasonably reach that conclusion, particularly in the absence of evidence that the past bar problems were exclusively related to Trahan's personal drug and alcohol use.

The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh the evidence or make independent findings of fact. *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). Relevant evidence in the record before the Commission was sufficient for it to impose a license condition prohibiting Trahan's working at the licensed premises.

CONCLUSION

The Commission had jurisdiction to initiate the April 3, 1997, hearing and to place reasonable conditions on the liquor license. Moreover, the decision to impose a condition that Trahan not work on the licensed premises is supported by sufficient relevant evidence in the record made before the Commission.

AFFIRMED.

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