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# SCOT THOMPSON, DOING BUSINESS AS VIVID PAINTING, APPELLEE, v. VALLEY CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

528 N.W.2d 352

Filed February 21, 1995. No. A-93-524.

1. **Courts: Appeal and Error.** In cases where the district court acts as an intermediate court of appeals, both the district court and the higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
3. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties.
6. _____. A contract must be construed as a whole, and, if possible, effect must be given to every part thereof.
7. _____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
8. _____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court reversed, and cause remanded.

Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellant.

Larry R. Forman, of Dixon & Dixon, P.C., for appellee.

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

MILLER-LERMAN, Judge.

Valley Corporation (Valley), a Nebraska corporation, appeals the decision of the Douglas County District Court affirming the decision of the Douglas County Court, which held that Valley had unilaterally terminated its contract with Scot Thompson, doing business as Vivid Painting (Thompson),

without just cause and awarded damages to Thompson. Because we find that the record does not support the county court's order, we reverse and remand.

## FACTS

Valley served as the general contractor to the city of Omaha for the construction of an addition to the Sherman Community Center (the Project), located at 5701 North 16th Street in Omaha. On April 16, 1991, Valley, as general contractor, and Thompson, as subcontractor, entered into a standard subcontract agreement (the Agreement) which provided for Thompson to supply all labor and materials necessary to complete all interior and exterior painting and wall covering in accordance with the specifications for the Project for a contract price of $5,400. The Agreement specified that

> [t]he work called for in this contract shall be performed promptly as requested by the contractor. The subcontractor agrees to complete his work in sufficient time and in such a manner to enable the contractor to complete the work in its contract with the Owner no later than November 21, 1991.

The Agreement further provided in paragraph XV:

> [I]n case the Sub-Contractor shall fail to correct, replace and/or re-execute faulty or defective work done and/or materials furnished under this contract, when and as required by the Contractor, or shall fail to complete or diligently proceed with this contract within the time herein provided for, the Contractor upon three days' written notice to the Sub-Contractor shall have the right to correct, replace and/or re-execute such faulty or defective work, or to take over this contract and complete same, and to charge the cost thereof to the Sub-Contractor, together with any liquidated damages caused by a delay in the performance of this contract.

At trial, the parties described the course of the work on the project as follows: According to Valley's work records, Thompson commenced work on the Project on June 19, 1991, and continued to work in a sporadic fashion throughout the summer. Valley's work log shows that Thompson and/or

someone from his crew showed up at the Project site 18 times between June 19 and September 4. In his testimony at trial, Thompson attributed his inconsistent work schedule and lack of progress to poor weather conditions and the simultaneous work efforts of Valley and Valley's other subcontractors. However, Valley's work log indicates that Thompson and his crew did not work on the Project on many days that were dry and clear.

During the time Thompson was working on the Project, the city's overall coordinator for the Project, David Johnson, expressed dissatisfaction with Thompson's performance and told Valley that Thompson would have to correct the work before the city would accept it. It is not clear whether Valley apprised Thompson of Johnson's dissatisfaction at the time he brought it to Valley's attention.

A. Richard Heupel II, Valley's project manager, testified that Thompson was on the "critical path" as of August 12. The term "critical path" refers to a construction timetable set up by the project manager to enable the project to be completed on time. Heupel explained at trial that every contractor falls within the critical path somewhere within his job and that the completion of the work which is on the critical path controls when the next phase of the project can begin.

After determining that Thompson's performance was on the critical path, Heupel called Thompson on August 15 but received no response. Thompson finally returned Heupel's call on August 21 and told him that Thompson and his crew would be at the Project on August 22. Thompson and his crew showed up and worked at the Project on August 22, 23, and 24.

On August 26, when Thompson did not show up to work on the Project, Heupel called Thompson and informed him that he was not performing the painting work in a timely and satisfactory manner and that he was holding up the progress on the Project. Heupel told Thompson that he had 3 days to complete the interior painting on the Project and to remedy all deficiencies in the quality of the work previously completed or Valley would exercise its right to take over the subcontract as provided in paragraph XV of the Agreement. Valley reduced the contents of the August 26 telephone conversation to writing

in a letter dated August 27, 1991. The letter demanded that Thompson complete all interior painting and remedy all deficiencies by 5 p.m. on August 29.

Although Valley ostensibly gave Thompson 3 days to complete the interior work, Valley allowed Thompson to work on the Project for an additional week. On Wednesday, September 4, when no one from Thompson's crew showed up to work on the Project, Valley informed Thompson in writing that it was exercising its right to take over the subcontract due to Thompson's failure to complete the interior painting pursuant to Valley's request of August 26. The parties agree that Thompson had not completed the interior painting by September 4.

On September 9, Thompson made a written demand to Valley for the $5,400 provided for in the Agreement. Thompson contended that under the Agreement, he had until November 21 to complete the work; that Valley had unilaterally terminated the Agreement without just cause; and that at the time of termination, he had substantially completed the work under the contract.

On September 11, Valley contracted with another painter to supply all materials and labor necessary to complete the painting and to correct faulty interior painting on the contract for a contract price of $5,300.

Thompson filed a breach of contract action against Valley on March 19, 1992, in the Douglas County Court to recover the contract price of $5,400 for substantially completing the labor contracted for under the Agreement. Valley acknowledged the existence of the Agreement, but denied owing Thompson the contract price due to the facts that Thompson did not accomplish the work in a workmanlike manner and that Valley was forced to expend the sum of $5,741.45 to have the job completed and repaired. Valley asked for a setoff of $5,300 and counterclaimed for $341.45.

The trial court found that Valley had breached the Agreement and awarded Thompson $5,400 plus costs and dismissed the counterclaim. Apparently, the trial court interpreted the Agreement to provide that Thompson complete the painting in such time as to allow Valley to complete its

obligations on the Project by November 21, 1991. The district court affirmed the decision of the county court, but recomputed the damages to equal $4,561.92, which included only compensation for labor and materials actually expended and prorated profits for the percentage of the Project completed. Valley appeals.

## SCOPE OF REVIEW

[1] In cases where the district court acts as an intermediate court of appeals, both the district court and this court generally review appeals from the county court for error appearing on the record. Neb. Rev. Stat. §§ 25-2733 (Reissue 1989) and 25-1911 (Cum. Supp. 1994).

[2] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

## ANALYSIS

The Agreement controls the commercial relationship between the parties. Thompson attached the Agreement to his original complaint and also offered the Agreement as exhibit 1 at trial. Paragraph III of the Agreement, which is the provision of the Agreement directly at issue, provides as follows:

> The work called for in this contract shall be performed promptly as requested by the contractor. The subcontractor agrees to complete his work in sufficient time and in such a manner to enable the contractor to complete the work in its contract with the Owner no later than November 21, 1991.

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Larsen, supra*; *Rigel Corp., supra*; *Baker's Supermarkets, supra*.

[3-5] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Kropp v.*

*Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Baker's Supermarkets, supra*. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Kropp, supra*; *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993); *Drain v. Board of Ed. of Frontier City*, 244 Neb. 551, 508 N.W.2d 255 (1993). A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties to a document have or suggest opposing interpretations of the document does not necessarily compel the conclusion that the document is ambiguous. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Baker's Supermarkets, supra*.

[6,7] Paragraph III of the Agreement specifies that (1) Thompson will perform the work promptly at Valley's request and (2) Thompson will complete his work in such a manner that the contractor's work will be completed no later than November 21, 1991, thus requiring Thompson's work to be completed by that date. We do not find these two provisions of paragraph III to be inconsistent. Nebraska law clearly provides that a contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Baker's Supermarkets, supra*; *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989). Our understanding of the plain language of both provisions of paragraph III, when read together, is that Thompson agreed to complete the painting at Valley's request, and to permit Valley to meet its contract with the owner, no later than November 21, 1991, absent a request for earlier performance. This is in accord with the well-settled law in Nebraska that the terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Murphy, supra*; *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994); *Rigel Corp., supra*. Further, we do not believe that any of the other provisions of the Agreement are susceptible of conflicting interpretations. Therefore, we find the Agreement to be unambiguous. For this reason, the intent of the parties is not at issue, and we ignore the

various interpretations of the provisions of paragraph III which the parties suggest. See, *Murphy, supra*; *Baker's Supermarkets, supra*.

Provision (1), which gives Valley the ability to request that Thompson perform the work promptly notwithstanding the November 21 completion date, is in the nature of an acceleration clause. Acceleration clauses are common in construction contracts. See, e.g., 48 C.F.R. § 52.243-4 (1994) (setting forth the federal government's general acceleration provision for construction contracts); *Johnson Controls, Inc. v. National Valve & Mfg. Co.*, 569 F. Supp. 758 (E.D. Okla. 1983); *Hensel Phelps Constr. Co. v. King County*, 57 Wash. App. 170, 787 P.2d 58 (1990).

The Nebraska Supreme Court recognized the doctrine of acceleration of performance under construction contracts in *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). The *Siefford* analysis recognized that most contract acceleration cases involve a subcontractor or contractor plaintiff who is making a claim against a general contractor or owner defendant for costs or damages the plaintiff incurred as a result of defendant's decision to accelerate plaintiff's performance under an express acceleration or "change in performance" clause. In such cases, although acceleration is provided for under the contract, the defendant may argue that no extra money is due plaintiff because plaintiff failed to give timely notice of claims or because the claimed acceleration costs merely reflect plaintiff's attempts to perform preacceleration contractual obligations. *Johnson Controls, Inc., supra*. It is commonplace that acceleration clauses provide for liquidated or contractual "damages" for acceleration. See, e.g., *Continental Consolidated Corp. v. United States*, 17 CCF, Par. 81,137 (1972). In cases where acceleration is expressly provided for in the contract, but liquidated damages for acceleration are not provided for in the contract, a subcontractor or contractor which is successful in proving damages due to unanticipated acceleration may be awarded relief which is generally limited to an equitable adjustment of the amount due under the contract. See, e.g., *United States v. Rice*, 317 U.S. 61, 63 S. Ct. 120, 87 L. Ed. 53 (1942); *Crook Co. v. United States*, 270 U.S. 4, 46 S. Ct.

184, 70 L. Ed. 438 (1926). See, also, *Omaha P. P. Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 288 N.W.2d 467 (1980).

In this case, the subcontractor, Thompson, sued the general contractor, Valley, for the full contract price. The action resulted from Valley's request of Thompson based on the existence of an acceleration clause in the Agreement to accelerate his performance. Thompson did not comply with Valley's request, and Valley terminated the subcontract. The Agreement indicates that Valley's request for prompt performance was anticipated by the terms of the Agreement and did not constitute an actionable acceleration. Parenthetically, our review of the facts shows that Valley initially sought from Thompson something in the nature of adequate assurance that he would complete the contract in a timely and satisfactory manner, rather than seeking an acceleration of performance. Cf. Neb. U.C.C. § 2-609 (Reissue 1992) (providing parties to a sales contract the right to demand adequate assurance of performance when reasonable grounds for insecurity arise; failure of party upon which demand is made to provide adequate assurance within a reasonable time constitutes a repudiation of the contract).

[8] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993). The provisions of the Agreement expressly provided Valley with the terms by which to request Thompson to promptly perform the work contracted for under the Agreement at Valley's request. The Agreement did not provide for a different or greater fee where the acceleration clause was invoked. Given Thompson's erratic work schedule, the challenged quality of his work, and the existence of the critical path, Valley's reliance on the acceleration and termination features of the Agreement was permissible under the contract.

Given the unambiguous terms of the Agreement, the record does not show a breach by Valley. For these reasons, we reverse the decision of the district court, affirming the decision of the

county court, and remand the cause to the district court for treatment consistent with this opinion.

REVERSED AND REMANDED.

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PAT KELLEY, APPELLANT, V. LAURENCE G. LONG AND CAROL LONG, HUSBAND AND WIFE, ET AL., APPELLEES.

529 N.W.2d 72

Filed February 21, 1995. No. A-93-552.

1. **Adverse Possession: Equity: Appeal and Error.** Adverse possession actions are equitable in nature, and an appellate court therefore reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court.
2. **Evidence: Appeal and Error.** When credible evidence is in conflict, an appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Motions to Dismiss: Proof.** 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 favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
4. **Motions to Dismiss.** If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law.
5. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
6. **Adverse Possession: Proof: Time.** One claiming title by adverse possession carries the burden of proving by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years.
7. **Adverse Possession: Title.** Title cannot be acquired by adverse possession without simultaneous and continuous existence of each element of adverse possession for the requisite period.
8. **Adverse Possession: Intent.** A party claiming adverse possession must have occupied the property with the intent and purpose of the occupant to assert his or her ownership of the property.
9. _____: _____. The intent with which an occupier possesses the land may be determined by examining the acts of the occupier and the nature of his possession.
10. _____: _____. An occupier's acts indicating such intent can be negated by an

admission that he in fact did not intend to assert ownership of the property.

11. **Adverse Possession.** To permit tacking of successive adverse possession of grantees of an area not within the calls of a deed or contract, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantees as successors in ownership, possession, and claim.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Nile K. Johnson for appellant.

Jon A. Sedlacek for appellees Long.

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

IRWIN, Judge.

This is an appeal from an action to quiet title brought by Pat Kelley against Laurence G. and Carol Long and all others claiming an interest in a certain parcel of land (Long), in the district court for Washington County, Nebraska. Long was the record owner of property to which Kelley sought title by adverse possession. At the close of Kelley's evidence, the court granted Long's motion to dismiss, and Kelley has appealed to this court. We find that because Kelley's predecessor in interest lacked the requisite intent to adversely possess the disputed tract of land, the trial court correctly dismissed Kelley's action.

## FACTUAL BACKGROUND

In 1977, Thomas Mencke purchased property near the Missouri River, described as Tax Lot 25 of Section 7, Township 18 North, Range 12 East of the 6th P.M., Blair, Washington County, Nebraska (Tax Lot 25). Mencke established his residence on the property. A strip of land owned by Consolidated Blenders, Inc., abutted Mencke's land to the east and separated Mencke's property from the Missouri River. This strip, referred to as the "CB tract," was roughly 115 feet wide and was bordered by Fish Creek along its south edge. Mencke used the CB tract for recreational purposes and kept the tract mowed and clear of debris. Mencke also kept his boat at the mouth of Fish Creek, and built a road across the CB tract to gain access to that area and take his boat in and out of Fish

Creek.

In 1980, Mencke strung a cable from near the northeast edge of his lot stretching eastward across the CB tract to a large cottonwood tree. He strung another cable from the cottonwood tree stretching further eastward to a post near where the CB tract met the Missouri River. Mencke erected the cable to keep vehicles from entering the CB tract and to prevent persons from having parties on the tract.

In December 1988, Mencke sold Tax Lot 25 to Pat Kelley. Kelley is employed as a riverboat pilot on the Mississippi River, and his work schedule is 30 days on, then 15 days off, on a continuing basis. His sole residence is located on Tax Lot 25, and he lives there during his time off from work. During the time that Kelley has owned Tax Lot 25, he has kept the CB tract clear of debris, mowed it, and replaced one of the cables across it. He has also used the tract for recreational purposes and has given—and refused to give—permission to persons wanting to fish from the CB tract.

In 1991, Kelley observed Laurence Long on the CB tract and had a conversation with him, during which Long told Kelley that he had purchased the tract from Consolidated Blenders. On August 12, 1991, Kelley filed this action to quiet title in the CB tract on a theory of adverse possession. The case was tried on April 27 and 28, 1993. At the trial, Mencke testified that while he owned Tax Lot 25, he was aware that Consolidated Blenders owned the CB tract. He also testified that he never intended to claim the CB tract as his own and that he erected the cable across the CB tract in order to stop vehicular traffic from going by his house. Both Mencke and Kelley testified that Mencke never indicated to Kelley that he owned the property.

At the end of Kelley's case, Long moved for a dismissal, which was granted by the trial court.

## ASSIGNMENTS OF ERROR

Kelley claims that the trial court erred in granting Long's motion to dismiss and in failing to find that Kelley and his predecessor in title had been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership of the CB tract for the full 10-year statutory period.

## STANDARD OF REVIEW

[1,2] Adverse possession actions are equitable in nature, and an appellate court therefore reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *State Nat. Bank & Trust Co. v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984). See *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993). However, when credible evidence is in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Nenneman, supra*. See *Hadley v. Ideus*, 220 Neb. 878, 374 N.W.2d 231 (1985).

[3] 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 favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992).

[4] If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law. *Knaub, supra*; *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991).

[5] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

## DISCUSSION

[6,7] One claiming title by adverse possession carries the burden of proving by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994); *Thornburg, supra*; *Nennemann, supra*. Title cannot

be acquired by adverse possession without simultaneous and continuous existence of each element of adverse possession for the requisite period. *Dugan, supra*; *Thornburg, supra*.

Evidence adduced by Kelley established that both he and his predecessor, Mencke, had actual, continuous, exclusive, and notorious possession of the CB tract. The testimony was uncontroverted that Mencke and Kelley continuously maintained the CB tract by mowing it and removing debris, by putting up and maintaining cable to keep out vehicles, by using the tract for recreational purposes, and by granting and denying others permission to use the tract for fishing. Mencke also built a road across the CB tract for access to the mouth of Fish Creek. Both Mencke and Kelley testified that they had never seen anyone from Consolidated Blenders on the tract and that, to their knowledge, the only other persons to use the tract had obtained permission from Mencke or Kelley.

[8] However, evidence adduced by Kelley did not establish that Mencke's possession of the CB tract was "adverse under a claim of ownership." "To establish 'adverse under a claim of ownership,' the party claiming adverse possession must have occupied the property in the same manner as an owner would occupy the property." *Dugan*, 244 Neb. at 942-43, 510 N.W.2d at 317. Accord *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). "The party claiming adverse possession must have occupied the property ' "with the intent and purpose of the occupant to assert his ownership of the property." ' " *Dugan*, 244 Neb. at 943, 510 N.W.2d at 317 (quoting *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981)).

[9,10] Ordinarily, the intent with which the occupier possesses the land may be determined by examining the acts of the occupier and the nature of his possession. *Dugan, supra*; *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993). However, an occupier's acts indicating such intent can be negated by an admission that he in fact did not intend to assert ownership of the property. See *Ryan v. City of Lincoln*, 85 Neb. 539, 123 N.W. 1021 (1909). In *Ryan*, the court stated:

> The fact that the tract had been inclosed [sic] by a fence more than ten years preceding 1899, and that plaintiff and his grantors during that time had received all benefits that

> accrued from an exclusive occupation of the land, unexplained by other evidence, would unquestionably support a judgment in his favor. Those acts, in the words of Judge GANTT, "are presumptive evidence and evincive of intention to assert ownership over and possession of the property." [Citation omitted.] If, however, that presumption is met by the sworn admission of the occupant that in exercising dominion over the land he did not claim to own it, the presumption will disappear. It is not essential that the occupant accompany his possession with declarations of hostility toward the owner of the fee. [Citation omitted.] His exclusive occupation under a claim of right is sufficient ordinarily to establish an adverse possession. To constitute adverse possession there must be a combination of conduct and intent. *If the actor testifies to his intention and purpose in performing his visible acts of authority over the property, and admits that he did not act under a claim of right or ownership, his testimony may, and as against himself ought to, overcome the conclusions and presumptions that otherwise would have been drawn from his conduct.*

(Emphasis supplied.) 85 Neb. at 541-42, 123 N.W. at 1022.

In the present case, Mencke testified at the trial that his actions of maintaining the CB tract and erecting the cable across it were not undertaken with the intent to claim the property as his own, as is revealed by the following excerpt from his testimony:

> Q And in that deposition, I asked if when you did these actions you intended to claim that property for your own, you said "No." Is that still correct?
>
> A Yes.
>
> Q And all of the cable that you put up that you just described, you didn't do that to do that as an act to say, "This is my property," did you?
>
> A No.
>
> Q It was just to stop that traffic that was going by your house, is that correct?
>
> A Yes.

We believe that Mencke's testimony negates any inference of

intent to assert ownership that may otherwise have been drawn from his actions. Further, both Mencke's and Kelley's testimony at trial revealed that Mencke did not intend to transfer or deliver possession or ownership of the CB tract to Kelley.

[11] Kelley purchased Tax Lot 25 in 1988 and allegedly began asserting dominion over the CB tract at that time. Because one must satisfy the adverse possession requirements for 10 years, Kelley must tack on the adverse possession of the land by his predecessor in title, Mencke, in order to be successful in his claim.

> "To permit tacking of successive adverse possession of grantees of an area not within the calls of a deed or contract, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantees as successors in ownership, possession, and claim." [Citation omitted.] "Privity means privity of possession. It is the transfer of possession, not title, which is the essential element." [Citation omitted.]

*Thornburg*, 243 Neb. at 698, 502 N.W.2d at 438. Accord *Rentschler v. Walnofer*, 203 Neb. 84, 277 N.W.2d 548 (1979).

In the present case, the CB tract is not within the calls of the Tax Lot 25 deed from Mencke to Kelley. Further, there is scant evidence that Mencke intended to transfer possession of the CB tract to Kelley. In fact, the testimony of both Mencke and Kelley indicates that Mencke did not intend to transfer possession of the CB tract. Kelley testified that when he bought Tax Lot 25 from Mencke, Kelley knew that it belonged to Consolidated Blenders and that Mencke never represented that he laid any claim to, or had any interest in, the CB tract. Mencke's testimony was similar.

Both Mencke and Kelley did testify that Mencke had told Kelley of his efforts to maintain the CB tract. However, such testimony does not establish that Mencke intended to transfer the CB tract to Kelley as his successor in ownership, possession, and claim.

## CONCLUSION

After reviewing the record de novo, we find that Kelley's

claim of adverse possession must fail, because his predecessor did not intend to possess the disputed property as an owner and further did not intend to transfer possession of the land to Kelley. Accordingly, we affirm the district court's dismissal of this action.

AFFIRMED.

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## IN RE INTEREST OF MCCAULEY H., A CHILD UNDER 18 YEARS OF AGE.
## STATE OF NEBRASKA, APPELLEE, V. JOELLEN R., APPELLANT.

529 N.W.2d 77

Filed February 21, 1995. No. A-94-700.

1. **Parental Rights: Appeal and Error.** An appellate court reviews a decision in an adjudication based on Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) de novo on the record, recognizing that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof.** The quantitative proof required for an adjudication based on Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) is "preponderance of the evidence" and, therefore, is analogous to the standard of proof generally applicable in civil cases.
3. **Parental Rights.** The Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
4. _____. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
5. **Parental Rights: Proof.** A finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.
6. **Parental Rights: Circumstantial Evidence: Abandonment: Proof.** Circumstantial evidence of intent may be used to establish abandonment as a basis for terminating parental rights.
7. **Rules of Evidence: Parental Rights.** The strict rules of evidence do not apply to temporary juvenile proceedings, to dispositional hearings, or to proceedings to terminate parental rights.
8. _____: _____. The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code.
9. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply,

admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.

10. **Evidence: Words and Phrases.** Evidence is probative if it tends in any degree to alter the probability of a material fact.
11. _____: _____. To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
12. _____: _____. There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

William G. Line, of Kerrigan & Line, for appellant.

Dean Skokan, Dodge County Attorney, and Sandra Silva for appellee.

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

MILLER-LERMAN, Judge.

JoEllen R., the natural mother of the juvenile, McCauley H., appeals the decision of the juvenile court for Dodge County adjudicating McCauley a juvenile as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). For the reasons recited below, we affirm.

## PROCEDURAL HISTORY

The procedural history of this case shows the following: A petition was filed on December 1, 1993, alleging that McCauley was a juvenile under § 43-247(3)(a). An amended petition dated December 8 alleged that McCauley was a child under § 43-247(3)(a) in that

> 1. McCauley S. [H.] is a child who, is in a situation dangerous to life or limb or injurious to the health or morals of such juvenile, to wit: on or about November 15, 1993, said child was subjected to physical abuse.
>
> 2. McCauley S. [H.] is under the age of eighteen years

of age, having been born March 14, 1992 and resides at [address given].

Although the natural father was identified in the amended petition, he did not participate in the proceedings which are the subject of this appeal.

A temporary order was entered on December 10, placing McCauley with the Department of Social Services. An adjudication hearing was conducted on February 2 and 16, 1994. On February 17, the county court sitting as a juvenile court adjudicated McCauley to be a juvenile as defined in § 43-247(3)(a). The court found by a preponderance of the evidence that the multiple bruises sustained by McCauley were consistent with a finding that the child had been subjected to physical abuse, although the evidence was inconclusive as to who inflicted the bruises. The court also found that the bruises on the child were inconsistent with being caused accidentally or incidental to the child's own behavior. The court adjudicated McCauley as a child "who is in a situation dangerous to life or limb, or injurious to his health, in that on or about November 15, 1993, said child was subjected to physical abuse." In making these findings and conclusions, the trial court noted that "[n]umerous witnesses testified as to possible causes for the bruises, as well as the character and veracity of the child's primary caretakers."

The mother appealed the adjudication order to the district court, which affirmed the order. This appeal followed.

## ASSIGNMENTS OF ERROR

On appeal, the mother claims that the evidence was insufficient to establish that McCauley was a child under § 43-247(3)(a) and that she was prejudiced by the exclusion of certain evidence at the adjudication hearing.

## FACTS

The record shows that on the afternoon of November 25, 1993, Officer Dwight Murphy of the Fremont Police Department was dispatched to the residence of McCauley's paternal grandmother. She called the police upon discovering that McCauley had bruises over his face, back, and rib area. McCauley was subsequently taken into protective custody.

On November 29, 1993, Dr. Cynthia Wengel, a board-certified pediatrician, examined the child and concluded that McCauley had been intentionally injured on multiple occasions. Dr. Wengel concluded that the bruises over McCauley's entire body were received on various occasions within the last 5 to 14 days. At the adjudication hearing, she opined that the bruises were not accidentally acquired because of their bilateral placement, because of their location, and because children 18 months old do not usually fall backward. Dr. Wengel further opined that McCauley's behavior was subdued and fearful and was consistent with abuse. It was Dr. Wengel's opinion that McCauley had been intentionally physically abused.

Dr. Monty Sellon, the child's primary care physician, was called as a witness by the mother at the adjudication hearing. Dr. Sellon stated that McCauley had received well-baby care, but that in his records, Dr. Sellon had noted concern of possible child abuse. Dr. Sellon also observed the extensive bruises depicted in photographs in evidence.

The record shows that from the date he was born, March 14, 1992, until November 25, 1993, McCauley had been in the care and custody of his mother. The mother shared her home with her boyfriend and allowed him to babysit McCauley on occasion. The boyfriend's criminal history and drug and alcohol abuse problems were testified to at the adjudication hearing.

Neither the mother nor her boyfriend could explain how a child in their custody and control could become so bruised. The mother testified that she did not see the bruises. Alternatively, she claimed that McCauley may have received the multiple bruises as depicted in the photographs in evidence from playing or falling, or from roughhousing with other little boys. The boyfriend denied abusing McCauley.

The boyfriend's former wife was called as a witness by the mother. She stated that her ex-husband had a good relationship with the children of their marriage and was not known to abuse them.

The paternal grandmother testified that November 25, 1993, was not the first time she had seen her grandson with bruises.

She stated that she had also observed bruises on McCauley's body on October 18, 1993, at which time the boyfriend was living with the mother. The record shows that McCauley's bruises ceased to exist once he was taken from the care of his mother on November 25.

During the mother's testimony at the adjudication hearing, her trial counsel identified and offered a December 11, 1993, letter written to the mother by her former counsel to the effect that after speaking with the county attorney's office, it appeared to counsel that the case specifically against the mother was not as strong as the State had originally suggested. The essence of the letter was that the county attorney thought that the mother was protecting her boyfriend by refusing to implicate him as being responsible for McCauley's injuries. The letter recites that the county attorney had stated the foregoing and more to the former counsel. The mother's trial attorney offered to call the first counsel as a witness as an alternative to receipt of the letter in evidence. The State objected to the receipt of the letter or comparable live testimony on the bases of hearsay and relevance. The trial court sustained the objection.

The record from the adjudication hearing consumes about 150 pages of testimony by 10 live witnesses and numerous exhibits, including photographs of McCauley which graphically depicted injuries over a substantial portion of his body. Following the adjudication hearing, the trial court found McCauley to be a juvenile as defined in § 43-247(3)(a). The adjudication order was affirmed by the district court, and this appeal followed.

## ANALYSIS

*Sufficiency of Evidence.*

The mother argues that the evidence was insufficient to establish jurisdiction over McCauley under § 43-247(3)(a). She claims specifically that the evidence did not establish directly who inflicted the bruises on McCauley. The State responds that the preponderance of the evidence shows that the bruises sustained by McCauley were not normal or accidental but intentional, and in any event, the child was shown to be in a situation injurious to his health as defined in § 43-247(3)(a). We

agree with the State.

[1] We review this appeal de novo, recognizing that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992); *In re Interest of J.L.H., J.L.H., and R.H.*, 2 Neb. App. 40, 507 N.W.2d 641 (1993).

[2] The relevant portion of § 43-247 applicable to this case provides as follows: "The juvenile court in each county as herein provided shall have jurisdiction of: . . . (3) Any juvenile (a) who is . . . in a situation . . . dangerous to life or limb or injurious to the health or morals of such juvenile . . . ." The quantitative proof required for an adjudication based on § 43-247(3)(a) is "preponderance of the evidence" and, therefore, is analogous to the standard of proof generally applicable in civil cases. *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511 (1991); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). See, also, Neb. Rev. Stat. § 43-279.01(3) (Reissue 1993).

[3,4] It has been held that "the Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act." *In re Interest of L.D. et al.*, 224 Neb. at 257, 398 N.W.2d at 97. It has also been observed that "[t]he right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child." *In re Interest of C.P.*, 235 Neb. 276, 284, 455 N.W.2d 138, 144 (1990).

We have reviewed the record in this case de novo, as we are required to do. *In re Interest of L.P. and R.P., supra*; *In re Interest of J.L.H., J.L.H., and R.H., supra*. The direct evidence amply establishes that given their placement, configuration, and aging, McCauley's extensive bruises were consistent with the conclusions that McCauley had been abused and was in a situation dangerous to life or limb, rather than the conclusion that the bruises had occurred normally or had been caused by accident. The direct evidence is undisputed that McCauley's injuries occurred while the child was in his mother's custody. Although the injuries occurred on her watch, the mother argues that the evidence is merely circumstantial as to

who inflicted the bruises and that, therefore, the State's proofs failed to establish jurisdiction by a preponderance of the evidence.

[5,6] Numerous jurisdictions which have considered the question of sufficiency of circumstantial evidence in connection with juvenile proceedings involving issues of child neglect or child abuse have adopted the position that a finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect. See *Higgins v. Dallas Cty. Child Welfare Unit*, 544 S.W.2d 745 (Tex. Civ. App. 1976), *overruled on other grounds, In re Interest of S.H.A.*, 728 S.W.2d 73 (Tex. App. 1987). We adopt the foregoing proposition in the instant case. See, also, *Matter of S.J.Z.*, 252 N.W.2d 224 (S.D. 1977) (holding that circumstantial evidence may be sufficient to establish child abuse or neglect, because requiring proof of the striking blow would place an onerous burden upon the State and would ignore the competing interests of the child); *In the Matter of S.*, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (1965) (holding that res ipsa loquitur applies to a battered child proceeding permitting an inference of neglect to be drawn from proof of the child's age and condition, and that the latter is such as in the ordinary course of things does not happen if a parent who has the responsibility and control of an infant is protective and nonabusive). We are aware that in Nebraska, circumstantial evidence of intent may be used to establish abandonment as a basis for terminating parental rights. *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990). We are also aware that the application of res ipsa loquitur to child abuse and child neglect cases has been adopted by statute in some jurisdictions. See, e.g., N.Y. Fam. Ct. Act § 1046(a)(ii) (McKinney 1983); Conn. Gen. Stat. Ann. § 17a-101(f)(4) (West 1992); R.I. Gen. Laws § 40-11-7.1 (1990).

In endorsing the use of circumstantial evidence to establish child neglect or child abuse, it has been stated that "[l]earned commentators have pointed out that in many such cases the

only proof available is circumstantial evidence since abusive actions usually occur within the privacy of the home, the child is either intimidated or too young to testify, and the parents tend to protect each other." *Higgins*, 544 S.W.2d at 750. See, also, Rowine H. Brown et al., *Medical and Legal Aspects of the Battered Child Syndrome*, 50 Chi.-Kent L. Rev. 45 (1973).

We have reviewed the record de novo and conclude that the preponderance of evidence shows that McCauley was a juvenile as defined under § 43-247(3)(a).

*Exclusion of Letter Written by Former Counsel.*

The mother claims on appeal that the exclusion of the December 11, 1993, letter to her from her former counsel, or comparable oral testimony, was improperly excluded and that she was prejudiced thereby. Her arguments are of a conspiratorial nature, generally to the effect that the instant case was pursued by the State as leverage to force her to implicate her boyfriend, apparently as a basis for a possible separate action against him. The mother claims that the letter would have demonstrated the weakness of the State's case in the current proceeding. The State responds that the letter is inadmissible as hearsay within hearsay, and, in any event, is irrelevant and was properly excluded. We agree that the letter was properly excluded.

[7,8] Under Nebraska jurisprudence, the strict rules of evidence do not apply to temporary juvenile proceedings, to dispositional hearings, or to proceedings to terminate parental rights. See, *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (detention hearing and dispositional hearing); *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991) (termination hearing); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987) (termination hearing). However, the Nebraska Supreme Court has held that the Nebraska Evidence Rules do "control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. at 262, 417 N.W.2d at 155. See, also, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

[9] It has been held that in all proceedings where the

Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). Although the State claims that the letter was properly excluded as hearsay, we need not decide this argument because we conclude the letter was properly excluded as irrelevant. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (holding that an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it).

[10,11] Under Neb. Evid. R. 401, "[r]elevant 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." Evidence is probative if it tends in any degree to alter the probability of a material fact. *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990); *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

[12] It has been held:

> There are two components to relevant evidence: " '[M]ateriality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> " 'The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . .' "

*State v. Bell*, 242 Neb. 138, 141, 493 N.W.2d 339, 343 (1992), quoting *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808

(1990). See, also, *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

The "fact that is of consequence," within the meaning of Neb. Evid. R. 401, in the instant case is whether or not McCauley was a juvenile under § 43-247(3)(a) because he was or was not in a situation dangerous to life or limb or injurious to his health. The letter proffered by the mother was not material to the issue of McCauley's situation and was, therefore, not relevant. At best, the letter pertained to the county attorney's view of the strength of the State's case. The county attorney's pretrial view of the case is not probative of any material fact in the case as presented at trial and before us upon review. Based on the foregoing, we conclude that the letter and comparable testimony were properly excluded as not relevant.

AFFIRMED.

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IN RE INTEREST OF TINA L.K. AND BILLY M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. TINA M.K., APPELLANT.

528 N.W.2d 357

Filed February 28, 1995. No. A-94-314.

1. **Parental Rights: Appeal and Error.** 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.

Appeal from the County Court for Dawson County: LLOYD G. KAUFMAN, Judge. Vacated and remanded for further proceedings.

Mark R. McKeone, of Hart Law Office, P.C., for appellant.

Rebecca Harling, Deputy Dawson County Attorney, for appellee.

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

NORTON, District Judge, Retired.

Tina M.K., natural mother of Tina L.K. and Billy M., appeals the termination of her parental rights. The Dawson County Court, acting in its capacity as a juvenile court, found that the mother had substantially and continuously neglected her children and had refused to give the children necessary parental care and protection and that she made little or no progress in meeting the goals of a rehabilitation plan instituted after adjudication of the children.

## STATEMENT OF FACTS

Tina M.K. is the mother of Billy M., now 5 years old, and Tina L.K., now 4 years old. On June 25, 1992, Tina and Billy were adjudicated by the county court. However, there is no petition for adjudication or adjudication order in the court records. In the transcript of the court proceedings, the judge announced at the end of the hearing that "I'm going to adjudicate in accordance with (indiscernible)." At that hearing, evidence was presented that the mother had left her children with an acquaintance in a trailer home on May 17, 1992. The mother testified that she had gone to inquire of a friend nearby whether the friend needed a ride to work. A Lexington police officer testified that the acquaintance had reported being assaulted in the trailer the evening of May 17. When she reported the incident, the acquaintance brought the children with her. The police officer testified that the mother did not contact the police about her missing children until May 19. A social worker who picked the children up from the police on May 17 stated that the children's hygiene was poor and that they seemed tired and hungry. The court stated at the hearing:

> I'm going to adjudicate the children. I — I think . . . she's sincere. I've seen her with the children here frequently, and I — I guess I know that in my heart I guess I know that [the mother] does love those children, and takes care of them as best she can. I think probably there was some, at the very least, some poor judgment here.

At the close of the "adjudication" hearing, the county court ordered the Department of Social Services (DSS) to prepare a rehabilitation plan. Thereafter, other plans were prepared.

However, the record does not contain any evidence that any evidentiary dispositional hearings took place, at which the court could determine whether the various plans ordered by the court contained reasonable material provisions which would correct, eliminate, or ameliorate the situation or condition on which the adjudication was supposedly based. The record reflects that the first case plan was prepared on August 13, 1992. On October 27, 1992, the court ordered the visitation plan contained in the case plan, but did not order the rehabilitative portion of the plan. The plan ordered visitation on Tuesday, Wednesday, Thursday, and Friday, to take place at the mother's home. Kim Burmond, a DSS family support provider, testified that between May 1992 and February 1993, the mother had about 47 visits with the children and missed about 17.

At the termination proceeding, the State adduced evidence regarding the mother's noncompliance with the August 13, 1992, plan, although the plan had not been approved by the court. Goal No. 1 of the plan required the mother to "work with family support provider in acquiring parenting skills to assist in parenting her children more effectively." Burmond testified at the termination hearing that the mother tried to work on parenting skills, but did not "really follow through real well." However, Burmond also testified, "I don't know how much of it sunk in or how much she would follow through on that."

Goal No. 2 required the mother to acquire "problem solving skills and decision making skills by attending and participating in individual counseling on a weekly basis." The mother's therapist, Maureen Lauby, testified at the termination hearing that the mother attended therapy three times and was angry because she did not understand the need for therapy. Goal No. 3 required the mother to "address her past victimizations of chaotic and abusive relationships by attending therapy on a weekly basis to better understand the past." Lauby testified that the mother did not meet this goal.

Goal No. 4 required the mother to obtain full-time employment and seek housing for herself and her children to become self-sufficient. In addition, the mother was required to work with a family support provider to meet this goal and to

attend and participate in "Job Support." Naomi McCurdy, a DSS caseworker, testified that the mother did attend some Job Support classes in Lexington and did obtain sporadic jobs, but that she did not keep any job very long. McCurdy also testified that the mother did not obtain housing by herself, but, instead, lived with others.

Sometime in October 1992, the mother moved from Lexington to Wauneta. Between the implementation of the visitation plan on October 27, 1992, and January 15, 1993, she visited her children once, on December 11, 1992. Burmond testified at the termination hearing that the mother had requested that visitation with her children take place in Lexington, but apparently her request was not granted. On January 15, 1993, a new case plan was drafted. The January 15 case plan contained the same goals for rehabilitation contained in the August 1992 case plan. In addition, the case plan noted that the mother failed to contact the family support provider when she was unable to travel to visit her children and that the mother's excuse was that the family support provider had not contacted her to set up the visitations. The new visitation schedule recommended visitation on Thursdays, to take place in Elwood. On January 27, 1993, the court found, "The case plan and visitation schedule of the Department of Social Services is ordered." In addition, the court transferred custody of Billy from foster parents in Elwood to Billy's paternal grandparents in Omaha.

A rehabilitation plan drafted on June 8, 1993, stated that between January and June 1993, the mother had visited her daughter twice and had not visited her son since he was placed with his grandparents in Omaha. The plan noted that the mother had told DSS that it was very difficult for her to travel to Elwood because of the cost and the distance. The plan also noted that the mother requested that she be allowed to phone her children once a week from the DSS office in Imperial. The plan recommended that visitation take place two times every other week in Wauneta.

On July 21, 1993, the court ordered the case plan. However, sometime in July 1993, the mother moved to Omaha, where she remained until August 1993, when she returned to Wauneta to

be married. Upon the mother's move to Omaha, DSS proceeded to transfer the case file to Omaha; however, the actual transfer did not take place until the day the mother left Omaha to move back to Wauneta. The mother testified that she tried to get visitation with Billy when she was in Omaha, but that until the file was transferred, a caseworker would not be assigned by DSS, and therefore she could not arrange visitation with DSS. The mother testified that she did have telephone contact with Billy and that that was the only contact she was permitted to have while she was in Omaha. Karen Poindexter, a DSS case manager, testified that after the mother moved back to Wauneta, "[it] took some time" to get the file transferred from Omaha back to Wauneta.

The June 1993 case plan includes Terry B., the mother's husband as of August 1993, in the required goals for rehabilitation. Goal No. 1 of the plan required the mother and her husband to "work with the therapist on bonding with the children, showing patience and appropriate disciplining." Rebecca Nielsen, the mother's therapist, stated that she was unable to work on goal No. 1 with the mother because of the mother's move to Omaha. Goal No. 2 required the mother to set up a schedule for meals and naps. Goal No. 3 required the mother to work with a family support provider to learn to fix nutritional meals. Goal No. 4 required the mother and her husband to set up a family budget. No evidence was introduced at the hearing regarding whether the mother met or failed to meet goals Nos. 2, 3, or 4. Goal No. 5 required the mother and her husband to acquire better communication skills. Nielsen testified at the termination proceeding that the couple worked "very hard" at reaching this goal. Nielsen testified that she met with the mother from January until July 1993, when the mother moved to Omaha.

Goal No. 6 required both the mother and her husband to attend weekly therapy. Poindexter testified at the termination hearing that the couple did not attend therapy regularly. Goal No. 7 required the mother to obtain a part-time job and "maintain the job without quitting or getting fired." Poindexter testified that the mother did obtain part-time jobs, but did not hold them. Goal No. 8 required the mother to acquire beds for

her children. Poindexter testified the mother did so. Goal No. 9 required the mother to keep a clean house and yard. Poindexter testified that while the mother did not keep her yard clean, she did keep the house clean.

On January 5, 1994, a new case plan was drafted which recommended the same visitation plan as that adopted in July 1993 and recommended that a case plan for the mother be assessed and redesigned to apply to her new residence and needs in Wauneta. The plan was adopted by the court on January 12, 1994. However, on January 31, 1994, the Dawson County Attorney filed a motion to terminate the mother's parental rights. McCurdy testified at the termination hearing that the mother had visited Tina on February 5, 12, and 19, 1994, but that prior to February 1994, she had not visited her children since August 1993.

The January 27, 1994, motion alleged that the mother's parental rights should be terminated as to Tina pursuant to Neb. Rev. Stat. § 43-292(7) (Reissue 1993), because Tina had been in an out-of-home placement for over 18 months and the mother had 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 DSS. The motion also alleged that the mother's parental rights should be terminated as to Billy pursuant to § 43-292(1), because she had abandoned Billy for over 6 months.

The county attorney then filed a supplemental petition to terminate the mother's rights, alleging that in addition to terminating her rights as to Tina because she had failed to comply with the rehabilitation plan, the mother's rights to Tina should also be terminated pursuant to § 43-292(1), because she had abandoned Tina for over 6 months. In addition, the supplemental petition alleged that the mother's rights to Billy should also be terminated pursuant to § 43-292(7), because Billy had been in an out-of-home placement for 18 or more months and the mother had failed to correct the conditions leading to the juvenile's out-of-home placement.

In contrast, in the transcript of the proceeding, the court terminated the mother's parental rights

> under 43-292(2) and (6) both, that being that the parents

have substantially and continuously repeatedly neglected the juvenile — juveniles, not given them necessary parental care or protection. Further that the minors were adjudicated, a plan was set up under paragraph — subparagraph 6 and efforts were made and little or no progress in either one of those.

According to the court's written order, the mother's rights were terminated under § 43-292(2) and (6), on the basis that the mother had substantially and continuously or repeatedly neglected her children and that the children had been adjudicated under § 43-247(3)(a) and the mother had failed to correct the conditions leading to the children's adjudication. The mother appeals the termination of her parental rights.

## ASSIGNMENTS OF ERROR

The mother alleges that the county court erred when it (1) terminated her rights based on a court-ordered plan that imposed unreasonable financial and travel requirements, (2) terminated her rights after failing to find that she willfully failed to comply with the rehabilitation plan, and (3) terminated her rights on the basis of neglect when there was no pattern of neglect shown.

## STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

## ANALYSIS

[1] 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). Neither of the plain errors we discuss in this opinion

was assigned as error by the mother. First, we note plain error under *In re Interest of D.M.B.* It is well-established law that if a court, upon an adjudication of a child pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), orders a rehabilitation plan, the court

> thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. . . . The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. The juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.

*In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 273, 417 N.W.2d 147, 161 (1987). The mother in *In re Interest of D.M.B.* had her parental rights terminated for failure to comply with a rehabilitation plan ordered by the court. The Supreme Court noted that the juvenile court had failed to find facts to support the rehabilitative steps it ordered and that such failure constituted plain error. The court further noted, " 'Without an adequate record reflecting the parental shortcomings or the parental conduct to be corrected, eliminated, or ameliorated through a rehabilitative plan, it is virtually impossible for this court to evaluate the efficacy of a rehabilitative plan . . . .' " 240 Neb. at 359, 481 N.W.2d at 913 (quoting *In re Interest of J.S., A.C., and C.S., supra*). In the record before us, we have neither a petition for adjudication nor an order by the court finding that the children were adjudicated. Instead, the sole record of adjudication before us is a transcript of the proceedings, in which the court found that the mother "takes care of [the children] as best she can. I think probably there was some, at the very least, some poor judgment here." There is no transcript of an evidentiary dispositional hearing, nor is there any order in the record reciting the factual basis for the court's decision to order the rehabilitative steps contained in the various rehabilitation plans. Without an adjudication petition or order,

this court can only guess as to why the children were adjudicated and what parental conduct or shortcoming was supposed to be corrected, eliminated, or ameliorated through the various rehabilitation plans.

Second, we note further plain error in that the mother was denied due process because she was not properly advised of the basis for termination. "[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). See, also, *In re Interest of D.J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986). The petition to terminate the mother's parental rights stated that termination should be had under § 43-292(1), because she had abandoned her children for 6 months or more immediately prior to the filing of the petition, and under § 43-292(7), because the children had been in an out-of-home placement for 18 or more months and the mother had failed to correct the conditions leading to the children's out-of-home placement in spite of the efforts and services to the mother ordered by the court. Although the State sought termination under § 43-292(1) and (7), the court terminated the mother's rights under § 43-292(2) and (6). Specifically, at the conclusion of the termination proceeding, the court pronounced judgment terminating the mother's parental rights under § 43-292(6), which provides that parental rights will be terminated when the court has previously adjudicated the child under § 43-247(3)(a) and reasonable efforts have failed to correct the reasons leading to the adjudication, and under § 43-292(2), on the basis that she had substantially and continuously or repeatedly neglected her children and refused to give her children necessary parental care and protection. Following the court's pronouncement at the hearing, the court entered a written order stating that the mother's parental rights should be terminated under § 43-292(2) and (6). In sum, neither the court's pronouncement of judgment at the end of the termination proceeding nor the court's written order terminated the mother's parental rights for

the same reasons alleged in the petition for termination. Although the petition for termination was apparently amended to add allegations that both children had been abandoned and had been in foster care for over 18 months and that the mother had not corrected her behavior which led to her children's placement, the petition was never amended to include the allegation of neglect, and thus, the court's judgment was not responsive to the allegations. Therefore, the mother was not given any notice that the action to terminate her parental rights would be based on neglect under § 43-292(2), nor was she given notice of the facts of the alleged neglect that termination would be based on, as is required under Neb. Rev. Stat. § 43-291 (Reissue 1993). The juvenile court ordered termination of parental rights between the mother and her children on such basis. Such lack of notice constitutes plain error. See *In re Interest of D. J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986).

Because plain error was made, we must vacate the order of the juvenile court to terminate the mother's parental rights and remand the cause for further proceedings in accord with this opinion.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

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DAN M. DANNEHL, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.
MELISSA K. KORNELSON, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.
DARBY L. CAIN, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

529 N.W.2d 100

Filed March 7, 1995. Nos. A-93-427, A-93-472, A-93-591.

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. _____: _____: _____. In an appeal under the Administrative Procedure Act,

the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified 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. **Administrative Law: Time.** No rule or regulation of any agency shall be valid as against any person until 5 days after such rule or regulation has been filed with the Secretary of State.
5. **Administrative Law.** Procedural rules may affect substantive rights, and where a procedural rule, such as a new rule of evidence, has a substantial impact on a party's rights, the distinction between procedural and substantive rules breaks down.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Due process is denied where the rules and regulations governing the administrative driver's license revocation procedure, statutorily required to be filed with the Secretary of State, were not in effect on the date of arrest.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE and PAUL D. MERRITT, JR., Judges. Affirmed.

Don Stenberg, Attorney General, Amy Hollenbeck, Jay C. Hinsley, and, on brief, Mary L. Hewitt for appellant.

Toney J. Redman for appellees.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

In three separate proceedings, the director of the Department of Motor Vehicles revoked the driver's licenses of Dan M. Dannehl, Melissa K. Kornelson, and Darby L. Cain for 90 days each, in accordance with the administrative driver's license revocation statutes, Neb. Rev. Stat. § 39-669.15 et seq. (Reissue 1988 & Cum. Supp. 1992) (currently Neb. Rev. Stat. § 60-6,205 et seq. (Reissue 1993)). The Lancaster County District Court reversed the director's order in each of the cases and remanded them to the department with directions that appellees' licenses be reinstated immediately. The department appeals the district court's reversals. The cases have been consolidated on appeal.

## LEGISLATIVE AND AGENCY ACTION

On January 1, 1993, § 39-669.15 (Cum. Supp. 1992) became

effective. That statute authorizes the automatic revocation of the driver's license of a person who is arrested for driving while under the influence of alcohol and who submits to a chemical test which discloses the presence of alcohol in any of the concentrations specified in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). To effectuate the revocation, the arresting officer must serve verbal notice to the arrested person of the intention to immediately impound and revoke that person's driver's license, as well as notice that the revocation will be automatic 30 days after the date of the arrest unless a petition for a hearing to contest the revocation is filed within 10 days after the date of arrest. § 39-669.15(3).

The operation of this license revocation statute was succinctly set forth by the Nebraska Supreme Court in *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 681-82, 522 N.W.2d 417, 420 (1994), from which we quote:

> The arresting officer must forward to the director a sworn report stating (1) that the person was validly arrested pursuant to § 39-669.08 and the reasons for the arrest; (2) that the person was requested to submit to the required test; (3) that the person was advised of the consequences if the test disclosed the presence of alcohol in a concentration specified in § 39-669.07, including that the driver's license would be immediately impounded and automatically revoked in 30 days; and (4) that the person submitted to a test, the type of test to which the person submitted, and that the test revealed the presence of alcohol in a concentration specified in § 39-669.07. § 39-669.15(3).
>
> The arresting officer is required to explain the administrative license revocation procedure and the rights of the arrested person and to provide an addressed envelope and a petition form which may be used to request a hearing before the director to contest the revocation. The petition form must be completed and delivered to the department or postmarked within 10 days after receipt. § 39-669.15(4). The arresting officer is required to take possession of the driver's license and to issue a temporary license which is valid for 30 days. The original license and

the sworn report are then forwarded to the director of the department. *Id.*

If a chemical test discloses the presence of alcohol in a concentration of .10 of a gram or more per 100 milliliters of blood or .10 of a gram or more per 210 liters of breath, the issues at the revocation hearing are limited to (1) whether the law enforcement officer had probable cause to believe the person was operating or in actual physical control of a motor vehicle in violation of § 39-669.07 or a city or village ordinance enacted pursuant to § 39-669.07, (2) whether the person was lawfully arrested, (3) whether the person was advised of the consequences if the chemical test disclosed the presence of alcohol in a concentration specified in § 39-669.07, and (4) whether the person was operating or in actual physical control of a motor vehicle while the person had an alcohol concentration in violation of § 39-669.07(1). § 39-669.15(6)(c)(ii)(A) through (D).

If the driver's license is revoked, then "[a]ny person who feels himself or herself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred . . . in accordance with the Administrative Procedure Act." § 39-669.18. The district court conducts the review without a jury de novo on the record of the agency. See, § 84-917(5)(a); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994).

Section 39-669.15(7) requires the director to "adopt and promulgate rules and regulations to govern the conduct of the hearing and insure that the hearing will proceed in an orderly manner." These rules and regulations, set forth at 247 Neb. Admin. Code, ch. 1, were filed on February 24, 1993, and pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992), became effective March 1, 1993.

The act provides that "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." Neb. Rev. Stat. § 84-906 (Reissue 1987). "No adoption . . . of any rule or regulation shall

> become effective until the same has been approved by the Governor and filed with the Secretary of State after a hearing has been set on such rule or regulation pursuant to section 84-907." § 84-908. Neb. Rev. Stat. § 84-907 (Reissue 1987) requires a public hearing prior to the adoption of such rules. Notice of the hearing must be given to the Secretary of State and published in a newspaper having general circulation in the state.

*Gausman*, 246 Neb. at 683, 522 N.W.2d at 420-21.

## BACKGROUND

On February 9, 13, and 14, 1993, Dannehl, Kornelson, and Cain, respectively, were arrested for operating a motor vehicle while under the influence of alcohol. After failing preliminary breath tests, each appellee submitted to a chemical breath test, which registered over twice the legal limit in all cases. Pursuant to § 39-669.15, the arresting officers gave each appellee a "Notice/Sworn Report/Temporary License" which informed the appellees that their driver's licenses would automatically be revoked effective 30 days from the date of the arrest and that if they wished to contest the automatic revocation, they could request a hearing by filing a petition with the department within 10 days. A "Petition For Administrative Hearing" was also provided to each appellee at the time of arrest. This petition purported to be the form to be used to initiate the contesting of the revocation which would otherwise automatically occur, in the absence of the filing, upon the expiration of 30 days. Each appellee timely filed the petition form requesting an administrative hearing, and, pursuant to notice, the hearings for Dannehl, Kornelson, and Cain were held on March 3, March 10, and March 10, respectively.

Appellees were each represented by counsel at the administrative hearings, and each objected to his or her hearing in its entirety on the grounds that there were no valid rules and regulations governing the conduct of the hearing in effect on the date of arrest. Each of these objections was overruled. The director determined in each case that § 39-669.15 set forth the issues which could be addressed at the administrative hearing and that the validity of the rules and regulations was not a

permissible issue. After full hearings, in which evidence was admitted and testimony was adduced, the director revoked each appellee's driving privileges for 90 days.

## THE DISTRICT COURT'S ORDERS

In separate appeals, the respective district court judges found that because the rules and regulations under which the department conducted the revocation hearings were not effective on certain dates determined to be critical to the respective appellees' cases, the revocations were invalid. Although the rules and regulations were effective on the date of the hearing in each appellee's case, appellees had not been given the benefit of the provisions contained in the rules and regulations which set forth certain available procedures. Specifically, in Dannehl's case (where he was arrested February 9, filed his petition on February 12, had a filing deadline of February 19, and had his administrative hearing on March 3), the district judge found that because the rules and regulations became effective only 2 days prior to his hearing, he could not have been given their benefit. The judge noted this was apparent because various provisions of the rules and regulations required specific periods of notice prior to the date of the hearing, including 5 days' notice for a continuance, 5 days' notice for discovery, 3 days' notice for the rules of evidence to apply, and that subpoenas must be requested at the time the petition is filed. In Kornelson's case (where she was arrested February 13, filed her petition on February 17, had a filing deadline of February 23, and had her administrative hearing on March 10), the district judge found that because the rules and regulations were not effective on the date the petition was actually filed, Kornelson was not given the benefit of the provisions, noting specifically that the rules and regulations limit the petition form which would be accepted by the department and require requests for subpoenas to be made at the time the petition is filed. Finally, in Cain's case (where he was arrested February 14, filed his petition on February 18, had a filing deadline of February 24, and had his administrative hearing on March 10), the district judge found that the revocation was invalid because the rules and regulations were

not effective at the time of Cain's arrest, and Cain, therefore, was generally not given the benefit of their provisions. The respective district judges reversed the director's orders and remanded the cases with directions that each appellee's license be reinstated immediately.

We note that the rules and regulations did not become effective until March 1, 1993, and thus, common denominators of all three cases are that the effective date of the rules and regulations was after the date of arrests, after the date the petitions were actually filed, and after the mandatory filing deadline for the petitions, but before the date of the administrative hearings.

## STANDARD OF REVIEW

[1-3] 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. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. 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. *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994); *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994).

## ASSIGNMENTS OF ERROR

The department assigns as error the district court's finding in each case that § 84-908 required that the rules and regulations governing the conduct of revocation hearings had to be approved and on file with the Secretary of State on the date of appellees' arrests to be effective. The department also assigns as error the reversal of the revocation orders and the reinstatement of each appellee's driver's license.

## DISCUSSION

The department defines the issue before us to be whether the district court correctly determined that the failure of the department's rules and regulations to be legally effective on the date of appellees' arrests rendered invalid the license revocation orders. As the foregoing discussion on the separate district court orders illustrates, this was not the precise basis for the conclusions reached by each separate district judge. However, since resolution of the issue as defined by the department is dispositive of each of these appeals, we restrict our analysis accordingly.

The department concedes that a driver's license is an important interest entitled to the protection of procedural due process. See, *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *Gausman, supra*. The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified. See, *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 17 L. Ed. 531 (1863); *Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991). The department contends that because the rules and regulations were filed with the Secretary of State prior to the date of appellees' administrative hearings, appellees were not denied due process and were not prejudiced by the utilization of the regulations at the revocation hearing.

*Gausman v. Department of Motor Vehicles.*

The Supreme Court recently addressed the effect the department's failure to file rules and regulations had upon an individual's due process rights in *Gausman, supra*. In *Gausman*, the department's rules and regulations were not in effect at either the time of Gausman's arrest or the time of the administrative hearing. In each of the cases presently before us, the rules and regulations became effective after the date of arrest, but prior to the date of the administrative hearing. That is the sole distinction between *Gausman* and the present actions.

[4] In *Gausman*, the Supreme Court recognized that although § 39-669.15 does not set forth the consequences for

failing to adopt and promulgate rules and regulations relating to revocation hearings, § 84-906 of the Administrative Procedure Act provides that "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." In *Gausman*, the department argued that "Gausman was afforded procedural due process because he received a 'Notice/Sworn Report/Temporary License' which outlined in detail the operation of administrative license revocation, Gausman's right to request a hearing before the department to contest the revocation, and the four issues which could be disputed at the revocation hearing." *Id.* at 683, 522 N.W.2d at 421. The department also argued that "a party who is not prejudiced by an agency's failure to adopt comprehensive rules governing the conduct of an administrative hearing is not entitled to a reversal of the agency's decision" and that "to the extent the rules and regulations were a restatement of the existing principle or mandate, those regulations were not required to be on file with the Secretary of State to be fully effective." *Id.* at 684, 522 N.W.2d at 421. The Supreme Court rejected the department's arguments, determining that they ignored the plain meaning of § 84-906. The court found that the department had no valid rules or regulations regarding administrative license revocation hearings in effect at the time of Gausman's revocation hearing and held that because the department failed to comply with § 84-906 and proceeded against Gausman using rules and regulations which it had failed to file with the Secretary of State and which were not valid as against Gausman, the department failed to comply with due process. The court thereafter affirmed the decision of the district court requiring reinstatement of Gausman's license. The court reached the same conclusion upon essentially identical facts in *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994).

*Rules and Regulations Specifically Covered by Statute.*

The department proffers the case *Weiner v. State Real Estate Commission*, 184 Neb. 752, 171 N.W.2d 783 (1969), for the proposition that the Administrative Procedure Act promul-

gation process does not apply to those rules and regulations which are already specifically covered by statute, thus arguing that since § 39-669.15 and various sections of the Administrative Procedure Act already define the rights of appellees and since they were in effect before the arrests, the failure to have the rules and regulations effective at the time of the arrests was inconsequential. We believe that the *Gausman* decision effectively disposes of that argument against the department. Specifically, in response to the department's argument that "to the extent the rules and regulations were a restatement of the existing principle or mandate, those regulations were not required to be on file with the Secretary of State to be fully effective," the *Gausman* court succinctly stated: "We find that [this argument] ignore[s] the plain meaning of § 84-906. No rule or regulation is valid until after it has been filed with the Secretary of State." 246 Neb. at 684, 522 N.W.2d at 421.

*Actual Prejudice.*

The department also contends that because appellees failed to demonstrate any actual prejudice from the absence of effective rules and regulations at the time of their arrests, they are not entitled to a reversal of the agency decisions. Although the rules and regulations were effective on the date of the hearings, several crucial topics addressed by the rules and regulations demanded action by appellees between the date of each arrest and the time of that hearing. These topics included requirements that appellees request subpoenas at the time of filing their petition, that motions for discovery be filed no later than 5 days prior to the hearing, that motions for continuances be filed 5 days prior to the hearing, and that requests to apply formal rules of evidence be made within 3 days of the hearing. These deadlines were not disclosed to appellees in § 39-669.15, and they were not legally notified of them until March 1, 1993—in some instances, too late for appellees to timely comply. In each of the cases before us, the district court found that appellees were denied the benefit of one or more of these provisions in that they were not legally informed of the timetables created by the rules until certain deadlines had

passed. That finding is supported by the record in each case.

More importantly, the Supreme Court was not persuaded when faced with the department's identical position in *Gausman*, again responding that arguing no prejudice "ignore[d] the plain meaning of § 84-906," which requires rules and regulations to be filed with the Secretary of State for 5 days to be valid against any person. Based on the reasoning in *Gausman*, we too conclude that arguing failure to demonstrate specific prejudice ignores the fact that the rules here were not in effect during times which had significant impacts on appellees' rights.

*Procedural Rules in Effect at Time of Hearing.*

Next, the department argues *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975), is dispositive of the issues on this appeal. In *Durousseau*, the Nebraska State Racing Commission revoked a jockey's license after an administrative hearing based upon a violation of the Nebraska Rules of Racing. At the time of the violation, rule 7.01 contained "skeletal provisions for practice and procedure," but prior to the hearing, the commission adopted amended rules of practice and procedure which were in effect by the date of the hearing. *Durousseau*, 194 Neb. at 290, 231 N.W.2d at 568. The court recognized:

> It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. . . .
>
> . . . "No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. Such a provision may be retroactive in its application."

(Citations omitted.) *Id.* at 293, 231 N.W.2d at 569-70. The Supreme Court affirmed the application of the amended procedural rules to the proceeding.

[5] The department claims that as in *Durousseau*, application of the department's newly created and adopted rules of practice

and procedure to appellees' cases violates no constitutional rule because such rules of practice and procedure were in effect on the date of the hearings and are only procedural in nature. There are at least two notable differences between the situation in *Durousseau* and the present actions. In *Durousseau*, and other cases relying on the same principle, the court was addressing the overall question of whether it was proper to apply an *amended* version of a procedural rule or statute enacted by the time of the hearing, rather than a procedural rule or statute effective at the time of the offense. See, also, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In the present actions, the rules and regulations were not amendments to rules already enacted. Indeed, prior to January 1, 1993, there was no automatic license revocation procedure in existence, and prior to March 1, 1993, there had been no rules in place governing the conduct of administrative hearings concerning the automatic license revocation created by § 39-669.15. Further, in *Durousseau*, the court found that the amended rules were procedural in nature and that the substantive rules of racing that Durousseau was charged with violating had not been altered. In the present actions, some of the "procedural" rules and regulations appear to substantially impact a licensee's rights, rather than being purely procedural, including those defining the burden of proof and application of the formal rules of evidence. Some courts have "recognized that procedural rules may affect substantive rights, and where a procedural rule, such as a new rule of evidence, has a substantial impact on a party's rights, the distinction between procedural and substantive rules breaks down." 2 Am. Jur. 2d *Administrative Law* § 162 at 186 (1994). We do not find *Durousseau* dispositive of the issues on this appeal.

*Due Process.*

Finally, the department argues that because appellees were given a "sufficient opportunity to be heard at the administrative hearing," their procedural due process rights were not violated. Brief for appellant in case No. A-93-427 at

12. The department contends that appellees received notice of their right to request a hearing and the operation of the license revocation laws when they received the "Notice/Sworn Report/Temporary License" and a notice of the hearing through the mail. The department further contends that each appellee was given a reasonable opportunity to defend against the charge at the administrative hearing and an opportunity to cross-examine witnesses before an impartial decisionmaker. In sum, the department asserts that appellees were afforded sufficient protections to comply with the "minimum procedures due process requires." *Id.* at 13.

[6] As we have stated, the department concedes that the protections of procedural due process apply to the revocation of a driver's license. In response to arguments that the department had complied with procedural due process requirements in *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 684, 522 N.W.2d 417, 421 (1994), the Supreme Court found that

> [a]lthough the department claim[ed] it complied with procedural due process by affording Gausman timely notice of the hearing, an opportunity to refute or defend against the charge, an opportunity to confront and examine adverse witnesses, and a hearing before an impartial decisionmaker, the department's failure to comply with § 84-906 [was] a denial of due process. The department held a revocation hearing and proceeded against Gausman using rules and regulations which it had failed to file with the Secretary of State, as required by the Administrative Procedure Act, and which were not valid as against Gausman. Such activity does not comport with due process.

We read *Gausman* as holding that fundamental procedural due process required the rules and regulations to be effective during the license revocation process—in that case at the time of the hearing. We believe this reasoning applies to all stages in the revocation process. The process was set in motion when appellees were stopped in their vehicles and arrested for driving under the influence. That point is the genesis of the entire revocation "process," as it is at that time that they first received

notice that their licenses would be revoked; that is the trigger point for the running of the 10-day period to file a petition, as well as the 30-day automatic revocation period. Appellees' due process rights demanded that the substantive and procedural rules and regulations which would govern the revocation process and administrative hearings be in effect at the commencement of this process—the time of their arrests. Fundamental principles of due process require fair and reasonable notice at the commencement of the process, not in the middle of it. In short, we believe the lack of rules and regulations at the time of the arrests is no less significant than the lack thereof at the time of the hearings under the circumstances involved in these cases. Nothing in the *Gausman* opinion suggests that the only stage of the revocation process at which a licensee is entitled to due process is the administrative hearing itself. Such a limited reading of that decision is not, in our judgment, a fair interpretation of its significance. We conclude that appellees were denied due process where the rules and regulations governing the administrative driver's license revocation procedure, statutorily required to be filed with the Secretary of State, were not in effect on the date of appellees' arrests. The decisions of the district court in these cases were correct.

Because we find no error on the record before us, the judgments of the district court, ordering the reinstatement of appellees' licenses, are affirmed.

AFFIRMED.

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PEGGY E. LEBRATO, APPELLANT, V. MICHAEL C. LEBRATO, APPELLEE.

529 N.W.2d 90

Filed March 7, 1995. No. A-93-780.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.

2. **Appeal and Error.** Where the evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change in circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, the good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
6. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines provide that all orders for child support obligations shall be established in accordance with such guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
7. **Child Support: Rules of the Supreme Court.** The trial court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file.
8. _____: _____. A parent's total monthly income for child support purposes is income derived from all sources.
9. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** The Nebraska Child Support Guidelines establish a rebuttable presumption of a material change in circumstances where application of the guidelines would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 6 months and can reasonably be expected to last for an additional 6 months.
10. **Child Support: Alimony: Wages.** It is appropriate to consider overtime wages in setting child support and alimony payments if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime.
11. _____: _____: _____. A court's findings regarding the employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control.

12. **Child Support: Appeal and Error.** When it can be avoided, the children and the custodial parent should not be penalized by the delay present in the appeal process, nor should the noncustodial parent profit. To hold that the children are not entitled to the benefit of increased child support during the time a matter was pending appellate review would be inequitable.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with directions.

Monica Green Kruger, of Raynor, Rensch & Pfeiffer, for appellant.

No appearance for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Peggy E. Lebrato appeals the order of the district court which increased the total child support obligation of her former husband, Michael C. Lebrato, from $650 to $700 per month for two children. Peggy challenges the trial court's failure to include Michael's overtime earnings and its failure to calculate the child support obligation in accordance with the Nebraska Child Support Guidelines (Guidelines). She contends these errors resulted in an increase which was insufficient. We agree and reverse the district court's order and remand the cause with directions.

## FACTS

Peggy and Michael Lebrato were married in 1981. A decree dissolving their marriage was entered January 22, 1990. The care, custody, and control of their two minor children, Shawn and Megan, was awarded to Peggy, and Michael's child support obligation was set at $325 per month per child, for a total of $650 per month.

Peggy filed a petition to modify the decree on January 29, 1993, seeking, inter alia, an increase in Michael's child support obligation and alleging a material change in circumstances due to Michael's increase in earnings. No responsive pleading was filed by Michael. At the hearing on the petition to modify, held in July 1993, Peggy was represented by counsel, and Michael appeared pro se. The evidence at the hearing disclosed that Michael is an hourly employee with Kellogg Company, the same

employer that he worked for at the time the decree was entered. Peggy was unemployed at the time, although she intended to seek employment when the children returned to school in the fall and expected to earn $5.50 to $6 per hour.

Michael's pay records from 1989 through July 1993 disclose that his gross earnings from Kellogg have increased each year since the entry of the decree in January 1990. A portion of each year's earnings was from overtime wages. In 1989, Michael's gross income was $51,923.15. At some point in 1990, his hourly wage increased from $17.54 to $19.51 per hour. In 1990, 1991, and 1992, Michael's gross income was $60,075.65, $67,555.13, and $70,949.27, respectively. His Kellogg payroll records through July 17, 1993, show that Michael's gross earnings were $43,572.71 for that 28-week period.

Michael's job duties involve that of an electrician for Kellogg. Michael testified that his increase in earnings from 1989 to 1993 was due essentially to his working considerably more than 40 hours per week. When asked generally how many hours per week he was working, he testified: "[S]even days a week . . . some days twelve hours, but there have been days that I haven't worked. So it works out to be eight hours, seven days a week." Michael testified that at the time of the hearing his position forced him to work a lot of overtime due to an expansion project, but that the project would be coming to an end soon. He later testified that the reason he had been receiving a lot of overtime "lately" was because an electrician was injured and other employees were on vacation. Moreover, the evidence disclosed that at the time of the hearing, Michael was in a chapter 13 bankruptcy proceeding requiring $500 in monthly payments, which he expected to continue for another 3 years, and he had a $100-per-month medical expense payment. The extensive documentary payroll evidence offered will be discussed later in this opinion.

At trial, Peggy contended that Michael's child support should be based upon his 1992 gross income of $70,949.20, which resulted in a gross monthly income of $5,912.43 and a net monthly income of $4,414.57 after deductions for income taxes, FICA, and union dues. Michael's retirement plan was not mandatory, and nothing was being deducted for his health

insurance plan. Using that amount as Michael's income and attributing a net monthly income to Peggy of $737.42 based upon an hourly wage of $5.50 for a 40-hour week, Michael's contribution for child support for two children under the Guidelines would be, according to Peggy's calculations, $1,028.56. These were the only child support calculations introduced at trial. The only suggestion from Michael as to what his support obligation should be came in response to the judge's asking what Michael felt that he should be paying, to which Michael responded: "I might be able to pay 700 a month."

At the conclusion of the hearing, the trial judge orally pronounced his ruling and commented on the reasons for it. He rejected Peggy's calculations and accepted Michael's testimony that his rise in income since the decree was due "mostly to overtime," which the judge did not think was legally required to support the children, and that, in any event, such overtime was "about to terminate." The trial judge reasoned that the only legitimate increase to consider was the hourly raise, per Michael's testimony, from "[a]bout, close to $18" to $19.51 per hour. Thus, the judge concluded that the only "actual increase" was $260 per month based on a 40-hour week (presumably 40 hours x $1.51 x 4.3 weeks per month). He also found that Michael was "having problems with his bankruptcy action being filed." Without more explanation, the order of the district court increased Michael's obligation to $350 per month per child, for a total of $700, and required Michael to reimburse Peggy for one-half of all out-of-pocket work-related day-care expenses incurred for the minor children. The original decree had ordered him to pay 80 percent of the day-care expenses. This reduction is not assigned as error by Peggy, although the record does not show why or on what basis this reduction was made.

The record contains no child support calculations of the trial judge, nor does it disclose total income figures which he utilized in arriving at Michael's increased child support obligation. Upon the overruling of her motion for new trial, Peggy perfected this appeal.

## ASSIGNMENTS OF ERROR

Peggy assigns three separate errors on her appeal. She alleges that the trial court erred (1) in failing to find Michael's increased earnings constituted a material change in circumstances requiring an increase in Michael's child support obligation to the amount specified by the Guidelines, (2) in determining that Michael's overtime earnings should not be considered in determining a material change in circumstances, and (3) in failing to apply the Guidelines.

## STANDARD OF REVIEW

[1] Modification of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

[2] Where the evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Sabatka, supra*; *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

[3] 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. *Sabatka, supra*; *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

## DISCUSSION

*Material Change.*

[4,5] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). Among the factors to be considered in determining whether a material change in circumstances has occurred are

changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, the good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Sabatka, supra*; *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

Although Peggy's first assignment of error points to the failure of the trial court to find that Michael's increased earnings since the date of the decree constituted a material change in circumstances, it is clear from the record that the court, in fact, *found* a material change in circumstances and *did* increase Michael's child support obligation, albeit only $50 per month. We construe Peggy's real contention on appeal to be her second and third assignments of error, i.e., that the court erred in not attributing *sufficient* earnings to Michael for child support purposes and in failing to compute support in accordance with the Guidelines.

*District Court's Order.*

[6,7] Although the trial judge expressly rejected Peggy's calculations, the record does not reflect what monthly income figure he attributed to either Peggy or Michael in arriving at Michael's support obligation for the two children of $700 per month. This is troublesome. The Guidelines provide that "[a]ll orders for child support obligations *shall* be established in accordance with [such] guidelines *unless* the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied." (Emphasis supplied.) Paragraph C. Accord Neb. Rev. Stat. § 42-364.16 (Reissue 1993). The Nebraska Supreme Court adheres to that rule. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). The trial court may deviate from the Guidelines whenever the application of the Guidelines in an individual case would be unjust or inappropriate. *Phelps, supra*; *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). "In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order; or worksheet 5 should be completed by the court and filed in the court file." Guidelines, paragraph C.

In this case, the trial judge expressly reasoned that the only "increase" in Michael's income that he would consider was that due to an hourly rate increase from $18 to $19.51, or a $1.51-per-hour increase. The pay records show the actual hourly rate increase was approximately $2 per hour (from $17.54 to $19.51). In any event, the judge concluded that there had been a $260-per-month increase in Michael's gross wages. However, to compute child support under the Guidelines and accompanying worksheets and table, that increase, even *if* it had been based on the correct actual hourly wage increase, had to be added to *some number*, presumably Michael's earnings at the time of the decree, to arrive at Michael's present monthly income. No such number appears in the record. If the judge did any calculations as mandated by the Guidelines to arrive at the $50-per-month increase, it is certainly not apparent from the record what those calculations consisted of. It is of little benefit to determine an *increase* of a certain dollar amount if the number being *increased* by that amount is not provided. Without a total income figure, the Guidelines cannot be applied.

*Michael's Earnings.*

Michael's gross earnings in 1989, the last full year before the decree was entered in January 1990, were $51,923, or an average gross monthly income of $4,327. During 1989, he was under a doctor's care and his work hours were restricted. He was back at work full time, including overtime, at the time the decree was entered in January 1990. In 1990, his approximate gross income was $60,075. His gross annual income has continued to increase, each year, through the time of the hearing on the petition to modify. Through July 17, 1993, his payroll records reflect that he had earned $43,572.71 in a 28-week period. Michael's earnings for 1993 included regular hourly wages, overtime wages, and payments shown on his payroll records under the category of "C.O.L.A.," which we conclude from Michael's testimony denotes "cost of living allowance." Another category of income appears under the notation "HRL. VAC-TAKEN." Although not explained in the record, it represented $5,675 of the total income earned

through July 17, 1993. By studying Michael's payroll records for 1990, 1991, and 1992, it appears that portions of his earnings in each of those years were, similarly, attributed to C.O.L.A. and HRL.VAC-TAKEN. As to the HRL.VAC-TAKEN category, those amounts were $4,135, $4,806, and $5,404, respectively, for those 3 years. It would seem, therefore, that the figure for 1993—$5,675—represents a one-time sum which, as of July 1993, had already been paid to Michael. We project Michael's 1993 earnings, based upon his earnings through July 17, by first deducting the one-time HRL.VAC-TAKEN figure, then determining his average weekly wage through July 17 from all other sources, and multiplying that by 52 weeks for the full year. To that figure, we add back the one-time HRL.VAC-TAKEN figure of $5,675. By doing so, Michael's projected 1993 income is $76,055, or an average gross monthly income of $6,338. Thus, Michael's average annual earnings have increased from the time of the decree to the date of the modification hearing from $51,923 to $76,055, an increase of $24,132 annually and $2,011 monthly.

[8,9] The Guidelines provide that a parent's "total monthly income" for child support purposes is income "derived from all sources." Paragraph D. Paragraph P of the Guidelines establishes a rebuttable presumption of a material change in circumstances where application of the Guidelines "would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 6 months and can reasonably be expected to last for an additional 6 months."

It is obvious that the trial judge did not consider the full amount of Michael's current income in computing child support in this case. Even Peggy's calculations, which were based upon Michael's 1992 earnings, with an average gross monthly amount of $5,912—approximately $425 per month less than his projected 1993 average gross monthly income—resulted in a child support obligation for Michael of $1,028, assuming full-time employment of Peggy. The court found Michael's child support obligation for both children to be a total of $700 per month.

The trial judge's stated reason for not including all of

Michael's income was that overtime wages and his hourly rate increase were the only sources of the rise in his income. He included only the hourly rate increase. The trial judge apparently based this upon Michael's testimony. The payroll records do not support this conclusion.

We have already pointed out that for each of the years 1990 to 1993, portions of Michael's annual earnings were attributed to categories other than regular wage income and overtime income. The amounts attributable to the category HRL.VAC-TAKEN for the years 1990 to 1993 are stated previously. These had risen consistently each year. Under the C.O.L.A. category, those amounts, for the years 1990, 1991, and 1992, were $3,032, $1,100, and $2,299, respectively. For only 28 weeks of 1993, the C.O.L.A. payments to Michael totaled $1,942. For 1993, the projected C.O.L.A. earnings would be approximately $3,606. Therefore, it is clear that Michael's increased earnings were not attributable solely to his increased hourly rate and overtime wages.

*Overtime.*

[10,11] The district court expressly discounted a significant portion of Michael's current earnings, finding that any increase in income since the decree was due "mostly to overtime," which the trial judge did not believe was properly considered in computing Michael's support obligations. In *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991), this subject was addressed. In *Stuczynski*, the obligor spouse, the husband, worked two separate jobs. One was a full-time position involving overtime. He had taken a second job to meet his responsibility concerning his family, but testified that he did not want to continue working the 70-hour week that the two jobs entailed. He argued that only his basic salary from one job, not including his overtime earnings, should be considered in determining his earnings for child support calculation purposes. The Supreme Court accepted his argument that income from his second job should not be included, noting that "a party obligated to furnish child support is not required to undertake two separate employments when the party has one full-time job. A spouse with a full-time job, which job also

furnishes substantial overtime, may not be required to work at a second job to furnish child support." *Id.* at 372, 471 N.W.2d at 125. As to the husband's claim that overtime from his full-time job should not be included, the court noted that the husband typically worked overtime hours in his employment and that the husband's estimated gross earnings for the year in which the hearing was held could "reasonably be expected" to include significant overtime. *Id.* at 373, 471 N.W.2d at 126.

> How is overtime to be treated in the calculation of income for the purposes of child support calculations? We believe it is appropriate to consider overtime wages in setting child support and alimony payments if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime. See, *Lenz v. Wergin*, 408 N.W.2d 873 (Minn. App. 1987); *Strauch v. Strauch*, 401 N.W.2d 444 (Minn. App. 1987); *In re Marriage of Heinemann*, 309 N.W.2d 151 (Iowa App. 1981). A court's findings regarding the employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control.

*Stuczynski*, 238 Neb. at 374, 471 N.W.2d at 126.

In rejecting the husband's claim that his overtime should be ignored for child support purposes, the court in *Stuczynski* observed that in the 3 years preceding the year of the hearing, the husband had earned overtime wages. It projected his annual income for the year of the hearing, based upon his partial-year earnings to the date of the hearing, and determined that significant overtime could reasonably be expected to be earned in that year as well. In its de novo determination of the husband's earnings for child support purposes, the Supreme Court utilized the husband's base salary at his regular hourly rate, adding to it his projected overtime earnings for the year of the hearing. It rejected the wife's argument that higher overtime earnings for preceding years should be used, as it would be speculative to base support upon a prior year's overtime when his projected overtime earnings at the time of trial were significantly less.

Based upon the reasoning of *Stuczynski*, we believe it is appropriate to consider Michael's overtime wages only if the evidence discloses that overtime is a regular part of Michael's employment and that he can actually expect to earn regularly a certain amount of income for working overtime.

Michael's payroll records reflect that a significant portion of his earnings for 1989 through July 17, 1993, was overtime wages. Michael admitted that 1989 was not a representative year for either overtime or regular wages due to his medical problems. However, the evidence is that during the majority of 1990, when his hourly increase went into effect, he had returned to his regular employment activities with Kellogg. In 1990, Michael's overtime earnings were $19,455. His overtime earnings for 1991 and 1992 were $26,858 and $28,275, respectively. His overtime earnings for 1993, projected out for the entire year, will be approximately $32,704.

It is apparent that, at least for a 4½-year period, overtime earnings were a regular part of Michael's employment with Kellogg. However, Michael testified that his overtime was about to terminate because a special project which had created the overtime was about completed. Thus, under the rationale of *Stuczynski*, we must determine whether Michael can actually expect to regularly earn a certain amount of income for overtime at this point.

We cannot accept Michael's testimony that all overtime wages would cease when this special project ended. A payroll representative from Kellogg testified that it was Kellogg's policy to provide hourly employees such as Michael with overtime and that it is "usually available when production demands it." Based upon Michael's own testimony, the special project did not start until 1991. Yet, in 1990, his overtime earnings were nearly $19,500. His average weekly overtime hours for 1990, 1991, 1992, and 1993 were 12.5 hours, 15.7 hours, 16.5 hours, and 18.8 hours, respectively. Thus, his average weekly overtime hours increased starting in 1991. Nevertheless, overtime was regularly paid in 1990 before the project commenced, and, in fact, he received over $14,000 in overtime wages in 1989, a year in which his medical condition admittedly did not allow him regular full-time employment and his hourly rate had not yet

increased. Moreover, if and when this "project" would be completed is not established by the evidence. It would be speculative to determine his earnings based upon an unknown.

In addition, and despite Michael's testimony that he was working "seven days a week . . . some days twelve hours," at the time of the hearing, Michael's work schedule does not remotely approximate the two-job, 70-hour week which the court in *Stuczynski* found onerous and unnecessary to support one's children. Although Michael's annual overtime *earnings* have increased substantially since 1990, his average weekly overtime *hours* have increased by only a little more than 6 hours per week. At the same time, his average weekly "regular" hours of work have decreased from 1990 to 1993. As of 1993, Michael's average workweek, including overtime hours, was 52.3 hours as compared to 47.8 hours per week in 1990, an increase of only 4.5 hours per week. In short, his increase in overtime hours since 1990 has been partially offset by a corresponding decrease in his "regular" hours each year, resulting in a net weekly increase of less than 5 hours.

In conclusion, we believe that the documentary evidence illustrates rather vividly that overtime has been a regular part of Michael's employment and that, at the time of the hearing, he could reasonably expect to earn an amount for working overtime even if and when the project terminated. Based upon Michael's past and current overtime earnings, we believe it was an abuse of discretion to totally exclude them from his income.

*Bankruptcy.*

Although we are unable to determine what weight the trial court placed on Michael's pending bankruptcy, that court did address it when orally pronouncing its decision. The evidence reflects that Michael was in a chapter 13 bankruptcy plan which required a $500-per-month payment that was expected to continue for another 3 years. The record is devoid of any indication of what Michael's other debt service requirements are, other than a $100-per-month medical payment. We cannot say on the record before us that the $500-per-month bankruptcy payment, in and of itself, is sufficient to rebut the presumption that the Guidelines should be applied or to require a deviation

from the Guidelines to avoid an unjust result. See *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991).

Michael testified that with this $500 monthly bankruptcy payment, child support, income taxes, and medical bills of $100 per month, he could pay no more than $700 per month for the care of his children. However, when we look at the evidence of how much money Michael has been putting into his *voluntary* retirement plan each year, for at least the last 4½ years, Michael's testimony is less than convincing. For the years 1989 through 1992, respectively, Michael contributed the following amounts to this plan: $7,627, $3,131, $6,065, and $8,728. For the 28-week period in 1993, he had already contributed nearly $6,536 to this voluntary retirement plan. At that rate, his projected contribution for 1993 would exceed $12,000. The Guidelines do not allow a deduction for contributions to voluntary retirement plans in arriving at net income for purposes of calculating child support. We believe this disallowance substantiates the view that, although a parent's planning for his or her needs in the *future*, upon retirement, may be a prudent course for the parent, it does not take priority over addressing the *present* needs of that parent's minor children.

*Michael's Child Support Obligation.*

Our de novo review leads us to the inescapable conclusion that the district court abused its discretion in finding that the increase in Michael's earnings was attributable only to his hourly rate increase and to his overtime hours. Moreover, the trial court applied an incorrect hourly rate increase and improperly excluded all of Michael's overtime earnings from consideration in setting child support. We must, therefore, make a de novo determination of the parties' income for child support purposes.

On our de novo review, we believe that it is appropriate to attribute earnings to Peggy in the amount suggested by her based upon her anticipated return to employment. The evidence was that this employment would produce a gross monthly income of $953.

Our de novo determination of what amount to attribute to

Michael for child support calculation purposes is problematical. Michael regularly earned overtime wages in the 4 1/2-year period preceding the hearing, but the amount of wages attributable to overtime fluctuated.

As stated, Michael's 1990 annual overtime wages were approximately $19,500 as compared to projected annual overtime wages at the time of the hearing of $32,704. Although some of that increase may have been attributable to the project which began in 1991, the record is unclear as to what, if any, that amount would be. Moreover, the record is definitely uncertain as to when this project will be completed and how much that will affect Michael's future overtime earnings. The Supreme Court in *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991), rejected the wife's attempt to base the husband's support upon a prior year's overtime when his current overtime was significantly *less*, labeling it as "speculative." Similarly, it would be speculative to base Michael's support on past years' overtime wages or on future possibilities.

In our judgment, Michael's monthly gross earnings for support purposes is $6,000. Although this is somewhat less than his *projected* monthly gross income at the time of the hearing—$6,338—we conclude it is just under the circumstances.

Upon remand, the district court shall determine the *net* monthly incomes of both Peggy and Michael in accordance with the Guidelines after the appropriate deductions. In that regard, there is no expense to Michael for health insurance, and his retirement contributions are purely voluntary. A monthly deduction for Michael's union dues in the amount of $25.72 is proper under the evidence presented. Appropriate deductions from both gross incomes for state, federal, and FICA taxes are necessary.

*Retroactivity of Support Order.*

[12] Peggy filed her petition seeking a modification of decree and an increase of child support on January 29, 1993. The district court's order was entered August 13, 1993, increasing Michael's total child support obligation by $50 per month to

$700 commencing on the first day of August 1993. Peggy asks that any increase in child support be made retroactive to the date of the modification hearing because the failure to do so would penalize her and her minor children during the appellate process and allow Michael to profit. We agree. Under our rationale in *State ex rel. Crook v. Mendoza*, 1 Neb. App. 180, 491 N.W.2d 62 (1992), we believe that had the district court properly considered all of the evidence offered at the modification hearing and modified Michael's child support obligation using the Guidelines, as it should have, Peggy and the minor children would have had the benefit of a substantially greater increase than that granted from August 1, 1993, until now.

> When it can be avoided, the children and the custodial parent should not be penalized by the delay present in the appeal process, nor should the father profit. To hold that the children are not entitled to the benefit of increased child support during the 2 years this matter was pending appellate review would be inequitable.

*Mendoza*, 1 Neb. App. at 183, 491 N.W.2d at 64.

Therefore, we conclude that Michael's child support obligation, as determined in accordance with this opinion, should be effective retroactive to August 1, 1993.

Finally, on remand, the district court's order setting child support shall be calculated and set forth as required by paragraph H of the Guidelines so as to reflect the amount due "with the amount recalculated and reduced as the obligation to support terminates for each child."

## CONCLUSION

The district court abused its discretion in determining Michael's earnings for child support purposes. Overtime is a regular part of Michael's employment, and he can actually expect to earn regularly an amount of income for working overtime. On remand, the district court shall determine the parties' net income, and child support shall be computed in accordance with this opinion and the Guidelines, with Michael's support obligation as so determined to be retroactive to August 1, 1993.

REVERSED AND REMANDED WITH DIRECTIONS.

# STATE OF NEBRASKA, APPELLEE, V. MICHAEL A. MARSHALL, APPELLANT.

529 N.W.2d 83

Filed March 7, 1995. No. A-94-449.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the judge issuing a search warrant had a substantial basis for determining that probable cause existed.
4. **Search and Seizure: Search Warrants: Presumptions.** A search pursuant to a warrant is presumed to be valid.
5. **Search Warrants: Affidavits.** In determining the sufficiency of an affidavit used to obtain a search warrant, Nebraska has adopted the "totality of the circumstances" test formulated by the U.S. Supreme Court.
6. **Search Warrants: Affidavits: Probable Cause.** In issuing a search warrant, a judge 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 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.
7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. _____: _____. An affidavit reciting that an undisclosed informant had given reliable information to the police in the past is sufficient to establish reliability for the purposes of issuing a search warrant.
9. **Search Warrants: Affidavits: Presumptions: Proof.** There is a presumption of validity with respect to the affidavit supporting the search warrant. In order to overcome this presumption, the defendant bears the burden of demonstrating that the affidavit was false.
10. **Search Warrants: Affidavits: Probable Cause: Proof.** In order to invalidate a warrant, it must be shown that the affiant made a deliberate falsehood or acted with reckless disregard for the truth, and it must be demonstrated that the challenged material is "material" or necessary to a finding of probable cause.
11. **Search Warrants: Affidavits: Proof.** Defendants who allege that warrant affidavits contain material falsehoods or omissions must establish that the

challenged information contained in the affidavit was deliberately false or made in reckless disregard of the truth or that the information was omitted intentionally or deliberately. Negligent or innocent mistakes are not sufficient to support such a challenge.

12. _____: _____: _____. To invalidate a search warrant on grounds that the supporting affidavit contains material falsehoods or omissions, the defendant bears the burden of showing that the affiant omitted facts with the intent to make the affidavit misleading or in reckless disregard of whether such omissions made the affidavit misleading.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

IRWIN and MILLER-LERMAN, Judges, and HOWARD, District Judge, Retired.

IRWIN, Judge.

## I. STATEMENT OF THE CASE

Appellant, Michael A. Marshall, argues that evidence used to convict him was obtained from his home pursuant to an invalid search warrant. His motion to suppress physical evidence and statements was denied. He appeals his conviction for possession with intent to manufacture, distribute, deliver, or dispense base cocaine (crack) in a quantity of less than 10 grams, a violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994). This crime is a Class II felony and is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1989). Marshall was sentenced to serve a term of imprisonment of 4 to 8 years.

## II. ASSIGNMENTS OF ERROR

Marshall claims that the district court erred in (1) failing to suppress evidence obtained as a result of an invalid search warrant because (a) the informant's reliability was not established and (b) there were omissions of material fact and (2) prohibiting Marshall from questioning a police officer at the suppression hearing about the amount of money paid to a

confidential informant whose information was used in the search warrant.

## III. STANDARD OF REVIEW

[1,2] In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

[3] The duty of the reviewing court is to ensure that the judge issuing a search warrant had a substantial basis for determining that probable cause existed. *Grimes, supra*.

[4-6] A search pursuant to a warrant is presumed to be valid. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994). In determining the sufficiency of an affidavit used to obtain a search warrant, Nebraska has adopted the "totality of the circumstances" test formulated by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). According to this test, the issuing judge 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 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.*

## IV. FACTUAL BACKGROUND

At approximately 11 p.m. on September 27, 1993, officers of the Omaha police narcotics unit, together with members of the emergency response unit, executed a search warrant at 1816 North 32d Street, Omaha, Nebraska. Present in the residence

were several adults and two children. Marshall and a female codefendant were found in the basement of the residence, which appeared to be used as a separate living area. It contained a living room area with appropriate furniture and appliances, such as televisions and a stereo. Also in the basement was a bedroom area with dressers and a bed. A search of the basement disclosed the presence of 3 grams of crack cocaine concealed underneath the carpet and another one-half gram of crack cocaine in a plastic bag lying on top of one of the appliances. A physical search of Marshall revealed $1,530 contained in his right front pants pocket and an additional $421 in his left front pants pocket. Some of the other items revealed in the search were 2 mobile phones, 2 digital pagers, 35 rounds of 9-mm ammunition, and 4 venue items relating to Marshall. Marshall was subsequently arrested, and after being advised of his *Miranda* rights, he gave a statement admitting that the cocaine was his, stating, " 'It's mine, all mine.' " When questioned about the money found on his person, he denied that it was revenue from drug sales. During the interview, Marshall stated that his sole source of income was approximately $400 in monthly disability benefits.

The warrant which the officers executed authorized the search for cocaine; instruments for administering cocaine; and venue items such as keys, moneys, and records. The sworn affidavit executed by the two police officers obtaining the search warrant stated in relevant part:

> The complaint and affidavit of [the police officers], on this 27th day of September 1993, who, being first duly sworn, upon oath says [sic]:
>
> That he has [sic] just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Cocaine, its' [sic] derivatives, all administering instruments whether homemade or manufactured. Venue items such as keys that would identify the person in control of 1816 N. 32 Street, Omaha, Douglas County, Nebraska. Also, monies and records used to conduct an illegal narcotics operation.
>
> . . . .

That the following are the grounds for issuance of a search warrant for said property and the reasons for his [sic] belief, to-wit: On Monday, 27 September 1993, affiant officers were contacted by a confidential reliable informant, in the early evening hours of today's date. In speaking with the C/I, the C/I informed affiant officers of a cocaine distribution operation eminating [sic] out of the address of 1816 N. 32 Street, Omaha, Nebraska. C/I advised affiant officers that he/she had observed a black female party known to the C/I as [codefendant's name]. The C/I further stated that [codefendant] is the resident of 1816 N. 32 Street. C/I stated that he/she had ocassion [sic] to be inside the above forementioned address within the last 24 hours. The C/I stated while inside the residence, he/she had observed [codefendant] possessing an amount of crack cocaine. The C/I stated he/she had observed [codefendant] sell a quantity of crack cocaine to an unidentified individual inside the residence within the last 24 hours. C/I further stated that he/she overheard [codefendant] indicate that she has additional amounts of crack cocaine and that she would be selling the crack cocaine from inside the residence into the late night hours.

The C/I that provided the information to affiant officers has provided reliable information to affiant officers and other officers to [sic] the Omaha Police Narcotics Unit which has resulted in the issuance of numerous narcotics related search warrants during which time crack cocaine has been seized and arrest [sic] made.

Based on the C/I's information, numerous convictions have been obtained on crack charges in Douglas County District Court. The C/I has made numerous controlled purchases of crack cocaine under the direct supervision of Narcotics Officers. The purchases did field test positive for crack. The C/I is under no terms of probation, parole or work release.

A warrant authorizing a night-time search is requested because [t]his information was received during the late evening hours of today's date and affiant officers are working as quickly as possible so as to prevent the

> complete dispersal of the evidence.
>
> That a No Knock Search Warrant is requested because . . . [i]f officers were required to announce their presence or purpose, the evidence being sought could easily be destroyed by flushing it down the toilet, sink and/or by swallowing it.

Marshall maintains that the search warrant was invalid because (1) the affidavit supporting it failed to detail any independent investigation which would establish the reliability of the informant and (2) the affidavit contained material omissions of fact. Based upon these reasons, he filed his motion to suppress all evidence seized and statements made as a result of the search. In addition to these two issues, Marshall maintains that the district court erred in sustaining the State's objection to questions concerning the amount of money paid to the confidential informant.

## V. ANALYSIS

### 1. Validity of Warrant

#### (a) Proof of Reliability of Affiant

Marshall argues that the search warrant was invalid because the affidavit in support of the search warrant did not establish the reliability of the confidential informant. Marshall appropriately cites *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), for the proposition that to credit a confidential source's information in making a probable cause determination, the affidavit should give rise to an inference that the source was trustworthy and that the source's accusation of criminal activity was made on the basis of information obtained in a reliable way.

[7] When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677

(1984).

The *Utterback* court stated that the reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.

In the present case, the police officers' affidavit to obtain the search warrant contains an averment that the informant had given reliable information in the past. The affidavit, as previously quoted, contained information that the informant had given reliable information in the past to the Omaha police and that this information had resulted in "numerous" convictions. No evidence in the record refutes this in any way.

[8] It is widely recognized that an affidavit reciting that an undisclosed informant had given reliable information to the police in the past is sufficient to establish reliability for the purposes of issuing a search warrant. See, *United States v. Hunley*, 567 F.2d 822 (8th Cir. 1977); *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985); *State v. Hoxsworth*, 218 Neb. 647, 358 N.W.2d 208 (1984).

We find that the affidavit executed in support of the search warrant contained, on its face, sufficient information to establish the reliability of the informant. However, since Marshall also assigns as error that there were omissions of material facts, we must examine that argument, set out below, before making a final determination as to the validity of the warrant.

(b) Material Omissions in the Affidavit

In his second attack on the search warrant, Marshall claims that since there were material omissions in the affidavit offered in support of the search warrant, i.e., that the informant was paid and the amount of such payment, the warrant is invalid.

Probable cause determinations are to be made by reviewing the "totality of the circumstances" set forth in the affidavit. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527

(1983). The concept of probable cause is a fluid one. As stated in *Stanert*, 762 F.2d at 778-79, the role of the issuing judge regarding probable cause is

> "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

An appellate court will not reverse such a conclusion unless the decision is clearly erroneous. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

[9,10] In *State v. Sims*, 216 Neb. 569, 572-73, 344 N.W.2d 645, 647 (1984), the Nebraska Supreme Court wrote:

> In *State v. Stickelman*, 207 Neb. 429, 435, 299 N.W.2d 520, 524 (1980) (quoting *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), we stated that there is " 'a presumption of validity with respect to the affidavit supporting the search warrant. . . .' " In order to overcome this presumption the defendant bears the burden of demonstrating that the affidavit was false. *State v. Stickelman, supra. Franks v. Delaware, supra*, indicates that in order to invalidate a warrant it must be shown that the affiant made a deliberate falsehood or acted with reckless disregard for the truth, and it must be demonstrated that the challenged material is "material" or necessary to a finding of probable cause. *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir. 1979), *cert. denied* 441 U.S. 950, 99 S. Ct. 2178, 60 L. Ed. 2d 1055.

[11] While the above-quoted language from *Sims* applied to false statements, *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), established that this language is applicable to situations involving omissions from affidavits as well. See, also, *United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980). Defendants who allege that warrant affidavits contain material falsehoods or omissions must establish that the challenged information contained in the affidavit was deliberately false or

made in reckless disregard of the truth or that the information was omitted intentionally or deliberately. Negligent or innocent mistakes are not sufficient to support such a challenge. See *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980). Marshall argues that the warrant affidavit contains material omissions that negate its facial showing of probable cause. See, *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Utterback, supra*.

[12] Marshall's argument ignores the requirement that omissions in warrant affidavits necessitate suppression of evidence only when they occur intentionally or recklessly. In Nebraska, to invalidate a search warrant on grounds that the supporting affidavit contains material falsehoods or omissions, the defendant bears the burden of showing that the affiant omitted facts with the intent to make the affidavit misleading or in reckless disregard of whether such omissions made the affidavit misleading. See, *Reivich, supra*; *State v. Jolitz*, 231 Neb. 254, 435 N.W.2d 907 (1989); *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989); *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987).

Our independent review of the record leads us to conclude that Marshall failed to show that the affiants even had knowledge at the time of the affidavit's creation that the informant was paid. He therefore has not shown that this omission was done intentionally or with a reckless disregard for the truth. The only salient testimony contained in the 48-page suppression hearing record is set forth below. Only one of the two affiant officers was called as a witness. The following exchanges occurred during cross-examination of the witness:

> Q. Are you the officer that's worked with this confidential informant in the past?
>
> A. Yes.
>
> . . . .
>
> Q. . . . The confidential informant [was] paid by the Omaha Police Department?
>
> A. Yes.
>
> Q. How much is the confidential informant paid?
>
> [Prosecutor]: Objection: relevance.
>
> THE COURT: I'll sustain the objection.

. . . .

Q. . . . Was the information that the confidential informant was paid for included in your—in your Affidavit for the Search Warrant?

A. Did we identify the confidential informant as being a paid informant?

Q. Yes.

A. Not in the Affidavit, no.

Q. I'd ask again: How much was the confidential informant paid?

[Prosecutor]: Again, I'll object. It's irrelevant.

THE COURT: Again, I'll rule it's irrelevant. The objection's sustained.

. . . .

Q. . . . The information that the confidential informant provided you in the past was provided on a paid—paid-for basis; is that correct, Officer?

A. Not at all times, no.

Q. Confidential informants had been paid by you in the past for information; is that correct?

A. Yes.

. . . .

Q. Of—Of the information gathered that led to warrants, what percentage would you say led to arrests?

A. I would say probably almost a 100%.

Q. You said this confidential informant was paid. Is that correct?

A. It was, but—If you're—If you're asking me if the confidential informant we've utilized in the past has been paid in the past, yes.

. . . .

Q. . . . Is the individual paid before or after the information is given?

A. Generally afterwards, but that doesn't—that isn't a rule of thumb.

Therefore, regarding this assigned error, we find the warrant to have been based on an affidavit which did establish the reliability of the informant by showing that the informant gave reliable information to the police in the past, and Marshall

failed to show that the affidavit contained intentional or reckless omissions. This assignment of error is without merit.

### 2. Amount of Money Paid to Informant

Given our resolution of the above assigned error, it serves no recognized purpose to discuss the district court's evidentiary ruling regarding the question of how much the informant was paid. Even were we to assume arguendo that such evidence was material, since Marshall has failed in his burden of proving that the information omitted from the affidavit was omitted intentionally or recklessly, the district court was correct in denying his motion to suppress.

## VI. CONCLUSION

The decision of the trial court denying the motion to suppress was not clearly erroneous and is therefore affirmed.

AFFIRMED.

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## Robert E. Dyer, appellant, v. Hastings Industries, Inc., and CNA Insurance Companies, appellees.

528 N.W.2d 363

Filed March 7, 1995. No. A-94-708.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon 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. _____: _____. 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 single judge who conducted the original hearing.
3. _____: _____. The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Dallas D. Jones and Brenda S. Spilker, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

MORAN, District Judge, Retired.

Robert E. Dyer appeals from a Workers' Compensation Court review panel order that affirmed the trial court's decision to dismiss Dyer's petition. Dyer filed a petition with the Workers' Compensation Court requesting benefits on the basis that he was harassed by his supervisor, which caused Dyer to suffer injuries. Hastings Industries, Inc., and its workers' compensation insurance carrier, CNA Insurance Companies, filed a motion for summary judgment or, in the alternative, judgment on the pleadings. The trial court granted the motion for judgment on the pleadings and dismissed Dyer's petition.

## STATEMENT OF FACTS

Robert E. Dyer was an employee of Hastings Industries, Inc. Dyer alleged in a petition for workers' compensation benefits that while he was working for Hastings Industries, he was "exposed to severe harassment by his supervisors at work." Dyer alleged that as a result of the harassment, he incurred severe depression and adjustment disorder, which manifested itself in the form of loss of appetite, loss of sleep, and homicidal ideation. Dyer claimed that as a result of his depression, he is totally and permanently disabled.

Hastings Industries and CNA filed an answer in response to Dyer's petition, denying all of Dyer's allegations and alleging that if Dyer had suffered any disability, it was not as the result of an accident or occupational disease arising out of or in the course of Dyer's employment with Hastings Industries. Hastings Industries and CNA then filed a summary judgment motion. The trial court denied Hastings Industries and CNA's

motion on the basis that there is no statutory provision or rule which authorizes the Workers' Compensation Court to grant summary judgments.

Hastings Industries and CNA then filed a motion for summary judgment and alternative motion for judgment on the pleadings. A hearing on the motion was had, at which evidence was entered, including a deposition of Dyer and a letter and medical report from his doctor. The trial court found:

> I
>
> . . . The plaintiff is not contending that he has suffered any violence to the physical structure of his body. The law in this state is that mental injuries which are not accompanied by "violence to the physical structure of the body" are not compensable. [Citation omitted.] The plaintiff has not alleged and the evidence received by the court does not show that the plaintiff is claiming any actual physical injury. As the plaintiff has alleged only mental injuries, he has failed to state a cause of action upon which relief may be granted to him.
>
> II
>
> No genuine issues of material fact or law appear herein and as the plaintiff has failed to state a cause of action upon which relief could be granted, the Motion . . . for judgment on the pleadings should be sustained . . . .

Upon appeal, the review panel affirmed the trial court's order dismissing Dyer's petition. Dyer appeals to this court.

## ASSIGNMENTS OF ERROR

Dyer alleges that the trial court erred (1) when it granted judgment on the pleadings because such procedure is not authorized by rule or statute; (2) when it considered evidence submitted when deciding upon the motion; (3) when it found that Dyer alleged only mental injuries, when he had alleged physical objective injuries; and (4) when it failed to find that Dyer was entitled to workers' compensation benefits.

## STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon 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. *Haney v. Aaron Ferer & Sons, ante* p. 14, 521 N.W.2d 77 (1994).

[2] 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 single judge who conducted the original hearing. *Id.*

[3] The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

## ANALYSIS

Dyer alleges that the Workers' Compensation Court is not empowered to render a judgment on the pleadings, as there is no statutory authority allowing such a motion to be made to the compensation court. In a motion for judgment on the pleadings in a civil case, the moving party admits the truth of the well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn from such facts. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991).

However, unlike civil courts, courts of workers' compensation generally will accept in lieu of a petition any paper that contains the substance usually supplied by a formal claim, although the form may be defective. 2B Arthur Larson, The Law of Workmen's Compensation § 77A.31 (1994).

Neb. Rev. Stat. § 48-173 (Reissue 1993) states that a petition for workers' compensation benefits shall contain

> the names and places of residence of the parties and the facts relating to the employment at the time of the injury for which compensation is claimed, the injury in its extent

> and character, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of such injury, and such other facts as may be considered necessary for the information of the compensation court, and also stating the matter or matters in dispute and the contention of the petitioner with reference thereto.

The Workers' Compensation Act further provides:

> Within seven days after the return day of such summons the party at interest upon whom the same is served shall file an answer to such petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition.

Neb. Rev. Stat. § 48-176 (Reissue 1993).

The next procedural step provided for in the statutes is a hearing on the cause. Neb. Rev. Stat. § 48-177 (Reissue 1993). There is no provision in the statutes for a summary judgment motion or for a motion for judgment on the pleadings. The Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred upon it by statute. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984). For example, although a court of general jurisdiction has the inherent power to vacate or modify its own judgment, such power does not apply to statutory tribunals such as the Workers' Compensation Court. *Id.* The Workers' Compensation Court cannot grant a motion for new trial. *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990). See, also, *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

Because the court was not authorized to order judgment on the pleadings and such a motion does not advance the liberal pleading policy behind the Workers' Compensation Act, we find that the trial court erred when it granted Hastings Industries and CNA's motion for judgment on the pleadings. We therefore reverse the judgment and remand the cause with directions to reinstate Dyer's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

# TAD D. HAMMOND, APPELLANT, V. JANICE C. HAMMOND, APPELLEE.

529 N.W.2d 542

Filed March 14, 1995. No. A-93-544.

1. **Final Orders: Jurisdiction: Appeal and Error.** In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
2. **Contempt: Appeal and Error.** In determining whether contempt orders are appealable, the Nebraska Supreme Court has distinguished between civil, or coercive, sanctions and punitive sanctions.
3. **Contempt.** When a coercive sanction is imposed, the contemner holds the keys to his jail cell because the sentence is conditioned upon his continued noncompliance with the court's order.
4. _____. An order imposing a coercive sanction in a civil contempt proceeding is always subject to modification by the contemner's conduct and thus is not a final, appealable order.
5. **Contempt: Collateral Attack.** A coercive sanction can only be attacked collaterally by habeas corpus.
6. **Contempt: Appeal and Error.** A punitive contempt sanction is like a criminal sentence, because it is not subject to mitigation should the contemner comply with the court order. A punitive contempt sanction thus is a final, appealable order.
7. _____: _____. The finding of contempt alone, without a noncontingent order of sanction, is not appealable.
8. _____: _____. The general rule is that a contempt order entered in a postjudgment proceeding that does not terminate that proceeding is nonappealable. There must be both a finding of contempt and a noncontingent order of sanction before the order can be appealable.

Appeal from the District Court for Otoe County: ROBERT T. FINN, Judge. Appeal dismissed.

Anne M. Marcotte, of Wellensiek Law Offices, for appellant.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

IRWIN, Judge.

Tad D. Hammond appeals from an order of the Otoe County District Court finding him in contempt of court for failing to

make property settlement payments as required by a divorce decree. Because the district court's finding of contempt is not a final, appealable order, this court lacks jurisdiction, and we dismiss this appeal.

## SUMMARY OF FACTS

On March 30, 1992, Tad and Janice C. Hammond were divorced in the district court for Otoe County. Although the divorce decree is not in the record presently before this court, the court below found that as part of the decree, the district court approved a property settlement agreement. That agreement, which is in the record, stated that Tad was to convey to Janice a condominium in Vero Beach, Florida, free and clear of encumbrances, on a date no later than July 15, 1992. The agreement further provided that Janice was entitled to immediate possession of the condominium, but that she would be responsible for a prorated amount of the real estate taxes and membership dues associated with the condominium upon taking possession. A dispute arose regarding the date that Janice took possession of the condominium, with Tad claiming that Janice took possession on April 1, and Janice claiming that she took possession no earlier than July 15. Tad thereafter did not pay several expenses related to the condominium that Janice contends he was ordered to pay under the decree.

Janice then brought civil contempt proceedings against Tad for failure to comply with the decree. See Neb. Rev. Stat. § 42-366(5) (Reissue 1993). After a hearing, the court found Tad in contempt and stated that Tad could purge himself of the contempt by making the required property settlement payments of $15,250, plus interest, within 30 days.

## DISCUSSION

[1] In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). Although neither party has presented the issue of whether the record contains a final, appealable order, this court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a defect which prevents acquisition of appellate jurisdiction. See *Manske v. Manske*,

246 Neb. 314, 518 N.W.2d 144 (1994).

[2-5] In determining whether contempt orders are appealable, the Nebraska Supreme Court has distinguished between civil, or coercive, sanctions and punitive sanctions. See, e.g., *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984). When a coercive sanction is imposed, the contemner holds the keys to his jail cell because the sentence is conditioned upon his continued noncompliance with the court's order. *Maddux, supra*; *In re Contempt of Liles, supra*. An order imposing a coercive sanction in a civil contempt proceeding is always subject to modification by the contemner's conduct and thus is not a final, appealable order. *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *Maddux, supra*. Rather, the coercive sanction can only be attacked collaterally by habeas corpus. *Maddux, supra*; *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987).

[6] On the other hand, a punitive contempt sanction is like a criminal sentence, because it is not subject to mitigation should the contemner comply with the court order. A punitive contempt sanction thus is a final, appealable order. *Maddux, supra*. See, *State ex rel. Kandt, supra*; *In re Contempt of Liles, supra*.

In the present case, the district court found Tad to be in contempt and gave him 30 days in which to purge himself of the contempt by paying $15,250 to Janice in accordance with the court-approved property settlement agreement. However, the court's order does not mention *any* sanction to be imposed if Tad failed to comply with the order.

[7,8] "The finding of contempt alone, without a noncontingent order of sanction, is not appealable." *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721, 722 (1988). " '[T]he general rule is that "a contempt order entered in a postjudgment proceeding that does not terminate that proceeding is . . . non-appealable." [Citation omitted.] There must be *both* a finding of contempt and a *noncontingent* order of sanction. . . .' " *State ex rel. Kandt*, 225 Neb. at 660, 407 N.W.2d at 750.

Because the district court in this case did not impose an order

of sanction, let alone a noncontingent order of sanction, the proceedings were not terminated in the court below, and the district court's order is not appealable. We therefore dismiss this appeal.

APPEAL DISMISSED.

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STATE OF NEBRASKA, APPELLEE, V. PHILIP M. YOUNG, APPELLANT.

530 N.W.2d 269

Filed March 14, 1995. No. A-94-495.

1. **Issue Preclusion.** The four conditions which must exist in order for issue preclusion to apply are that (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or a privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
2. **Issue Preclusion: Appeal and Error.** The applicability of the doctrine of issue preclusion constitutes a question of law for which an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
3. **Criminal Law: Administrative Law: Drunk Driving: Licenses and Permits: Revocation.** The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one action is of no consequence to the other.
4. **Criminal Law: Administrative Law: Issue Preclusion: Drunk Driving: Licenses and Permits: Revocation.** A factual determination in an administrative hearing for driver's license revocation does not operate to preclude prosecution for driving while intoxicated because the administrative proceedings were not conducted by a court.
5. _____: _____: _____: _____: _____: _____. Issue preclusion does not apply to criminal proceedings after an administrative determination in a driver's license revocation proceeding has been made because at least one element of issue preclusion is not present—the State has not had a full and fair opportunity to litigate the issue in the previous administrative hearing.
6. **Issue Preclusion.** If the issues in the two proceedings are not identical, the doctrine of issue of preclusion does not apply.
7. **Double Jeopardy: Penalties and Forfeitures.** A civil penalty may constitute punishment for purposes of double jeopardy.

8. **Double Jeopardy: Legislature: Penalties and Forfeitures.** A legislature's characterization of a sanction as civil is not final and does not foreclose the possibility that the "civil" sanction could be a penalty under the Double Jeopardy Clause.
9. **Double Jeopardy: Penalties and Forfeitures.** The determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.
10. **Double Jeopardy: Licenses and Permits: Revocation.** Under *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), the question is whether revoking a driver's license is remedial, and thus only a deterrent, or whether it is retribution, and thus a penalty. A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that the license may be revoked for cause by the state.
11. **Licenses and Permits: Revocation.** The revocation of a driver's license is not a penalty for the violation of the statutes or ordinances involved.
12. **Drunk Driving: Licenses and Permits: Revocation.** The purpose of enacting the license revocation procedure under Neb. Rev. Stat. §§ 39-669.15 to 39-669.19 (Reissue 1988 & Cum. Supp. 1992) was to protect the public by getting people with drinking propensities off the road quickly and to deter driving while intoxicated.
13. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Douglas County, JOSEPH S. TROIA, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of District Court affirmed.

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

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

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

Philip M. Young appeals his conviction for driving under the influence of alcohol in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). At the time of his arrest, his license was impounded pursuant to Neb. Rev. Stat. § 39-669.15 (Cum. Supp. 1992), and he petitioned the Nebraska Department of

Motor Vehicles for an administrative hearing to appeal the automatic revocation of his driver's license. That proceeding resulted in an administrative determination in Young's favor. Before trial, Young moved to have this case dismissed on the basis that the determinations in the driver's license revocation proceedings conclusively determined the issues in this case and the Double Jeopardy Clause applied to prevent determination of these issues again. Young appeals on the basis that the trial court erred in denying his motion to dismiss and also in finding that the evidence was sufficient to support the conviction. We conclude that the Double Jeopardy Clause does not preclude this prosecution and that the evidence was sufficient to sustain his conviction. We therefore affirm.

## STATEMENT OF FACTS

On Friday, April 16, 1993, at approximately 9 p.m., Anne Ball and her son were on their way home after shopping. While traveling south on 24th Street at the intersection of 24th and M Streets, in Omaha, Nebraska, Ball noticed a car pulling out from in front of the Cardinal Bar and traveling in the same direction as she. Later, she learned that car was operated by Young. She observed that Young swerved within his lane, and at one point, he forced Ball's car off of the road and onto the curb. Five blocks later, Young ran a red light and almost collided with another vehicle. Ball became irate because of Young's driving, and she followed him in order to get his license plate number. She saw him turn into an alleyway on Railroad Avenue. She then pulled into a nearby auto body shop and reported the matter to a 911 operator over the telephone. After making the call to 911, Ball drove her car into the alley where Young's car was parked. Ball and Young engaged in a verbal confrontation. Ball then left and called 911 again. During that call, the police arrived and took Ball's statement. Two police cars then followed Ball to Young's car.

Upon arriving, Officer Gregory Hansen noticed the brake lights of a vehicle inside Young's garage come on and go off. Officer David Baker then observed Young get out of the vehicle. Baker then took Young's statement. He noticed that Young's eyes were glassy and red and that the odor of alcohol

was emanating from him. Baker then asked Young if he would take field sobriety tests. Young agreed, but was argumentative when asked to actually perform the requested tests. Baker stated that Young failed the "alphabet recitation test," the "count down test," and the "manual dexterity test." Both officers testified that in their opinion, Young was intoxicated. The officers placed Young under arrest for driving while under the influence of alcohol and transported him to the police station, where a breath test was administered. The breath test showed that Young's breath had a concentration of .169 of 1 gram of alcohol per 210 liters of breath.

Ball testified that she was a nurse at the VA hospital and worked in the substance abuse treatment center, which deals with alcohol and drug abuse. She stated that as part of her job, she has substantial contact with people who are under the influence of alcohol and that she knows the common indicators of intoxication. She was not asked to render an opinion on whether Young was intoxicated, but she testified that he had the common symptoms of intoxication—that is, he had a red and flushed face, a casual appearance, and slurred speech, and he swayed while he walked. She also testified that he was irrational, gruff, unruly, and addressed her with racial epithets.

At trial, George Cranford, a friend of Young, testified that on the night in question, he was at Young's residence asleep on the couch waiting for Young to get home from work. Cranford stated that at around 9 p.m., Young entered the house and started ranting about a crazy woman who followed him and started yelling at him. Cranford stated that Young then started gulping whiskey from a bottle Cranford had just opened. Young went back outside to lock up the car and shut the garage door. Cranford then went back to sleep, and by the time he woke up, Young had already been transported by police to the police station.

Prior to trial, Young moved to dismiss the case on the basis of issue preclusion. After an evidentiary hearing, the trial court denied that motion.

## ASSIGNMENTS OF ERROR

Young alleges the district court erred (1) in not finding that

the doctrines of res judicata and collateral estoppel barred the State from relitigating issues or claims previously settled in the administrative license revocation hearing and (2) in not finding there was insufficient evidence to support the conclusion that Young was operating a motor vehicle while being intoxicated.

## GENERAL CONSIDERATIONS

The U.S. Supreme Court has stated that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Young's counsel argues that the State's action in attempting to take Young's license precludes the State from prosecuting him in this action. In so doing, Young's counsel relies upon those cases that analyze double jeopardy in terms of collateral estoppel, issue preclusion, and res judicata. These issues are included in those double jeopardy cases which analyze the doctrine from the standpoint of a second prosecution after either an acquittal or a conviction. We shall consider this group of cases first under the heading of issue preclusion. There is considerable authority in which courts have considered whether the doctrine of issue preclusion can apply to cases similar to this one. Young also relies upon a second group of cases which considers the doctrine of double jeopardy from the standpoint of multiple punishments for the same offense. This issue developed recently out of the holdings of the U.S. Supreme Court in *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), and *United States v. Halper, supra*. These two cases recognized that a sanction which has been designated as a civil sanction can be a punishment for purposes of double jeopardy and that if such a penalty was provided for in addition to a criminal punishment, the Double Jeopardy Clause could be violated. Young's counsel argues that the taking of a driver's license in an administrative proceeding is a punishment under the Double Jeopardy Clause which precludes a later prosecution of driving under the influence, and the fact that the attempt to take his license was

ineffective is not material to this issue. We shall consider those cases under the heading of multiple punishments.

## ISSUE PRECLUSION

*Standard of Review.*

The doctrine of issue preclusion is another name for the doctrine of collateral estoppel. The doctrine is called by both names. See, *JED Constr. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981); *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). In this opinion, we shall use the term "issue preclusion" except when the doctrine is referred to as "collateral estoppel" in quoted material.

[1,2] The four conditions which must exist in order for issue preclusion to apply are that (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or a privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994); *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993). The applicability of the doctrine of issue preclusion constitutes a question of law for which an appellate court is obligated to reach a conclusion independent from the lower court's conclusion. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

*Parties' Positions.*

Young argues that once the validity of a claim is decided at an administrative hearing and not appealed from, as a general rule, the decision is res judicata, and the claim cannot be relitigated. For this proposition, Young cites *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993). In the case at hand, Young argues that in the administrative license revocation hearing, the director of the Department of Motor Vehicles determined that Young was not intoxicated at the time he was operating his vehicle, and this finding bars any relitigation on the issue of whether Young was intoxicated at that time.

In *L. J. Vontz Constr. Co.*, the Supreme Court held that the

denial of a claim in an administrative proceeding before the city council was res judicata to a subsequent action in the district court to recover a claim based on the same facts. In making that decision, the court said:

> [A] claim before a tribunal, be it an administrative agency or a municipal board, once decided and not appealed from, or if appealed and the appeal is dismissed, is res judicata and may not, as a general rule, be relitigated. [Citation omitted.] "An unreviewed administrative hearing can preclude later litigation on the same issues." *Scott v. Mattingly*, 241 Neb. 276, 281, 488 N.W.2d 349, 351-52 (1992).

243 Neb. at 344, 500 N.W.2d at 179.

[3] On the other hand, the State relies on *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982). In *Neil*, the defendant had been prosecuted in the county court for driving under the influence of alcohol. He refused to take a breath, blood, or urine test when he was arrested. In the county court, he pled guilty to driving under the influence, and the charges of refusing to submit to a chemical test were dismissed. The Director of Motor Vehicles then brought an administrative action to revoke Neil's driver's license because he refused to take a chemical test. In the license revocation proceeding, Neil argued that the county court criminal proceeding had adjudicated the issue of his having refused to take a test and that he was being subjected to double jeopardy. The district court accepted Neil's argument, but the Supreme Court reversed, stating:

> The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other.

*Id.* at 379, 314 N.W.2d at 276. See *Ziemba v. Johns*, 183 Neb. 644, 163 N.W.2d 780 (1968), for a similar holding. Young

argues that *Neil* differs from the case at hand in that *Neil* was decided on the basis of double jeopardy, while the issue in the instant case is based on collateral estoppel.

> "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit. . . .
>
> This court has also recognized that collateral estoppel may apply in a criminal case. In *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989), a case involving drunk driving, we noted that the doctrine may be applied when an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate in the prior litigation. We reasoned that the constitutional protection against double jeopardy afforded the doctrine of collateral estoppel to a criminal defendant.

*State v. Dean*, 246 Neb. 869, 874-75, 523 N.W.2d 681, 688 (1994). On the basis of this statement and the holding in *Neil*, we conclude that the distinction Young seeks to draw is not valid because the doctrine of issue preclusion as utilized in criminal proceedings is based upon the doctrine of double jeopardy.

In *Dean*, the Supreme Court clearly stated that issue preclusion applies in criminal cases; however, it was only considering whether a factual determination in one criminal case precluded relitigation of the same issue in another criminal case. In the case at hand, Young seeks to use the doctrine of issue preclusion to require a criminal court to accept as binding a determination made in an administrative proceeding. Young relies on *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993), for his argument. However, both of the proceedings in *L. J. Vontz Constr. Co.* were civil proceedings. That case did not consider whether an administrative decision can affect a criminal case.

With respect to administrative hearings and separation of powers, a notion similar to that quoted in *Neil* above, the

Supreme Court recently stated the following: "State agencies may perform functions of a judicial, quasi-judicial, or factfinding character; however, such agencies are extrajudicial bodies, not courts, judges, judicial bodies, or officers. [Citation omitted.] The proceedings of such agencies are not judicial and are without judicial effect." *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 367, 527 N.W.2d 185, 193 (1995).

[4] In some states, the courts have held or indicated that a factual determination in an administrative hearing for driver's license revocation does not operate to preclude prosecution for driving while intoxicated because the administrative proceedings were not conducted by a court. See, *Walton v. State*, 831 S.W.2d 488 (Tex. App. 1992); *State v. Ratliff*, 304 Or. 254, 744 P.2d 247 (1987). However, in these cases, the courts did not rest solely on this point, but recognized additional problems when a defendant seeks to rely upon the doctrine of issue preclusion in a criminal case involving a previous administrative determination concerning license revocation. *Neil* gives an indication of how the Supreme Court might rule if it were presented with a case where a factual determination in an administrative proceeding was used to preclude litigation of an issue in a criminal case. However, it is not a clear holding on this point. Therefore, in the absence of clear authority, we will not rely solely on *Neil*, but will consider additional authority in deciding whether issue preclusion can be utilized in the instant case.

*Full and Fair Litigation.*

[5] Our research discloses that other jurisdictions have assumed that the doctrine of issue preclusion may apply to allow the determination made by an administrative officer to preclude litigation of the same issue in a criminal court if the elements for issue preclusion are met. However, these courts have held that issue preclusion does not apply to criminal proceedings after an administrative determination in a driver's license revocation proceeding has been made because at least one element of issue preclusion is not present—the State has not had a full and fair opportunity to litigate the issue in the

previous administrative hearing. *State v. Bishop*, 113 N.M. 732, 832 P.2d 793 (N.M. App. 1992); *State v. Stearns*, 159 Vt. 266, 617 A.2d 140 (1992); *State v. Goodon*, 443 N.W.2d 74 (Iowa App. 1989); *State v. Ratliff, supra*. These courts have concluded that administrative license revocation laws establish a quick procedure which is not intended to give the State a full and fair opportunity to litigate the issues, and therefore issue preclusion does not apply in later criminal proceedings. The court in *Bishop* stated the following:

> [I]f every license revocation hearing carries with it potential collateral estoppel impact on a subsequent criminal action, the state may feel compelled to intervene in every administrative action to effectively protect its interests in some future criminal proceeding. The net effect would be to slow down what should be a summary administrative proceeding designed to handle license revocation matters quickly. [Citations omitted.] In addition, we agree with those courts that recognize that the integrity of our judicial system requires adjudications of criminal guilt or innocence to be made in a judicial setting, not in an administrative hearing.

113 N.M. at 735, 832 P.2d at 796.

In Missouri, the same result was reached; however, a Missouri statute specifically provided that a determination made by the administrator for license revocation is independent from a determination in a criminal proceeding. See *State v. Warfield*, 854 S.W.2d 9 (Mo. App. 1993). We did not find a case where the administrative hearing in a license revocation proceeding was held to preclude or affect a later trial for driving under the influence.

In adopting Neb. Laws 1992, L.B. 291, which, among other things, amended Neb. Rev. Stat. §§ 39-669.15 to 39-669.19 (Reissue 1988 & Cum. Supp. 1992), Senator Emil E. Beyer, Jr., stated the reasons for introducing the bill as follows:

> LB 291 was introduced with the intent of providing a swift and sure method for administratively revoking a person's driver's license if he or she either refuses to submit to a test of his or her alcohol concentration under the state implied consent law or if such test of alcohol concen-

> tration indicates that he or she is under the influence of alcohol or drugs in violation of Section 39-669.07.
>
> The bill also finds that persons who drive while under the influence of alcohol or drugs are hazardous to the health and safety of all persons using the highways. The intent of LB 291 is to provide a deterrent to persons who might be tempted to drink and drive by providing for the immediate revocation of the license while still protecting an individual's right to due process....

Statement of Purpose, L.B. 291, Committee on Transportation, 92d Leg., 1st Sess. (Feb. 11, 1991).

The Legislature therefore adopted an informal procedure for quick license revocation to protect the public from drunk drivers. It also allows individuals who have had their licenses revoked to appeal such revocation to an administrative body when they feel the revocation was wrongful. However, this administrative appeal provision was not meant to be the forum where the State has the obligation to present its case involving criminal drunk driving charges. Thus, the State does not have the same interest in a quick license revocation proceeding as it does in criminal prosecution.

*Identity of Issues.*

[6] If the issues in the two proceedings are not identical, the doctrine of issue of preclusion does not apply. In this case, we find that the issues in the administrative determination are not the same as the issues in the criminal prosecution. Thus, another necessary element for the application of issue preclusion is not present.

Under § 39-669.07, it is a crime for a person to be in the actual physical control of any motor vehicle while under the influence of alcohol or drugs, or with a concentration of more than ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of his or her breath. Since Young submitted to the breath test, the issues decided at the administrative hearing were as follows: (1) Did the peace officer have probable cause to believe Young was in control of a motor vehicle in violation of

§ 39-669.07, (2) was Young's arrest lawful, (3) was he advised of the consequences if the chemical test showed a concentration of alcohol above that allowed by statute, and (4) was he operating or in the actual physical control of a motor vehicle while having an alcohol concentration above that allowed by statute? See § 39-669.15(6)(c)(ii). The hearing officer made findings in accordance with these issues only. In so doing, the hearing officer did not find that Young was not intoxicated while driving, but did find that Young did not have the concentration in his breath at the time he was driving, as prohibited under § 39-669.07(1)(c). The hearing officer did not have the power to determine and did not purport to consider or determine whether Young was driving in violation of § 39-669.07(1)(a), that is, whether he was under the influence of alcoholic liquor. Therefore, the issues decided at the administrative hearing under § 39-669.15 are not identical to the issues decided at a criminal proceeding under § 39-669.07.

The doctrine of issue preclusion does not apply if the issue sought to be precluded at a subsequent proceeding is not the same as the issue litigated in the prior proceeding. Young raised the defense of issue preclusion by a motion to dismiss in the district court, and in this court, Young argues that the license revocation proceeding determined he was not intoxicated at the time he was operating the vehicle. Even if issue preclusion were recognized in these circumstances—which we hold it is not—Young would still not be entitled to utilize issue preclusion because the administrative law decision upon which he relies only purports to determine the concentration of alcohol in Young's breath. Since Young can still be found guilty under § 39-669.07(1)(a) without a breath test, the decision of the administrative hearing is irrelevant.

## MULTIPLE PUNISHMENTS

[7] At oral argument, Young's attorney argued that *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), and *U.S. v. McCaslin*, 863 F. Supp. 1299 (W.D. Wash. 1994), apply to the case at hand to preclude a criminal prosection after the conclusion of a civil proceeding for forfeiture involving the same facts, on the basis that this procedure violates the Double

Jeopardy Clause. These two cases involved civil forfeiture proceedings that were held prior to a criminal prosecution, where the defendants' personal property involved in the criminal act was seized and retained by the U.S. Government. The courts in both of these cases held that civil forfeitures under the provisions involved in these cases constituted " ' "payment to a sovereign as punishment for some offense." ' " *McCaslin*, 863 F. Supp. at 1302. These courts further held that such civil forfeitures are punishment for purposes of double jeopardy. Thus, these courts held that subsequently imposed criminal punishments constituted multiple punishments for the same offense which violated the double jeopardy clause and therefore would have to be vacated. These cases are based upon *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), and *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), which held that a civil penalty may constitute punishment for purposes of double jeopardy. These lower court cases seem to go further than *Halper* or *Kurth Ranch*. In *Halper* and *Kurth Ranch*, the Court used a criminal prosecution to preclude a later civil action, whereas these lower courts used previous civil forfeiture proceedings to preclude criminal prosecution. However, we will assume the distinction is not important for our purposes.

[8] The *Halper* Court changed longstanding precedent and held that the legislature's characterization of a sanction as civil was not final and did not foreclose the possibility that the "civil" sanction could be a penalty under the Double Jeopardy Clause. In the *Kurth Ranch* case, the Court determined that a tax could be a penalty. The *$405,089.23 U.S. Currency* and *McCaslin* cases cited above extend the same notion to forfeiture cases under federal drug laws. Young's counsel asked us to apply the holding of these federal cases to driver's license revocation proceedings.

Young's counsel supplied this court with copies of trial court decisions from courts in Florida and Ohio which applied the principles discussed in the above-cited federal cases. These trial courts held that the taking of a driver's license was a penalty, and hence, after proceedings under license revocation laws, the

criminal prosecution for the same incident violated the Double Jeopardy Clause. These cases are in no sense precedent, but they do articulate Young's arguments, and they indicate that other defense counsel are likely to rely upon this position in future cases. The *Halper* and *Kurth Ranch* cases are comparatively new, and cases which are based upon an application of the principles announced in them are not likely to have worked their way through appellate courts to generate legal authority. We find very few cases which consider whether the principles announced in *Halper* and *Kurth Ranch* should be applied to cases involving something other than money and property.

[9] We found no appellate level cases where the *Halper* holding was discussed with reference to a claim that driver's license revocation constituted a penalty under the Double Jeopardy Clause. We have found two recent cases where litigants attempted to have courts treat the revocation of a professional license as punishment under the Double Jeopardy Clause, and both courts refused to so hold. See *Schillerstrom v. State*, 180 Ariz. 468, 885 P.2d 156 (Ariz. App. 1994), and *Alexander v. State Bd. of Med. Examiners*, 644 So. 2d 238 (La. App. 1994). In *Alexander*, the Louisiana court quoted *Halper* as follows:

> "[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. . . . [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

644 So. 2d at 243.

The Louisiana court concluded that the U.S. Supreme Court left the determination of whether the sanction was remedial to the lower courts and concluded that revoking the medical

license of a doctor who had been convicted of a felony was not a violation of the Double Jeopardy Clause. In *Schillerstrom*, the Arizona court came to the same conclusion in the revocation of a chiropractor's license. The Arizona court recognized the fact that even remedial civil sanctions can carry the " ' "sting of punishment." ' " 885 P.2d at 159.

[10,11] Under *Halper*, the question is whether revoking a driver's license is remedial, and thus only a deterrent, or whether it is retribution, and thus a penalty. "A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state." *Durfee v. Ress*, 163 Neb. 768, 772, 81 N.W.2d 148, 150 (1957). The *Durfee* court further stated, "The purpose of [license] revocation is to protect the public, and not to punish the licensee." *Id.* at 773, 81 N.W.2d at 151. The revocation of a driver's license is not a penalty for the violation of the statutes or ordinances involved. See *Durfee, supra*. *Durfee* is a case involving revocation of a driver's license under the point system. It is dispositive of this issue raised by the defendant. The U.S. Supreme Court cases of *Halper* and *Kurth Ranch* justify revisiting this issue in light of these holdings. However, upon reflection, the principles of *Halper* and *Kurth Ranch* do not require abandonment of the reasoning set forth in *Durfee*.

[12] The purpose of enacting the license revocation procedure under §§ 39-669.15 to 39-669.19 was to protect the public by getting people with drinking propensities off the road quickly and to deter driving while intoxicated. This civil license revocation is therefore remedial and not a punishment, even though the loss of a driver's license in our society carries a considerable "sting." We conclude that a criminal prosecution for driving under the influence is not a violation of the Double Jeopardy Clause on the basis that the driver has already been subject to possible revocation of his or her driver's license under §§ 39-669.15 to 39-669.19 for the same incident.

## SUFFICIENCY OF EVIDENCE

[13] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility

of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

In the case at hand, Ball observed Young's vehicle pull away from a bar and drive erratically. At one point, Young's vehicle forced Ball's vehicle over a curb. Ball also observed Young run a red light and almost run into another automobile. After Ball followed Young to his residence and confronted him, she observed that Young exhibited signs of intoxication. Ball was aware of the signs of intoxication due to her experience as a nurse in the substance abuse program at the VA hospital. After police officers arrived, they performed field sobriety tests and determined that Young was under the influence. After placing Young under arrest, officers gave him a breath test which yielded a reading of .169. The above is clearly substantial evidence to support a finding that Young violated § 39-669.07.

Young's only witness in his defense created an interesting fact question. Cranford testified that he was in Young's home when Young arrived after being confronted by Ball. He stated that after Young came into the house, Young gulped a substantial amount of whiskey before going back outside to lock up the car and shut the garage door. During the time Young was outside, Cranford went back to sleep on Young's couch and therefore did not witness any of the events involving the police.

On the basis of this testimony, Young argues that the breath test was unreliable as to the amount of alcohol present during the time Young was in control of the vehicle he was driving and that therefore the State failed to carry its burden of proof. Such evidence supplies a certain amount of spice to jury trials. However, the credibility of such a witness is a matter for the jury to decide. And in this case, the fact that the jury did not accept Cranford's testimony reaffirms our belief in the jury system.

We find no error and therefore affirm the trial court's decision.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JOHN MARTIN, APPELLANT.

529 N.W.2d 545

Filed March 14, 1995. No. A-94-504.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Statutes: Words and Phrases.** As a general rule of statutory construction, the word "shall" is considered mandatory.
3. **Statutes.** In the absence of anything indicating 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. **Sentences: Probation and Parole.** Because the statutory penalty imposed for a noxious weed violation is a mandatory fine, probation is not available.
5. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a lower appellate court is correct, although such correctness is based on a ground or reason different from that assigned by the lower appellate court, a higher appellate court will affirm.

Appeal from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, DANIEL BRYAN, JR., Judge. Judgment of District Court affirmed.

John R. Brogan, of Brogan & Brogan, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

IRWIN, Judge.

In the county court for York County, defendant John Martin was found guilty of 15 counts of failing or refusing to control noxious weeds, Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991), and was sentenced to 6 months' probation. The State appealed to the York County District Court, contending that probation was not an allowable sentence. The district court vacated defendant's sentence and remanded the case to the county court for resentencing. Because probation is not an available sanction for violations of § 2-955(3)(a), we affirm the district court's order.

## SUMMARY OF FACTS

On August 27, 1992, defendant was charged with 15 counts of violating § 2-955(3)(a). The complaint alleged that defendant refused or failed to control noxious weeds on his land after the weed control authority had given defendant notice and the statutorily mandated 15 days to control the weeds. No error is assigned with regard to the charging document, and we find no plain error with regard to that pleading. See *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992) (a plain error is one that is unasserted at trial but is plainly evident from the record; prejudicially affects a litigant's substantial right; and if left uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process).

Trial was held in the county court for York County on April 1, 1993. In its order, the county court found that on April 28, 1992, the York County noxious weed superintendent, Randy Campbell, inspected property in York County owned by defendant and Lucille Martin. Campbell identified an estimated 200 musk thistle plants in an open pasture on the property. Campbell thereafter sent an official notice to defendant via certified mail which described where the thistles were located and recommended a method for controlling the weeds. Defendant received the notice on April 29. Upon receipt of the notice, the Martins decided to control the thistles by digging them up by hand. The Martins testified that they dug the thistles within the 15-day period prescribed by the notice.

On July 8, Campbell revisited the property to determine whether defendant had complied with the notice. Campbell observed and photographed a patch of approximately 100 musk thistle plants growing in the same location. He also observed that "seeds were being blown out spreading the infestation" and determined that these thistles were a "continuation" of the weeds that he had observed in April.

In its order, the county court stated that there was no evidence to indicate why defendant did not see the plants, as they were in an open area of pasture and were at a size that rendered them easily observed. The court proceeded to find defendant guilty of failing to control his noxious weeds from

May 15 to 29, 1992, and thereafter sentenced defendant to 6 months' probation.

The State appealed to the York County District Court, claiming that the trial court had erred in sentencing defendant to probation. The State argued that the trial court had no authority to impose probation on defendant because § 2-955(3)(a) provides a mandatory $100 fine per day for each day of violation up to a total of $1,500 for 15 days of noncompliance and because probation is not an available penalty for a conviction of an infraction.

In an order dated April 22, 1994, the district court vacated defendant's sentence and remanded the case to the county court for resentencing. The district court reasoned that the law does not provide a sentence of probation for an infraction conviction and that the county court therefore "lacked subject matter jurisdiction to sentence the defendant to probation." Defendant has appealed from the district court's order.

## ASSIGNMENTS OF ERROR

Defendant has assigned three errors on this appeal, which we have consolidated into two assigned errors for purposes of analysis. Defendant claims that the district court erred in (1) finding that the county court lacked subject matter jurisdiction to sentence defendant to probation and (2) finding that the law does not allow a sentence of probation to be given for violation of an infraction.

## STANDARD OF REVIEW

[1] The issues on this appeal involve questions of law. On questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *National Acct. Sys. of Lincoln v. Vergith*, 246 Neb. 604, 521 N.W.2d 910 (1994); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994).

## DISCUSSION

Section 2-955(3)(a) provides that a person charged with a noxious weed violation "shall, upon conviction, be guilty of an infraction pursuant to sections 29-431 to 29-438, except that the penalty *shall* be a fine of one hundred dollars per day for each

day of violation up to a total of one thousand five hundred dollars for fifteen days of noncompliance." (Emphasis supplied.)

[2,3] As a general rule of statutory construction, the word "shall" is considered mandatory. *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993); *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). But see *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). "In the absence of anything indicating 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." *State v. Flye*, 245 Neb. 495, 506, 513 N.W.2d 526, 533 (1994). Accord *Stratton, supra*. Moreover, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.*; *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

In *Flye*, the defendant had claimed on appeal that the trial court erred in failing to sentence him to probation on a habitual criminal charge. The court in *Flye* rejected the defendant's claim, stating, "Because a conviction of habitual criminal dictates mandatory imprisonment, the court did not have discretion to impose a sentence of probation." *Id.* at 507, 513 N.W.2d at 533. As was the case in *Flye*, the conviction for a noxious weed violation under § 2-955(3)(a) dictates a mandatory punishment, that being a fine of $100 per day up to a maximum of $1,500. Because the fine was mandatory, the county court had no discretion to impose a sentence of probation.

[4] We hold that because the statutory penalty imposed for a noxious weed violation is a mandatory fine, probation is not available. The district court thus correctly vacated defendant's sentence and remanded the case for resentencing. However, in its order, the district court stated that the county court "lacked subject matter jurisdiction to sentence the defendant to probation." Contrary to this statement, there is no question that the county court had subject matter jurisdiction in this

case. See Neb. Rev. Stat. § 24-517(5) (Cum. Supp. 1994).

[5] Where the record adequately demonstrates that the decision of a lower appellate court is correct, although such correctness is based on a ground or reason different from that assigned by the lower appellate court, a higher appellate court will affirm. See, *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993).

## CONCLUSION

Because § 2-955(3)(a) imposes a mandatory fine, the county court erred in sentencing defendant to probation. The district court was therefore correct in vacating defendant's sentence and remanding the case to the county court for resentencing.

AFFIRMED.

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# IN RE INTEREST OF LISA V., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. STEVEN S., APPELLEE.

529 N.W.2d 805

Filed March 14, 1995. No. A-94-722.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Juvenile Courts: Final Orders: Appeal and Error.** An order terminating the jurisdiction of the juvenile court is a final, appealable order.
3. **Parental Rights: Final Orders.** An order requiring the Department of Social Services to pay for services rendered to a juvenile's parent constitutes a disposition.

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER, Judge. Reversed.

Don Stenberg, Attorney General, Royce N. Harper, and Lisa Swinton and Beth Tallon, Special Assistant Attorneys General, for appellant.

Michael L. Munch, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

MORAN, District Judge, Retired.

The Nebraska Department of Social Services appeals from an order by the Sarpy County Separate Juvenile Court requiring the department to reimburse William Collamer and Diana Larsen for counseling each offered Steven S. Lisa V., Steven's daughter, was adjudicated a child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), and the court ordered counseling for both Lisa and Steven. After both had participated in counseling, the court found that Steven had complied with a court-ordered plan of rehabilitation and therefore terminated its jurisdiction on April 19, 1994. On June 28, 1994, the court held a hearing to determine the extent to which Lisa's parents were to be responsible for payment of services rendered to Steven. The court ordered that the department should be responsible for the bills Steven incurred for counseling. For the reasons stated below, we reverse the court's order.

## STATEMENT OF FACTS

On September 14, 1990, the Sarpy County Attorney filed a petition alleging that Lisa V., the child of Steven S. and Rebecca V., should be adjudicated a juvenile in need under § 43-247(3)(a), upon the basis that she was homeless, destitute, or without proper parental support through neither parent's fault. Lisa was adjudicated a juvenile in need on February 19, 1992. Steven entered into a stipulation with the State, admitting that there had been a breakdown in the relationship between himself, Lisa, and Rebecca through no person's fault and that he believed it was in the best interests of all parties that they receive counseling in order to restore a normal parental relationship with Lisa. The court ordered that the Department of Social Services should have custody of Lisa and that Lisa, Rebecca, and Steven receive individual counseling.

Steven sought counseling from William Collamer and Diana

Larsen. At a review hearing on January 19, 1994, the court ordered continued counseling and ordered that "the jurisdiction of the Court in this matter shall terminate on April 19, 1994, unless application or order of the Court is sooner made to extend or terminate same." On April 19, the court held a hearing upon a motion by Lisa's guardian ad litem requesting that the court retain jurisdiction over Lisa. Upon hearing testimony and argument, the court stated, "I do not see where this court can provide any more structure or assistance . . . . Therefore, I am going to terminate jurisdiction effective today." Steven's attorney then stated to the court that Steven had trouble getting his therapy bills paid and that the court had told him at the last hearing that if he was having problems, he should address the court. The trial judge stated, "Why don't you file a separate motion." The record before us does not contain such a motion.

On June 28, 1994, the court held a hearing pursuant to Neb. Rev. Stat. § 43-290 (Reissue 1993) regarding payment of certain expenses. The court ordered that the department should reimburse Collamer and Larsen for professional services provided to Steven. The department has appealed.

## ASSIGNMENT OF ERROR

The department alleges that the juvenile court erred when it ordered the department to reimburse Collamer and Larsen for professional services provided to Steven.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

## ANALYSIS

The department alleges that the juvenile court was without jurisdiction to order the department to pay for Steven's therapy, first, because the court terminated jurisdiction before it held a

§ 43-290 hearing, and second, because § 43-290 does not provide statutory authority for the juvenile court to order the department to pay for a parent's treatment. If a juvenile court has not acquired jurisdiction of a child through an adjudication hearing, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

A court gains jurisdiction over a juvenile and that juvenile's parents under § 43-247. The statute provides that the court's jurisdiction "over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." The Nebraska Juvenile Code further provides that after a petition is filed alleging that the juvenile appears to be a juvenile as described in § 43-247, an adjudication hearing must be had to determine whether the juvenile court has jurisdiction over the juvenile and his or her parents. Neb. Rev. Stat. § 43-274 et seq. (Reissue 1993). After receiving evidence at the hearing, the juvenile court must make a finding as to whether the allegations in the petition have been proven by a preponderance of the evidence. § 43-279.01.

Section 43-290 provides:

> Pursuant to the petition filed by the county attorney or any reputable person in accordance with section 43-274, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a parent for the juvenile at the same proceeding at which placement . . . is determined *or at a separate proceeding. Such proceeding, which may occur prior to, at the same time as, or subsequent to adjudication, shall be in the nature of a disposition hearing.*
>
> . . . .

> The juvenile court shall *retain* jurisdiction over a parent ordered to pay support for the purpose of enforcing such support order for so long as such support remains unpaid but not to exceed ten years from the nineteenth birthday of the youngest child for whom support was ordered.

(Emphasis supplied.)

Although we read § 43-290 to permit a court to retain jurisdiction over a parent when the parent is ordered to pay for services rendered to a child, we believe the statute does not give the court power over a parent when the court either lost jurisdiction over the parent or never had jurisdiction over the parent in the first place. If the special proceeding to allocate costs is to be in the nature of a disposition proceeding, and under *In re Interest of D.M.B., supra*, a juvenile court cannot order disposition if it does not have jurisdiction over the parties, then it would appear that under § 43-290, an order to pay costs must be made against only those parties over whom the court currently has jurisdiction, and on behalf of only those parties over whom the court currently has jurisdiction.

A § 43-290 proceeding is unlike a proceeding for costs which follows a judgment, such as provided for in Neb. Rev. Stat. § 25-1708 (Reissue 1989). "Generally, costs in the trial courts are allowable, of course, to a plaintiff upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property." *Ehlers v. Campbell*, 159 Neb. 328, 334, 66 N.W.2d 585, 588 (1954). "In other actions, the court may award and tax costs and apportion them between the parties on the same or adverse sides as in its discretion it may think right and equitable." *Id.* Costs may not be taxed against persons who are not parties to the litigation. *State v. Canizales*, 240 Neb. 811, 484 N.W.2d 446 (1992). Costs of trial and attorney fees may be awarded in a juvenile matter. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). However, the purpose of § 43-290 is "to promote parental responsibility and to provide for the most equitable use and availability of public money." § 43-290. The cost of a juvenile's treatment and the decision regarding who shall bear such cost are considered at a dispositional hearing, at which parental responsibility and the best interests of the child are weighed.

[2] Nor can we characterize the juvenile court's action in this case as a modification of its own judgment. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). However, a juvenile court is not a court of general jurisdiction and therefore is not empowered to modify or vacate its own judgments during the term in which they are rendered. An order terminating the jurisdiction of the juvenile court is a final, appealable order. *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992). If the parties in the present case believed the juvenile court erred when it terminated jurisdiction because it did not dispose of the matter of Steven's therapy, any one of the parties could have filed a motion for new trial within 10 days of the order terminating jurisdiction.

[3] An order requiring the department to pay for services rendered to a juvenile's father constitutes a disposition. *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). We find that once the juvenile court terminated jurisdiction over the juvenile, and thereby over the parties, it lost its ability to order dispositional plans, including allocation of treatment costs. We therefore reverse the juvenile court's order which required the department to pay for Steven's therapy, as the juvenile court no longer had jurisdiction over the case.

REVERSED.

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STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. MICHAEL RAY SMITH, APPELLANT AND CROSS-APPELLEE.

529 N.W.2d 116

Filed March 21, 1995. No. A-94-567.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

2. **Pleadings: Double Jeopardy: Final Orders: Appeal and Error.** A grant or denial of a plea in bar raising a double jeopardy claim is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989).
3. **Constitutional Law: Double Jeopardy.** Both the Nebraska and U.S. Constitutions provide that no person shall be twice put in jeopardy for the same offense.
4. _____: _____. The constitutional prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal or conviction on that same offense and against multiple punishments for the same offense.
5. **Constitutional Law: Double Jeopardy: Lesser-Included Offenses.** The Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser-included offense.
6. **Double Jeopardy: Lesser-Included Offenses.** The test for determining whether two offenses constitute the same offense is whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.
7. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
8. **Assault: Intent.** Neb. Rev. Stat. § 28-308(1) (Reissue 1989) provides that a person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.
9. **Homicide: Intent.** Neb. Rev. Stat. 28-304(1) (Reissue 1989) provides that a person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
10. _____: _____. Malice is an essential element of second degree murder.
11. **Homicide: Criminal Attempt: Intent.** The elements of attempted second degree murder require (1) taking a substantial step in a course of conduct (2) intended to cause the death of another (3) with intent and (4) with malice.
12. **Assault: Homicide: Criminal Attempt: Lesser-Included Offenses.** First degree assault is not a lesser-included offense of *attempted* second degree murder.
13. **Double Jeopardy.** Where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy.
14. **Homicide.** Neb. Rev. Stat. § 28-305(1) (Reissue 1989) defines manslaughter as the killing of another without malice, either upon a sudden quarrel, or causing the death of another unintentionally while in the commission of an unlawful act.
15. _____. Intent to kill is *not* an element of manslaughter.
16. **Criminal Law: Homicide: Intent.** Because a person cannot perform the same act intentionally and unintentionally at the same time, attempted voluntary manslaughter does not and cannot exist under current Nebraska law.
17. **Criminal Attempt: Intent.** A person cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime.
18. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a

ground or reason different from that assigned by the trial court, an appellate court will affirm.

19. **Criminal Law: Weapons.** The elements of the specific underlying felony are necessarily elements of the crime of using a weapon to commit a felony.

20. _____: _____. A defendant acquitted on the underlying felony charge cannot be convicted of an offense under Neb. Rev. Stat. § 28-1205 (Reissue 1989) involving that felony; but a defendant convicted of the underlying felony might still be acquitted on a charge under § 28-1205.

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

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellant.

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

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

This appeal arises from a plea in bar challenging the retrial of Michael Ray Smith for attempted voluntary manslaughter, first degree assault, and use of a weapon to commit a felony. In the original trial, Smith was charged with attempted second degree murder and use of a firearm to commit a felony and was found not guilty on both counts by a jury. The State subsequently filed a separate information charging Smith with attempted voluntary manslaughter, first degree assault, and use of a weapon to commit a felony. On grounds of double jeopardy, Smith filed a plea in bar objecting to a retrial on these charges. The plea was overruled as to the first degree assault charge and sustained as to the charges of attempted voluntary manslaughter and use of a weapon to commit a felony. Smith appeals, and the State cross-appeals. For the following reasons, we affirm in part and reverse in part.

## BACKGROUND

For purposes of this appeal, we take the factual background from the trial judge's statement of the facts used by him for the purpose of ruling on the plea in bar.

Smith was involved in an incident that occurred on or about September 15, 1993, in Sarpy County, specifically at the

Sundowner Bar. Following an exchange of words within the bar and a physical altercation between Smith and Dennis Ratigan in the parking lot of the bar, Smith fired a handgun at Ratigan, with the bullet striking Ratigan in the stomach. Smith left the scene and was arrested a short time later at the home of his parents, a few blocks away. On September 23, 1993, Smith was charged in an information with attempted second degree murder and use of a firearm to commit a felony. Following a trial by jury on January 27, 1994, a verdict of not guilty on each count was returned and judgment rendered accordingly. The State then filed the present "Direct Information" on February 2, 1994. It is undisputed that the charges contained in the direct information arise out of the same events that formed the basis for the first information.

Smith filed a plea in bar on March 18, 1994, pursuant to Neb. Rev. Stat. § 29-1817 (Reissue 1989), in which he argued that he had "faced these charges or the same elements of these charges previously, and for these said charges and/or elements of said charges he was acquitted by a jury." The plea was overruled as to the first degree assault charge and sustained as to the charges of attempted voluntary manslaughter and use of a weapon to commit a felony. Smith's appeal and the State's cross-appeal were timely filed.

## ASSIGNMENTS OF ERROR

Considering both Smith's appeal and the State's cross-appeal together, the issues before us are whether, on the ground of double jeopardy, the district court erred in (1) overruling Smith's plea in bar to the charge of first degree assault, (2) sustaining Smith's plea in bar to the charge of attempted voluntary manslaughter, and (3) sustaining Smith's plea in bar to the charge of use of a weapon to commit a felony.

## STANDARD OF REVIEW

[1] The issues presented in this appeal involve questions of law. Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d

554 (1993).

## DISCUSSION

[2] We observe, initially, that Smith's appeal and the State's cross-appeal are properly before this court because a grant or denial of a plea in bar raising a double jeopardy claim is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). See *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), *overruled on other grounds, State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

Smith's appeal and the State's cross-appeal involve the constitutional permissibility of a second prosecution on the charges of first degree assault, attempted manslaughter upon a sudden quarrel (voluntary), and use of a weapon to commit a felony, after an acquittal on the charges of attempted second degree murder and use of a weapon to commit a felony. The State essentially contends that first degree assault and attempted voluntary manslaughter are not lesser-included offenses of attempted second degree murder and that, therefore, a second prosecution for both those crimes does not violate the constitutional prohibition against being twice placed in jeopardy for the same offense.

*Double Jeopardy—Evolution of Statutory-Elements Approach.*

[3-5] Both the Nebraska and U.S. Constitutions provide that no person shall be twice put in jeopardy for the same offense. U.S. Const. amend. V; Neb. Const. art. I, § 12; *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). The constitutional prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal or conviction on that same offense and against multiple punishments for the same offense. *Id.* See, also, *State v. George, ante* p. 354, 527 N.W.2d 638 (1995). In *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), the U.S. Supreme Court stated: "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

[6] The test for determining whether two crimes constitute

the "same offense" has been set forth by the U.S. Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which states:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of a fact which the other does not.*

(Emphasis supplied.) The U.S. Supreme Court subsequently modified this rule in *Grady v. Corbin*, 495 U.S. 508, 510, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), in which the Court added a second step to the double jeopardy analysis and held that even if the *Blockburger* test was satisfied, the Double Jeopardy Clause would still bar a subsequent prosecution "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." In 1993, the U.S. Supreme Court overruled *Grady* and returned to the *Blockburger* test in *U.S. v. Dixon*, ____ U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In *Dixon*, the Court stated:

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. . . . The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

(Citation omitted.) 113 S. Ct. at 2856.

The consequence of the rule set forth by the U.S. Supreme Court in *Blockburger*, and readopted in *Dixon*, is that if *each* offense contains an element that is not contained in the other, then they are not the "same offense" and double jeopardy does *not* bar successive prosecution. However, if only *one* of the offenses contains an element not contained in the other, as is the case with greater and lesser-included offenses, a classic

application of this rule dictates that a successive prosecution *is* barred by double jeopardy. Both greater and lesser-included offenses share common elements, with only one, the greater offense, having an element or elements different from that of the lesser. Therefore, if the second prosecution is for a crime that constitutes a lesser-included offense of the crime for which one is acquitted, for purposes of double jeopardy, these crimes are considered the "same offense" and the second prosecution is barred.

[7] Pre-*Dixon* and pre-*Grady* Nebraska law applied the test set forth in *Blockburger* for determining whether double jeopardy principles bar subsequent prosecution. In *State v. Lovelace*, 212 Neb. 356, 359-60, 322 N.W.2d 673, 675 (1982), the Nebraska Supreme Court explained the test as follows:

> To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . . In sum the lesser included offense is one all the elements of which are necessarily included in the greater. . . . To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.

Applying the *Blockburger-Dixon* rationale, the lesser offense does not contain an element that is not also contained in the greater. Thus, double jeopardy bars subsequent prosecution.

The Nebraska Supreme Court in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), has reaffirmed its commitment to the statutory-elements approach announced in *Lovelace*, and it is clear that Nebraska now applies the *Blockburger-Dixon* analysis in determining whether one faces double jeopardy by contemporaneous or successive prosecutions for different crimes. If such "different crimes" do not pass muster under *Blockburger*, they are deemed to be the "same offense," thus barring additional punishment and successive prosecution.

*First Degree Assault.*

Smith contends that it was error for the district court to conclude that double jeopardy does not prohibit the State from prosecuting him on the charge of first degree assault after the

jury has acquitted him of attempted second degree murder. Under the *Blockburger* and *Williams* analyses, prosecution on the first degree assault charge is prohibited if first degree assault is a lesser-included offense of attempted second degree murder, that is, if the elements of first degree assault are such that it is impossible to commit attempted second degree murder without at the same time having committed first degree assault. However, if each offense contains an element not contained in the other, double jeopardy will not prohibit the successive prosecution.

[8-10] That analysis leads us to an examination of the elements the State is required to prove beyond a reasonable doubt for each crime. Neb. Rev. Stat. § 28-308(1) (Reissue 1989) provides that "[a] person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." Therefore, the elements of first degree assault involve (1) intentionally or knowingly (2) causing serious bodily injury (3) to another person. The offense of attempted second degree murder is defined by Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 1989). Section 28-304(1) provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." The Nebraska Supreme Court has recently stated that malice is an essential element of second degree murder. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). We read *Blockburger* to require a consideration of all the elements, whether statutorily or judicially created.

[11] The inchoate crime of attempt is defined in § 28-201, which provides, inter alia:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

Therefore, combining the provisions of the attempt statute,

§ 28-201, with the second degree murder statute, § 28-304, and *Myers, supra*, the elements of attempted second degree murder require (1) taking a substantial step in a course of conduct (2) intended to cause the death of another (3) with intent and (4) with malice. See *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). "The fact that *no* injury befalls the victim is of no consequence." (Emphasis in original.) *Id.* at 358-59, 322 N.W.2d at 674.

[12,13] The Nebraska Supreme Court has recognized that first degree assault is not a lesser-included offense of *attempted* second degree murder. In *Lovelace*, 212 Neb. at 359-60, 322 N.W.2d at 674-75, the Nebraska Supreme Court explained:

> One may attempt to murder another by shooting at him. Should he, however, miss his victim, striking a nearby tree, he may nevertheless be guilty of attempted murder in the second degree. Assault in the first degree, on the other hand, is committed when one "intentionally or knowingly *causes* serious bodily injury to another." (Emphasis supplied.) Neb. Rev. Stat. § 28-308 (Reissue 1979). The crime of assault in the first degree requires that a serious bodily injury *in fact* occurred. That one attempts to injure another and fails to cause a serious bodily injury is not sufficient to constitute assault in the first degree, as it is in the case of *attempted* second degree murder. It is therefore clear that while the elements of first degree assault *may* be present in a case of attempted second degree murder, it is likewise clear that one may nevertheless be guilty of attempted second degree murder without having committed first degree assault. It is this distinction which precludes assault in the first degree from being a lesser-included offense of attempted murder in the second degree. . . . To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.

(Emphasis in original.) Where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy. *State v. Dinverno*, 205 Neb. 775, 290 N.W.2d 203 (1980). Based upon the reasoning of *Lovelace*

and an examination of the statutes, it is clear that first degree assault is not a lesser-included offense of attempted second degree murder. To be guilty of violating § 28-308, one must *actually cause* serious bodily injury to another.

Actual injury, a necessary element of the crime of first degree assault, is not a necessary element of the crime of attempted second degree murder. Malice and intent to kill, required elements of the crime of attempted second degree murder, are not elements of the crime of first degree assault. Each offense requires proof of an element which the other does not. See *U.S. v. Dixon*, ____ U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). The trial court correctly determined that the State was not barred, on double jeopardy grounds, from prosecuting Smith for first degree assault after his acquittal on the attempted second degree murder charge.

*Attempted Manslaughter Upon a Sudden Quarrel (Voluntary Manslaughter).*

[14] On its cross-appeal, the State first contends that prosecuting Smith for attempted voluntary manslaughter after his acquittal for attempted second degree murder does not violate *Blockburger* because the two charges do not constitute the same offense—each crime has an element that the other does not. We must examine the elements of each. Neb. Rev. Stat. § 28-305(1) (Reissue 1989) defines manslaughter as the killing of "another without malice, either upon a sudden quarrel, or caus[ing] the death of another unintentionally while in the commission of an unlawful act."

[15] In *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), the Nebraska Supreme Court overruled *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), which had judicially recognized that intent to kill was an element of manslaughter. *Jones* specifically held that intent to kill is *not* an element of manslaughter. After recognizing that malice is defined as " 'that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse,' " the court held: "Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter.

The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill." 245 Neb. at 830, 515 N.W.2d at 659 (quoting *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993)).

[16,17] Under current Nebraska law, the elements of attempted manslaughter upon a sudden quarrel as required by combining the provisions of § 28-201 (the attempt statute) with § 28-305 (the manslaughter statute) would consist of (1) *intentionally* engaging in conduct which constitutes a substantial step in a course of conduct (2) *intended to kill* another (3) upon a sudden quarrel, (4) without malice and (5) *without intent* to kill. Recently, in *State v. George, ante* p. 354, 358, 527 N.W.2d 638, 642 (1995), this court held, in the context of involuntary manslaughter, that because "[a] person cannot perform the same act intentionally and unintentionally at the same time[,] . . . attempted [involuntary] manslaughter does not and cannot exist under current Nebraska law." This court recognized that "a person cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime." *Id.* Although *George* was decided in the context of attempted involuntary manslaughter, the same reasoning applies in the context of attempted voluntary manslaughter. In *Jones, supra*, as discussed above, the Supreme Court expressly stated, in a *voluntary* manslaughter context, that intent is not a required element for manslaughter. Because one cannot intend to commit the unintentional crime of attempted voluntary manslaughter, it does not exist as a crime under Nebraska law.

[18] The district court determined that the State was barred from prosecuting Smith for the crime of attempted voluntary manslaughter. Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993). The prosecution for attempted voluntary manslaughter is barred because the crime does not exist under Nebraska law in view of *Jones, supra*.

*Use of a Weapon to Commit a Felony.*

The State next contends that the district court erred in concluding that a successive prosecution for the crime of using a weapon to commit a felony, under Neb. Rev. Stat. § 28-1205 (Reissue 1989), is barred on double jeopardy grounds. The State argues that because the underlying felony constitutes an element of the crime charged, changing the underlying felony from that of the first prosecution results in a separate offense. We agree. Section 28-1205(1) provides:

> Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.

[19] In order for one to be convicted of using a weapon to commit a felony, the State must obviously prove the elements of that crime, including that a felony was committed. To prove beyond a reasonable doubt that a felony was committed, the State must prove every element of the particular felony beyond a reasonable doubt. Therefore, the specific felony (and its particular elements) underlying the weapons charge is necessarily an element of that crime.

[20] When the jury found Smith not guilty of the attempted second degree murder charge, they necessarily had to conclude that he was also not guilty of the charge of using a weapon to commit attempted second degree murder. " '[A] defendant acquitted on the underlying felony charge cannot be convicted of an offense under [§ 28-1205] involving that felony; but a defendant convicted of the underlying felony might still be acquitted on a charge under [§ 28-1205].' " *State v. George, ante* p. 354, 359, 527 N.W.2d 638, 642 (1995), quoting *State v. Saxon*, 193 Neb. 278, 226 N.W.2d 765 (1975).

The State originally might have charged Smith with attempted second degree murder, first degree assault, and two counts of using a weapon to commit the two separate felonies. Since we have concluded that the underlying felonies

themselves are not barred from successive prosecution on double jeopardy grounds, changing the underlying felony for purposes of the use of a weapon charge will result in a separate offense, as well, and will not be barred by double jeopardy. We find that the district court erred in concluding that the weapons charge based upon the underlying felony of first degree assault was barred by double jeopardy because of Smith's acquittal on the previous weapons charge.

## CONCLUSION

The trial court was correct in concluding that double jeopardy principles do not prohibit Smith's subsequent prosecution for first degree assault after his acquittal on charges of attempted second degree murder. However, the trial court erred in concluding that the charge of using a weapon to commit a felony consisted of the same elements as the charge for which Smith was acquitted. Because the elements of the specific underlying felony are necessary elements to prove the use of a weapon charge, changing the underlying felony results in a separate offense, so long as the underlying felony is not itself barred on double jeopardy grounds. Finally, the trial court's dismissal of the charge of attempted voluntary manslaughter was correct because the crime of attempted voluntary manslaughter upon a sudden quarrel does not exist under Nebraska law. Of the three charges brought in the information, double jeopardy will not bar the successive prosecution for first degree assault and using a weapon to commit first degree assault. However, as we have just stated, since attempted voluntary manslaughter does not exist as a crime in Nebraska, the State is barred from prosecuting Smith on that charge.

AFFIRMED IN PART, AND IN PART REVERSED.

# KAREN J. KRAUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH FELIX KRAUS, DECEASED, AND PERSONALLY AND AS GUARDIAN AND NEXT FRIEND OF NICHOLAS JOSEPH KRAUS ET AL., APPELLEE AND CROSS-APPELLANT, V. JONES AUTOMOTIVE, INC., APPELLANT AND CROSS-APPELLEE.

529 N.W.2d 108

Filed March 21, 1995. No. A-94-602.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that a higher appellate court does not substitute its view of the facts for that of the trial judge.
2. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
3. **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.
4. **Workers' Compensation.** When an employee is injured on a trip that has both a business and a personal element, the first step in determining compensability is to determine whether the trip, as a whole, was taken for business or for personal reasons.
5. _____. If 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.
6. _____. 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.
7. _____. 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 Workers' Compensation Act.
8. _____. The return trip from a dual purpose journey, at any point where it constitutes a return from places that had to be reached for business reasons, is within the course of employment.
9. **Appeal and Error.** An appellate court will not consider assignments of error

which are not discussed in the brief.

10. **Workers' Compensation: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent payment for waiting time where an employer is delinquent in paying compensation and where there is no reasonable controversy regarding the employee's claim for workers' compensation benefits.
11. _____: _____. Whether a reasonable controversy exists regarding Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.
12. _____: _____. Under Neb. Rev. Stat. § 48-125 (Reissue 1993), a reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part.
13. _____: _____. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1993), an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellant.

James F. Kasher and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellee.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

IRWIN, Judge.

Jones Automotive, Inc., appeals from a decision of the Workers' Compensation Court review panel affirming an award of benefits to the widow and minor children of Joseph Felix Kraus, who died in an automobile accident on February 1, 1993. Jones Automotive claims that the review panel erred in affirming the trial court's determination that Kraus was within the course and scope of his employment when the accident occurred. For the reasons discussed below, we affirm.

## FACTUAL BACKGROUND

Joseph Felix Kraus was the president of Jones Automotive,

Inc., an automotive parts wholesaler located in Omaha, Nebraska. As president, Kraus' duties included servicing distributors of Jones Automotive's parts and traveling to the distributors' places of business to inventory their stock and solicit orders for parts. On February 1, 1993, Kraus had plans to travel to North Platte, Nebraska, to meet with distributors that sold products for Jones Automotive. Upon arriving at Jones Automotive that morning, he discovered that the van he had planned to drive to North Platte was inoperable. He then changed his plans, deciding to take a different, company-owned vehicle to Lincoln, Nebraska; meet with Jones Automotive's largest distributor; and then travel to Grand Island, Nebraska, to pick up his mother's car and drive it to Omaha for repairs.

Kraus left Omaha and drove to Lincoln, which is approximately 60 miles southwest of Omaha. The trial court's written order does not contain a finding determining Kraus' route from Omaha to Lincoln. No witness had firsthand knowledge of what route Kraus took from Omaha to Lincoln. In Lincoln, Kraus met with the owner of Progressive Automotive, Daniel Hicks, for approximately 2 hours. While at Progressive Automotive, Kraus went over price sheets with Hicks and did a brief check of Progressive Automotive's inventory. Kraus told Hicks of his plans to travel on to Grand Island and also stated that because he was having car troubles, he was considering driving directly back to Omaha.

When Kraus left Lincoln, testimony revealed, he traveled west on Highway 34 toward Grand Island. When Kraus reached Aurora, Nebraska, which is approximately 75 miles west of Lincoln and approximately 20 miles east of Grand Island, he phoned his brother, Thomas Kraus, who was the parts manager at Jones Automotive. Kraus told Thomas Kraus that he was having car troubles and that he was going to travel north to Highway 92, then east to Omaha. At approximately 8:15 p.m., Kraus died in a one-car accident near the intersection of Highways 275 and 92, just outside of Omaha.

On June 8, 1993, Kraus' widow, Karen J. Kraus, filed a petition in the Workers' Compensation Court, alleging that Kraus died within the course and scope of his employment, and

seeking to recover benefits under the Workers' Compensation Act. See Neb. Rev. Stat. § 48-122 (Reissue 1993). Jones Automotive's answer generally denied the allegations in the petition. A hearing was held on December 7, 1993, and on January 10, 1994, the trial judge issued an award to Kraus' widow and minor children.

In its award, the trial judge found that Kraus' trip to Lincoln and toward Grand Island served a legitimate business purpose and that Kraus was therefore in the course and scope of his employment when he died. The award listed three different bases for its conclusion. The trial judge reasoned that the trip to Grand Island had a legitimate business purpose because Kraus' mother was a stockholder, former creditor, and employee of Jones Automotive. The trial judge went on to hold that, even if the trip from Lincoln toward Grand Island had been personal, Kraus would have completed this personal deviation and returned to his regular route, and thus returned to being within the course of employment, when the accident occurred. Finally, the trial court found that liability would also have attached to Jones Automotive because the vehicle which Kraus had been driving at the time of the accident belonged to Jones Automotive.

On review, the compensation court review panel affirmed. The review panel found that the trial judge's finding that Kraus' trip to Lincoln was for business purposes was not clearly wrong. The review panel went on to hold that the trial judge was not clearly wrong in finding that any personal deviation had ended prior to the accident and that at the time of the accident, Kraus was returning from Progressive Automotive and was in the course of his employment. The review panel did not address the trial judge's finding that Kraus was in the course of his employment because he was driving a vehicle owned by Jones Automotive at the time of the accident. Jones Automotive thereafter appealed to this court, and Karen Kraus filed a cross-appeal relating to the question of whether a penalty should be imposed on Jones Automotive as provided by the Workers' Compensation Act.

## ASSIGNMENTS OF ERROR

Jones Automotive has assigned eight errors on this appeal, which we have consolidated into four assigned errors for purposes of discussion. Jones Automotive claims that the review panel erred in affirming the trial judge's determination that (1) Kraus' trip was in the course and scope of his employment under the dual purpose doctrine; (2) Kraus' accident did not occur during a personal deviation from his employment; (3) Kraus' death was compensable under the Workers' Compensation Act because he was driving a vehicle owned by Jones Automotive; and (4) Kraus' widow and dependent children were entitled to benefits, including remarriage benefits and burial expenses.

In her cross-appeal, Kraus' widow alleges that the review panel erred in failing to address and award a 50-percent penalty to her and her dependent children, as provided under the Workers' Compensation Act where the employer is delinquent in paying compensation in the absence of a reasonable controversy.

## STANDARD OF REVIEW

[1-3] Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that the Court of Appeals does not substitute its view of the facts for that of the trial judge. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *McGowan v.*

*Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

## DISCUSSION

*Dual Purpose Doctrine.*

[4] There is no dispute that Kraus performed business functions in Lincoln on February 1, 1993, and that his journey from Omaha to Lincoln on that date was for business purposes. Also, for purposes of this opinion, we will assume, without deciding, that Kraus' reasons for traveling from Lincoln to Aurora on the date of his accident were purely personal. We assume this because a determination that Kraus' death is compensable despite a personal journey to Aurora will render it unnecessary to review the trial judge's determination that such journey was business related. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994)(holding that an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it). We therefore assume that Kraus' trip on February 1, 1993, had both a business and a personal element. When an employee is injured on a trip that has both a business and a personal element, the first step in determining compensability is to determine whether the trip, *as a whole*, was taken for business or for personal reasons. See 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 19.10 (1994).

[5] A device for determining whether an employee's entire trip was business or personal was developed by Justice Cardozo in *Matter of Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). That device has become commonly known as the dual purpose doctrine. 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), 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."

(Quoting *Matter of Marks, supra.*)

In the present case, the trial court concluded that, under the dual purpose doctrine, Kraus' trip was a business trip. Jones Automotive claims that this finding was error, because Kraus had no business purpose in traveling from Lincoln toward Grand Island. Jones Automotive claims that "[f]or the [dual purpose] doctrine to apply, the primary purpose of the trip must be for business purposes, and the personal part must take place at the business destination." Brief for appellant at 17. These claims lack merit. First, Jones Automotive cites no authority for its assertion that the personal purpose must take place "at the business destination" in order for the dual purpose doctrine to apply, nor are we aware of any. Second, the "primary purpose" approach that Jones Automotive espouses was explicitly rejected by the Nebraska Supreme Court in *Jacobs*, where the court noted that its previous cases had utilized the primary purpose approach, but that the approach had been widely criticized, and went on to employ the *Matter of Marks* test, stating:

> The rule as set out in *Matter of Marks, supra*, makes clear that we need not engage in a weighing of errands performed after arrival at the destination to determine whether a trip is in the course of employment. . . .
>
> Under *Marks*, what plaintiff did with his spare time is largely irrelevant if his work either created the necessity for travel or was a concurrent cause of the trip. *Business need not have been the "major factor" in inducing this particular trip if the trip would have been made at some time to accomplish the business.*

(Emphasis supplied.) *Jacobs*, 237 Neb. at 776, 467 N.W.2d at

867.

In the present case, the trial judge found that Kraus would have traveled to Progressive Automotive in Lincoln at a different time had he not done so on the date of the accident. This finding is supported by the record. Karen Kraus testified that Kraus had planned to stop and meet with several distributors on his journey home from his planned trip to North Platte. Both Karen Kraus and Thomas Kraus testified that Kraus had been particularly concerned about Progressive Automotive because of a significant drop in parts that it had ordered from Jones Automotive during the previous year. In addition, Daniel Hicks, the owner of Progressive Automotive, testified in a deposition that was admitted into evidence that Kraus stopped to meet with Hicks at least six times per year. Hicks testified that Kraus would surely have ventured to Lincoln sometime in February 1993, because Hicks had requested some price sheets from Jones Automotive in January and because the winter and spring months are the time of year when automotive distributors stock their inventory for the busy summer season. We find that the review panel correctly held that the trial judge was not clearly wrong in determining that Kraus' trip, as a whole, was undertaken for a business purpose.

The determination that Kraus' accident occurred during a business trip does not necessarily mean that his death is compensable. Rather, if Kraus' accident occurred while he was deviating from his business purpose for personal reasons, his death would not be compensable under the Nebraska Workers' Compensation Act.

*Deviation From Business Trip.*

As noted above, the dual purpose doctrine serves to label the overall trip as business or as personal. Once the trip is labeled a business trip, it must be determined whether the accident in question occurred during a deviation from the business purpose. See 1 Larson & Larson, *supra*, § 19.10.

We have assumed that Kraus ventured from Lincoln to Aurora for personal reasons and thus deviated from his business purpose. However, Kraus' accident occurred on the stretch of his trip between Aurora and Omaha. The critical

question now becomes whether Kraus was still on a personal deviation or whether he had resumed his business purpose when his accident occurred.

[6,7] In *Murphy v. Hi-Way G.M.C. Sales & Service Corp.*, 178 Neb. 397, 400, 133 N.W.2d 595, 597 (1965), the court set forth the rule for determining when an employee who deviates from a business trip for personal reasons is considered to have reentered the course of employment, stating:

> "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."

Accord *Gibb v. Highway G.M.C. Sales & Service Corp.*, 178 Neb. 127, 132 N.W.2d 297 (1964).

[8] In the Larson treatise on workers' compensation, it states that any business trip that begins from a particular place, such as the employee's home or office, must necessarily contemplate both an outgoing and a returning trip. 1 Larson & Larson, *supra*, § 19.29(a). Further, the Larson treatise states that "the return trip from a dual-purpose journey, at any point where it constitutes a return from places that had to be reached for business reasons, is within the course of employment." *Id.*, § 19.29(a) at 4-368.

Jones Automotive argues that because Kraus did not return to his geographical point of deviation, he could not have reentered the scope and course of his employment. We disagree. Because Kraus is deceased and no witness was produced with personal knowledge of which roads Kraus traveled en route to Lincoln, we will never know the exact route that he traveled from Omaha to Lincoln. It is even possible that Kraus drove west on Highway 92 en route to Lincoln, thus making the point

of his accident along his business route. However, we do not need to reach this conclusion to resolve this case. In both *Murphy* and *Gibb*, the court did not indicate that in order to find that an employee had resumed his employment, it must be proven that the employee had crossed the exact geographical point of deviation. In *Gibb*, the court stated that the point of deviation is "the *most acceptable* point for reentering the scope of the employment." (Emphasis supplied.) 178 Neb. at 133, 132 N.W.2d at 301. Likewise, in *Murphy*, the court stated, "Under the rule of [*Gibb*] it is *sufficient* that [the employee] had returned to the point of deviation before the accident happened." (Emphasis supplied.) 178 Neb. at 401, 133 N.W.2d at 598. The quoted language from these two cases indicates that while it is "acceptable" or "sufficient" for an employee to reenter the course of employment at the point of deviation, it is not mandatory that the employee do so. This interpretation finds support in the Larson treatise on worker's compensation. The treatise labels cases similar to the present case "triangular cases." These cases are labeled as such because often the pattern traveled by the employee forms a triangle, with the points on the triangle being the place of employment or point of origin, the employment destination, and the personal destination. With regard to these cases, the treatise states:

> In these triangular cases, then, no fixed formula seems possible. Perhaps the most that can be said is that *the court must form a judgment on whether the real function of the journey back toward the main route is essentially to undo the effects of the private detour or to carry the employee toward his employment destination*.

(Emphasis supplied.) 1 Larson & Larson, *supra*, § 19.43 at 4-418.

In the present case, the accident occurred just a few miles outside of Omaha. At the time of the accident, Kraus was not undoing the effects of his deviation, but was returning to his place of employment, which he would have had to do even if he had not gone to Aurora. The trial court thus correctly determined that Kraus' personal deviation had ended and that Kraus had reassumed his business purpose when his accident occurred.

To accept Jones Automotive's argument and hold that Kraus was out of the course of employment merely because he did not return to a certain geographical spot or stretch of highway on his return journey to Omaha would be an arbitrary decision. Indeed, it would be an eccentric result to allow compensation if Kraus had traveled through Lincoln on his return from Aurora and had an accident some 60 miles from Omaha, yet deny compensation in this case merely because Kraus failed to drive through Lincoln on his return trip, even though the accident actually occurred on the outskirts of Omaha, the point from which he undeniably began his business trip. We find that Kraus was within the scope and course of his employment when his fatal accident occurred.

In reaching our decision, we have considered *McDuffee v. Seiler Surgical Co., Inc.*, 172 Neb. 325, 109 N.W.2d 384 (1961), a case, factually similar to the present case, in which compensation was denied. We have not relied on *McDuffee* because it was decided before *Jacobs v. Consolidated Tel. Co.*, 237 Neb. 772, 467 N.W.2d 864 (1991); *Murphy*; and *Gibb*, and our analysis is more consistent with these latter cases and with current workers' compensation jurisprudence which we have discussed above.

[9] Because we affirm the determination that Kraus was within the course and scope of his employment when he sustained his fatal injuries, we need not discuss Jones Automotive's second and third consolidated assigned errors. We also note that Jones Automotive did not discuss its fourth consolidated assigned error in its brief. It is well established that an appellate court will not consider assignments of error which are not discussed in the brief. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993); *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993). We therefore reject Jones Automotive's fourth assigned error.

*Penalty.*

[10] Karen Kraus claims in her cross-appeal that the compensation court should have awarded her and her children a 50-percent penalty, in accordance with Neb. Rev. Stat. § 48-125 (Reissue 1993). As construed by the Nebraska

Supreme Court, § 48-125 authorizes a 50-percent payment for waiting time where an employer is delinquent in paying compensation and where there is no reasonable controversy regarding the employee's claim for workers' compensation benefits. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

[11] Whether a reasonable controversy exists regarding § 48-125 is a question of fact. *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992); *Mendoza, supra*.

[12,13] In *Mendoza*, the court set forth some criteria for determining whether a reasonable controversy exists, stating:

> [A] reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

225 Neb. at 784-85, 408 N.W.2d at 288.

We find that a reasonable controversy existed regarding Karen Kraus' claim for benefits in this case. Karen Kraus and her children are therefore not entitled to a 50-percent penalty.

## CONCLUSION

The decision of the review panel is affirmed.

AFFIRMED.

# JOHN BEAL AND JOAN BEAL, HUSBAND AND WIFE, APPELLANTS, V. MARSHALL BART ENDSLEY, APPELLEE.

529 N.W.2d 125

Filed March 28, 1995. No. A-94-637.

1. **Constitutional Law: Parent and Child: Due Process: Visitation: Pleadings: Parties.** The relationship between parent and child is constitutionally protected, and proceedings which impact that relationship must afford both parents due process of law. In a petition filed pursuant to Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1993) where the grandchild's parents are divorced, both parents should be made parties to the proceedings.
2. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation rights are initially entrusted to the discretion of the trial judge, whose determination, on appeal, shall be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
3. **Visitation: Proof.** To succeed in obtaining a grant of visitation with grandchildren, grandparents have the burden to prove, by clear and convincing evidence, the following: (1) the existence of a significant beneficial relationship, past or present; (2) that it is in the best interests of the child that such relationship continue; and (3) that such visitation will not adversely interfere with the parent-child relationship. Once the grandparents have sustained that burden of proof, reasonable rights of visitation may be granted.
4. **Visitation.** The overriding and paramount consideration in determining grandparent visitation rights under Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1993) is the best interests of the children.
5. _____. The disruption to the lives of the grandchildren, including the distance of travel to exercise visitation rights, is clearly an appropriate consideration in the award of grandparent visitation privileges under Neb. Rev. Stat. § 43-1802 (Reissue 1993).

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed as modified, and cause remanded with directions.

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

A. James Moravek, of Curtiss, Moravek & Curtiss, P.C., for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

John Beal and Joan Beal, maternal grandparents of Nicholle and Tyler Endsley, appeal the decision of the district court for

Box Butte County, claiming that the grandparent visitation rights granted to them on their petition filed pursuant to Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1993) were not reasonable. Nicholle and Tyler are the children of the Beals' daughter, Jacquelyn Endsley, and Marshall Bart Endsley (Bart) and are in Bart's custody following the dissolution of the Endsleys' marriage. At the time of the hearing on the Beals' petition, Nicholle and Tyler were ages 13 and 9, respectively. We affirm the district court's order as modified, and remand the cause with directions.

## BACKGROUND

Bart and Jacquelyn are the divorced parents of Nicholle and Tyler. At the time of the hearing on the Beals' petition, Jacquelyn resided in the Denver, Colorado, area and Bart resided in Alliance, Nebraska. Nicholle and Tyler are in Bart's custody. This case was tried upon affidavits, as allowed by § 43-1802(2). The record is sparse on what Jacquelyn's visitation privileges are. It is clear that Jacquelyn has visitation with the minor children for the three "summer months." The record contains a letter dated December 23, 1992, proposing that Jacquelyn "have visitation with the minor children on the first and third weekends of each month from Friday evening to Sunday evening, with Jackie and Bart meeting half way to exchange the children at the beginning and at the end of each visitation" and that "the school holidays be alternated between Bart and Jackie," but there is nothing to indicate that this proposal was ever accepted or that this was, in fact, Jacquelyn's visitation schedule at the time of the hearing. There are a number of general references in the record regarding weekends that Jacquelyn was to have the children and to the "Memorial Day weekend which is already decided by the parties where the grandchildren are to go by the agreement of the parties," and Jacquelyn expresses that she has no problems as to whatever times may be set by the court insofar as her parents' visitation rights over her children, "as long as it is not over the Mother's Day weekend." Jacquelyn's "Voluntary Appearance" alleges that her visitation rights are set out by "the Court in her divorce proceedings." However, no order from the Endsleys' divorce

proceedings is in the record before us.

The record does not indicate where Bart and Jacquelyn exchange the children on whatever visitations she might have. There is passing reference to Sterling, Colorado, as a location where Bart and Jacquelyn had exchanged the children at some unidentified point in time. The evidence discloses that the children had been exchanged on past grandparent visitations with Bart at "the 7-11 store in Wray," presumably a reference to Wray, Colorado.

In short, what we can glean from the record is that Bart and Jacquelyn were married and divorced; Bart has custody of their children and now lives in Alliance, Nebraska; Jacquelyn lives in Denver or Englewood, Colorado, and has visits of three summer months and certain weekends and holidays. The Beals live in Goodland, Kansas, where they moved from Alliance in June 1992, some time after Bart and Jacquelyn were divorced. Bart is "on the road a lot," an apparent reference to Bart's employment. Jacquelyn had employment at some point, which has interfered with her visitation on occasion.

*Pleadings and Parties.*

The Beals filed their petition in Box Butte County, naming Bart as the sole defendant. The petition alleges that "since the divorce of the grandchildren's parents," the Beals had attempted to maintain a relationship with the grandchildren, but that these attempts had been unsuccessful, the differences between the parties becoming irreconcilable. The Beals allege that they had established a significant beneficial relationship with their grandchildren and allege that due to Bart's actions, the grandchildren had been limited in their ability to see their grandparents and spend time with them.

Jacquelyn was not named as a party in the Beals' petition and thus filed no answer, but a pleading captioned "Voluntary Appearance" was filed which contains a response to the petition. Therein, Jacquelyn

> admits the allegations of the plaintiff [sic] petition as to a significant beneficial relationship and that the visitations with the minor children should be mutually shared by the parents. No adverse parent-child relationship will be

affected by the granting of the visitations to the Plaintiffs. Her visitations are as set by the Court in her divorce proceedings, as amended by Court order thereafter. Transportation should be shared equally between the Defendant and Plaintiff's.

[1] We digress, for a moment, to correct the caption in this matter to properly reflect that Jacquelyn Endsley is a party to these proceedings. Although not originally named, she did enter a voluntary appearance, thus subjecting herself to the jurisdiction of the court. Although § 43-1803, the statute addressing the contents of a petition seeking grandparent visitation rights, does not specify who the proper parties defendant are, that section does require that the name of the custodial, as well as the noncustodial, parent of the child is to be set forth, and subsection (2) of that statute requires that a copy of the petition is to be served upon both. The relationship between parent and child is constitutionally protected, *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), and proceedings which impact that relationship must afford both parents due process of law. In a petition filed pursuant to § 43-1801 et seq., in that circumstance where the grandchild's parents are divorced, both parents should be made parties to the proceedings.

Bart answered the Beals' petition, alleging an oral agreement between him and the Beals providing that they have visitation with the minor children "the last weekend of each month that had five weekends in the month" and alleging that Jacquelyn "has the children for visitation during the months of June, July and August which allows adequate time for visitation with Plaintiffs." Bart's answer goes on to allege various dates during 1993 that the Beals had visitations with the children and prays that the court award visitation consisting of "the last weekend of any month that has five weekends contained therein."

The Beals' reply to Bart's answer denies any agreement. The reply, made a part of the bill of exceptions through the Beals' affidavits, generally contests and explains the various allegations in Bart's answer regarding the Beals' time with the children during 1993.

## FACTS

The sole evidence offered in this proceeding was the affidavits of John Beal, Joan Beal, Floyd Studer, Jacquelyn Endsley, and Bart Endsley. The evidence discloses a history of care and parenting that the Beals provided to their grandchildren. It also shows the problems with continuing the grandparent relationship since the Beals' move to Kansas in mid-1992 and the rejection by the Beals of Bart's proposal, through his attorney, with regard to specific grandparent visitation rights with Nicholle and Tyler.

Animosity and disagreements have existed between the Beals and Bart since July 12, 1992, an animosity which has continued from that point forward. Attempts on the part of the Beals to arrange visitation with Nicholle and Tyler have been less than satisfactorily received by Bart, although some have been accommodated.

The evidence further reflects that there are weekends when Jacquelyn, due to work scheduling or illness, could not exercise weekend visitations and where Bart has refused the request of Jacquelyn or the Beals for the Beals to have the children for that weekend. However, there is other evidence that the Beals were allowed visitation with their grandchildren on such occasions. Clearly, differences exist between the Beals and Bart regarding their visitation of the children and those differences have exacerbated since 1992, when they moved to Kansas.

The Beals sought the following visitation privileges: (1) Visitation one weekend every 6 weeks "in such manner as will alternate between the respective parents, a weekend that would affect each of them equally in terms of a visitation"; (2) one weekend alone each year with each separate child; (3) in September, the "grandparents' day weekend, which occurs generally on the 2nd weekend in September of each year," as well as Halloween; (4) notice of the children's school programs and special events and days off so that the grandparents can work out a time to be able to be present for these events; and (5) "whatever extended time during the summer for visitation with the grandchildren could be allowed."

The evidence strongly suggests it is the Beals' conviction that visitation "should be times taken equally from the Defendant

[Bart] and from the daughter [Jacquelyn] so that the grandchildren have a meaningful relationship with the grandparents, as well as, the parents."

As stated above, Jacquelyn generally has no opposition to whatever visitation the court may award her parents, so long as it does not interfere with Mother's Day weekend and she is not always the one forced to give up her time to accomplish it. Bart admitted the existence of a significant beneficial relationship between the Beals and the children and proposed that visitation be granted on the fifth weekend of each month having such a weekend.

*District Court's Order.*

The district court concluded that the Beals had established a significant beneficial relationship with Nicholle and Tyler. The court further found: "There is not a lot of time for visitation away from home when the mother exercises the visitation she is allowed. The Court is also in the opinion that taking visitation from the children's mother may not be best for the children."

Having said this, the court granted certain visitation to the Beals, requiring them to pay all costs for transportation for the visitations. The court's order provided:

> Plaintiffs shall be allowed weekend visitation on the fifth weekend of any month that occurs. They shall also be allowed to exercise weekend visitation on any weekend or holiday that their daughter is allowed visitation with the children. They may also have visitation during the summer months with the minor children when the daughter has visitation with the minor children . . . .

The court specifically found that "[t]o allow greater visitation would be a disservice to the children as their father has a duty to maintain some continuity in their lives." The Beals have appealed the order of the district court.

## ASSIGNMENTS OF ERROR

The Beals allege two assignments of error. We view their second assignment as an argument in support of their single assignment of error, that being that the trial court erred in failing to award them *reasonable* grandparent visitation rights pursuant to § 43-1801 et seq. The Beals argue that the visitation

rights granted were insufficient and that it was error for the trial court to order their visitation be exercised in conjunction with Jacquelyn's visitations.

## STANDARD OF REVIEW

[2] Determinations concerning grandparent visitation rights are initially entrusted to the discretion of the trial judge, whose determination, on appeal, shall be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994); *Dice v. Dice*, 1 Neb. App. 241, 493 N.W.2d 207 (1992). See, also, *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

## DISCUSSION

The common-law view was that grandparents enjoyed no legal right to visitation with their grandchildren. *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982). In 1986 Neb. Laws, L.B. 105, the Nebraska Legislature adopted a statutory procedure for grandparents to seek court-ordered visitation privileges with their grandchildren if, inter alia, the marriage of the grandchildren's parents has been dissolved. § 43-1802(1)(b). Section 43-1802(2) provides in pertinent part:

> Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

[3] To succeed in obtaining a grant of visitation with grandchildren, grandparents have the burden to prove, by clear and convincing evidence, the following: (1) the existence of a significant beneficial relationship, past or present; (2) that it is in the best interests of the child that such relationship continue; and (3) that such visitation will not adversely interfere with the parent-child relationship. Once the grandparents have sustained that burden of proof, reasonable rights of visitation *may* be granted.

The Beals argue that the issue on appeal is the reasonableness

of the visitation rights granted by the district court. Bart admitted that a significant beneficial relationship exists between the Beals and their grandchildren and requested, at trial, the grant of certain visitation. The court's order expressly determined the existence of such a relationship and implicitly found that it would be in the best interests of Nicholle and Tyler that the relationship continue and that the visitation awarded would not adversely interfere with the parent-child relationship. Neither Bart nor Jacquelyn has cross-appealed.

Although § 43-1802 allows the district court to grant reasonable rights of visitation only after it is satisfied that the evidence is clear and convincing that the three conditions set forth above have been proven, the determination of what is reasonable visitation under the circumstances of each case necessarily requires the trial court to revisit consideration of the best interests of the children and the effect on the parent-child relationship in awarding specific visitation privileges. In other words, if a significant *beneficial* relationship exists, or has existed, between grandparents and grandchildren, it would naturally follow, by definition, that it would be *beneficial* for it to continue unless the "best interests" of the children, in the broader sense, suggest otherwise. Although certain visitation rights may not adversely affect the parent-child relationship, others most certainly would. Thus, the *nature and extent* of visitation granted is inextricably intertwined with the initial determination under § 43-1802 of *whether* such rights should be granted at all.

The Nebraska Legislature has clearly expressed the policy of this state regarding the importance of the parent-child relationship. Neb. Rev. Stat. § 42-364(1) (Cum. Supp. 1994) provides that time spent with each parent following a divorce should be determined with the "objective of maintaining the ongoing involvement of both parents in the minor child's life." Section 43-1802(2) recognizes such policy by requiring that the grant of grandparent visitation be conditioned upon clear and convincing proof that such visitation "will not adversely interfere with the parent-child relationship." The grant of grandparent visitation necessarily involves a balancing of the superior parent-child relationship with the grandparent-child

relationship.

[4] We believe the overriding and paramount consideration in determining grandparent visitation rights under § 43-1801 et seq. is the best interests of the children. That standard is well settled as the benchmark in determining visitation rights between divorced parents. See § 42-364. See, also, *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). There is no reason to suggest that the Legislature, in passing § 43-1801 et seq., intended to diminish the importance of that factor in determining the grant of grandparent visitation rights and the nature and extent of those rights.

In *Gerber*, the Supreme Court identified certain factors and circumstances properly considered in determining the nature and extent of *parental* visitation, recognizing that such visitation rights must be determined on a case-by-case basis. While recognizing that the factors set forth were not exhaustive or inflexible, the *Gerber* court pointed to such factors and circumstances as the age and health of the child; character of the noncustodial parent; the place where visitation will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle; and, in some circumstances, the wishes of the child. While recognizing the rights of parents to visitation as clearly superior, we believe the *Gerber* factors are appropriate considerations in determining whether to award grandparent visitation rights under § 43-1801 et seq., as well as the nature and extent of any such award, substituting, of course, "grandparent" for "noncustodial parent" or "visiting parent," as those terms appear in *Gerber*.

The Beals essentially challenge the visitation awarded on three grounds. First, they argue that the fifth-weekend visitation is simply insufficient because there are so few fifth-weekend situations in a calendar year that it does not provide any meaningful opportunity for them to visit their grandchildren. Second, they contend that the court's order which says they "shall" be allowed to exercise visitation "on

any weekend or holiday that their daughter is allowed visitation" contradicts the court's own finding that "taking visitation from the children's mother may not be best for the children" and is inconsistent with the legislative enactment in that it fixes the burden of sharing visitation upon the noncustodial parent, which is not lawful, fair, or just. Finally, they claim that the court's order which provides that the Beals "may also have visitation during the summer months . . . when the daughter has visitation with the minor children" is purely discretionary and provides no assurance of any separate visits with the children.

*Summer Visitation.*

Discussing the last argument first, we agree that the court's order that the Beals "may" have visitation during the summer months leaves those visitation rights subject to agreement between the Beals and Jacquelyn. To that extent, it provides no definite visitation privileges. This portion of the "order" appears to represent more the reasoning of the district court in denying greater visitation to the Beals than an additional "award" of grandparent visitation. The relationship between the Beals and Jacquelyn appears to be good. The evidence reflects that in years past, the Beals have spent a significant amount of time with the children during the summer months, presumably during Jacquelyn's summer visitation. We take the Beals' argument on this point to simply be that they were not given sufficient separate visitation with their grandchildren by the court's order, a subject which we will address later in this opinion.

*Weekend and Holiday Visitation.*

With regard to the court's order that the Beals "shall" have visitation on weekends and holidays that Jacquelyn has visitation, we believe that this portion of the court's order was erroneous to the extent it purportedly creates visitation rights in the Beals which directly conflict with Jacquelyn's visitation privileges. "Shall" is a mandatory term. Although Jacquelyn's affidavit stated that she would "not have a problem as to times set up by the courts, as long as it is not over the Mother's Day weekend," thus suggesting that she would have no objection to

giving up her weekends and holidays for the Beals, her affidavit also indicates that her visitations with the children are important to her and that she does not feel that she should "always be the one to give up my time with the children so that they may have visitation with their grandparents." It may be that the district court's use of the word "shall" in this portion of its order was inadvertent, in that it had clearly expressed the view that taking visitation from Jacquelyn may not be best for the children. Indeed, from the record, a more proper interpretation is that the court used the word "shall" in addressing visitation rights of the Beals during Jacquelyn's weekend and holiday visitations in order to clarify that in those instances where Jacquelyn was unable to exercise her visitation rights over the children, or was unable to pick up the children at precisely the designated time for visitation, the Beals, upon proper notice to Bart, were to be allowed visitation with their grandchildren. The record is replete with problems between the parties in those circumstances. In short, to the extent that the district court's order granted visitation rights to the Beals that superseded or conflicted with Jacquelyn's weekend and holiday visitation, it must be modified. We find that the district court's order should be clarified to express that the Beals' rights to visitation on Jacquelyn's holidays and weekends shall arise *only* on those occasions where Jacquelyn wishes her parents to exercise visitation or to assist her in her exercise of visitation with Nicholle and Tyler. In such circumstances, upon reasonable notice to Bart from Jacquelyn, consisting of at least verbal notice by phone no less than 24 hours before the visitation is to commence, Bart shall fully cooperate to allow the Beals such weekend and holiday visits as would have otherwise been due Jacquelyn, including such transportation arrangements as are applied to the Bart-Jacquelyn exchange of the children. We caution all parties that the parent-child visitation is paramount and should be infrequently replaced in this manner.

*Derivative Visitation.*

The Beals generally argue that it was error for the district court to require that their visitation be exercised "principally in

conjunction with" Jacquelyn's visitations. Brief for appellants at 19. This issue was assigned, but not discussed, by the appellant in *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994), and thus the Supreme Court did not address it.

We do not believe that a hard-and-fast rule can be established in this regard. Some decisions from other jurisdictions suggest that grandparents' visitation with their grandchildren is sufficient if the relationship between the grandparents and their own child is not antagonistic and that the grandparents are given a reasonable opportunity to visit the grandchildren during their child's visitation time with the grandchildren. The cases cited by Bart for this proposition are ones where separate grandparent visitation was denied. See, e.g., *Stricker v. Stricker*, 474 So. 2d 1146 (Ala. Civ. App. 1985); *Minns v. Minns*, 615 S.W.2d 893 (Tex. Civ. App. 1981). In *Stricker*, the appellate court affirmed the refusal to award separate visitation rights to a minor child's paternal grandmother. The grandmother lived in Colorado and the 6-year-old lived in Mobile, Alabama, with his mother. The grandmother's son, the noncustodial father, also lived in Mobile. The court noted that the grandmother frequently visited her son and could arrange to visit with her grandchild during the times that the father exercised his visitation rights. This was not a *grant* of grandparent visitation. It was an explanation for why grandparent visitation was being denied. Similarly, in *Minns*, the appellate court affirmed the denial of visitation rights to the paternal grandmother, again noting that the father was allowed generous visitation privileges and there was nothing to suggest that the grandmother and her noncustodial son were antagonistic or, for any reason, were unable to share visitation. Yet there are other situations where, despite a good relationship between the grandparents and their child, and despite the grandparents' having visitation with the grandchild while visiting with the grandchild's parent, a grant of separate visitation has been found to be appropriate. In *Pointer and Pointer*, 112 Or. App. 511, 829 P.2d 1016 (1992), the appellate court rejected the custodial parent's argument that the grandparents' visitation should be confined only to those times when the child was visiting the grandparents' son, the

noncustodial parent. Despite a good relationship and the opportunity to visit, the appellate court stated that it did not believe it was in the child's best interests to require the grandparents to visit only during the time that the child was with his noncustodial father, noting: "Father's time with the child is also important and is quite limited." *Id.* at 516, 829 P.2d at 1019.

It is one thing to *award* grandparents visitation rights during their child's visitation privileges with the grandchildren and quite another to deny visitation rights, recognizing that the grandparents already have adequate visitation privileges through the visitation schedule of their child with the grandchildren.

In the case before us, we believe the district court applied the rationale of both of the foregoing schools of thought. While recognizing that Jacquelyn and the Beals had a good relationship and that the Beals had the opportunity to maintain their relationship with Nicholle and Tyler during periods when Jacquelyn had them with her, as in *Stricker* and *Minns*, the district court also recognized, as in *Pointer*, that Jacquelyn's visitation time was important and thus granted the Beals separate visitation privileges, distinct from Jacquelyn's, although not as great as those sought.

*Fifth Weekend.*

We turn now to the Beals' contention that the court's grant of "the fifth weekend of every month that occurs" is patently insufficient. As stated above, in essence, this is the extent of the separate visitation granted by the court's order. The Beals argue that this is clearly insufficient as their only separate visitation because it is so infrequent and, even when allowed, the distance between Goodland, Kansas, and Alliance, Nebraska, and the attendant travel time give them little opportunity to visit their grandchildren.

The Beals begin their argument by interpreting the word "weekend" as "both a Saturday and Sunday which has a numerical date in the same month." Brief for appellants at 16. They then go on to apply that definition to various calendar years as an illustration of just how little visitation this gives to

them, i.e., 1994—three weekends; 1995—three weekends; 1996—two weekends, etc. We believe the court's order is consistent with another interpretation, i.e., that the "fifth weekend" occurs in any month when there is a weekend which commences with a fifth Saturday and that it includes the following Sunday, whether it is in that same month or not. So defined, the Beals would have had visitations on five weekends for the year 1994; for 1995, four weekends; and for 1996, four weekends.

Rather than guess at what visitation the order was intended to grant to the Beals, we remand the matter to the district court with directions to clarify this portion of its order to more specifically define when a "fifth weekend" shall be deemed to occur and what it shall consist of, including the times and days of the week the Beals' visitation thereunder is to commence and to end.

Regarding the brevity occasioned by distance, we accept that the distance between Goodland, Kansas, and Alliance, Nebraska, will impact the Beals' visits with their grandchildren. The distance from Goodland to Englewood, Colorado, is also significant and it necessarily affects the Beals' ability to visit their grandchildren during Jacquelyn's visits with them. However, the children already travel extensively for visitations with Jacquelyn in Englewood, also a good distance from where the children reside in Alliance. The trial court's implicit conclusion that further disruption caused by more frequent separate visitations with the Beals would not be in the best interests of the children under the circumstances of this case is a wise one. The Supreme Court has often recognized the need for stability in the lives of young children. See, e.g., *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986).

[5] The district court, in rejecting the more extensive visitation sought by the Beals, noted the importance to the children of "continuity in their lives." Such reasoning evidences sound discretion, not an abuse of discretion. The disruption to the lives of the grandchildren, including the distance of travel to exercise visitation rights, is clearly an appropriate consideration in the award of grandparent visitation privileges under § 43-1802. See, also, *Gerber v. Gerber*, 225 Neb. 611, 407

N.W.2d 497 (1987). We cannot ignore that it was the Beals' move to Kansas which precipitated the visitation problems that are now being experienced. While they should not be penalized for such a move, neither should the Endsley children and their parents be forced to readjust their lives to accommodate the logistic problem created by such a decision. Finally, we note that the district court's order did not *require* that the Beals travel to Alliance to pick up Nicholle and Tyler. Rather, the court ordered that the Beals bear transportation costs for the visits. Presumably, options are available to mitigate travel time, provided the Beals wish to bear the expense.

## CONCLUSION

To summarize, the Beals and their grandchildren, Nicholle and Tyler, obviously have a significant beneficial relationship. Jacquelyn and Bart both feel that it should continue, as did the district judge. We agree. The district court's order, while recognizing that the Beals have significant visitation opportunities with their grandchildren while they are with Jacquelyn during her times of visitation, also recognized that Jacquelyn's time alone with the children was critical. The "fifth weekend" visitation, clarified under either interpretation discussed, although not as extensive as that requested by the Beals, is a reasonable exercise of the trial court's discretion to fashion a plan of visitation taking into account all of the circumstances presented. The district court properly recognized the importance of the mother's separate visitation and the need for continuity and stability in the children's lives, while still allowing for separate visitation by the Beals.

The district court's order is remanded to clarify the "fifth weekend" grant of visitation to the Beals and is otherwise affirmed as modified herein.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

# IN RE INTEREST OF TEELA H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KATHY H., APPELLANT.

529 N.W.2d 134

Filed March 28, 1995. No. A-94-758.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.
3. **Jurisdiction: Time: Appeal and Error.** The timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
4. **Final Orders.** An unfiled letter from the court is not the equivalent of an oral pronouncement of judgment in open court.
5. **Judgments.** A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question.
6. **Parental Rights.** Neb. Rev. Stat. § 43-285 (Reissue 1993) does not authorize the Department of Social Services or any other third party to determine or place restrictions on parental visitation rights.

Appeal from the County Court for Scotts Bluff County: JAMES L. MACKEN, Judge. Appeal dismissed in part, and in part reversed and remanded with directions.

Byron M. Johnson, Scotts Bluff County Public Defender, and W.E. Madelung for appellant.

Deborah A. Birgen, Deputy Scotts Bluff County Attorney, for appellee.

Michelle M. Dreibelbis, guardian ad litem.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

IRWIN, Judge.

## INTRODUCTION

Kathy H. appeals the orders of the county court for Scotts Bluff County, Nebraska, sitting as a juvenile court, terminating unsupervised visitation with her child, Teela H., at Kathy's residence in Cheyenne, Wyoming; denying her motion to return custody of Teela to her; and granting her supervised visitation in Scottsbluff, Nebraska, "as recommended by Dr. [James]

Sorrell." For the reasons hereafter stated, we dismiss in part, in part reverse, and remand with directions.

## FACTUAL BACKGROUND

Kathy H. is the natural mother of Teela H., born December 29, 1991. A deputy Scotts Bluff County Attorney filed a petition on June 3, 1992, alleging that Teela lacked proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) by reason of the fault or habits of Kathy. Teela was ordered to remain in the temporary custody of the Department of Social Services (DSS). After a July 14, 1992, hearing on Kathy's motion for temporary custody, Teela was returned to Kathy on a trial basis pending further hearing. On August 14, Teela was returned to the temporary custody of DSS. Subsequently, Kathy moved to live with her boyfriend in Cheyenne, Wyoming, where she continues to reside.

On August 28, 1992, an adjudication hearing was held on the juvenile petition, at which time Kathy pled the equivalent of a no contest plea to the allegations. The court found Teela to be a juvenile within the meaning of § 43-247(3)(a) and placed her in the custody of DSS.

At an October 22, 1992, dispositional hearing, the court adopted DSS' case plan of October 21, 1992, and ordered Kathy to comply with the plan. The October 21 plan had two parts. The first part set a target date of February 1993 to establish Dave and Nancy C. as guardians for Teela. The guardianship was supported by Kathy, Dave and Nancy, and DSS. The second part was a rehabilitative plan in the event Kathy changed her mind about the guardianship. It established the following goals: Kathy was to remain sober, she was to attend two Alcoholics Anonymous (AA) meetings each month, she was to meet with an alcohol counselor, she was to complete a parenting class, she was to obtain her GED, and she was to attend individual counseling to deal with her background of being an abused child. The court also ordered unsupervised visitation of two weekends per month.

Prior to December 1993, Kathy was averaging one visit per month and had also had one full-week visit in Cheyenne and three overnight visits in Scottsbluff and had maintained regular

phone contact with Dave and Nancy. From December 1993 to April 1994, Kathy continued to visit Teela in Scottsbluff, and Teela went to Cheyenne on a couple of occasions.

At some point in December 1993, Kathy decided that she wanted to regain custody of Teela. At that time, the court apparently ordered visitation every weekend with Kathy in Cheyenne and that Kathy comply with the rehabilitative plan. This plan involved alcohol evaluations of Kathy and her boyfriend, parenting classes, the completion of a home study by the Wyoming Department of Social Services, and Kathy's cooperation with that department in Wyoming and DSS in Nebraska.

On November 29, 1993, Kathy filed a motion to return custody of Teela to her. On February 11, 1994, a hearing was held on Kathy's motion. The court took this matter under advisement and later, according to a February 17, 1994, letter, intended to overrule it.

On July 8, 1994, a review hearing was held. According to the testimony at trial, Kathy was attempting to comply with the rehabilitative plan. Kathy had completed parenting classes. Kathy was attending AA meetings, family dysfunction counseling, additional parenting classes, and college-level courses at a local junior college. Kathy's boyfriend had received an alcohol evaluation which indicated that he did not have an alcohol problem. Melody Wilson, a social worker in Cheyenne, testified that she had completed a home study report and found Kathy's home and family appropriate. Wilson recommended reunification.

According to the record, in May 1994, about 1 month after the weekly weekend visits to Cheyenne began, Teela, age 2 1/2 years, began exhibiting behavioral problems. Teela seemed angry and was kicking, spitting at, and hitting people. Teela refused to associate with the people who normally took her to Cheyenne. On Thursday nights before visitation, Teela would become very agitated, angry, and "clingy" to Nancy.

On June 6, 1994, Dr. James Sorrell, a psychiatrist, examined Teela. He diagnosed Teela as suffering from severe separation anxiety. In a letter dated July 6, 1994, that was offered and received at trial, Dr. Sorrell opined that Teela was emotionally

attached to Dave and Nancy and was reacting to the threatened loss of this relationship. He made the following recommendations: The weekend visits should be terminated, Kathy should be granted supervised visitation with Teela in Scottsbluff, and Teela should continue to receive counseling from Dr. Sorrell and Ellen Jensen, a play therapist.

According to the record, Jensen had met with Teela for nine sessions. Jensen felt that Teela was emotionally invested in Dave and Nancy and overtly neutral with respect to Kathy. Jensen opined that Teela fears that Dave and Nancy, her parent figures, will be taken from her, and Teela is angry, sad, and frustrated.

Kelly Case, the DSS social worker assigned to this case, testified that she still recommended the completion of the guardianship with Dave and Nancy. She stated that this recommendation was based upon Teela's anxiety disorder and the period of time she has been in the care of Dave and Nancy, not Kathy's failure to comply with the plan. Case testified that since approximately January 1994, Kathy had complied with most of the recommendations in the rehabilitative plan. In the event that reunification remained the goal, Case testified that she would ask Dr. Sorrell to develop a plan indicating what he sees as timeframes for Kathy's visits with Teela and therapy sessions with the doctor and Teela.

In a journal entry filed August 2, 1994, the county court ordered that the unsupervised weekend visits to Kathy's residence in Cheyenne be terminated and that "visitation by the mother of the juvenile be held in Scottsbluff, Nebraska and shall be supervised by the Department of Social Services as recommended by Dr. Sorrell." This appeal followed.

## ASSIGNMENTS OF ERROR

Kathy asserts the following: (1) The juvenile court abused its discretion when it denied her motion to return custody despite the completion of the conditions set forth in the rehabilitative plan, (2) the juvenile court violated her due process rights by failing to return Teela to her custody and by not setting conditions by which a return may be effected and that were within her ability to perform, and (3) the juvenile court

improperly delegated its authority to determine parental visitation rights.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

[2] Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994).

## DISCUSSION

*Letter Ruling from the Court Dated February 17, 1994.*

The first two assignments of error concern the February 17, 1994, letter that "overruled" Kathy's motion to return custody. We lack jurisdiction to entertain an appeal regarding the first two assigned errors for the following reasons.

[3] The timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Neb. Rev. Stat. § 25-2729 (Cum. Supp. 1994) requires that

> [i]n order to perfect an appeal from the county court, the appealing party shall within thirty days after the rendition of the judgment or making of the final order complained of:
>
> (a) File with the clerk of the county court a notice of appeal; and
>
> (b) Deposit with the clerk of the county court a docket fee....

Section 25-2729(3) states:

> The time of rendition of a judgment or making of a final order is the time at which the action of the judge in announcing the judgment or final order is noted on the trial docket or, if the action is not noted on the trial docket, the time at which the journal entry of the action is filed.

[4] The trial docket sheet contained in the transcript has a written entry regarding the February 11, 1994, hearing

reflecting those present and the evidence adduced. A journal entry states that the court took the matter under advisement and would inform the parties by letter of its decision. The only indication of the court's decision regarding Kathy's November 29, 1993, motion is an unfiled letter from the court, dated February 17, 1994, which indicates that it was sent to the parties. This letter is not the equivalent of an oral pronouncement of the judgment in open court. See *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995) (holding that a district court's letter to counsel is not the equivalent of an oral pronouncement of the judgment in open court pursuant to Neb. Rev. Stat. § 25-1301 (Reissue 1989)). The final order of the court is not on the trial docket, nor is there a journal entry filed. Thus, judgment has not yet been rendered on Kathy's November 29, 1993, motion, nor has a final order been made upon it.

Since there is no final, appealable order in regard to the above motion, we lack jurisdiction regarding these two assigned errors.

*August 2, 1994, Order.*

We will discuss the appellant's assigned error concerning the August 2, 1994, order, as it is properly before us. Kathy argues that the county court improperly delegated its authority to determine parental visitation rights to DSS and Dr. Sorrell. This argument is based upon the following language in the August 2 order: "[V]isitation by the mother of the juvenile [shall] be held in Scottsbluff, Nebraska and shall be supervised by the Department of Social Services as recommended by Dr. Sorrell."

[5] A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question. *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). Unless the language used in a judgment is ambiguous, "the effect of the decree must be declared in the light of the literal meaning of the language used." *Bokelman v. Bokelman*, 202 Neb. 17, 21, 272 N.W.2d 916, 919 (1979). A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. *Kerndt, supra.* However, the fact that the parties have suggested opposing meanings of the disputed instrument does

not necessarily compel the conclusion that the instrument is ambiguous. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). Based on the language in the August 2, 1994, order, we conclude that the plain and unambiguous meaning of that order is that Dr. Sorrell shall determine the frequency and manner that Kathy is allowed supervised visitation of Teela. This interpretation is based upon the language of the order, not upon what the parties believe the court meant but did not say. See *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

Our conclusion regarding the import of the order is consistent with the evidence. Case testified that she would recommend that Dr. Sorrell construct the case plan. Dr. Sorrell gave a general recommendation that the Wyoming visits be terminated and that visits be supervised in Scottsbluff. He did not provide any suggested visitation schedule which the court could have been attempting to adopt.

[6] The next question is whether a juvenile court may leave the amount, time, and manner of parental visitation with an adjudicated juvenile to the discretion of a third party. Neb. Rev. Stat. § 43-285(1) (Reissue 1993) states: "When the court awards a juvenile to the care of the Department of Social Services, an association, or an individual" in accordance with the Nebraska Juvenile Code, "such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it." Section 43-285 does not authorize DSS or any other third party to determine or place restrictions on parental visitation rights. *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990). Parental visitation rights, as a subject within the Nebraska Juvenile Code, are matters for judicial determination. *In re Interest of C.A., supra*. The rule that custody and visitation of minor children are to be determined on the basis of their best interests "clearly envisions an independent inquiry by the court." *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 743, 272 N.W.2d 40, 42 (1978).

In *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980),

where a parent requested a divorce decree be modified to grant specific visitation privileges, the trial court denied the request and ordered the parent and the children to attend psychological counseling. Apparently, the court allowed the psychologist to determine when and how often the counseling would occur. The Nebraska Supreme Court held that "the trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation, is not the intent of the law and is an unlawful delegation of the trial court's duty." *Id.* at 200, 297 N.W.2d at 762. The Supreme Court has also held that it is plain error for a juvenile court to require that a parent " 'participate in Parents United support group on a regular basis *and follow all directions of the counselor.*' " (Emphasis supplied.) *In re Interest of D.M.B.*, 240 Neb. 349, 362, 481 N.W.2d 905, 914 (1992). The court stated: "It is the court's duty, not that of counselors, Department of Social Services workers, social workers, child protection workers, or probation officers to fix the terms and limitations of a rehabilitation provision." *Id.* at 362, 481 N.W.2d at 914-15.

The county court granted Dr. Sorrell the authority to determine the time, manner, and extent of Kathy's visits with Teela. In so doing, the county court, like the trial courts in *Deacon* and *In re Interest of D.M.B.*, delegated a matter for judicial determination to a third party. We hold that the county court improperly delegated its authority to determine parental visitation rights to Dr. Sorrell and in doing so committed reversible error. We reverse the August 2, 1994, order of the county court and remand this matter with directions to determine visitation privileges if and when appropriate.

APPEAL DISMISSED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

# CAROLJEAN WATSON, APPELLANT, V. ALPO PET FOODS AND CIGNA INSURANCE COMPANY, APPELLEES.

529 N.W.2d 139

Filed March 28, 1995. No. A-94-793.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court award only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. _____: _____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge, whose decision has the same force and effect as a jury verdict.
3. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation: Appeal and Error.** Findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that a higher appellate court also does not substitute its view of the facts for that of the trial judge.
5. **Workers' Compensation: Proof.** In a workers' compensation case involving a preexisting condition, it is the claimant's burden to prove by a preponderance of the evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.
6. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
7. **Workers' Compensation: Appeal and Error.** The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.
8. **Trial: Expert Witnesses.** The opinion of an expert must be examined in the context of the expert's entire testimony.
9. **Workers' Compensation: Witnesses.** The Workers' Compensation Court trial judge, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony.
10. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court

trial judge is not required to accept an expert's opinion as binding and may accept or reject an opinion from an expert witness.

11. **Trial: Expert Witnesses.** The value of an expert's opinion is no stronger than the facts upon which it is based.
12. _____: _____. Where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Mark E. Ford for appellant.

James J. DeMars, of DeMars, Gordon, Olson, Recknor & Shively, for appellees.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Caroljean Watson appeals the order of the Workers' Compensation Court review panel which affirmed the order of the trial judge. The trial judge found that Watson failed to prove that an injury to her right knee was the result of an accident arising out of and in the course of her employment with Alpo Pet Foods, but, rather, that it was the result of a " 'degenerative' problem with her right knee that was 'chronic' in nature." For the following reasons, we affirm.

## FACTS

The record reflects that Watson is a 37-year-old woman with a high school education. Watson began working for Alpo in September 1988. During the course of her employment, she has worked as a palletizer, depalletizer, baler room operator, table attendant, and control room operator and in sanitation.

Watson's petition, filed September 3, 1993, consists of two separate counts. In the first count, Watson alleged that on May 19, 1989, she injured her left knee when she slipped and fell during the course of her employment, and she required medical attention. Watson was treated by Dr. Andris Matisons after this initial injury. On June 6, 1992, her left knee was either reinjured or the prior injury was aggravated when she was required to work in ill-fitting rubber boots for her position in sanitation because her regular boots were missing. She again received medical treatment from Dr. Matisons. The Workers'

Compensation Court recognized that Alpo and CIGNA Insurance Company essentially conceded that the injury to Watson's left knee was compensable and awarded benefits accordingly. The compensability of the injury to Watson's left knee is not the subject of this appeal.

In her second count, Watson claimed that on July 18, 1992, while working in sanitation at Alpo, she slipped on cow udders lying on the floor at the bottom of a staircase and injured her right knee. It was Watson's uncontroverted testimony that she had no symptoms or problems with her right knee prior to this accident. The injury was reported to a supervisor, and Watson immediately sought medical attention from the Crete Municipal Hospital emergency room. Dr. Leon Jons, the emergency room physician, noted that she had a "[s]uprapatellar abrasion and contusion . . . with some mild swelling," but that the ligaments were intact and that she had normal range of motion in her knee, except that there was pain with extreme flexion. The x ray of her right knee was normal. Dr. Jons diagnosed a soft-tissue contusion to her right knee and subsequently released her. Watson did not see Dr. Jons any further for medical treatment.

Despite the fact that Watson's medical treatment for the injury to her left knee was ongoing at the time of, and following, the injury to her right knee, she first complained of problems with her right knee to her treating physician, Dr. Matisons, on November 18, 1992, some 4 months after the accident. In fact, Watson saw Dr. Matisons on three occasions after the July 18, 1992, accident for problems with her left knee, specifically, August 14, August 21, and October 5, without mentioning any problem with her right knee. On November 18, when she finally mentioned her right knee problems, Dr. Matisons examined her knee and took x rays, but noted no bony damage. He diagnosed Watson with a contusion of the right knee, "lateral anterior aspect." Again on January 8, 1993, Watson discussed the problems with her right knee with Dr. Matisons, who recommended that a magnetic resonance imaging (MRI) be performed. Dr. Matisons' "impression" of her right knee at that time was a "contusion . . . with possible internal derangement."

The MRI was performed on January 13, 1993, by Dr. David Kiple. His report stated:

> There is only minimal joint fluid present. The chondral joint margins appear normal. The patellar and quadriceps tendons are intact. The anterior and posterior cructiate [sic] ligaments appear normal. There are Grade II, linear areas of increased signal within the posterior horn of the medial meniscus. The lateral meniscus appeared normal. I could not see a tear communicating with either articular surface. IMPRESSION: Grade II degenerative changes within the posterior horn of the medial meniscus. Otherwise, normal magnetic imaging of the right knee.

In a letter dated March 17, 1993, Dr. Matisons diagnosed the difficulties with Watson's right knee as "[d]egenerative changes within posterior horn, medial meniscus" and acknowledged that arthroscopic surgery may be needed. Watson underwent arthroscopic surgery on July 29, 1993, for her right knee. Dr. Matisons' operative record indicates:

> Initial examination of the medial compartment failed to reveal any damage to the chondral surface, or to the medial meniscus. An MRI was performed earlier, and had shown that there were some degenerative changes involving the posterior horn of the medial meniscus. The medial meniscus area was thoroughly explored from above and below. Great care was taken, looking for any kind of damage that could be visualized on the surface. None was noted. Photographs taken to represent this, as well, indicating intact meniscus segment. Following this, ACL was examined. This was intact. The lateral compartment was examined, and the lateral horn was found to have a tear present in the posterior aspect. This was one of a chronic type, where the meniscus, itself, was just starting to get shredded. There was not a single tear, just sort of widening and shredding of the lateral horn. . . . Additional examination also revealed the under surface of the patella to be considerably roughened . . . .

Dr. Matisons' postoperative diagnosis of Watson's right knee injury was as follows: "1. Torn lateral meniscus, posterior horn, right knee. 2. Chondromalacia patella, right knee."

In a letter dated December 21, 1993, Dr. Matisons offered an opinion as to the cause of Watson's injuries and disability to her knees, including her right knee, stating:

> I have been treating Carol Jean Watson for injuries to her knees from June 8, 1989, through December 15, 1993. During this time I have had repeated opportunities to examine her knees, review the history that she has presented to me, and each time with each knee injury she has clearly indicated a specific date, and that she was at work at Alpo Plant in Crete, Nebraska, when her injuries occurred.
>
> Based on medical education, experience, and training, I can state with a reasonable degree of medical certainty that the injuries related by Mrs. Watson in regards to her knees were related to the accidents which injured her knees at work.

Dr. Matisons also attributed a 16-percent permanent partial impairment to Watson's right knee as a result of injury sustained at work. No conflicting medical evidence was adduced at trial.

Watson was absent from work for a substantial period of time due to the surgery and problems with her knees. She testified that she continued to experience problems with both of her knees after returning to work. Watson did not receive any compensation from Alpo for the injury, disability, or expenses related to her right knee.

## TRIAL COURT DECISION

A hearing was held before Judge Joseph S. Ramirez in the Workers' Compensation Court on February 3, 1994. The judge set forth, in detail, the findings in the medical records and letters, as discussed above. He also established the relevant principles of law upon which he was basing his decision:

> It is well settled that the value of an opinion of an expert witness depends upon, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. Niesen v. Logan County COOP Oil Assn., 215 Neb. 587, 340 N.W. 2d 146 (1983). Furthermore, this

> Court is not required to take the opinions of such experts as binding upon it. Butler v. Midwest Supply Co.[,] 212 Neb. 421, 322 N.W. 2d 815 (1982).

Relying upon these principles, the trial court found that Watson

> failed in her burden to show, by a preponderance of the evidence, that the injuries to her right leg were a result of an accident that occurred with the first named defendant on July 18, 1992. Rather, the evidence shows that she had a "degenerative" problem with her right knee that was "chronic" in nature.

The court thereafter denied all compensation for disability and expenses related to Watson's right knee and also denied compensation where the records did not sufficiently reflect that treatments or absenteeism from work were related solely to the left knee, finding that Watson failed to sustain her burden of proof. On appeal, Watson does not contend that she is entitled to additional compensation for injuries and disability related to her left knee.

## REVIEW PANEL DECISION

Without setting forth a detailed opinion, the Workers' Compensation Court affirmed the trial judge's decision on review, finding that the trial judge's decision was not clearly wrong and that no error of law appeared. The review panel recognized that Judge Ramirez discussed in detail why he chose to "disregard the opinion of Dr. Matison[s] with respect to the cause of [Watson's] right knee condition" and restated the principle that "[i]t is axiomatic that the Nebraska Workers' Compensation Court is not required to take an expert's opinion as binding and may, as may any other trier of fact, either accept or reject such an opinion. Brandt v. Leon Plastics, Inc., 240 Neb. 517, 483 N.W.2d 523 (1992)."

## ASSIGNMENTS OF ERROR

Watson's assigned errors can be summarized as alleging that the Workers' Compensation Court review panel erred in affirming the decision of the trial judge in (1) failing to find that the injury and disability to her right knee were the result of an accident arising out of and in the course of her employment with Alpo, and (2) failing to award certain benefits associated

with her right knee injury, including temporary total disability, permanent partial disability, medical expenses, and a 50-percent penalty for waiting time and attorney fees.

## STANDARD OF REVIEW

[1-4] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court award 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. *Haney v. Aaron Ferer & Sons*, 3 Neb. App. 14, 521 N.W.2d 77 (1994); *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). 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 trial judge, whose decision has the same force and effect as a jury verdict. *Haney, supra*. See *Pearson, supra*. When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). Findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that we also do not substitute our view of the facts for that of the trial judge. See *Pearson, supra*.

## ANALYSIS

Watson argues the trial judge erred in finding that she failed to prove by a preponderance of the evidence that the injury and attendant disability to her right knee were the result of an

accident which occurred in the course and scope of her employment with Alpo. As stated above, the trial judge found that the evidence demonstrated that Watson "had a 'degenerative' problem with her right knee that was 'chronic' in nature." Implicit in this finding is that Watson's right knee condition was of longstanding origin which preexisted the work accident. The principal issue in contention on appeal is the trial judge's obvious rejection of Dr. Matisons' December 21, 1993, letter regarding causation of the right knee condition. A review of the record discloses that Watson presented medical testimony through Dr. Matisons' records and December 21 letter that her injury resulted from an accident arising out of and in the course of her employment and that she has a permanent disability. Alpo offered no conflicting expert medical testimony.

[5-7] The Nebraska Supreme Court has held that in a workers' compensation case involving a preexisting condition, it is the claimant's burden to prove by a preponderance of the evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. *Liberty v. Colonial Acres Nsg. Home*, 240 Neb. 189, 481 N.W.2d 189 (1992); *Miner, supra*. The Supreme Court has established that unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992); *Miner, supra*. The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong. *Bernhardt, supra*; *Liberty, supra*.

As we understand the trial judge's order, it is clear that he carefully considered all of Dr. Matisons' medical records and those prepared by others with regard to Watson's right knee, but apparently determined that Matisons' final opinion, that the injury and disability were work related, as stated in the December 21, 1993, letter, contradicted earlier statements contained in the medical records referring to the presence of right knee "degenerative changes" and his own operative report

which described the tearing of the lateral meniscus as "of a chronic type."

[8-10] The Supreme Court has recognized that the opinion of an expert must be examined in the context of the expert's entire testimony. See *Miner, supra*. As such, it is proper to evaluate Dr. Matisons' opinion from all of his medical records and letters. The Workers' Compensation Court trial judge, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994); *Pearson, supra*. Moreover, the trial judge is not required to accept an expert's opinion as binding and may accept or reject an opinion from an expert witness. See, *Bernhardt, supra*; *Liberty, supra*.

The issue presented requires us to examine cases wherein the rejection of an expert opinion by the factfinding body in a workers' compensation case has been addressed by the Supreme Court. In *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982), the plaintiff presented uncontroverted medical testimony that the cause of his injury, i.e., heart problems, was work-related. The defendant offered no medical evidence. The Supreme Court recognized the general principle that the opinions of experts are not binding on the court, but held:

> However, where the medical testimony is uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on firsthand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored.

*Id.* at 592-93, 319 N.W.2d at 459. The court reversed the orders of the trial judge and the three-judge panel of the Workers' Compensation Court which had denied the plaintiff compensation.

In *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989), the Supreme Court addressed this issue again, but resolved the

issue against plaintiff Spangler by affirming the compensation court's order of dismissal. Spangler claimed that his heart problems were caused by work-induced stress. The court recognized that two physicians testified that the stresses of Spangler's employment contributed to and aggravated his heart problems, but one of those physicians was unable to determine how much of that aggravation was attributable to his work stress and how much was attributable to the personal risk factors present in Spangler's situation. The court distinguished *Mann* by noting that in that case, the only physician to offer testimony stated that it was " 'inconceivable' " that the personal risk factors were significant contributors to his heart problems and "instead opined unequivocally that the heart attack was caused by work-related rises in blood pressure." *Spangler*, 233 Neb. at 798-99, 448 N.W.2d at 151. The court recognized the holding in *Mann* set forth above, but qualified it by stating:

> Nonetheless, it must be remembered that in workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact. . . . As the finder of fact the compensation court is not required to take the opinion of an expert in regard to the causal connection between the alleged accident or exertion and the resulting disability as binding upon it.

(Citation omitted.) *Spangler*, 233 Neb. at 798, 448 N.W.2d at 151. The court found that there was "sufficient evidence for the compensation court to determine that Spangler's work-related stress did not contribute in a material and substantial degree to cause his heart" problems and that it was "merely the regrettable result of the normal progression of his condition." *Id.* at 799, 448 N.W.2d at 151.

Finally, in *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992), plaintiff Brandt offered expert medical testimony by a physician in the form of letters. In three of the letters, the physician wrote that "in his opinion, Brandt's injury was, to a reasonable degree of medical certainty, caused by the repetitive and cumulative trauma she sustained during her

employment at Leon Plastics." *Id.* at 520, 483 N.W.2d at 525. However, in one letter, the physician attributed Brandt's disability to a work-related injury occurring on a specific date. In a subsequent letter, the physician explained that his previous reference to a specific date was "inadvertent and that date was intended only to approximate the onset of the radiating pain into her leg." *Id.* No other medical evidence on causation was presented. The Supreme Court found that it was for the compensation court to determine whether or not to believe the physician's explanation for the discrepancy in the letters, and that court resolved the issue against Brandt. The Supreme Court recognized the general rules that "where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact" and that the "compensation court is not required to take an expert's opinion as binding and may . . . reject such an opinion." *Id.* The court thereafter affirmed the dismissal of Brandt's claim for benefits.

[11] Although Watson asserts that the rule set forth in *Mann* is applicable in the instant action, based upon the record before us, we see significant distinguishing factors. In *Mann*, the medical testimony presented by only one expert was entirely consistent and truly uncontroverted. Contrary to Watson's assertions, the medical evidence in this action is not entirely uncontroverted. First, both the emergency room doctor's records and the report setting forth the results of the MRI contradict the December 21, 1993, letter from Dr. Matisons. Second, Dr. Matisons' December 21 letter contradicts his own previous records, which indicated that the injury was "degenerative" or "chronic," without even attempting to explain those inconsistencies. This letter, prepared prior to trial, does not specifically detail Dr. Matisons' reasoning behind his conclusion that the right knee problems were attributable to Watson's employment, particularly in light of the fact that up until that time the records indicated "degenerative" and "chronic" problems. Had Dr. Matisons' opinion recognized the preexisting nature of Watson's knee problems; specified that the July 1992 fall had aggravated them to cause the injury; and described that without that fall, such injury would not have occurred, his opinion would, perhaps, have been stronger.

However, his opinion ignored the obvious. The weight and credibility to be accorded the opinion of an expert is for the fact finder, in this case, the trial judge, and the value of an expert's opinion is no stronger than the facts upon which it is based. See *Liberty v. Colonial Acres Nsg. Home*, 240 Neb. 189, 194, 481 N.W.2d 189, 193 (1992) ("[a]n expert opinion that consists of an X on a questionnaire that details no factual basis for the opinion or the expert's reasoning behind the opinion may explain the lack of credibility or weight the compensation court apparently attributed to [the] opinion as to the cause of [the] injuries"). It would be naive to suggest that the extent and specificity of medical opinions are not considered by the fact finder in determining the weight to be afforded them. The fact that Dr. Matisons' letter regarding the cause of Watson's injury and attendant disability merely stated that the injury was work related and failed to include a factual basis or reasoning as to how the opinion was reached or why it contradicted previous records which indicated that the problems were "degenerative" or "chronic" may explain why the trial judge attributed little or no weight to the opinion.

[12] There are "demonstrable weaknesses" present in Dr. Matisons' December 21, 1993, letter which affect its weight and credibility and which render the rule set forth in *Mann* inapplicable so as to justify its disregard by the trial judge. It was for the trial judge to initially determine whether to accept Dr. Matisons' opinion that Watson's injury was work related, when it provided no explanation for the earlier medical evidence, some of it provided by Matisons himself, which described the condition as "degenerative" in nature and the tear itself as "chronic." Since Dr. Matisons' medical conclusions conflicted, resolution of the conflict rested with the trial judge. See *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992). We cannot substitute our view of the facts for that of the trial judge if the record contains evidence to substantiate his view. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). It was not clearly wrong for the trial judge to resolve the inconsistencies in the medical records against Watson and to conclude that she failed to meet her burden of proving by a preponderance of the evidence that the

injury to her right knee was the result of a work-related accident.

Because we conclude that the trial judge was not clearly erroneous in determining that Watson's right knee injury was not compensable, we need not consider Watson's remaining assigned errors.

AFFIRMED.

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IN RE INTEREST OF TAMIKA S. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. DEBRA S., APPELLANT.

529 N.W.2d 147

Filed April 4, 1995. No. A-94-634.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach conclusions independent of the trial court's findings. However, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Child Support: Appeal and Error.** The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed.
3. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines apply in juvenile cases where child support is ordered.
4. _____: _____. A court may and should deviate from the Nebraska Child Support Guidelines when a parent's earning capacity exceeds her or his actual earnings and the application of the guidelines would result in an unfair and inequitable support order.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Sandra Stern-Adams, of Legal Aid Society, Inc., for appellant.

Marti English, of Child Support Services of Nebraska, for appellee.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

Debra S. appeals from an order of the separate juvenile court of Douglas County requiring her to pay $144 per month in child support for her six children, all of whom were in the custody of the Nebraska Department of Social Services (DSS). Appellant claims that the juvenile court erred in calculating her monthly income and that the support order reduced her monthly net income below the subsistence level set forth in the Nebraska Child Support Guidelines. For the reasons set forth below, we affirm.

## FACTUAL BACKGROUND

Evidence gathered from the record establishes the following: Appellant is the natural mother of six children, Tamika S., Herbert S., Brandon S., Chris S., Deandre S., and Rosavelt S. Appellant does not know where the fathers of her children are located. In February 1992, the Douglas County Attorney filed an amended petition in the juvenile court alleging that appellant's six children lacked proper parental care due to the faults or habits of appellant. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). Specifically, the petition alleged that appellant left her children alone and unsupervised and that the family residence was found in a filthy and unsafe condition on January 25, 1992. The petition also alleged that appellant's boyfriend used inappropriate physical discipline on the children and that appellant did nothing to protect her children from such discipline.

On April 15, 1992, the court found appellant's six children to fall within the meaning of § 43-247(3)(a) and placed them in the temporary custody of DSS. Appellant was thereafter placed on a plan of reunification. Pursuant to the reunification plan, the court ordered appellant to obtain and maintain legal employment and to provide proof of her employment to DSS.

In May 1992 and in March 1993, Child Support Services of Nebraska requested financial information from appellant, but she failed to respond to either request. Pursuant to Neb. Rev. Stat. § 43-512.03 (Reissue 1993), Child Support Services filed a motion on May 24, 1994, requesting that appellant be ordered to pay a reasonable amount of child support.

A hearing on the motion was held May 31, 1994. At the hearing, appellant testified that she had worked "[o]ff and on" over the past 2 1/2 years. When the judge asked appellant why she had not read papers sent to her by DSS, she testified that she did not have time to do so, because she worked "[e]ight, pretty well to nine and ten" hours per day. However, later in the hearing, when the issue was how much appellant could pay for child support, she testified that she worked only 30 hours per week earning $4.50 per hour and that her average net earnings totaled $213 biweekly. Appellant's caseworker testified that she did not attend work on a regular basis. Appellant stated that she could work more than 30 hours per week. Appellant also receives free public housing and food stamps, and she testified that she spent her income on food, clothes, and personal things.

The State argued at the hearing that appellant's support should be set at $144 per month. Child Support Services' attorney stated that she arrived at this figure by calculating appellant's gross income at $737 per month, or appellant's alleged earning capacity working full time at minimum wage.

Evidence adduced at the hearing also showed that as of the hearing date, the State had spent over $37,000 for the support of appellant's children. In its order, the court found that appellant had the ability to pay $144 per month for child support, and ordered appellant to pay such amount, with no retroactive payments. See *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993). Appellant has timely appealed from this order.

## ASSIGNMENTS OF ERROR

Appellant claims that the trial court erred in disregarding appellant's actual earnings in its calculation of her child support obligation and in ordering appellant to pay child support in an amount that reduced her monthly net income below the subsistence level of $500 per month.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach conclusions independent of the trial court's findings. However, where the evidence is in conflict, the appellate court will consider and may give weight

to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

[2] The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed. *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992).

## DISCUSSION

Neb. Rev. Stat. § 43-290 (Reissue 1993) provides that a juvenile court

> may order and decree that the parent shall pay, in such manner as the court may direct, a reasonable sum that will cover in whole or part the support, study, and treatment of the juvenile, which amount ordered paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment, and maintenance of the juvenile, the *ability of the parent to pay*, and the availability of money for the support of the juvenile from previous judicial decrees, social security benefits, veterans benefits, or other sources.

(Emphasis supplied.)

[3] In their arguments, both parties in this case refer to the child support guidelines promulgated by the Nebraska Supreme Court. The authority for such guidelines is found in Neb. Rev. Stat. § 42-364.16 (Reissue 1993):

> The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of *all* child support obligations. Child support shall be established in accordance with such guidelines 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.

(Emphasis supplied.) We recognize that this statute is found in

chapter 42, article 3, of the Nebraska Revised Statutes, which is entitled "Divorce and Alimony," but that the case presently before us is a juvenile case. However, § 42-364.16 states that the guidelines are to apply to *all* child support obligations, and we have not been presented with, nor can we think of, any good reason not to apply the child support guidelines in juvenile cases where child support is ordered. Further, paragraph C of the Nebraska Child Support Guidelines provides in part, "*All* orders for child support obligations shall be established in accordance with the provisions of the guidelines . . . ." (Emphasis supplied.) The Nebraska Supreme Court has recognized that the use of the guidelines is not limited to divorce cases. See *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). We therefore find that such guidelines apply in juvenile cases where child support is ordered.

[4] Appellant claims that the juvenile court erroneously calculated her support obligation by using an "imputed income" instead of appellant's actual income. Brief for appellant at 7. We disagree. There is statutory and judicial authority for considering a parent's net earning capacity rather than his or her actual net income in determining child support. See, Neb. Rev. Stat. § 42-364(6) (Reissue 1993); *Shiers, supra*; *Ristow v. Ristow*, 152 Neb. 615, 41 N.W.2d 924 (1950). Additionally, paragraph C of the child support guidelines provides that deviations from the guidelines are permitted "for juveniles placed in foster care" and "whenever the application of the guidelines in an individual case would be unjust or inappropriate." Further, the Nebraska Supreme Court has held that a court may and should deviate from the child support guidelines when a parent's earning capacity exceeds her or his actual earnings and the application of the guidelines would result in an unfair and inequitable support order. *Shiers, supra*.

In this case, all of appellant's children were in foster care. Appellant worked approximately 30 hours per week and presented no credible evidence that she was unable to work more than 30 hours per week. Further, the juvenile court's remarks to appellant contained in the record reveal that the court strongly felt that appellant was able to work a full-time job. However, the juvenile court did not state in its findings the

reasons for deviating from the guidelines, nor did the court file worksheet 5 in the court file, as is required by paragraph C of the guidelines. See *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). Nonetheless, in our de novo review, we find that appellant's earning capacity exceeded her actual earnings. Such is a valid reason for this court to deviate from using appellant's actual income in determining the amount of support owed, and to use appellant's earning capacity instead. We also find that it would be unfair and inequitable for appellant to escape her child support obligations on the basis that she could not afford to pay child support when her own testimony indicates that she could earn enough to pay some support for her children, yet chose not to.

Although the juvenile court did not make a specific finding regarding the amount of appellant's earning capacity, it found that appellant had the ability to pay $144 per month in child support. Table 1 of the guidelines provides for a $144 per month child support obligation for six children where the parents' net monthly income is $650. The trial court obviously concluded appellant could work full time. Appellant testified that she earned $4.50 per hour, which would make her gross earning capacity, based on a 40-hour work week, $780 per month. Given this evidence, we cannot say that the trial court abused its discretion in setting appellant's child support obligation at $144 per month.

In her second assigned error, appellant claims that the juvenile court erred in ordering her to pay $144 per month in child support because such payment would reduce her income below the subsistence level set forth in the child support guidelines. In support of her argument, appellant cites paragraph Q of the child support guidelines, which states, "A parent's support obligation shall not reduce his or her net income below the minimum of $500, net monthly for one person, except minimum support may be ordered . . . ."

Basing appellant's net income upon earning capacity, appellant's support obligation does not reduce her net income below subsistence level. The juvenile court did not abuse its discretion in setting appellant's support obligation according to her earning capacity.

## CONCLUSION

Having found no abuse of discretion, we affirm the decision of the separate juvenile court.

AFFIRMED.

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# IN RE INTEREST OF DANIEL W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KEN W. AND DIANE W., APPELLANTS.

529 N.W.2d 548

Filed April 4, 1995. No. A-94-642.

1. **Jurisdiction: Appeal and Error.** An appellate court has both the power and the duty to determine whether it has jurisdiction over the matter before it.
2. **Final Orders: Appeal and Error.** There are three types of final and appealable orders under Neb. Rev. Stat. § 25-1902 (Reissue 1989): (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
3. **Juvenile Courts.** Litigation under the juvenile code which involves the determination of whether a child is within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) is a special proceeding.
4. _____. Litigation involving a child's status under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993) constitutes a special proceeding.
5. **Juvenile Courts: Parental Rights.** The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
6. **Juvenile Courts: Parental Rights: Visitation.** An order granting a grandparent's motion for visitation of children involved in juvenile proceedings affects a substantial right of the parent if it places no limits on the visitation and allows the visitation to be determined by the Department of Social Services.
7. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
8. **Appeal and Error.** Although an appellate court ordinarily considers only those

errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

9. **Appeal and Error: Words and Phrases.** The term "plain error" refers to 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.
10. **Child Custody: Words and Phrases.** In the context of minor children, the term "custody" may be used to characterize both the legal and physical responsibility for a child.
11. **Juvenile Courts: Child Custody.** It is common during the pendency of juvenile proceedings for legal custody to be separate from physical custody of a child.
12. **Child Custody: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-247(5) (Reissue 1993), the term "custody" is interpreted to include reference to parents who have legal custody of the child.
13. **Minors: Visitation.** Siblings possess the natural, inherent, and inalienable right to visit with each other.
14. _____: _____. The relationship between a child and his or her siblings is a significant and unique one, from which a myriad of benefits and experiences may be derived.
15. _____: _____. The bonds which develop between brothers and sisters are strong ones and are, in most cases, irreplaceable.
16. **Juvenile Courts: Due Process.** Hearings regarding rehabilitative plans in juvenile cases are dispositional hearings, to which the Nebraska Rules of Evidence, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1993 & Cum. Supp. 1994), do not apply, and due process safeguards at a disposition or detention hearing are less than those required at a hearing regarding the termination of parental rights.
17. **Juvenile Courts.** The juvenile court may exercise broad discretion and may liberally construe the juvenile code in order to serve the best interests of the children who fall within it.
18. _____. In most cases, the juvenile court will initially attempt to serve the best interests of the subject child by preserving the relationship between the child and the child's family.
19. **Juvenile Courts: Parent and Child.** Once there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.
20. **Parental Rights: Visitation.** In a question about visitation, as in the case of child custody, a parent's rights are not absolute, but must yield to the best interests of the child.

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER, Judge. Affirmed.

James Martin Davis for appellants.

Michael L. Munch, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired.

MILLER-LERMAN, Judge.

Ken W. and Diane W. appeal the June 10, 1994, decision of the separate juvenile court of Sarpy County, Nebraska, ordering sibling visitation between their 2-year-old daughter, Megan W., and their 16-year-old son, Daniel W., for 1 hour per month. The order of visitation arose after the court adjudged Daniel to be a juvenile under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993). Following our review for plain error, we affirm.

## FACTS

On April 1, 1992, Diane W. placed her son, Daniel W., in the custody of the Sarpy County sheriff's Children at Risk Education (C.A.R.E.) program because of his allegedly uncontrollable behavior. In order to detain Daniel, juvenile probation officer William Marang completed a detention authorization worksheet which stated his findings that (1) Daniel's behavior was uncontrollable and (2) Daniel's further detention was necessary for the protection of Daniel and others.

A petition was filed on April 2, alleging that Daniel was a child within the meaning of § 43-247(3)(b) who deported himself in a manner which could seriously injure the health or morals of himself or others. The separate juvenile court of Sarpy County held a hearing on the matter on April 2 and found that Daniel's further detention was necessary. As a result, the court placed Daniel in the temporary custody of the Nebraska Department of Social Services (DSS).

The court held an arraignment on the matter on April 22. At the arraignment, Daniel admitted the allegations of the petition. Relying on Marang's detention authorization worksheet as a factual basis and Daniel's admission of the allegations, Judge William D. Staley adjudged Daniel to be a child as described in § 43-247(3)(b). Judge Staley then placed Daniel in the custody of the Sarpy County sheriff pending

further disposition.

On May 22, a disposition hearing was held before Judge Staley. Present at this hearing were Daniel and his attorney appointed as guardian ad litem, Diane and Ken, and Daniel's 5 1/2-month-old sister, Megan W. During this hearing, Daniel told the judge he liked his sister. Judge Staley ordered that the application for Daniel's placement at Boys Town proceed. Judge Staley also ordered Daniel to reside at home with his parents while his application for Boys Town was pending and directed the parents to participate in a parenting program.

On May 27, Daniel was returned to the custody of the Sarpy County sheriff's office as a result of further allegations of uncontrollable behavior. Consequently, the Sarpy County Attorney's office filed a motion for review of disposition. This motion was sustained on July 9, and the court ordered Daniel to remain in the custody of the Sarpy County sheriff. On September 8, Judge Ronald E. Reagan amended the April 22 order and placed Daniel in the custody of DSS.

On September 10, Daniel's application was approved, and he was placed at Boys Town. Daniel resided at Boys Town until August 11, 1993, when he left to live with his paternal grandmother, Agnes R.

On June 16, 1993, a disposition hearing was held in front of Judge Lawrence D. Gendler of the separate juvenile court of Sarpy County. Daniel and his father appeared with counsel. Lori Rall, Daniel's case manager from DSS, and Yvonne Promes from Boys Town both testified at the hearing in regard to Daniel's progress at Boys Town. Rall also testified that the parents had taken an inactive role and had rarely visited Daniel during his stay at Boys Town. Judge Gendler's journal entry for this hearing reflects that the parents "refused to become involved with the said minor and have stated they do not want to be part of the reunification process."

The court held another disposition hearing on December 16, 1993. At this time, Daniel was living with his grandmother. The record suggests animosity exists between the grandmother and the parents. The court received into evidence a report from Daniel's therapist, Daniel Dwyer, which was also signed by Thomas Jaeger, M.D., child and adolescent psychiatrist, and

the DSS case report. At the hearing, Rall again stated that Daniel continued to progress, but was in need of contact with his family. Judge Gendler's journal entry from the hearing provides in pertinent part:

> [Dwyer's report] reflects the minor desires to have a relationship with his father and would like his father to be included in his therapy. The reports also reflect that the parents do not want anything to do with their son and do not want to participate in any therapy with him. In addition, the minor requested that visitation be considered between himself and his two year old sister.

At the December 16 hearing, Daniel's guardian ad litem moved the court to grant supervised sibling visitations between Daniel and his sister, Megan, who was then 2 years old. The court advised the parents that a ruling on the motion would be postponed to permit the parents to consult with their counsel and to permit them an opportunity to respond.

The court took up the issue, inter alia, of visitation between Daniel and his sister, Megan, on February 3, 1994. On February 3, the court received into evidence another report from Dwyer, also signed by Dr. Jaeger, which indicated that Daniel was having a great deal of difficulty dealing with the loss of his parents and the lack of contact with his sister. A report prepared by Rall generally to the same effect was also received in evidence. In connection with argument on the sibling visitation motion, the guardian ad litem for Daniel stated:

> This is a case of a young man who has had some problems, who has been — has come under the jurisdiction of the court as a result of some of those problems, and who desperately wants to have a relationship with his mom and dad, who cries out for that relationship on a regular basis in therapy, who talks about it on a regular basis to me when we've had our discussions, who doesn't necessarily expect that he'll ever get to live back home again, but all he wants to do is have a relationship with his mom and dad.
>
> It's a situation that is heartbreaking because there have been times in which we've stood out in the hallway and had one parent or another walk right by this young man

> with not even so much as a glance, and it's one that hurts him very deeply and one that he continues to battle in therapy in dealing with trying to understand how he has gotten and how the family has gotten to the place in which they now are.
>
> . . . .
>
> Dan hasn't made a choice of his grandmother over his mom and dad. He has merely responded to the people who have expressed some attention and love for him in the last two years. What he wants to do is be able to respond to some attention and love from — and caring from his parents in the same way that he has been able to do that with the family members who have reached out to him.
>
> . . . .
>
> As for the visitation with Megan, Dan, of course, would like to see his little sister and it hurts him deeply that he hasn't been able to . . . .

At the February 3 hearing, the parents iterated that they wanted no contact with Daniel, especially when he was living with his grandmother. The parents also expressed their concern that sibling visitation between Daniel and Megan would cause problems in their home. The parents did not offer evidence in support of their position.

After reviewing the evidence, Judge Gendler ordered 1 hour of supervised sibling visitation per month between Daniel and Megan. Judge Gendler determined that Daniel's therapist, Dwyer, would act as supervisor for purposes of the visitation.

On June 9, the court held a visitation review hearing. At that time, no supervised monthly visits had occurred between Daniel and Megan. During the hearing, Judge Gendler admitted the most recent DSS case report into evidence and took judicial notice of his docket entry relating to the February 3 hearing and the exhibits which were received on February 3. Judge Gendler's comments at the June 9 hearing indicated that he did not think a contempt citation would be unreasonable if the parents did not make an effort to comply with the sibling visitation order. Specifically, Judge Gendler stated to the father: "It's time you put forth some effort. This boy deserves it." Accordingly, in his findings and order dated June 10, 1994,

Judge Gendler directed the parents to make Megan available for visitation with Daniel for 1 hour per month, supervised by Dwyer, upon 48 hours' notice by DSS. The parents appeal the June 10 findings and order.

## APPELLATE JURISDICTION

[1] Before addressing the merits of this case, we must determine whether this court has jurisdiction to hear this appeal. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (holding that an appellate court has both the power and the duty to determine whether it has jurisdiction over the matter before it).

[2] Pursuant to Neb. Rev. Stat. § 43-2,126 (Reissue 1993), "[a]ny final order or judgment entered by a separate juvenile court may be appealed to the Court of Appeals." There are three types of final and appealable orders under Neb. Rev. Stat. § 25-1902 (Reissue 1989): (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

[3,4] The Nebraska Supreme Court has held that litigation under the juvenile code which involves the determination of whether a child is within the purview of § 43-247(3)(a) is a special proceeding. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Based on the reasoning of *In re Interest of R.G.*, we hold that litigation involving a child's status under § 43-247(3)(b) constitutes a special proceeding.

[5] In regard to the issue of whether special proceedings involving juvenile matters affect substantial rights, the Nebraska Supreme Court stated in *In re Interest of R.G.*, *supra*, that

> the question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

*Id.* at 415, 470 N.W.2d at 788.

[6] In *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994), this court determined that an order granting a grandparent's motion for visitation of children involved in juvenile proceedings affected a substantial right of the parent because it placed no limits on the visitation and allowed the visitation to be determined by DSS. Applying our analysis in *In re Interest of Zachary W. & Alyssa W.* to the facts of this case, we conclude that the order of visitation in the instant case is of sufficient importance and can reasonably be expected to last a sufficient period of time to affect a substantial right of the parents. Accordingly, the order of visitation is appealable.

## STANDARD OF REVIEW

[7-9] Ordinarily this court reviews juvenile cases de novo on the record and is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, an appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). In the instant case, however, the parents' brief contains no assignments of error, and although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, an appellate court may, at its option, notice plain error. See *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994). The term "plain error" refers to "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.* at 233, 512 N.W.2d at 365.

## ANALYSIS

*Sibling Visitation Order.*

The parents argue that the separate juvenile court of Sarpy County erred in ordering sibling visitation between Daniel and Megan because the court did not have jurisdiction over the parents or, alternatively, authority over Megan.

Section 43-247 of the Nebraska Juvenile Code grants the juvenile court of each county jurisdiction over the following:

> (3) Any juvenile . . . (b) who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school; [and]
>
> . . . .
>
> (5) The parent, guardian, or custodian who has custody of any juvenile described in this section.

On April 22, 1992, Daniel was adjudged to be a child within the meaning of § 43-247(3)(b). The juvenile court acquired jurisdiction over Daniel under § 43-247(3)(b). Because of the adjudication of Daniel's status under § 43-247(3)(b), the juvenile court additionally gained jurisdiction over Daniel's parent, guardian, or custodian pursuant to subsection (5) of § 43-247.

[10-12] We note that the language of § 43-247(5) grants the juvenile court jurisdiction over the parent or legal guardian "who has custody of" the juvenile in question. The term "custody" as used in § 43-247(5) is not defined in § 43-247 or elsewhere in the juvenile code. The cases show that in the context of minor children, the term "custody" may be used to characterize both the legal and physical responsibility for a child. The cases illustrate that it is common during the pendency of juvenile proceedings for legal custody to be separate from physical custody of a child. See, e.g., *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994). For purposes of subsection (5) of § 43-247, we interpret the term "custody" to include reference to parents who have legal custody of the child. This interpretation is in accord with recent Nebraska Supreme Court cases which have allowed juvenile courts to issue orders prescribing treatment for, or prohibiting certain actions of, parents of § 43-247(3)(a) children where the parents had legal but not physical custody of such children. See, *In re Interest of J.T.B. and H.J.T., supra* (ordering the mother to obtain a chemical dependency evaluation and to enter a treatment program if recommended by the evaluator); *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991) (directing the mother to live without roommates, unless approved by DSS;

find employment and housing; and participate in an inpatient treatment program for drug and alcohol abuse).

The foregoing analysis of subsection (5) as including jurisdiction over the legal custodians of juveniles is consistent with the Practice Note for § 43-247, which ignores the statutory "custody" language of subsection (5), and states:

> (1) The juvenile court has exclusive original jurisdiction of . . . (b) juveniles who are under age 18 and are alleged to be neglected or dependent or in need of special supervision (43-247(3)(a) and (b)); [and] (c) the parents, guardians, or custodians of any juvenile coming under provisions of section 43-247 . . . .

Accordingly, we find that the juvenile court has jurisdiction over the parents.

The parents argue that, even if the juvenile court has jurisdiction over them, it does not have "jurisdiction" over their daughter, Megan. The parents argue that there have been no allegations that Daniel's sibling, Megan, is a juvenile within the meaning of § 43-247 and argue that none of the subsections of § 43-247 directly confer jurisdiction in the juvenile court over siblings of a subject juvenile.

Although we agree with the parents that the juvenile court has no direct statutory jurisdictional authority over Megan, we believe that given the juvenile court's jurisdiction over the parents and the court's broad powers to fashion appropriate placement and plans in the best interests of its subject juveniles such as Daniel, the juvenile court did not commit plain error in this case when it directed the parents to make Megan available for visitation with her sibling for 1 hour per month. See Neb. Rev. Stat. § 43-246(4) (Reissue 1993) (providing that the juvenile code shall be construed in a manner "to assure every reasonable effort possible to reunite the juvenile and his or her family").

The parents argue that the absence of statutory authority providing for sibling visitation precludes the visitation order issued in this case. They note that grandparents' visitation rights in Nebraska are statutorily created by Neb. Rev. Stat. § 43-1802 (Reissue 1993) and suggest that similar legislation is required before sibling visitation is properly ordered.

Prior to the enactment of the grandparent visitation statute in 1986, the Nebraska Supreme Court held in *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982), that where the natural parents' rights had been terminated, the grandparents were not entitled to grandchild visitation. The logic applied in *In re Interest of Ditter* was that grandparents' visitation rights were derived through the natural parents of the children in question, and where the natural parents' parental rights were terminated, the rights of the grandparents were also extinguished. Subsequent legislation thus provided the basis for grandparents seeking visitation following termination and under other scenarios, such as divorce.

[13] In contrast to the case law finding the nature of grandparent visitation to be derivative, it has been held that "siblings possess the natural, inherent and inalienable right to visit with each other." *L. v. G.*, 203 N.J. Super. 385, 398, 497 A.2d 215, 222 (1985). Thus, even in the absence of legislation providing therefor, sibling visitation has been ordered where the best interests of the subject juvenile were demonstrated. *Id.*

[14,15] It has been said that "the relationship between a child and his/her siblings is a significant and unique one, from which a myriad of benefits and experiences may be derived. The bonds which develop between brothers and sisters are strong ones, and are, in most cases, irreplaceable." *Id.* at 398, 497 A.2d at 222. Indeed, it has also been stated that

> [a] sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot be derived from any other. . . . Surely, the right to visit with one's own brother or sister is equal to, if not greater than the right to visit with one's grandchildren. . . . The fact that custodial parents may not desire visitation between their children and the children's sibling can never, in and of itself, be a sufficient reason for denying that visitation. Rather, this Court finds that its inquiry must focus upon whether the child's best interests will be served by maintaining contact and communication with their [sic] siblings.

*Id.* at 395, 497 A.2d at 220-21.

The foregoing statement of the need for sibling association is consistent with the cases emphasizing continued sibling association after divorce and the continued visitation among siblings placed in separate foster homes. See, e.g., *Roberts v. Roberts*, 668 S.W.2d 249 (Mo. App. 1984) (divorce); *Matter of Adoption of Anthony*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (1982) (foster homes). It has also been observed that statutes granting visitation rights to family members are intended to supplement the common-law rights of those entitled to visitation. See, e.g., *In re Custody of D.M.M.*, 137 Wis. 2d 375, 404 N.W.2d 530 (1987). See, also, *L. v. G., supra* (collection of cases and state statutes granting visitation rights to family members).

We are aware of cases where sibling visitation has been denied by the court due to a lack of showing of the best interests of the nonadjudicated juvenile. See, e.g., *In Interest of C.F.*, 436 Pa. Super. 83, 647 A.2d 253 (1994). In the instant case, the parents presented no evidence that visitation between Daniel and Megan would be harmful to Megan. We distinguish *In Interest of C.F.* on its facts. In that case, the two siblings in question had been adopted by the same family. The opinion in *In Interest of C.F.* states that the boy threatened his sister with a knife, and thereafter, the adoptive parents abandoned the boy, who became a ward of the state. After 3 years in the custody of the York County (Pennsylvania) Children and Youth Services, the brother was still troubled, threatened to kill his teachers, and was committed for psychiatric evaluation. During this time, the York County Children and Youth Services, on behalf of the brother, moved the court to grant sibling visitation between the brother and the sister. The adoptive parents opposed visitation between the siblings. The court denied visitation for lack of statutory authority and a failure to demonstrate best interests.

In contrast to *In Interest of C.F.*, in the instant case, Daniel and Megan are part of a legally intact family, and the parents are the legal custodians and natural parents of both children. Further, in the instant case, Daniel and the parents are statutorily within the jurisdiction of the juvenile court.

Although the brother in *In Interest of C.F.* was adjudicated to be within the jurisdiction of the juvenile court, the facts in *In Interest of C.F.* show that the adoptive parents had relinquished legal and physical custody of him and did not regularly appear at his disposition hearings. The facts in *In Interest of C.F.* are further distinguishable because the record in the instant case shows that Daniel, while not free of trouble, has made significant progress in his behavior and social development. Moreover, there is no evidence that Daniel has ever threatened Megan or that he has violent tendencies. In contrast, in *In Interest of C.F.*, the juvenile C.F. violently threatened the very individual whom he sought to visit, which incident caused his adoptive parents to abandon him to the state.

In reviewing the Nebraska Juvenile Code, we note that in addition to the statutory jurisdictional authority over the parents granted pursuant to § 43-247(5), the juvenile code gives the juvenile court broad authority to initiate care, placement, and rehabilitation plans which are in the best interests of the subject juveniles. Neb. Rev. Stat. § 43-289 (Reissue 1993) provides that "[w]henever any juvenile has been committed to the Department of Social Services, the department shall follow the court's orders, if any, concerning the juvenile's specific needs for treatment or special care for his or her physical well-being and healthy personality." See, also, Neb. Rev. Stat. § 43-285(2) (Reissue 1993); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). Juvenile court orders commonly involve directions to the parents in the nature of seeking family counseling, attending parenting classes, and maintaining adequate visitation with the children. Orders such as the foregoing illustrate the juvenile courts' attempts to reunify subject families and to emphasize family units. See, generally, § 43-246(4). There is no dispute that the family in this case is legally intact and that the parents are the natural parents of both the siblings, Daniel and Megan, and the court had statutory jurisdiction over Daniel and the parents. We do not believe it was plain error for the court to direct the parents to produce Megan for sibling visitation with her legal and biological brother, Daniel.

*Best Interests.*

In their brief, the parents request that in the event we find that the juvenile court had the authority to order the sibling visitation involved in this case, we remand the cause for an evidentiary hearing as to whether the visitation is in Daniel's best interests. We interpret this argument to be in the nature of a due process claim and find the claim to be without merit.

Daniel's guardian ad litem moved for sibling visitation on December 16, 1993. The court postponed ruling on the motion to permit the parents to consult with their counsel and to permit them an opportunity to respond. That opportunity presented itself on February 3, 1994.

On February 3, after notice to all parties, Judge Gendler initially ruled on the issue of supervised monthly sibling visitation between Daniel and Megan. At this hearing, a report from Dwyer and a report from DSS were received in evidence. The parents argued against the sibling visitation, and notwithstanding the opportunity afforded by having approximately 6 weeks to prepare, the parents did not offer evidence contradicting the contents of the State's evidence. On February 3, the trial judge ordered monthly sibling visitation between Megan and Daniel.

The parents did not comply with the sibling visitation order. When the case was further reviewed on June 9, a hearing was held regarding visitation. The parents appeared with new counsel at the June 9 hearing. On June 9, the parents did not offer evidence. The transcription of the proceedings of the June 9 hearing shows that the father answered questions from Judge Gendler and that the parents' counsel presented oral argument. The oral statements of the father and the parents' counsel, in essence, reflect that the parents felt that sibling visitation between Megan and Daniel would create turmoil in their home because of Daniel's manipulative and uncontrollable behavior and would contribute to the family "feud."

At the June 9 hearing, Judge Gendler admitted the most recent DSS case report into evidence and took judicial notice of the exhibits received at the February 3 hearing and his docket entry regarding the February 3 visitation hearing. The judge then continued his order that the parents make Megan available

for supervised sibling visitation with her older brother for 1 hour per month.

[16] The Nebraska Supreme Court has held that hearings regarding rehabilitative plans in juvenile cases are dispositional hearings, to which the Nebraska rules of evidence, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1993 & Cum. Supp. 1994), do not apply, and due process safeguards at a disposition or detention hearing are less than those required at a hearing regarding the termination of parental rights. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). The cases do not require an evidentiary-type hearing in connection with periodic disposition hearings for cases where the juvenile has been adjudicated a child under § 43-247(3)(b). See *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). See, also, Neb. Rev. Stat. § 43-286 (Reissue 1993 & Supp. 1994) (setting forth dispositional procedures for § 43-247(3)(b) children and including specific provisions for production of evidence at dispositional hearings only in context of hearings relating to revocation of probation under § 43-286(4)(f)). The record reflects that, under the foregoing standards, the parents received the process they were due at the February 3 and June 9 hearings.

The parents additionally argue that the evidence in this case does not establish that sibling visitation between Megan and Daniel is in Daniel's best interests. We disagree.

[17] As mentioned above, the provisions of the juvenile code generally seek to protect the best interests of the subject children. Section 43-285(2) of the juvenile code authorizes the juvenile court to order DSS to prepare and file a proposed plan for the care, placement, and services which are to be provided to the subject juvenile and his or her family. Under Nebraska case law, the juvenile court may exercise broad discretion and may liberally construe the juvenile code in order to serve the best interests of the children who fall within it. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[18,19] In most cases, the juvenile court will initially attempt

to serve the best interests of the subject child by preserving the relationship between the child and the child's family. See, e.g., *In re Interest of J.S., A.C., and C.S., supra.* The Nebraska Supreme Court has stated:

> [O]nce there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.

*Id.* at 263, 417 N.W.2d at 156. Additionally, the juvenile code specifically states in § 43-246(4) that its provisions will be construed in a manner "to assure every reasonable effort possible to reunite the juvenile and his or her family." We interpret "family" as used in § 43-246(4) as including the juvenile's sister, Megan.

In the instant case, it became evident that it was not beneficial for Daniel to live at home with his parents during the course of these proceedings. Although it was not possible for Daniel to live at home, Daniel's counselors consistently and continually asserted that Daniel needed to have a relationship with his family. Daniel's counselors urged that the parents make some effort in this regard. Daniel specifically stated that he liked his younger sister and expressed an interest in seeing her. The reports of Dwyer generally to the effect that family contact would be beneficial to Daniel were received by the court at the periodic hearings held in this case. The record reflects that, nevertheless, the parents wanted to sever their relationship with Daniel and did not want Megan to have a relationship with Daniel.

Based on an adequate evidentiary record, the juvenile court found that it was in Daniel's best interests to maintain regular contact with his family. Consequently, the juvenile court ordered 1 hour of supervised monthly sibling visitation between Daniel and his baby sister. In this regard, the juvenile court apparently struck a compromise by ordering contact between the two siblings rather than between Daniel and the parents, who had affirmatively stated that they did not want to be

involved in Daniel's rehabilitation or reunification.

[20] The record indicates that sibling visitation between Megan and Daniel would benefit Daniel. Although the parents do not agree with the visitation order, the order obligating them to make Megan available for visitation with their son for 1 hour per month does not place an onerous burden upon them. It has been stated: "In a question about visitation, as in the case of child custody, a parent's rights are not absolute but must yield to the best interests of the child." *Nielsen v. Nielsen*, 217 Neb. 34, 35, 348 N.W.2d 416, 417 (1984). The benefit to Daniel of sibling association outweighs any burden or inconvenience upon the parents, and there is no evidence in this record that the supervised sibling visitation would have a negative impact on Megan. It was not plain error for the court to conclude that sibling visitation is in Daniel's best interests.

## CONCLUSION

We conclude that the juvenile court did not commit plain error in granting sibling visitation between Daniel and Megan.

AFFIRMED.

IRWIN, Judge, dissenting.

"[T]he relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' " *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). A juvenile court order providing for visitation between a 16-year-old boy and his 2-year-old sister, whom he has not seen since she was 5 months old, surely affects a substantial right. The substantial right affected is that of a parent to decide how to raise a child who has not been brought within the jurisdiction of the judicial system.

Neither the statutes of this state nor developed jurisprudence provides a basis for a juvenile court to order visitation between a minor sibling who is within the jurisdiction of the court and a minor sibling who is not within the jurisdiction of the court. Put

another way, the juvenile court has no jurisdiction to compel a parent of a child within the jurisdiction of the juvenile court, and in the custody of the Department of Social Services, to produce the child's nonadjudicated sibling for visitation. " 'The right to raise one's children has long been recognized as one of our basic civil rights. . . . [G]overnmental intrusion into the family is warranted only in exceptional circumstances. The statutory bas[e]s for court interference with the parents' right to custody are limited and specific, reflecting that philosophy. . . .' " *In Interest of C.F.*, 436 Pa. Super. 83, 91, 647 A.2d 253, 256-57 (1994) (quoting *Weber v. Weber*, 362 Pa. Super. 262, 524 A.2d 498 (1987), *appeal dismissed* 517 Pa. 458, 538 A.2d 494 (1988)).

The case *In Interest of C.F., supra*, which is cited by the majority, is "on all fours" with the instant case. In that case, the court held that since no statutory basis existed which would allow court interference with the parents' right to undisturbed custody of a nonadjudicated daughter, the parents could not be required to produce their daughter for visitation with the child's sibling. The court in *In Interest of C.F.* also discussed whether visitation was in the best interests of the child. This latter issue should not be reached or become the focus of discussion in our case, however, since there exists no authority to order the visitation in the first place.

Three Nebraska statutes and a case from the Superior Court of New Jersey, Chancery Division, are cited as the legal basis for the juvenile court's action in the case before us. Those are Neb. Rev. Stat. §§ 43-246(4), 43-285(2), and 43-289 (Reissue 1993) and *L. v. G.*, 203 N.J. Super. 385, 497 A.2d 215 (1985).

Section 43-246 states as follows:

> **Code, how construed.** Acknowledging the responsibility of the juvenile court to act to preserve the public peace and security, the Nebraska Juvenile Code shall be construed to effectuate the following:
>
> . . . .
>
> (4) To achieve the foregoing purposes in the juvenile's own home whenever possible, separating the juvenile from his or her parent only when necessary for his or her welfare or in the interest of public safety and, when

> temporary separation is necessary, to consider the developmental needs of the individual juvenile in all placements and to assure every reasonable effort possible to reunite the juvenile and his or her family.

Section 43-285 states:

> **Care of juvenile; authority of guardian; placement plan and report; when; standing; State Foster Care Review Board; participation authorized; immunity.** . . .
>
> (2) Following an adjudication hearing at which a juvenile is adjudged to be under subdivision (3) of section 43-247, the court may order the department to prepare and file with the court a proposed plan for the care, placement, and services which are to be provided to such juvenile and his or her family.

Section 43-289 states in relevant part:

> **Juvenile committed; release from confinement upon reaching age of majority; hospital treatment; custody in state institutions; discharge.** . . . Whenever any juvenile has been committed to the Department of Social Services, the department shall follow the court's orders, if any, concerning the juvenile's specific needs for treatment or special care for his or her physical well-being and healthy personality.

None of the statutes set out above provide that a juvenile court may order visitation, against the parents' wishes, between their minor child who is within the jurisdiction of the court and their other child, who is not within the jurisdiction of the court. If in fact these statutes were to be interpreted to allow such, there would be no limit to what a juvenile court might do in the name of what is in the best interests of the adjudicated child. Besides visitation, could the juvenile court order the parents to place the *nonadjudicated* child in treatment, counseling, therapy, classes, and whatever else was viewed as being in the *adjudicated* child's best interests? It must also be remembered that if, in fact, these statutes vest the juvenile court with such broad powers, then a parent who refuses to do any of the above is subject to the court's contempt power, as in fact the parents in this case were reminded:

> THE COURT: That's fine. Mr. W[.], we shouldn't even

be here fighting about this.

KEN W[.]: That's true, it should be somebody —

THE COURT: No, let me finish. You've talked.

You ought to be putting forth an effort to get to know your son, and I submit to you you've put forth no effort. You better change.

Despite what your attorney says, I do have contempt powers, and I promise you if evidence is appropriately presented to me, I will use it. Also understand under the law I can assess costs against you, and I can order you to pay the costs of the representation of your son, which is currently born[e] by Sarpy County through a contract with Mr. O'Neal. It's time you put forth some effort. This boy deserves it.

It is also noteworthy that § 43-246(2) states that when construing the juvenile code, those doing the construing should give "due regard to parental rights and capacities." Also, § 43-246(5) reminds us that the statutes in the juvenile code should be construed "[t]o provide a judicial procedure through which these purposes and goals are accomplished and enforced in which the parties are assured a fair hearing and their *constitutional and other legal rights are recognized and enforced.*" (Emphasis supplied.)

While I am compelled to write this dissent, it should not be interpreted as lowering the value of sibling relationships. Such relationships should be closely guarded and nurtured, since it is those relationships that will provide a haven in which a child may find refuge during the often turbulent journey of life. Moral or personal value of such does not, however, serve as a basis to ignore Ken and Diane W.'s constitutional rights as parents of Megan W.

The relevant law in this case centers on the constitutional rights of the parents regarding their nonadjudicated child, and absent authority of the juvenile court to interfere with such, the result of this case necessitates reversal.

# NORTHLAND TRANSPORTATION, INC., APPELLEE, V. GORDON MCELHOSE, DOING BUSINESS AS MCELHOSE TRUCKING OF VERDIGRE, NEBRASKA, APPELLANT.

529 N.W.2d 809

Filed April 11, 1995. No. A-93-573.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Contracts.** As a general rule, both at law and in equity, a court will not aid either party to an illegal agreement, whether executory or executed, but leaves the parties where it finds them.
4. **Proof.** Where one can establish his or her case without reliance on an illegal transaction, the illegality will not bar recovery.
5. **Loans: Proof.** A prima facie case is established by the plaintiff in an action for money lent by evidence that the money was delivered to the defendant, was a loan, and has not been repaid.

Appeal from the District Court for Cedar County: ROBERT E. OTTE and DARVID D. QUIST, Judges. Affirmed.

John Thomas for appellant.

Wesley E. Hauptman and Craig Monson for appellee.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

In this action the plaintiff, Northland Transportation, Inc. (Northland), sued to recover $19,232.07 it claimed to have loaned the defendant, Gordon McElhose. McElhose defended upon the basis that any money he might owe Northland originated from an illegal transaction engaged in by the parties and that therefore Northland could not recover. The trial court refused to accept the defense of illegality and directed a verdict against McElhose at the close of evidence. We conclude that under the facts in this case, the defense of illegality was not

available to McElhose because Northland was able to establish its case without relying upon any illegal activity. We therefore affirm.

## PLEADINGS

In its operative petition, Northland alleged that on February 15, 1990, McElhose contacted Northland and requested a loan; that Northland agreed to loan McElhose $19,232.07 repayable within 6 months; and that Northland issued a check to McElhose for that sum which McElhose deposited in his account. Northland further alleged that more than 6 months had expired and that McElhose had failed to repay the loan. Northland prayed for judgment in the amount of $19,232.07 plus interest provided by law. In his answer, McElhose admitted he had a conversation with Robert V. Morris, Northland's manager, on February 15, 1990, but denied asking for a loan. He admitted receiving the check and depositing it into his account. Also in the answer, McElhose alleged that the loan grew out of illegal leases which were for an illegal purpose in violation of the authority granted to McElhose by the Nebraska Public Service Commission (PSC). McElhose alleged this claimed illegality with greater specificity, but the details of this transaction can be better explained when the facts are summarized.

## SUMMARY OF FACTS

Since this is an appeal from an order granting a directed verdict for Northland, we shall summarize the facts in the light most favorable to McElhose. The only witness at the trial was Morris, Northland's sole owner, president, and manager. McElhose's case was presented during the cross-examination of Morris and through documents.

Northland is a corporation located in Laurel, Nebraska, that engages in the trucking business carrying various bulk commodities. Northland needed a trucker that held authority from the PSC to carry certain bulk commodities so Northland could carry these commodities. McElhose held the authority to carry the kind of freight Northland wanted to carry.

The law does not permit a person holding PSC authority to carry freight to lease that authority to another. McElhose could

not legally lease the privilege of operating trucks under his authority to Northland. On the other hand, the law permits a firm holding PSC authority to lease equipment from another party and to use that equipment to carry freight generated by the equipment owner for the equipment owner's customers. Apparently the law does not dictate the amount of money that can be paid for the equipment lease, nor does it prohibit the equipment lessor from acting as a dispatcher for the truck company that is leasing its equipment. The PSC even issues a standard lease for such arrangements. The authorized lease clearly provides that the entity with PSC authority retains exclusive control and supervision of the equipment. Such leases are common, but it takes no particular insight to see how a legal lease could be a cover for an arrangement whereby someone could illegally lease his or her authority.

On July 11, 1989, Northland and McElhose entered into three "Equipment Lease Agreements" on PSC forms by which McElhose leased three trucks from Northland for a term ending on March 1, 1990. The leases provided that McElhose would lease each truck at 95 percent of the gross revenue earned. On February 23, 1990, they entered into a new equipment lease agreement which provided for McElhose to lease some 20 pieces of trucking equipment from Northland under the same terms as the previous leases but for a term that ended on March 1, 1991.

McElhose offered into evidence certified copies of the records of the PSC which the court refused to receive because it felt the evidence was irrelevant. These PSC records show that several competitors of McElhose and Northland filed complaints against them claiming the operations that they were conducting under the equipment lease agreements were unlawful. The complainants alleged that the operation amounted to Northland leasing McElhose's authority rather than McElhose leasing Northland's equipment. The complainants further alleged that McElhose only held authority to carry freight " 'occasionally to and from points within the radius of 325 miles from Plainview' " but the parties were using that authority to give unrestricted statewide service to the public. These PSC records show that these complaints were extensively litigated before the PSC. The PSC found that

the parties' operation under the lease agreements was in violation of law for both of the reasons alleged by the complainants, and it issued a cease and desist order. McElhose seeks to use these findings as a basis for his contention that the debt which Northland seeks to collect is based upon illegal transactions and hence uncollectible.

The record shows without dispute that commencing in September 1989, the parties operated under the equipment lease agreements. The evidence contains an exhibit which shows the date and amount of each transaction under the lease agreements and the amounts that McElhose owed Northland under the lease. These amounts correspond to the 18 different checks that McElhose delivered to Northland from September 27, 1989, to January 15, 1990. These checks totaled $19,349.12. The evidence shows without dispute that Morris deposited all of the checks in Northland's account on February 12, 1990, and when they reached McElhose's bank for payment, his account contained only $117.05. All of these checks were stamped by the bank as paid on February 16, 1990. The $19,232.07 check from Northland to McElhose, which Northland claims was a loan, was dated February 15, 1990, and the check shows it was paid by Northland's bank on February 20. There is no doubt that this check was deposited in McElhose's account to make the previous checks to Northland good.

Northland introduced part of a deposition taken of McElhose. He does not keep track of his bank balance and did not realize that Northland was not negotiating the checks as they were delivered. When Northland finally cashed the checks, McElhose was surprised because he thought they had already cleared his bank. Upon learning from his banker that the checks had been presented and that they could not be paid from his account, McElhose called Morris and asked him what he was trying to do to him. McElhose testified that Morris said he had not cashed the checks because " 'we were settling up on a business deal.' " McElhose further testified in his deposition that Morris then said, " 'Don't worry about it,' he says, 'I'll mail you a check over right today to take care of it.' And that was the end of the conversation." McElhose claimed they never had any discussion about how the money was going to be

repaid. When asked what his intentions were with regard to the debt, he said, "Well, I thought I would probably pay it."

Since we are considering an appeal from the direction of a verdict, Morris' testimony that McElhose asked for a loan and agreed to repay it within 6 months must be disbelieved. The only evidence offered by McElhose in his case was the PSC records showing the litigation before it, which is referred to above. It would serve no purpose to describe in further detail the issues of that litigation or the findings of the PSC.

After McElhose's documentary evidence was refused, McElhose's attorney announced that he had no further evidence. Northland moved for a directed verdict. The court granted it and awarded judgment against McElhose. Within 10 days, McElhose filed a motion for a new trial. The motion presented the questions already raised during the trial.

On May 7, 1993, McElhose filed a second motion for a new trial, alleging misconduct on Northland's part along with newly discovered evidence. An affidavit in support of the second motion for a new trial was made by McElhose's trial counsel. Attached to that affidavit are a "Petition for Informal Intervention" and a "Pre-Filed Statement," signed by Morris, which are dated April 26, 1993. These documents had been filed with the PSC by Northland in a proceeding in which Don McElhose applied to have the authority formerly held by his father, Gordon McElhose, transferred to him. This is the same authority which the parties operated under in the leases described above. In this second PSC proceeding, Northland sought to have the PSC stop the transfer of the authority from Gordon McElhose to his son on the ground that the transfer would defraud his creditors, particularly Northland. In that complaint, Northland attaches a copy of the judgment attained in this case, and Morris states that prior to August 1990, Gordon McElhose leased equipment from Northland and "failed to pay the lease sums due pursuant to the lease agreement in the amount of $19,232.07."

McElhose takes the position that Northland's statement contained in the complaint contradicts Morris' testimony that the $19,232.07 was a loan. The affidavit and its attachments were received in evidence at the hearing on the motion for a new

trial. In due time, both motions for a new trial were overruled. McElhose appeals.

## ASSIGNMENTS OF ERROR

McElhose alleges the trial court erred (1) in refusing to admit in evidence a letter dated March 22, 1991, from Northland's attorney to McElhose; (2) in refusing to receive the records of the PSC; (3) in directing a verdict against McElhose because of the defense of illegality; (4) in denying the first motion for a new trial; and (5) in denying the second motion for a new trial. These separate assignments raise one basic question—whether the defense of illegality is available to McElhose under the facts in this case.

## STANDARD OF REVIEW

[1] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Lindsay Mfg. Co. v. Universal Surety Co., supra*; *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993).

[2] In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. 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. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

## DISCUSSION

[3] McElhose relies upon the principle that "[a]s a general rule, both at law and in equity, a court will not aid either party to an illegal agreement, whether executory or executed, but leaves the parties where it finds them." 17 C.J.S. *Contracts* § 272 at 1188 (1963). See, also, *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 456 N.W.2d 474 (1990); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956). He argues that the contract under which his obligation to Northland originated was illegal, or at least the business the parties conducted under it was illegal, and that therefore a court must not aid Northland in collecting its share of the profits from that illegal business.

We start by assuming that the 18 checks which McElhose gave to Northland were a means of transmitting to Northland the money that he owed under the equipment leases entered into on July 11, 1989. We shall assume, but not decide, that the lease agreements were themselves legal but that the business conducted by the parties under the lease agreements was illegal. We will further assume, but not decide, that the business Northland conducted under McElhose's authority was illegal and that if Northland had sued McElhose to collect its share of the profits from that transaction, it could not have done so because this money was realized from an illegal transaction.

[4] The general rule quoted above is undoubtedly correct, but it has many exceptions or refinements which limit its application in those cases where a plaintiff is not directly suing to enforce rights acquired under an illegal contract. One of these exceptions is, "Where one can establish his case without reliance on an illegal transaction, the illegality will not bar his recovery." 17 C.J.S., *supra*, § 276 at 1201. In this case, Northland did not sue to recover on checks issued by McElhose but upon a separate check given by Northland to McElhose.

This exception was recognized by the Nebraska Supreme

Court in *In re Estate of Lowe*, 104 Neb. 147, 175 N.W. 1015 (1920). In that case, the defendant's decedent gave a statement that he owed the plaintiff $214.94. The plaintiff sued to recover, and the estate defended upon the basis that the account balance originated from board of trade transactions which were considered against public policy and illegal at the time. The Supreme Court recognized that the transactions under which the account originated were considered gambling and contrary to public policy. The court stated, "The record shows the plaintiff was able to sustain and did maintain his cause of action without aid or assistance of any transaction growing out of an illegal act or one that might be construed as contrary to public policy." *Id.* at 148, 175 N.W. at 1016. In holding that the plaintiff could recover, the court said:

> The true test is: Does the plaintiff, to sustain his claim, of necessity have recourse to an illegal act? If he cannot maintain his cause of action without so doing, this court as a matter of law will not assist him. The plaintiff's cause of action can be maintained at law as of and for money had and received; while the defendants as a matter of law are compelled to rely upon a contract that is vitiated with the poison of immorality. To maintain his theory, we recognize the validity of his defense to set up a contract that is *contra bonos mores*. Then this court must leave him just where it found him.

*Id.* at 149, 175 N.W. at 1016.

[5] In the case at hand, Northland sued to recover $19,232.07 which the evidence shows without dispute Northland advanced by check to McElhose, who deposited the check and kept the money. " 'A prima facie case is established by plaintiff in an action for money lent by evidence that the money was delivered to defendant, that it was a loan, and has not been repaid.' " *Cartney v. Olson*, 154 Neb. 546, 550, 48 N.W.2d 653, 656 (1951) (quoting 58 C.J.S. *Money Lent* § 7 (1948)). Northland not only proved the facts necessary to establish a prima facie case against McElhose for money lent, but McElhose admitted the necessary facts to establish Northland's prima facie case by allegations in his answer as well as answers he gave to questions in the deposition.

Northland was not required to establish the illegal contract or transactions to prove its case. It is McElhose, in his defense, who seeks to prove and rely upon the illegal transactions to nullify his obligation. As the above authority shows, McElhose cannot utilize such a defense based on illegal transactions that Northland does not rely upon to prove its case. Once Northland proved it was entitled to recover without relying on transactions that were illegal, it was entitled to recover. A defendant cannot rely upon proof of his or her illegal conduct any more than a plaintiff can do so. Therefore, the exhibits which McElhose offered into evidence were irrelevant because the illegality which they might prove would not be a defense.

McElhose's first motion for a new trial presented the same issues as discussed above and therefore will not be reconsidered. McElhose's second motion for a new trial is based upon a claim of newly discovered evidence, that is, upon a postlitigation statement by a witness which contradicts that witness' statement at trial and upon Northland's taking a position in subsequent litigation which is inconsistent with the position in this litigation. The most that this evidence could do for McElhose is to attack Morris' credibility as a witness. However, the court directed a verdict; hence, Northland's case did not depend upon Morris' credibility. Northland was entitled to a directed verdict because of the answer McElhose filed to Northland's petition and because of the answers he gave in his deposition. Therefore, the trial court correctly denied the motion for a new trial on the basis of newly discovered evidence and misconduct.

AFFIRMED.

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BLAKE EMERSON, APPELLANT, V. ROBIN M. ZAGURSKI, APPELLEE.

531 N.W.2d 237

Filed April 11, 1995. No. A-93-595.

1. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.

2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
3. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
4. **Promissory Notes: Negotiable Instruments: Uniform Commercial Code: Limitations of Actions.** If the promissory note entered into by the parties is a negotiable instrument, the 6-year statute of limitations provided in the Uniform Commercial Code is applicable.
5. **Demurrer: Pleadings: Limitations of Actions.** A petition fails to state a cause of action and is subject to a general demurrer when it is apparent from the face of the petition that the action is barred by the statute of limitations.
6. **Promissory Notes: Limitations of Actions.** If the promissory note at issue is payable upon demand, the statute of limitations would begin to run after demand for payment was made.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Roger C. Lott for appellant.

Hugh I. Abrahamson and William P. Jones for appellee.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

## INTRODUCTION

Blake Emerson appeals the judgment of the district court for Douglas County, Nebraska, sustaining the demurrer to her second amended petition and the subsequent dismissal of her lawsuit. Emerson claims that she did state a cause of action that was not barred by the statute of limitations. Because the district court applied the improper statute of limitations, we reverse, and remand for further proceedings.

## SECOND AMENDED PETITION

In her second amended petition, Emerson alleges that on or about September 17, 1985, she and Robin M. Zagurski entered into a loan agreement in which she loaned Zagurski $17,000. Emerson alleges that Zagurski failed, neglected, and refused to make payments as called for by the agreement and that the most recent payment was made by Zagurski on January 2, 1987. She

alleges that Zagurski acknowledged her liability on the contract and renewed her promise to pay in writing in December 1987. She alleges that a further acknowledgment of liability was contained in a letter dated July 31, 1990, received from Zagurski's legal counsel. Emerson alleges that she made demand upon Zagurski for payment of the debt, although the specific date of the demand is not pled. She also alleges that as a result of Zagurski's failure to pay, she declared the entire debt due. She alleges that as of July 20, 1990, the balance due under the agreement is $23,219.26 plus interest at the rate of 10 percent per year since July 20, 1990.

The promissory note between the parties was executed September 17, 1985. It reads, in relevant part, as follows:

> For full value received, I promise to pay to L. Blake Emerson . . . or her order upon demand the sum of seventeen thousand ($17,000.00) dollars with interest at the rate of ten percent (10%) per annum payable monthly on the 24th day of each and every month until the principal of the within note is fully paid.

## PROCEDURAL HISTORY

The original petition in this matter was filed in the district court for Douglas County on December 31, 1992. It alleged that a loan agreement was entered into on September 17, 1985, and that Zagurski had not paid the amounts due and owing. On January 19, 1993, Zagurski filed a demurrer, alleging that the "petition does not state facts sufficient to constitute a cause of action in that it appears from the face of the petition that the alleged cause of action for payment on the demand note is barred by the statute of limitations as set forth in NEB. REV. STAT. §25-205." On February 11, 1993, after arguments were heard, the district court sustained the demurrer and ordered Emerson to file an amended petition within 10 days and to attach the loan agreement mentioned in the original petition.

On February 22, 1993, Emerson filed an amended petition which alleged, in addition to the allegations in the original petition, that the last payment on the loan was made January 2, 1987, and that in December 1987, Zagurski acknowledged her liability on the contract and renewed her promise to pay in

writing. Copies of the loan agreement, promissory note, and alleged acknowledgment were attached.

On February 24, 1993, Zagurski filed a motion to make more definite and certain. In response, on March 12, Emerson filed a second amended petition, which included allegations as set forth above.

On April 8, 1993, Zagurski filed a motion to strike and motion for sanctions. The court's journal entry for the May 4 hearing on these motions states in part: "Hearing held on the Defendant's motion to strike and for sanctions. The Court converts the motion to strike into a demurrer. Arguments made. Demurrer sustained on the basis of the statute of limitations. Plaintiff granted Fourteen (14) days to file an amended petition."

In a journal entry dated June 10, 1993, the district court, on its own motion, dismissed the action with prejudice. The court stated that it had received a letter from Emerson's counsel dated May 14, 1993, indicating that Emerson did not intend to file a third amended petition. This appeal followed.

## ASSIGNMENTS OF ERROR

Emerson makes the following assignments of error: (1) The district court erred in sustaining Zagurski's demurrer, and (2) the district court erred in finding that the letter from Zagurski's counsel to Emerson's counsel did not constitute an acknowledgment of an existing debt or a promise to pay the same.

## STANDARD OF REVIEW

[1] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

## DISCUSSION

[2] As Emerson chose to stand upon her second amended petition, she preserved her right to appeal the trial court's judgment sustaining the demurrer to it. See *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). In ruling on a demurrer, the petition is to be construed liberally; if as so construed the

petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *Sinn v. City of Seward, ante* p. 59, 523 N.W.2d 39 (1994). A statement of facts "sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *Wheeler, supra*; *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

[3] In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Hoffman, supra*.

[4] The first step in our analysis is to determine the applicable statute of limitations. As a general rule, the limitations period in effect at the time an action is filed governs the action. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991). Article 3 of the Uniform Commercial Code determines the rights and obligations of parties to negotiable instruments. Neb. U.C.C. § 3-102(a) (Reissue 1992). Neb. U.C.C. § 3-118 (Reissue 1992), effective January 1, 1992, provides a 6-year statute of limitations for promissory notes that are negotiable instruments. See *Givens, supra* (holding that it is competent for the Legislature to change statutes prescribing limitations to actions and that the one in force at the time suit is brought is applicable to the cause of action; however, the Legislature cannot remove a bar or limitation which has already become complete). See, also, *Schendt, supra*. Emerson's cause of action was not time barred under the applicable statutes prescribing limitations to actions on the effective date of § 3-118. See, Neb. U.C.C. § 3-122 (Reissue 1980); Neb. Rev. Stat. § 25-205 (Reissue 1989). Therefore, if the promissory note entered into by Emerson and Zagurski is a negotiable instrument, the 6-year statute of limitations provided in the Uniform Commercial

Code is applicable. See § 3-118. If the promissory note is not a negotiable instrument, the 5-year statute of limitations for actions on written contracts is applicable. See § 25-205. It appears from the record before us that the district court and the parties applied the 5-year statute of limitations.

The Uniform Commercial Code defines the term "negotiable instrument." An "instrument" is either a "promise," which is a written undertaking to pay money signed by the person undertaking to pay, Neb. U.C.C. § 3-103(a)(9) (Reissue 1992), or an "order," which is a written instruction to pay money signed by the person giving the instruction. § 3-103(a)(6). Neb. U.C.C. § 3-104 (Reissue 1992) provides that an instrument is negotiable if the following requirements are met. First, the promise or order must be unconditional. § 3-104(a). The promise or order is unconditional unless it states an express condition to payment, it is subject to or governed by another writing, or the rights or obligations with respect to the promise or order are stated in another writing. Neb. U.C.C. § 3-106 (Reissue 1992). Second, the amount of money must be "a fixed amount . . . with or without interest or other charges described in the promise or order." § 3-104(a). Third, the promise or order must be "payable to bearer or to order." § 3-104(a)(1). This language regarding "payable to bearer or to order" is defined in Neb. U.C.C. § 3-109 (Reissue 1992), which states in part:

> (a) A promise or order is payable to bearer if it:
>
> (1) states that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
>
> (2) does not state a payee; or
>
> (3) states that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.
>
> (b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) *to an identified person or order*. A promise or order that is payable to order is payable to the identified person.

(Emphasis supplied.) The fourth requirement for a negotiable

instrument is that the promise or order must be payable "on demand or at a definite time." § 3-104(a)(2). A negotiable instrument that is payable on demand may provide for the payment of interest on a specified basis such as monthly or yearly. See *Berman v. United States Nat. Bank*, 197 Neb. 268, 249 N.W.2d 187 (1976). Fifth, and last, the promise or order may not state "any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money," with three exceptions that are not relevant to the case before us. § 3-104(a)(3). See, generally, § 3-104, comment 1.

Based upon the properly pled allegations in the second amended petition and its attachments and the applicable law, we conclude that the promissory note in the case before us is a negotiable instrument because it is an unconditional promise made by Zagurski to pay $17,000 plus interest to *Emerson or her order upon demand*. Therefore, the 6-year statute of limitations in the Uniform Commercial Code is controlling.

[5] The next step in our analysis is to determine if Emerson's petition fails to state a cause of action based upon the applicable statute of limitations. A petition fails to state a cause of action and is subject to a general demurrer when it is apparent from the face of the petition that the action is barred by the statute of limitations. *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989). See § 25-806. When it is not apparent from the face of the petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer. *L.J. Vontz Constr. Co., supra*.

[6] As the promissory note at issue is payable upon demand, the statute of limitations would begin to run after demand for payment was made. See § 3-118(b). If no demand for payment is made, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years. *Id.*

The second amended petition alleges that demand was made, but does not provide the date on which it was made. As a result, it is not apparent from the face of the petition that the action is time barred. If a particular date of demand were alleged, it

could be determined from the face of the petition whether the cause of action was barred by the statute of limitations. As the petition only contains a general allegation of demand, it is not subject to demurrer.

We need not address Emerson's assignments of error regarding whether either the December 1987 letter from Zagurski to Emerson or the July 31, 1990, letter to Emerson's counsel from Zagurski's counsel constituted proper acknowledgment of the debt, tolling the statute of limitations period.

We conclude as a matter of law that the applicable statute of limitations is the 6-year statute of limitations for promissory notes in the Uniform Commercial Code. The district court's judgment sustaining Zagurski's demurrer and holding that Emerson's cause of action was time barred was in error because it applied the incorrect statute of limitations. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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ERVIN MELCHER, APPELLEE, V. THE BANK OF MADISON, APPELLANT.

529 N.W.2d 814

Filed April 11, 1995. No. A-93-670.

1. **Directed Verdict: Appeal and Error.** A trial court may sustain a motion for a directed verdict or a motion for judgment notwithstanding the verdict only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issue should be decided as a matter of law; if there is any evidence which will sustain a finding for the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly wrong.
3. **Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
4. **Torts: Conversion: Property: Words and Phrases.** The term "tortious

conversion" means any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. In order for the cause of action to arise, the tort-feasor must have assumed and exercised the right of ownership over goods or chattels belonging to another.

5. **Torts: Conversion: Property: Proof.** A plaintiff who asserts that a defendant has tortiously converted plaintiff's property generally must prove that (1) plaintiff has an immediate right to possession of the subject property, and (2) defendant wrongfully possesses such property.
6. **Taxation: Property.** Factors pertinent to determination of ownership for tax purposes include whether legal title passes; the manner in which the parties treat the transaction; whether the purchaser acquired any equity in the property; whether the purchaser has any control over the property and, if so, the extent of such control; whether the purchaser bears the risk of loss or damage to the property; and whether the purchaser will receive any benefit from the operation or disposition of the property.
7. **Replevin.** The purpose of a replevin action is primarily to adjudicate the right of possession of property.
8. **Pleadings.** Where a defendant is in default the allegations of the petition are to be taken as true against him.
9. **Contracts: Consideration.** Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor.
10. _____: _____. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract.
11. _____: _____. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud.
12. **Property: Sales: Consideration.** A sale of property ordinarily occurs upon a transmutation of property from one person to another in consideration of some price or recompense in value.
13. **Uniform Commercial Code: Security Interests.** The purchase money priority is an exception to the first-to-file rule, and it should be applied only in accordance with the limitations established by the Uniform Commercial Code.
14. **Security Interests.** To effect perfection by possession, possession must be unequivocal, absolute, and notorious, so that third persons may be advised.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed.

Daniel A. Fullner, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Vince Kirby for appellee.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired.

MILLER-LERMAN, Judge.

The Bank of Madison appeals the judgment entered against it by the district court for Madison County, Nebraska, following a trial to a jury. By its verdict, the jury found that The Bank of Madison had wrongfully converted a John Deere model 4450 tractor allegedly owned by Ervin Melcher, plaintiff-appellee, and awarded damages to him in the amount of $28,000. For the reasons recited below, we reverse.

## FACTS

This case involves the resolution of various conflicting ownership interests in a John Deere model 4450 tractor (the 4450 tractor). The persons and entity involved are Ervin Melcher (Ervin); Donald Melcher (Don), Ervin's 37-year-old son and a former part-time grain farmer with 6 acres of his own and approximately 160 acres leased from Ervin; and The Bank of Madison (the Bank).

In April 1979, by virtue of a document entitled "Financing Statement," Don granted the Bank

> a security interest in the following collateral, whether now owned or hereafter acquired by the debtor; all equipment, including but not limited to all farm equipment, tractors, machinery and implements: all farm products, including but not limited to crops, livestock, and supplies used or produced in farming operations; all contract rights and accounts; and in additions, accessions and substitutions thereto; and all products and proceeds thereof.

The security agreement underlying the original 1979 security interest evidenced by the above-referenced financing statement is not part of the record in front of this court. The security interest in Don's property secured Don's present and future indebtedness to the Bank. The Bank perfected its security interest in the above-described property by filing the Uniform Commercial Code financing statement on May 1, 1979. By filing the necessary continuation financing statements, the Bank held a perfected security interest in all of Don's farm property and equipment throughout the period in question in this case.

The testimony shows that at least since early 1986, Don had

been having frequent mechanical difficulties with his John Deere model 4430 tractor (the 4430 tractor). Consequently, Don had been looking at the 4450 tractor at C.C. Implement, Inc. (C.C.), and had even taken it home to his farm to try it out. Don returned the 4450 tractor to C.C. after deciding it was out of his price range.

At Don's request to him to "go out and trade [the 4430 tractor] for that [4450] tractor," Ervin went to C.C. on June 9, 1986, and traded the 4430 tractor toward the $40,357.50 total purchase price of the 4450 tractor. The sales contract between C.C. and Ervin for the 4450 tractor reflects that C.C. gave a $15,000 credit for the trade-in of Don's 4430 tractor, less the $7,693 balance due on the 4430 tractor. Ervin also tendered $5,000 in cash toward the purchase of the 4450 tractor. The balance due on the 4450 tractor, after subtracting the $5,000 cash payment and the trade-in value of the 4430 tractor, less balance due, equaled $28,050.50. According to Ervin's testimony, he paid off the balance due on the 4450 tractor soon after the purchase. After the purchase of the tractor, Ervin directed Tim Tighe, vice president of the Bank, to prepare a promissory note from Don in favor of Ervin in the amount of $28,000. Tighe testified that Ervin indicated to him that Don was the owner of the 4450 tractor, that Ervin had loaned Don the money to purchase the tractor, and that the purpose of the note was to evidence and document such loan. Pursuant to Ervin's instructions, the note carried interest at the rate of 8 percent, called for one $5,000 payment, and extended for a term of 1 year. The 4450 tractor did not serve as security for the note. Don executed the note at Ervin's request. Ervin testified that the parties executed identical notes for the years 1988 through 1991. Each of the notes included the notation "loan to purchase John Deere 4450 MFWD tractor."

Ervin and Don both testified that Don never paid Ervin any money toward the satisfaction of the notes. However, the record indicates that the testimony in this regard may not be completely accurate. Exhibit 49, a commercial lending agreement, reflects that Don obtained a $5,000 loan from the Bank on February 17, 1987. According to the language of Exhibit 49, the purpose of the loan was "Business: First

payment on John Deere 4450 MFWD tractor." Also on February 17, Don wrote a check to Ervin in the amount of $5,000. The memo on the check notes "4430 last payment."

Don's testimony with respect to the February 17 loan and check to Ervin was inconsistent. First, Don testified that he did not know if he had borrowed the money to pay Ervin. Thereafter, Don testified that the purpose of the loan was to make the final payment on the 4430 tractor. Notwithstanding Don's explanation, it is undisputed that the 4430 tractor had been traded in and paid off 8 months prior to the date of the loan, and it would appear logical that the purpose of the $5,000 loan to Don was to permit Don to make the one-time $5,000 payment to Ervin as required by the promissory note executed in connection with the 4450 tractor.

Ervin testified that he had possession of the 4450 tractor from the time of its purchase until it was seized and sold in 1992. However, the record indicates that after the purchase of the 4450 tractor on June 9, 1986, C.C. delivered it directly to Don's farm. Ervin also testified that all of the members of the Melcher family used the tractor whenever they needed it. It is clear from the record that Don used the 4450 tractor in his farming operations from 1986 through 1992. Additionally, Don and Ervin agreed that Don would be responsible for all necessary repairs on the 4450 tractor.

Rodney Zwygart, a certified public accountant who prepared the income tax returns for both Ervin and Don for the years in question, testified that Don deducted the depreciation generated by the 4450 tractor on his tax returns for 1986 and subsequent years. Ervin never claimed any depreciation for the 4450 tractor. Zwygart testified that prior to March 1, 1987, Ervin explained to him that Don would take the entire depreciation deduction for the 4450 tractor because Ervin had previously sold the 4450 tractor to Don. At trial, Ervin explained that he did not take the depreciation deduction for the 4450 tractor because he "didn't need it." However, the record indicates that the depreciation deduction was not necessarily beneficial to Don because Don had a net operating loss to carry forward during the years in question.

As established by exhibits 16 through 18, Don's bank

financial statements for the years 1987 through 1989, Don listed the 4450 tractor as a personal asset. Tighe testified that the Bank had relied on these financial statements and specifically Don's claim of ownership of the 4450 tractor in advancing Don further loans during this period.

On December 1, 1989, Don filed a petition for relief under chapter 12 of the U.S. Bankruptcy Code. Don filed a schedule of assets with the bankruptcy court which included the 4450 tractor. Ervin received notice of Don's bankruptcy petition, but did not file an objection or other pleading to contest Don's claim of ownership of the 4450 tractor. Don moved to convert his bankruptcy to chapter 7 on February 7, 1992, after the chapter 12 plan proved unsuccessful.

When Don's bankruptcy was converted to chapter 7, the Bank filed an action in replevin to confirm its right to possession of the collateral, including the 4450 tractor, covered under its security agreement with Don. Don did not respond to the Bank's replevin action. Consequently, the district court for Madison County entered a default judgment in favor of the Bank on June 12, 1992. The judgment of replevin included an itemized list of the subject property, which list included the 4450 tractor. Pursuant to its rights under the judgment of replevin, the Bank seized and sold the subject property, including the 4450 tractor, and applied the proceeds against Don's indebtedness.

On August 18, 1992, Ervin filed a petition against the Bank in the district court for Madison County. The petition alleged that Ervin was the rightful owner of the 4450 tractor and that the Bank had wrongfully converted it, damaging Ervin in the amount of $39,500.

The case was tried to a jury on May 17, 1993. At the close of Ervin's evidence and at the close of all evidence, the Bank moved for a directed verdict, which motions the court overruled. On May 18, counsel for the Bank stated that the Bank had no objections to the court's proposed jury instructions or to the form of the verdicts. After the court instructed the jury, the jury deliberated and returned a verdict in favor of Ervin in the amount of $28,000.

On May 27, 1993, the Bank moved the court to grant a

judgment notwithstanding the verdict or, alternatively, to vacate the verdict and grant a new trial. The court overruled both the motion for judgment notwithstanding the verdict and the motion for new trial on July 9, 1993. The Bank appeals.

## ASSIGNMENTS OF ERROR

The Bank asserts that the district court erred in (1) overruling the Bank's motion for judgment notwithstanding the verdict, (2) overruling the Bank's motion for new trial, and (3) refusing to give several of the Bank's tendered jury instructions.

## SCOPE OF REVIEW

[1,2] A trial court may sustain a motion for a directed verdict or a motion for judgment notwithstanding the verdict only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issue should be decided as a matter of law; if there is any evidence which will sustain a finding for the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995); *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990); *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). A jury verdict will not be disturbed on appeal unless it is clearly wrong. *Stoco, Inc., supra*; *Commerce Sav. Scottsbluff, supra.*

[3] As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *National Acct. Sys. of Lincoln v. Vergith*, 246 Neb. 604, 521 N.W.2d 910 (1994); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

## ANALYSIS

[4,5] Ervin sued the Bank for conversion. The term "tortious conversion" means " 'any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.' . . . In order for the cause of action to arise, the tort-feasor must have assumed and exercised 'the

right of ownership over goods or chattels belonging to another . . . .' " (Citations omitted.) *Barelmann v. Fox*, 239 Neb. 771, 786, 478 N.W.2d 548, 558 (1992). A plaintiff who asserts that a defendant has tortiously converted plaintiff's property generally must prove that (1) plaintiff has an immediate right to possession of the subject property, and (2) defendant wrongfully possesses such property. *Id.*

The essence of the argument propounded by the Bank in its motions for directed verdict and posttrial motions was that Ervin neither owned nor had an immediate right to possession of the 4450 tractor. The Bank asserted in its motions that the law and evidence showed that Don had some ownership interest in the tractor and that Ervin did not have an immediate possessory interest or legal title to the tractor. We agree with the Bank.

The record shows that C.C. delivered the tractor to Don's farm, that Don consistently used the 4450 tractor for his farming operations and was responsible for its repair, that Don claimed ownership of the 4450 tractor in his financial statements and in his tax returns, and that Ervin did not claim an ownership interest in the 4450 tractor in Don's bankruptcy proceedings. The foregoing evidence indicates that Don, rather than Ervin, exercised possessory and some legal rights to the 4450 tractor.

[6] The record shows that Don affirmatively claimed ownership of the 4450 tractor to his benefit in two respects: (1) by deducting the depreciation of the tractor on his income tax returns and (2) by listing the 4450 tractor on his financial statements. We note that the Internal Revenue Service applies stringent tests of ownership to determine whether a taxpayer is entitled to take a depreciation deduction with respect to certain property. See *Upham v. C.I.R.*, 923 F.2d 1328, 1334 (8th Cir. 1991) (holding that factors pertinent to determination of "ownership" for tax purposes include " '(1) [w]hether legal title passes; (2) the manner in which the parties treat the transaction; (3) whether the purchaser acquired any equity in the property; (4) whether the purchaser has any control over the property and, if so, the extent of such control; (5) whether the purchaser bears the risk of loss or damage to the property; and (6) whether

the purchaser will receive any benefit from the operation or disposition of the property' ").

[7,8] The record also shows that the Bank obtained a default judgment against Don in a replevin action. In the replevin action, the Bank alleged that it was entitled to possession and immediate delivery of all of Don's farm products, inventory, and equipment, pursuant to its security interest in such property. The itemized list of replevied property included the 4450 tractor. The purpose of a replevin action is primarily to adjudicate the right of possession of property. *Barelmann, supra*. Further, " ' "[w]here a defendant is in default the allegations of the petition are to be taken as true against him . . . ." ' " *State on behalf of Yankton v. Cummings*, 2 Neb. App. 820, 827, 515 N.W.2d 680, 685 (1994) (quoting *Weir v. Woodruff*, 107 Neb. 585, 186 N.W. 988 (1922)). See, also, Neb. Rev. Stat. § 25-842 (Reissue 1989). Thus, pursuant to the replevin action, the Bank gained Don's possessory rights to the 4450 tractor.

At trial and on appeal, Ervin claims that he is the sole owner of the 4450 tractor. Ervin argues that he bought the tractor and that a "sale" of the tractor from Ervin to Don never occurred because Don never paid Ervin for the tractor. Ervin testified that "if [Don] pays me for the tractor, he can have it." However, the uncontradicted facts of this case are inconsistent with Ervin's suggestion that Don held no ownership interest in the 4450 tractor.

[9-12] The promissory notes from Don to Ervin in the amount of $28,000 constituted adequate consideration in exchange for the 4450 tractor. In this regard, the Nebraska Supreme Court has stated:

> "[C]onsideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud."

*Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991) (quoting *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985)). It has long been held that a "sale" of property ordinarily occurs upon "a transmutation of property from one man to another in consideration of some price or recompense in value." *Dial Realty, Inc. v. Cudahy Co.*, 198 Neb. 641, 644, 254 N.W.2d 421, 423 (1977). Accordingly, Ervin cannot avoid the reality of the sale because Don failed to pay him the full $28,000.

This court has examined Ervin's argument that he intended to retain an ownership interest in the 4450 tractor. We believe that the proper analysis of Ervin's claim is found in the Nebraska version of article 9 of the Uniform Commercial Code, Neb. U.C.C. § 9-101 et seq. (Reissue 1992).

Article 9 of the Uniform Commercial Code defines and prioritizes conflicting interests in property such as the 4450 tractor at issue in this case. Under article 9, parties can share ownership of property, with each party having its own bundle of ownership interests. *Greenbush State Bank v. Stephens*, 463 N.W.2d 303 (Minn. App. 1990). In the case at bar, both Don and Ervin contributed to the purchase of the 4450 tractor: (1) Don traded in his 4430 tractor, for which he was given a $15,000 credit, out of which C.C. subtracted $7,693 to pay off the 4430 tractor, and (2) Ervin paid $5,000 in cash at the time of the purchase and eventually paid off the $28,050.50 balance. The money Ervin contributed toward the purchase of the 4450 tractor allowed Don to obtain a new tractor. Article 9 contemplates this type of transaction and, upon fulfillment of code requirements, grants those who contribute money toward the purchase of property and who retain a security interest in such property a "purchase money security interest." See *Greenbush State Bank, supra*; § 9-107.

Section 9-107 provides:

> A security interest is a "purchase money security interest" to the extent that it is
>
> . . .
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in

fact so used.

Under § 9-107(b), Ervin would have a purchase money security interest, and no more.

As recited above, due, inter alia, to its source of funding, its use, and its tax treatment, we conclude that Don had some ownership interest in the 4450 tractor beginning at the time of its purchase. As indicated above, the Bank had a continuously perfected security interest in all of Don's property and equipment. Through the after-acquired property clause in the security agreement, the Bank's security interest attached to any ownership interest that Don had in the tractor at the time Don acquired such ownership interest. Under § 9-203(1)(c), Don had "rights in the collateral" such that those rights could be attached by the Bank under a security agreement. Therefore, the Bank's security interest attached to the 4450 tractor at the time of its purchase. The Bank's security interest was the basis of its successful replevin action against Don, in which judgment was entered in June 1992.

The foregoing analysis indicates that when Ervin filed his instant petition in August 1992, alleging conversion, both Ervin and the Bank had conflicting security interests in the 4450 tractor. The priority of these conflicting security interests is resolved under the Uniform Commercial Code.

Section 9-312(5)(a) provides in part that "[c]onflicting security interests rank according to priority in time of filing or perfection." As stated above, the Bank perfected its security interest in all of Don's farm equipment and after-acquired property by filing a financing statement in May 1979. There was no subsequent period when the Bank did not have a perfected security interest in Don's equipment. Pursuant to the after-acquired property clause, the secured property included the 4450 tractor as soon as it was purchased. Therefore, the Bank's security interest in the 4450 tractor was immediately perfected. Nevertheless, a purchase money security interest could defeat the Bank's first-in-time security interest, if perfected under the code.

[13] Article 9 provides special priorities for purchase money security interests in certain situations. Section 9-312(4) provides that "[a] purchase money security interest in collateral other

than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty days thereafter." In order to retain the priority of his purchase money security interest over the Bank's existing security interest, Ervin had to perfect his interest within 20 days after Don received the 4450 tractor. There is no claim or any evidence in the record which indicates that Ervin filed a security interest, and, accordingly, due to lack of perfection, Ervin lost the priority available to him under § 9-312(4) to the Bank's perfected security interest. Any argument that Ervin might make that the Bank was aware that Ervin had provided funds toward the purchase of the 4450 tractor and that, therefore, Ervin should be excused from § 9-312(4) compliance is unavailing. It has been stated that "[t]he purchase money priority is an exception to the first to file rule, and it should be applied only in accordance with the limitations established by the Code." *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 54, 200 N.W.2d 1, 7 (1972).

[14] Notwithstanding Ervin's failure to perfect by filing, Ervin could also have perfected his security interest under the Uniform Commercial Code by taking absolute possession of the 4450 tractor within 20 days of its purchase. See § 9-305. Under § 9-305, a "security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral." The definition of "goods" under article 9 includes farm equipment. See §§ 9-105(1)(h) and 9-109(2). To effect perfection by possession, " 'possession . . . must be unequivocal, absolute and notorious, so that third persons may be advised.' " (Emphasis omitted.) *Transport Equipment Co. v. Guaranty State Bank*, 518 F.2d 377, 381 (10th Cir. 1975). Accord *Hutchison v. C.I.T. Corp.*, 726 F.2d 300 (6th Cir. 1984). Under the code, perfection by possession "continues only so long as possession is retained." § 9-305. Even taking the facts favorably to Ervin, in view of Ervin's testimony that other family members used the 4450 tractor, it cannot be concluded that Ervin perfected by absolute and continuous possession.

The foregoing demonstrates that, even under a reading of the

facts favorable to Ervin, Don had an ownership interest in the 4450 tractor. Because Don had an ownership interest in the 4450 tractor, the Bank's security interest attached to the 4450 tractor at the time of its purchase. The ownership interest of Don as assumed by the Bank in the 4450 tractor has priority over Ervin's unperfected purchase money security interest and precludes a successful conversion action by Ervin.

In view of the foregoing, the trial court erred in denying the Bank's motion for directed verdict at the close of the evidence and in denying the Bank's posttrial motions. Due to the nature of our holding, we need not address the Bank's other assignments of error.

REVERSED.

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ANN L. HOSCHLER, APPELLANT, V. EMILY CUNNINGHAM KOZLIK, APPELLEE.

529 N.W.2d 822

Filed April 11, 1995. No. A-93-771.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
3. **Torts: Intent: Proof.** The necessary elements of tortious interference with a business relationship or expectation include (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
4. **Pleadings: Words and Phrases.** A cause of action is stated where a narrative of events, acts, and things alleged in the petition to have been done or omitted shows legal liability on the part of a defendant to a plaintiff.
5. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.

6. **Actions: Torts: Employer and Employee.** A cause of action for tortious interference can be maintained even when the business relationship being interfered with is an at-will employment relationship.
7. **Torts.** Although malice, as such, is not an element of the tort of tortious interference in Nebraska, it is persuasive evidence on whether the defendant's conduct was proper and justified or improper and not justified.
8. **Actions: Torts: Intent: Employer and Employee.** The intentional interference by a fellow employee, including an officer, director, or other employee, in the employment relationship of another employee with a common employer, when it is malicious and thus unjustified or is outside the scope of authority of the interfering employee, gives rise to a cause of action for tortious interference.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for further proceedings.

Tim B. Streff and J. Patrick Green, of Wintroub, Rinden and Sens, for appellant.

Brian D. Nolan, of Hansen, Engles & Locher, P.C., for appellee.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

Ann L. Hoschler filed a petition alleging that Emily Cunningham Kozlik intentionally interfered with her contract of employment with the YWCA. Kozlik demurred to the petition on the ground that it failed to state a cause of action. The district court sustained Kozlik's demurrer and, upon Hoschler's election to stand on her petition, dismissed the action. Hoschler then appealed to this court.

## STANDARD OF REVIEW

[1] Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995); *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995).

## FACTS AS ALLEGED

[2] In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of

law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). Hoschler asserts that she was employed by the YWCA as a program coordinator in the "Women Against Domestic Violence" program until she was terminated on February 5, 1993. Kozlik was the executive director of the YWCA. Hoschler's petition further alleges:

> 3. . . . Plaintiff's employment was governed by an employee handbook provided by the YWCA which in part provided certain procedures, policies, and guidelines for termination of an employee. These policies limited the power and authority of officers of the YWCA such as Defendant.
>
> 4. The Plaintiff was fired by the Defendant on February 5, 1993 without the benefit of due process as required by the procedures, policies, and guidelines in effect in the employee handbook at the time. Such firing of Plaintiff was outside the scope of the authority granted to Defendant by the YWCA and was done with malice to inflict harm on Plaintiff and to destroy her ongoing relationship with the YWCA.
>
> 5. Defendant's conduct was an intentional interference with Plaintiff's contract of employment with the YWCA.

Hoschler claims that as a consequence, she suffered damages resulting from lost wages, both past and future; a diminution in the value of her pension; a loss of fringe benefits; mental distress; humiliation; and embarrassment.

## ASSIGNMENT OF ERROR

Hoschler's sole assignment of error is that the district court erred in sustaining Kozlik's demurrer and dismissing the petition.

## ANALYSIS

[3] Although Hoschler's petition characterizes her action as one for "intentional interference" with her contract of employment, we construe it as an attempt to state a cause of action generally labeled in Nebraska jurisprudence as one for "tortious interference with a business relationship or expectation." The question before us is whether Hoschler's

petition states a cause of action under that theory of recovery. In Nebraska, it is established that the elements necessary to state such a cause of action include (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

[4,5] A cause of action is stated where a narrative of events, acts, and things alleged in the petition to have been done or omitted shows legal liability on the part of a defendant to a plaintiff. *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995). In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994). We thus proceed to analyze Hoschler's petition under the foregoing principles.

We have no reservation in concluding that the petition satisfies elements Nos. 2, 4, and 5 as required by *Matheson, supra*. That Kozlik, as executive director of the YWCA, had knowledge of Hoschler's employment relationship with the YWCA and that the alleged interference caused harm and damages to Hoschler is obviously stated. Thus, we concentrate our analysis on the first and third elements as identified in *Matheson*.

*Valid Business Relationship or Expectancy.*

To be actionable as tortious interference with a business relationship, the interference must necessarily impact on a valid business relationship or expectancy. *Matheson, supra*. Thus, the nature of the relationship with which Kozlik allegedly interfered must be examined. Hoschler did not allege the existence of a contract obligating the YWCA to employ her for a particular period of time or that the employee handbook

contractually modified her employment. In such circumstance, we must properly infer that she was an at-will employee. See *Matheson, supra*. Does an at-will employment relationship constitute a "valid business relationship" that can be the subject of an action for tortious interference? Although Kozlik does not raise this issue, it was expressly left unresolved by the Supreme Court in *Matheson, supra*, and we view it as a threshold issue in this appeal.

We are mindful that the Supreme Court has previously held, in *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988), that there is no cause of action in Nebraska for the tort of "malicious termination." In *White*, plaintiffs brought an action against both their employer, Ardan, Inc., and an Ardan security executive for malicious termination, breach of contract by wrongful or "bad faith" discharge, and defamation. Plaintiffs were presumed to be at-will employees and argued that they were terminated based upon false statements made by the security executive that they were involved in dishonest acts during their employment. Hoschler's petition obviously has similarities with the claim of the plaintiffs in *White*, i.e., that a coemployee, through his or her intentional and malicious acts, interfered with their at-will employment. Nevertheless, the facts in *Matheson* were also similar to those alleged by the plaintiffs in *White*. In *Matheson*, some 3 years later, the court specifically framed the issue in the context of "tortious interference" and not "malicious termination." We believe that the Supreme Court would approach Hoschler's petition similarly and not deem *White* as dispositive of whether Nebraska recognizes a cause of action for tortious interference involving an at-will employee.

[6] The majority of courts addressing this issue have concluded that a cause of action for tortious interference can be maintained even when the business relationship being interfered with is an at-will employment relationship. See, e.g., *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991); *Toney v. Casey's General Stores, Inc.*, 460 N.W.2d 849 (Iowa 1990); *Hennum v. City of Medina*, 402 N.W.2d 327 (N.D. 1987); *Benny M. Estes and Assoc. v. Time Ins.*, 980 F.2d 1228 (8th Cir. 1992) (applying Arkansas law);

*Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286 (8th Cir. 1990) (applying Missouri law). See, also, generally, Annot., 5 A.L.R.4th 9 (1981). In protecting at-will employment relationships, courts have reasoned that although an employment relationship is terminable at will, the fact that a relationship is at the will of the employer and employee does not make it at the will of others who wrongfully interfere with the relationship. See, *Nordling, supra*; *Aalgaard v. Merchants Nat. Bank, Inc.*, 224 Cal. App. 3d 674, 274 Cal. Rptr. 81 (1990), *cert. denied* 502 U.S. 901, 112 S. Ct. 278, 116 L. Ed. 2d 230 (1991). This reasoning corresponds with the Restatement (Second) of Torts § 766, comment *g*. at 10-11 (1979), which provides, with regard to a cause of action for tortious interference with a terminable at-will employment contract:

> Until [the employee or employer] has so terminated [the at-will contract], the contract is valid and subsisting, and the defendant may not improperly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach.

Therefore, the fact that an at-will contract may be terminated by the parties without liability does not necessarily privilege another individual, business, or entity, in other words, a "third person," to unjustifiably induce the termination. We find this reasoning persuasive and conclude that Hoschler's inferred at-will employment status, in and of itself, does not preclude a claim for tortious interference with her employment relationship with the YWCA.

*Unjustified Interference.*

The third element of a cause of action for tortious interference requires that the interference was "unjustified." See *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991). An examination of what is sufficient to constitute an "unjustified" interference is therefore necessary. The Restatement has labeled the type of interference required to state a cause of action for tortious or intentional interference as "improper."

One who *intentionally and improperly* interferes with

> the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

(Emphasis supplied.) The Restatement, *supra*, § 766 at 7. Section 767 of the Restatement sets forth the factors to consider in determining whether an act of interference is improper:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

*Id.* at 26-27. We believe that the factors recited by the Restatement for determining whether an action is "improper" are equally applicable to determining whether an action is "unjustified." See NJI2d Civ. 17.02 comment and authorities.

[7] Hoschler has essentially alleged that Kozlik acted outside the scope of her authority in firing Hoschler in intentional disregard of the procedures, policies, and guidelines in effect in the employee handbook at the time and "with malice to inflict harm." Black's Law Dictionary 956 (6th ed. 1990) defines "malice" as intentionally doing "a wrongful act toward another without justification or excuse." We believe that a proper and reasonable inference to be drawn from Hoschler's use of the words "with malice to inflict harm" is that Kozlik's intentional acts were "unjustified." Thus, we conclude that the allegations are sufficient to satisfy this third element as delineated in *Matheson, supra*. Although malice, as such, is not an element of the tort of tortious interference in Nebraska, it is persuasive evidence on whether the defendant's conduct was proper and justified or improper and not justified. See *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

*Acts of Coemployee.*

The main thrust of Kozlik's argument that the demurrer was properly sustained is that a cause of action is not properly stated against her because as executive director, she is the "alter ego" of the YWCA. We construe her argument to be that either she essentially *is* the YWCA and therefore not a "third person" or that she was "privileged" to interfere because she was acting as an agent of the YWCA and within the scope of her authority. The argument itself suggests that these are matters of defense and dependent on factual development and are not, thus, matters of law to be addressed by demurrer. Indeed, even the cases cited by Kozlik do not hold that, in every instance, a supervisory employee could never be held liable for tortious interference with a coemployee's business relationship with the common employer. See, *Bradley v. Consolidated Edison Co. of New York, Inc.*, 657 F. Supp. 197 (S.D.N.Y. 1987) (individually named defendants not liable for interference with a contractual relationship *where no allegation that any of them acted outside the scope of his or her authority as an agent of the employer*); *Dzierwa v Mich Oil Co*, 152 Mich. App. 281, 287, 393 N.W.2d 610, 613 (1986) (*summary judgment* was proper upon finding that the defendant "was" the company *after facts developed* to show that defendant was a director, president, and controlling shareholder of company with "express authority and responsibility for hiring, evaluating, supervising, and terminating plaintiff on behalf of" the company); *Cummings v. Walsh Const. Co.*, 561 F. Supp. 872, 883 (S.D. Ga. 1983) (noted in dicta that "if an employer's agent does not have absolute authority to fire an employee and does so improperly, that agent can be construed to be a 'third person' tort-feasor liable in an action for tortious interference" and that *whether such absolute authority exists is a question of fact*); *J. E. Brulatour, Inc. v. Wilmer & Vincent Corporation*, 63 N.Y.S.2d 54 (N.Y. Sup. 1946) (officer considered alter ego of corporation and not liable for inducing a breach of contract *where there is no allegation of an independent tort by defendant upon the plaintiff*).

In *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991), the court expressly reserved ruling on whether another

employee or supervisor may under any circumstances tortiously interfere with an employee's at-will employment relationship with the same employer. Many jurisdictions recognize that a cause of action for tortious interference does exist in favor of an employee and against another employee of the business, whether an officer, director, or other, in certain circumstances. Generally, the defendant's conduct is found actionable "where the action of a corporate officer, director, or employee was malicious, and where they were not acting within the scope of their authority," or "where the acts of a corporate officer, director, or agent involve individual and separate torts distinguishable from acts solely on the corporation's behalf or where his acts are performed, at least in part, in his interest and adverse to that of the firm." 45 Am. Jur. 2d *Interference* § 54 at 327 (1969). See, *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (corporate officer or agent may be liable for tortious interference with another employee's at-will employment if he or she acts outside the scope of his or her duties); *Zappa v. Seiver*, 706 P.2d 440 (Colo. App. 1985) (genuine issue of material fact as to whether president's action in terminating vice president's at-will employment contract was motivated by improper personal reasons or by desire to serve corporate interests); *Stanfield v. Nat. Elec. Contractors Ass'n*, 588 S.W.2d 199 (Mo. App. 1979) (cause of action stated where petition alleged that corporate officer acted only from motivations of spite and ill will in inducing plaintiff corporate officer's discharge).

However, an "officer, director, or employee of a corporation is not liable for its breach of contract on the theory that he induced such breach if he acts in his official capacity on behalf of the corporation and not as an individual for his individual advantage." 45 Am. Jur. 2d, *supra*, § 54 at 327. The rationale for this rule was appropriately explained in *Nordling v. Northern States Power*, 478 N.W.2d at 505-06:

> If a corporation's officer or agent acting pursuant to his company duties terminates or causes to be terminated an employee, the actions are those of the corporation; the employee's dispute is with the company employer for breach of contract, not the agent individually for a tort.

> To allow the officer or agent to be sued and to be personally liable would chill corporate personnel from performing their duties and would be contrary to the limited liability accorded incorporation.

See, also, *Hickman v. Winston County Hosp. Bd.*, 508 So. 2d 237 (Ala. 1987) (associate administrator of hospital and supervisory employee not liable for tortious interference with former employee's contract of employment where no evidence that defendants acted outside the scope of their authority); *Murray v. Bridgeport Hosp.*, 40 Conn. Supp. 56, 480 A.2d 610 (1984) (former employee cannot state claim of interference with contract against supervisors where supervisors acted legitimately within scope of their authority and employee did not allege that supervisors profited by inducing alleged breach or that acts were motivated by personal feelings against employee).

[8] It is apparent from the foregoing cases that the intentional interference by a fellow employee, including an officer, director, or other employee, in the employment relationship of another employee with a common employer, when it is malicious and thus unjustified or is outside the scope of authority of the interfering employee, gives rise to a cause of action for tortious interference. Again, Hoschler has alleged both maliciousness on the part of Kozlik and that she acted beyond her authority. We cannot infer from the allegations that Kozlik, as the executive director, was necessarily the alter ego of the YWCA or that her acts were within the scope of her responsibilities for the YWCA, particularly in the face of Hoschler's allegation that she acted *outside* of the authority granted to her by the YWCA. A demurrer goes only to those defects which appear on the *face* of the petition. *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); Neb. Rev. Stat. § 25-806 (Reissue 1989). Its function is necessarily limited to determining whether, on its face, the petition contains sufficient allegations to state a cause of action. We conclude that Hoschler's petition contains sufficient allegations to withstand a general demurrer.

## CONCLUSION

Kozlik did not seek to have Hoschler's petition made more definite and certain, but generally demurred to it. Accepting the allegations as true, as we must for purposes of a demurrer, Hoschler has alleged a cause of action against Kozlik for tortious interference with Hoschler's valid business relationship with the YWCA. The demurrer was erroneously sustained by the district court. Hoschler's action must be reinstated.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# KLH RETIREMENT PLANNING, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLEE, V. JOHN D. CEJKA AND ANN MARIE CEJKA, HUSBAND AND WIFE, APPELLANTS, AND LINCOLN GOODYEAR EMPLOYEES FEDERAL CREDIT UNION ET AL., APPELLEES.

530 N.W.2d 279

Filed April 18, 1995. No. A-93-564.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Taxation: Real Estate: Redemption.** By virtue of Neb. Rev. Stat. §§ 77-1824 and 77-1917 (Reissue 1990), the right of redemption continues until either a treasurer's tax deed is issued or there is a judicial confirmation of sale.
5. **Foreclosure: Tender: Costs.** If a tender is made in an action of foreclosure of the sum due, with interest and costs to the date of tender, it will be sufficient, and

any further proceedings in the case by plaintiff will be at his cost.

6. **Tax Sale: Real Estate: Foreclosure: Redemption.** A landowner may redeem a tax sale certificate after a foreclosure action has been filed.
7. **Judgments: Time: Notice: Appeal and Error.** A notice of appeal must be filed within 30 days of the rendition of judgment or the entry of judgment.
8. **Judgments: Records: Time: Notice: Appeal and Error.** There are two occurrences which may begin the 30-day period in which a notice of appeal must be filed: (1) the rendition of the judgment, which occurs when an oral pronouncement of the judgment is made in open court and a notation of the judgment is made on the trial docket, or (2) the entry of a judgment, which is the act of the clerk of the court in spreading on the court's journal both the proceedings had and the relief granted or denied.
9. **Judgments: Final Orders: Records.** All judgments and orders must be entered on the journal of the court and specify clearly the relief granted or order made in the action.
10. **Final Orders: Records: Time.** Orders which are not announced in open court are not formalized until they have been entered on the journal.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for further proceedings.

Leonard Dunker for appellants.

Peter W. Katt, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellee KLH Retirement Planning, Ltd.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

John D. Cejka and Ann Marie Cejka appeal from a summary judgment and decree foreclosing a real estate tax lien on their real property. The foreclosure action was brought by KLH Retirement Planning, Ltd. (KLH), as the holder of a tax sale certificate to the property. See Neb. Rev. Stat. § 77-1902 (Reissue 1990). Appellants claim, among other things, that the district court erred in finding that they were prohibited by law from redeeming the tax certificate after KLH had filed the foreclosure action. Because a landowner may redeem a tax sale certificate at any time prior to confirmation of judicial sale, even while a foreclosure action is pending, we must reverse, and remand for further proceedings.

## SUMMARY OF FACTS

Appellants are the owners of real estate described as Lot 28

of Irregular Tracts in the northeast quarter of Section 17, Township 10 North, Range 7 East of the 6th P.M., Lincoln, Lancaster County, Nebraska. From 1988 through October 15, 1992, appellants failed to pay the real estate taxes levied on the property. On September 28, 1989, Lancaster County issued and purchased a tax sale certificate for the property, see Neb. Rev. Stat. § 77-1809 (Reissue 1990). The tax sale certificate was assigned to KLH for $7,603 on September 25, 1992.

On October 13, KLH filed a petition in the district court for Lancaster County to foreclose the lien on the property. See § 77-1902. On October 15, appellants tendered payment of the taxes and interest due on the property to the Lancaster County treasurer, who issued them a certificate of redemption in the amount of $7,664. Thereafter, the county treasurer tendered the redemption proceeds to KLH, who in turn rejected the tender.

Appellants filed an answer in the foreclosure action, claiming that they had redeemed the tax sale certificate by tendering payment of the taxes due. In a reply, KLH maintained that appellants' redemption was invalid because redemption is not allowed by law while a foreclosure action is pending.

On March 23, 1993, KLH filed a motion for summary judgment. A hearing regarding the motion was held on March 31, after which the court took the matter under submission. The court granted the motion, and a decree was signed by the court on May 28 and filed on June 4. In the decree, the court found as a matter of law that appellants could not redeem the tax sale certificate on October 15, 1992. The court found that the amount owed on the certificate with interest, costs, and statutory attorney fees was $9,030. The court also ordered that appellants' land be sold as upon execution unless the above amount was satisfied within 20 days of the decree. Appellants thereafter appealed to this court.

## ASSIGNMENTS OF ERROR

Although appellants have assigned six errors on this appeal, our resolution of one of the assigned errors disposes of this appeal, and we thus need not address the remaining assigned errors. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994). In the assigned error which we shall address, appellants claim

that the trial court erred in failing to acknowledge a property owner's right to redeem a tax sale certificate at any time prior to a decree of confirmation after sale.

## STANDARD OF REVIEW

[1] 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. *LaBenz Trucking v. Snyder*, 246 Neb. 468, 519 N.W.2d 259 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994); *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994).

[2] 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. *LaBenz Trucking, supra*; *Hillie, supra*; *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994).

[3] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994); *Transamerica Commercial Fin. Corp. v. Rochford*, 244 Neb. 802, 509 N.W.2d 214 (1993).

## DISCUSSION

*Time for Redemption.*

The central issue that we address in this decision is whether a delinquent taxpayer may redeem a tax sale certificate after the holder of the certificate has filed a foreclosure action under § 77-1902.

Chapter 77 of the Nebraska Revised Statutes provides two separate and distinct methods for the handling of delinquent real estate taxes. The first method is set forth in chapter 77, article 18, and the second is set forth in chapter 77, article 19. See, Neb. Rev. Stat. §§ 77-1801 to 77-1863 and 77-1901 to

77-1941 (Reissue 1990); *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). The method set forth in article 18 involves no judicial proceedings or judicial sale and allows an owner to redeem his property that has been sold for taxes at any time before the county treasurer delivers a "tax deed." See § 77-1824. In this case, KLH did not pursue the method set forth in article 18.

The method set forth in article 19 involves judicial proceedings and was used by KLH in this case. See §§ 77-1901 to 77-1941. Section 77-1902 provides that the holder of a tax sale certificate may, within 6 months after the expiration of 3 years from the date of the administrative sale, surrender the certificate in the district court and foreclose the lien for the delinquent taxes. Section 77-1909 provides that costs are to be assessed against the real estate and a 10-percent attorney fee awarded to the plaintiff and taxed as part of the costs of the foreclosure action. With regard to redemption, § 77-1917 provides:

> Any person, entitled to redeem any lot or parcel of land, may do so at any time after the decree of foreclosure and before the final confirmation of the sale by paying to the clerk of the district court the amount found due against the same, with interest and costs to the date of redemption. . . ."

KLH claims that once a petition for foreclosure has been filed, the redemption provisions in § 77-1824 no longer apply, and that § 77-1917 governs the time for redemption. Since § 77-1917 only mentions redemption after foreclosure and before confirmation, KLH argues, redemption is not allowed while the foreclosure action is pending. However, a review of appellate decisions regarding redemption leads us to conclude that redemption is permitted while a foreclosure action is pending.

[4] In *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987), the court stated that by virtue of §§ 77-1824 and 77-1917, the right of redemption *continues* until either a treasurer's tax deed is issued or there is a judicial confirmation of sale. The court in *Maser* did not recognize any period of time after the administrative sale and before confirmation when

redemption was not permitted.

[5] The Nebraska Supreme Court has also recognized, in *Merrill v. Jones*, 39 Neb. 763, 58 N.W. 449 (1894), that redemption is permissible while a foreclosure action is pending. In *Merrill*, a defendant in a tax foreclosure action had tendered the plaintiff the amount of the tax sale certificate, plus interest and costs of the foreclosure action, after the foreclosure action had been filed. The plaintiff refused the tender. The action was tried, and judgment was rendered for the plaintiff for the amount of the tax sale certificate, plus interest and costs. The plaintiff appealed, claiming that he should have been awarded an attorney fee. The Nebraska Supreme Court rejected plaintiff's claim, stating, "It cannot be disputed that if a tender is made *in an action of foreclosure* . . . of the sum due, with interest and costs to [the] date of tender, it will be sufficient, and any further proceedings in the case by plaintiff will be at his cost . . . ." (Emphasis supplied.) *Id.* at 768, 58 N.W. at 451.

[6] While the issue of whether redemption is permitted during a foreclosure action was not directly addressed in these cases, they nonetheless indicate that a landowner may redeem a tax sale certificate after a foreclosure action has been filed. Indeed, to hold that a landowner can exercise his right of redemption before and after a foreclosure action, but not during a foreclosure action, would not only amount to a waste of judicial resources, but would lack common sense.

We have examined the real estate mortgage cases cited by KLH for the proposition that redemption is not permitted during a foreclosure action. The court in each of those cases stated that a mortgagor in default for failure to pay taxes on the property could not deprive the mortgagee of his rights under the agreement by paying the taxes after the commencement of the foreclosure action. These cases are not authority for tax foreclosure cases such as the one before us, for the failure to pay taxes in those cases constituted a breach of an agreement between the parties and in no way involved the statutory right of redemption. See, *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986); *Hockett v. Burns*, 90 Neb. 1, 132 N.W. 718 (1911); *Plummer v. Park*, 62 Neb. 665, 87 N.W. 534 (1901).

*Jurisdiction.*

In its brief, KLH raises the jurisdictional issue of whether appellants timely filed a notice of appeal. KLH claims that the district court entered judgment on May 6, 1993, and that appellants' notice of appeal, filed on June 24, was filed outside of the 30-day appeal period set forth in Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994).

The record on appeal contains a document dated May 6, which the clerk of the district court lists as a "Judges Entry." The "Judges Entry" states in its entirety:

> #1 Mot of Plff for Default or Summary Judgement.
> Motion for Summary Judgement granted.
> Atty Katt to submit decree. Letter to attys.
> Endacott

KLH claims that because appellants' notice of appeal was filed later than 30 days after this alleged judgment, their appeal was not timely filed.

[7] The Nebraska Supreme Court has recently held that a notice of appeal must be filed within 30 days of the *rendition of judgment* or the *entry of judgment*. See, *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Thus, whether appellants' notice of appeal was timely filed in this case depends on whether the "Judges Entry" dated May 6 constituted a rendition of judgment or an entry of judgment.

[8] In *Tri-County Landfill, supra*, the court stated:

> [T]here are two occurrences which may begin the 30-day period in which a notice of appeal must be filed: (1) the rendition of the judgment, which occurs when an oral pronouncement of the judgment is made in open court and a notation of the judgment is made on the trial docket, or (2) the entry of a judgment, which is the act of the clerk of the court in spreading on the court's journal both the proceedings had and the relief granted or denied.

247 Neb. at 354, 526 N.W.2d at 671. Accord *In re Interest of J.A., supra.*

In the present case, the district court took the motion for summary judgment under submission, and there was no oral pronouncement of the judgment in open court. Therefore, the

May 6 "Judges Entry" is not a *rendition of judgment*.

[9,10] We thus must determine whether the May 6 "Judges Entry" constituted an *entry of judgment*. In *In re Interest of J.A.*, 244 Neb. at 921-22, 510 N.W.2d at 71, the court stated:

> "All judgments and orders must be entered on the journal of the court, and *specify clearly the relief granted or order made in the action*." Neb. Rev. Stat. § 25-1318 (Reissue 1989). Orders which are not announced in open court are not formalized until they have been entered on the journal. Cf. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992).

(Emphasis supplied.)

In the present case, the May 6 "Judges Entry" does not specify the amount of the judgment, nor does it specify whether KLH had been awarded attorney fees, much less the amount of such attorney fees. Therefore, the May 6 entry does not specify clearly the relief granted or order made in this action, and it does not constitute an entry of judgment as that term is used in *In re Interest of J.A., supra*, and *Tri-County Landfill, supra*. We thus reject KLH's jurisdictional claim.

## CONCLUSION

Appellants correctly assert that they tendered redemption in this case. We therefore reverse, and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# FRANK KOTERZINA, APPELLEE AND CROSS-APPELLANT, V. COPPLE CHEVROLET, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT AND CROSS-APPELLEE.

531 N.W.2d 1

Filed April 18, 1995. No. A-94-117.

1. **Garnishment.** A garnishment is a legal remedy.
2. **Judgments: Appeal and Error.** The factual findings of the trial court in a law action tried without a jury have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
3. **Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Garnishment.** A garnishment is a limited proceeding which is confined to the provisions of the garnishment statutes.
5. _____. A garnishment is a special proceeding, rather than a substantive action in and of itself.
6. **Actions: Garnishment.** A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action is made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or, as it is sometimes referred to in such a situation, a part of the main case.
7. **Judgments: Res Judicata: Garnishment: Liability.** The underlying judgment sought to be enforced pursuant to a garnishment proceeding is generally considered res judicata between the parties regarding the issue of liability.
8. **Garnishment: Legislature.** Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.
9. **Workers' Compensation: Attorney Fees: Interest.** When a court awards attorney fees against an employer pursuant to Neb. Rev. Stat. § 48-125(1) (Reissue 1993), the employer shall be liable for interest pursuant to § 48-125(2).
10. **Statutes.** Statutes are ordinarily construed in a manner such that the specific controls the general.
11. **Workers' Compensation.** The term "compensation," as used in Neb. Rev. Stat. § 48-125 (Reissue 1993), refers only to disability or indemnity benefits payable on account of the employee's work-related injury or death.

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

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Michael G. Goodman, of Cannon, Goodman, O'Brien & Grant, P.C., for appellee Koterzina.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee Copple Chevrolet, Inc.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired.

MILLER-LERMAN, Judge.

State of Nebraska, Second Injury Fund (the Fund), third-party defendant, appeals from an order of the district court for Douglas County holding the Fund liable for interest under Neb. Rev. Stat. § 48-125(2) (Reissue 1993). The order of the district court also held defendant-appellee Copple Chevrolet, Inc. (Copple), liable for interest under Neb. Rev. Stat. § 45-103 (Reissue 1993). Copple filed a cross-appeal, claiming that the award of interest against it was improper. At oral argument, Copple abandoned its cross-appeal without conceding the merits of its cross-appeal. Plaintiff-appellee Frank Koterzina also filed a cross-appeal, claiming that the awards of interest were proper. For the reasons recited below, we reverse both of the district court's awards of interest.

## BACKGROUND

This is the second appearance of this case in this court. The underlying facts are outlined in our prior opinion, *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993) (*Koterzina I*). We will briefly review those facts necessary to consideration of the instant appeal.

Koterzina originally brought an action in the Nebraska Workers' Compensation Court to recover disability benefits against his employer, Copple. The Fund was a third-party defendant in the case at the compensation court level. On rehearing, the compensation court entered an award dated September 3, 1992, in favor of Koterzina, ordering Copple to pay all medical and hospital services, $140 per week for home health care provided by Koterzina's wife, $18,376 for construction costs to Koterzina's new home to make it handicapped-accessible, the entire amount of Koterzina's temporary total disability benefits, and 70 percent of the weekly

permanent total disability payments. The compensation court ordered the Fund to pay 30 percent of the weekly permanent total disability payments.

Copple appealed the compensation court's award to this court. On July 6, 1993, this court decided *Koterzina I*, which modified the award to the extent that the Fund should provide 100 percent of the temporary total and permanent total disability benefits. Koterzina was awarded attorney fees in the amount of $1,500 in the *Koterzina I* appeal.

After our decision in *Koterzina I*, on November 24, 1993, Koterzina commenced a garnishment proceeding in the Douglas County District Court to enforce the *Koterzina I* judgment. This appeal stems from the garnishment proceeding. The record reflects that Koterzina instituted the garnishment proceeding against Copple's surety, United States Fidelity and Guaranty Company (USF&G), in the amount of $5,410.31. It appears that the amount of $5,410.31 represented prejudgment and postjudgment interest that Koterzina believed was due and owing him from Copple.

On December 10, 1993, Copple filed a request for hearing regarding the garnishment proceeding. In its motion, Copple asserted that all amounts due and owing Koterzina from Copple pursuant to the Workers' Compensation Court's September 3, 1992, award, as modified by *Koterzina I*, had been paid in full. Copple further contended that any amounts due and owing pursuant to the prior award and *Koterzina I* were the responsibility of the Fund, rather than Copple. Copple stated in its motion that the claimed amount of $5,410.31 represented prejudgment and postjudgment interest and that either (1) no interest was due and owing on such awards or (2) any such interest due and owing was owed to Koterzina by the Fund.

On December 29, 1993, the district court determined that the garnishee, USF&G, was liable for interest pursuant to § 45-103 in the amount of $2,847.34 and that the Fund was liable for interest pursuant to § 48-125(2). The Fund appealed the order of interest against it. Copple cross-appealed the order of interest against it. Koterzina cross-appealed.

## SCOPE OF REVIEW

[1,2] A garnishment is a legal remedy. *Otoe Cty. Nat. Bank v. Froelich*, 234 Neb. 1, 448 N.W.2d 917 (1989). The factual findings of the trial court in a law action tried without a jury have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Id.*

[3] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994); *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994); *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

## ASSIGNMENTS OF ERROR

### APPEAL AND CROSS-APPEALS

The Fund appeals and Copple cross-appealed the district court's determinations regarding their liability for prejudgment and postjudgment interest. Koterzina cross-appeals, claiming that the interest awards are proper. The Fund argues in its brief that because attorney fees were awarded against Copple in *Koterzina I*, Copple, rather than the Fund, should be liable for all prejudgment and postjudgment interest under § 48-125(2). Section 48-125(2) provides: "When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable . . . ." As the basis for its cross-appeal, Copple argued that interest under § 48-125(2) is payable only on awards of "compensation" and that nothing in the award against Copple pursuant to *Koterzina I* constituted "compensation" as that term is used in § 48-125(2). Copple argued, in essence, that § 48-125(2) should not be construed in a manner to obligate Copple to pay interest when Copple is not liable for any of the judgment principal. In connection with the award of interest against it under § 45-103, Copple generally argued that interest liability in a workers' compensation case should arise only under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993) (the Act), rather than under

§ 45-103, a general judgment interest statute. Koterzina argues that the awards of interest were proper.

## ANALYSIS

[4-6] This is an appeal from a determination of the district court in a garnishment proceeding. A garnishment is a limited proceeding which is confined to the provisions of the garnishment statutes. *NC + Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988). The garnishment statutes provide a means for a party to enforce an existing judgment. Accordingly, this appeal of the district court's order in the garnishment proceeding is to be distinguished from the workers' compensation action which is the main case. A garnishment is a special proceeding, rather than a substantive action in and of itself. The Nebraska Supreme Court has stated:

> "A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are [sic] made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the 'main case.'. . ."

*In re Interest of R.G.*, 238 Neb. 405, 412, 470 N.W.2d 780, 787 (1991), quoting *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953) (Boslaugh, J., concurring).

[7] The underlying judgment sought to be enforced pursuant to a garnishment proceeding is generally considered res judicata between the parties regarding the issue of liability. See *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991). Although the garnishment statutes provide for a "trial" regarding the issue of liability, the applicable statutes limit the scope of the determination to that of the garnishee's liability. See Neb. Rev. Stat. §§ 25-1030.01 and 25-1030.02 (Reissue 1989). If the court finds that the garnishee is liable to the plaintiff, the statutes limit the plaintiff to a judgment against the garnishee

> (1) for the amount of money due from the garnishee to the defendant in the original action, or (2) for the delivery to the sheriff or to the clerk of the court of any property in

> the garnishee's hands belonging to the defendant in the original action within a time to be fixed by the court, or for the value of the same as fixed in the judgment if not delivered within the time fixed.

§ 25-1030.02.

In this case, the parties to the proceedings in the compensation court and *Koterzina I* were Koterzina, Copple, and the Fund. Pursuant to the foregoing statutory analysis, the liability of Copple or the Fund, as determined in the compensation court and affirmed as modified in *Koterzina I*, was res judicata for purposes of the garnishment proceeding. Accordingly, we conclude that the district court's consideration and determination of liability of the Fund and Copple for prejudgment interest during the garnishment proceeding exceeded the provisions of the garnishment statutes.

[8] It has been held that " '[b]ecause garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.' " *NC + Hybrids*, 228 Neb. at 308, 422 N.W.2d at 544. Ordinarily, the district court does not have the authority to expand the garnishee's liability in connection with interest. See § 25-1030.02. We are aware that interest which was previously awarded may be enforced in a garnishment proceeding, such as by operation of law or by agreement of the parties. See, e.g., *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978) (interest awarded in original judgment pursuant to child support statute); *Niemeyer v. Estate of Tichota*, 191 Neb. 484, 215 N.W.2d 885 (1974) (interest awarded in original action pursuant to contract between the parties); *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973) (judgment interest awarded in original action). We distinguish the foregoing cases from the case at bar because these cases merely enforce judgment interest, as opposed to creating interest liability at the garnishment level.

[9] In *Koterzina I*, this court awarded attorney fees to Koterzina pursuant to § 48-125. The parties do not dispute that Copple is the party liable to Koterzina for this award. In *Koterzina I*, we awarded neither attorney fees nor prejudgment

interest against the Fund. Although this case comes to us as an appeal from a garnishment proceeding, we note that nothing in the workers' compensation penalty statute, § 48-125, requires assessment of interest against the Fund in the absence of an assessment of attorney fees. Compare *Sherard v. State*, 244 Neb. 743, 747, 509 N.W.2d 194, 198 (1993) (*Sherard II*) (holding that "when a court awards attorney fees against an employer pursuant to § 48-125(1), the employer shall be liable for interest pursuant to § 48-125(2)"). Indeed, to the extent that the issue of interest without an award of attorney fees has been discussed, the Supreme Court has indicated that the award of attorney fees under § 48-125(1) is a "prerequisite" to an award of interest under § 48-125(2). *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 554, 451 N.W.2d 910, 921 (1990). *Koterzina I* did not award attorney fees against the Fund, nor did it award interest against the Fund. Accordingly, the district court's order directing the Fund to pay interest pursuant to § 48-125(2) was improper.

Copple cross-appealed, claiming that the interest the district court assessed against it was improper. Copple abandoned its cross-appeal at oral argument. In its order in the garnishment proceeding, the district court found that Copple's surety, USF&G, was liable for interest in the amount of $2,847.34 under § 45-103.

As noted above, the garnishment statutes are limited in scope, are strictly construed, and do not enable a trial judge to expand the original judgment. The foregoing analysis is equally applicable to the district court's order involving the award of interest against Copple.

[10] The district court assessed interest against Copple under § 45-103, which is a general judgment interest statute. The underlying case, in *Koterzina I*, was a proceeding under the Act, and attorney fees were assessed against Copple under § 48-125. Accordingly, the district court's order of interest against Copple implicates two potentially applicable statutes relating to judgment interest. It is well settled under Nebraska law that statutes are ordinarily construed in a manner such that the specific controls the general. See, e.g., *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). To be statutorily

mandated in this case, an interest award would have to be required by the specific provisions of the Act, rather than under § 45-103. Thus, the district court's award of interest under § 45-103 was improper, and we proceed to consider whether there is a basis for an award of interest against Copple under the Act.

Section 48-125 of the Act provides for waiting-time penalties, attorney fees, and interest in certain situations. In *Koterzina I*, Copple's liability for medical expenses and construction costs was affirmed by this court and attorney fees were assessed under the Act. Section 48-125(2) provides: "When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . ."

In *Sherard II, supra*, the Supreme Court held that "when a court awards attorney fees against an employer pursuant to § 48-125(1), the employer shall be liable for interest pursuant to § 48-125(2)." 244 Neb. at 747, 509 N.W.2d at 198. However, *Sherard II* is distinguishable from the case at bar on its facts. *Sherard II* involved two appeals to the Nebraska Supreme Court. In *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991) (*Sherard I*), the Supreme Court affirmed a workers' compensation award against the Fund, and the award consisted solely of disability benefits. In *Sherard I*, the Fund was the appellant, and the Supreme Court assessed attorney fees against the Fund under § 48-125(1). *Sherard I* was silent as to interest. The employee's appeal in *Sherard II* was from a district court proceeding and involved the issue of whether interest applied to the award of disability benefits against the Fund as affirmed in *Sherard I*. In *Sherard II*, the Supreme Court held the Fund liable for interest under § 48-125(2), stating that where attorney fees are awarded based on § 48-125(1) in connection with an award of "weekly compensation benefits," interest "shall" be awarded under § 48-125(2).

The distinguishing and determinative factor between *Sherard II* and the case at bar involves the underlying basis of the award for which the party is ordered to pay attorney fees. The nature of the award is determinative because § 48-125(2)

provides that "[i]nterest shall apply only to those weekly *compensation* benefits awarded which have accrued at the time payment is made by the employer." (Emphasis supplied.) In *Sherard II*, the Supreme Court ordered the Fund to pay interest on disability benefits awarded in the Workers' Compensation Court. In this case, Copple, the party liable for attorney fees under *Koterzina I*, was not liable for disability benefits, but was instead liable for medical and hospital services and construction costs incurred to make Koterzina's home handicapped-accessible.

[11] In *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990), the Supreme Court construed the term "compensation," as used in § 48-125, to refer only to disability or indemnity benefits payable on account of the employee's work-related injury or death. Pursuant to the definition of "compensation" set forth in *Bituminous Casualty Corp.*, the medical expenses and construction costs for which Copple was liable would not constitute "compensation" for purposes of § 48-125. Therefore, because interest under § 48-125(2) is required where the underlying liability is for "compensation" and in the instant case Copple is not liable for "compensation," an interest award against Copple is not required by operation of law under § 48-125(2).

Based on the foregoing, we find that the district court's awards of interest against both the Fund and Copple were improper. We reverse with respect to the Fund's appeal. We make no ruling on Copple's cross-appeal, which was abandoned. Koterzina's cross-appeal, claiming the awards of interest were proper, is therefore without merit, and Koterzina's motion for attorney fees is denied.

REVERSED.

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

530 N.W.2d 291

Filed April 18, 1995. No. A-94-771.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile proceedings de novo on the record and is required to reach a conclusion independent of the juvenile court's findings.
2. _____: _____. Where the evidence conflicts, an appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another.
3. **Judgments: Final Orders: Records: Appeal and Error.** A transcript on appeal which does not contain a final order or judgment presents nothing for review.
4. _____: _____: _____: _____. To obtain a review by an appellate court, the transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified.
5. **Juvenile Courts: Judgments: Probation and Parole: Records.** The written statement requirement contained in Neb. Rev. Stat. § 43-286(4)(f) (Cum. Supp. 1994) is satisfied if the judge's oral statements appearing in the bill of exceptions from the revocation hearing, as well as in the revocation order, when taken together, reveal the evidence relied upon and reasons for the revocation.

Appeal from the County Court for Seward County: ALAN G. GLESS and FRANK J. SKORUPA, Judges. Affirmed in part, and in part dismissed.

David L. Kimble for appellant.

C. Jo Petersen, Seward County Attorney, for appellee.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

Thomas W., a juvenile, appeals the revocation of his probation. The revocation proceedings were conducted by the county court for Seward County sitting as a juvenile court. Appellant alleges that the court failed to enter a written statement of the evidence relied on and the reasons for the revocation, as required by Neb. Rev. Stat. § 43-286(4)(f) (Cum. Supp. 1994). This appeal involves two juvenile cases, apparently consolidated at the trial court level. We find that the order in case No. JV92-56 complies with § 43-286(4)(f), and we therefore affirm the order with regard to that case. However, because there is no revocation order in the record with regard to

case No. JV93-51, we dismiss this appeal with regard to case No. JV93-51.

## SUMMARY OF FACTS

The record in this case contains pleadings and orders with regard to three cases involving appellant, case Nos. JV92-56, JV93-37, and JV93-51. Appellant has appealed only from case Nos. JV92-56 and JV93-51, and we will therefore address only these cases. On July 17, 1992, a petition was filed in case No. JV92-56 alleging that appellant had committed the crimes of theft by unlawful taking, burglary, and criminal mischief. At an adjudication hearing, appellant admitted to theft by unlawful taking, and the charges of burglary and criminal mischief were dismissed. At a disposition hearing, the court placed appellant on 12 months' probation, ordered him to complete 75 hours of community service, and ordered him to pay restitution and court costs.

On May 12, 1993, a petition in case No. JV93-51 was filed alleging that appellant had committed the crimes of minor in possession of alcohol and possession of drug paraphernalia. At an adjudication hearing on June 1, appellant admitted the charges of minor in possession of alcohol and possession of drug paraphernalia. Also on June 1, the court heard a motion to revoke appellant's probation in case No. JV92-56. At the hearing, appellant admitted to violating probation.

A disposition hearing was held on July 8, 1993, with regard to case No. JV92-56. At the end of that hearing, the court placed appellant on 24 months' juvenile intensive supervision probation. Terms of the intensive supervision probation included attending school without any expulsions or truancy; refraining from the violation of local, state, or federal laws; and refraining from associating with any current or former friends from Pleasant Dale, Nebraska. On April 22, 1994, the court approved a stipulation between appellant and the State which provided that the disposition of case No. JV93-51 would be the same as the disposition entered on July 8, 1993, in case No. JV92-56, i.e., intensive supervision probation.

On April 21, 1994, the State filed a motion to revoke probation in both cases. In the motion, the State alleged that

appellant violated the terms of his probation by (1) associating with a former friend from Pleasant Dale, (2) failing to attend school with a good record and without expulsions, and (3) using and/or possessing marijuana. At an initial hearing, appellant denied the allegations in the motion to revoke. However, at a hearing on July 14, appellant withdrew his denial and admitted the allegations in the motion to revoke. Thereafter, the trial court read each allegation in the motion and asked appellant whether he admitted or denied each allegation. In response, appellant admitted each allegation in the motion.

As a factual basis for appellant's admissions, the State offered into evidence several exhibits. One of the exhibits was a "Conference Summary" from the Lincoln Public Schools, in which it is reported that appellant was to be expelled for being tardy, being truant, and smoking on campus. A second exhibit was a June 17, 1994, laboratory report from the Nebraska State Patrol Criminalistics Laboratory which states that appellant tested positive for marijuana usage. The State's attorney also stated that appellant's probation officer had received reports that appellant had associated with one of his previous friends from Pleasant Dale.

The only revocation order in the record is dated July 14, 1994, and bears case No. JV92-56, but not case No. JV93-51. In its order, the court noted that appellant had withdrawn his prior denials and admitted the allegations of the motion to revoke. The court also stated that it considered appellant's admissions and the factual basis for the motion in finding that appellant had violated probation. The court then ordered appellant's probation revoked.

## ASSIGNMENT OF ERROR

Appellant claims that the trial court erred in failing to issue a written statement of the evidence it relied on and the reasons for revocation of his probation, in violation of § 43-286(4)(f).

## STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile proceedings de novo on the record and is required to reach a conclusion independent of the juvenile court's findings. However, where the evidence conflicts, an appellate court considers and may

give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

With regard to questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994). *State v. Yelli*, 3 Neb. App. 148, 524 N.W.2d 353 (1994).

## DISCUSSION

*Case No. JV93-51.*

Appellant filed a single notice of appeal with this court listing case Nos. JV92-56 and JV93-51. In his notice of appeal, he states that he "intends to appeal the Order of the Court committing the Juvenile to the Youth Development Center at Kearney dated July 14, 1994." There is an order in the record dated July 14, 1994, for case No. JV92-56, but not for case No. JV93-51. Further, in his praecipe for transcript, appellant did not request an order dated July 14, 1994, with regard to case No. JV93-51. The only order requested for case No. JV93-51 was one dated April 22, 1994. With regard to the April 22 order, the notice of appeal was filed well beyond the time period allowed for filing appeals. See Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 1994). Thus, from the record before us, we cannot tell if there ever was an order entered in case No. JV93-51 on July 14, 1994, much less what the order contained.

[3,4] A transcript on appeal to this court which does not contain a final order or judgment presents nothing for review. See *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987). To obtain a review by this court, the transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified. *Id.* Since there is no order in the record dated July 14, 1994, and bearing the case No. JV93-51, we dismiss this appeal with regard to such case.

*Case No. JV92-56.*

There is an order dated July 14, 1994, in the transcript for case No. JV92-56. We will therefore address appellant's assigned error on the merits with regard to this case only.

Appellant claims that the juvenile court erred by not

complying with the requirements of § 43-286(4)(f), which provides, "In cases when the court revokes probation, it shall enter a written statement as to the evidence relied on and the reasons for revocation." In order to resolve this issue, we must first determine what constitutes a "written statement" within the meaning of § 43-286(4)(f). This issue is one of first impression in this state.

According to the legislative history of § 43-286, subsection (4) was enacted "to provide a due process procedure of revoking probation to conform to the recent decisions of the U.S. Supreme Court of Morrissey v. Brewer and Gagnon v. Scarpelli." Statement of Purpose, L.B. 541, Committee on the Judiciary, 84th Leg., 1st Sess. (Feb. 4, 1975).

In *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), the Court held that in the context of parole revocation proceedings, due process minimally requires, among other things, "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Shortly thereafter, in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), the Court extended the due process requirements enumerated in *Morrissey* to adult probation revocation proceedings.

The Nebraska Supreme Court has addressed the *Morrissey* and *Gagnon* written statement requirement in two adult probation revocation cases, *State v. Jaworski*, 194 Neb. 645, 234 N.W.2d 221 (1975), and *State v. McFarland*, 195 Neb. 394, 238 N.W.2d 237 (1976). In *Jaworski*, the court noted that the *Morrissey* and *Gagnon* decisions arose in the context of administrative hearings and that the written statement requirement enumerated in those cases does not apply to judicial adult probation revocation proceedings. The court concluded:

> Neither the Nebraska Probation Administration Act nor Morrissey or Gagnon require the District Court to specify which exhibits or which witnesses were relied upon for its written findings. In its written findings and judgment in the record the court need only refer to the evidence in the record.

*Jaworski*, 194 Neb. at 648, 234 N.W.2d at 223. Accord

*McFarland, supra.*

We note that both *Jaworski* and *McFarland* dealt with adult probation revocation proceedings, and unlike the case presently before this court, there was no statutory requirement of a written statement of evidence relied on and reasons for revocation. Because the written statement requirement of § 43-286(4)(f) was intended to comply with the due process requirements of *Morrissey* and *Gagnon*, we will look to those cases and their progeny for authority on what constitutes a "written statement" within the meaning of § 43-286(4)(f).

Neither *Morrissey* nor *Gagnon* specified what would satisfy the written statement requirement. However, in a subsequent decision, *Black v. Romano*, 471 U.S. 606, 616, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985), the Court held that a defendant's due process rights were not violated where "[t]he memorandum prepared by the sentencing court *and the transcript of the hearing* provided the necessary written statement explaining the evidence relied upon and the reason for the decision to revoke probation." (Emphasis supplied.) The Court reasoned that the written statement requirement helped to ensure accurate factfinding and provided an adequate basis for review to determine if the revocation decision rested on permissible grounds supported by the evidence.

Other appellate courts have uniformly held that the written statement requirements of *Morrissey* and *Gagnon* are satisfied where oral pronouncements made by the judge at the revocation hearing appear in the trial record on appeal. See, e.g., *U.S. v. Copeland*, 20 F.3d 412 (11th Cir. 1994); *U.S. v. Gilbert*, 990 F.2d 916 (6th Cir. 1993); *U.S. v. Barnhart*, 980 F.2d 219 (3d Cir. 1992); *U.S. v. Copley*, 978 F.2d 829 (4th Cir. 1992); *U.S. v. Barth*, 899 F.2d 199 (2d Cir. 1990), *cert. denied* 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991); *U.S. v. Yancey*, 827 F.2d 83 (7th Cir. 1987), *cert. denied* 485 U.S. 967, 108 S. Ct. 1239, 99 L. Ed. 2d 437 (1988); *Clark v. State*, 580 N.E.2d 708 (Ind. App. 1991); *Southern v. State*, 589 So. 2d 811 (Ala. Crim. App. 1991); *State v. Hodges*, 798 P.2d 270 (Utah App. 1990); *People v. Moss*, 213 Cal. App. 3d 532, 261 Cal. Rptr. 651 (1989); *Powell v. State*, 745 P.2d 747 (Okla. Crim. App. 1987); *Soden v. State*, 71 Md. App. 1, 523 A.2d 1015 (1987); *Pannell v.*

*State*, 707 S.W.2d 692 (Tex. App. 1986); *Saunders v. United States*, 508 A.2d 92 (D.C. 1986); *Rutledge v. State*, 263 Ark. 300, 564 S.W.2d 511 (1978). But cf. *United States v. Smith*, 767 F.2d 521 (8th Cir. 1985).

The U.S. Supreme Court has also held that a court must issue a written statement of reasons for its decision in any action that is "critically important" in determining important rights of a juvenile. *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). A probation revocation hearing is critically important in determining a juvenile's right to liberty. See *In re Jane Doe*, 62 Haw. 70, 610 P.2d 509 (1980). Consistent with the *adult probation* cases cited above, at least one appellate court has looked to the trial court's recorded oral pronouncements in determining whether it satisfied the requirement of a written statement of reasons for revoking a *juvenile's probation*. See *id.*

In summary, the Nebraska Legislature enacted § 43-286(4) in order to afford juveniles due process in the context of probation revocation hearings. The legislative history of § 43-286(4) reveals that the Legislature intended to afford juveniles the same procedures as were outlined in *Morrissey* and *Gagnon*, including a written statement of evidence relied upon and reasons for revocation of parole. Cases subsequent to *Morrissey* and *Gagnon* have held that the written statement requirement is satisfied if the trial judge orally gives a statement of evidence relied upon and reasons for revocation, and if those oral statements are transcribed and included in the record on appeal.

[5] Consistent with the above authority, we find that the written statement requirement contained in § 43-286(4)(f) is satisfied if the judge's oral statements appearing in the bill of exceptions from the revocation hearing, as well as in the revocation order, when taken together, reveal the evidence relied upon and reasons for the revocation. We believe that our holding today adequately preserves the juvenile's due process rights by ensuring accurate factfinding and establishing a record for appellate review. Further, our holding today allows a juvenile judge to refer to his or her oral statements made on the record rather than to regurgitate such statements word for word in a separate written statement or order. In this sense, our

holding is also consistent with the Nebraska Supreme Court's decision in *State v. Jaworski*, 194 Neb. 645, 234 N.W.2d 221 (1975).

In the present case, the juvenile court recited the evidence that it relied on in its order of revocation. The court stated that it relied on a personal colloquy with the juvenile, the factual basis for the motion to revoke, and the juvenile's admission of the allegations in the motion. All of this evidence appears in the record. With regard to the reasons for revocation, the court orally stated the following at the revocation hearing:

> Because of the — the nature of the charges, because of the nature of the allegations, because of the nature of the original charges particularly in case number JV92-56, because of the nature of the — as [the State] correctly points out, complete disregard for any of the conditions or terms of probation, the Court does find that it is in the best interests of the juvenile that he not be continued on probation. That he — That his probation be revoked, particularly because of the nature of the charges, the Court finds that it is in the best interests of the juvenile and society in general that he be committed to the Department of Correctional Services for placement at Kearney.

We find that this statement, which was recorded by a court reporter and appears in the bill of exceptions of this case, satisfies the requirement of a written statement of reasons for revoking appellant's probation.

## CONCLUSION

Because there is no revocation order in the record with regard to case No. JV93-51, we dismiss the appeal with regard to that case. With regard to case No. JV92-56, we find that the juvenile court complied with § 43-286(4)(f), and we therefore affirm the order of revocation with regard to that case.

AFFIRMED IN PART, AND IN PART DISMISSED.

# CARL STANSBURY, APPELLANT, V. HEP, INC., APPELLEE.

530 N.W.2d 284

Filed April 18, 1995. No. A-94-813.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon 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. _____: _____. 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 single judge who conducted the original hearing.
3. _____: _____. The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge.
4. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right would not entitle one to recover. A procedural right, on the other hand, is considered to simply be the method by which an already existing right is exercised.

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

Gordon Peterson, of Orton, Brown, Thomas & Peterson, for appellant.

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

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired.

HOWARD, District Judge, Retired.

Carl Stansbury appeals from the Workers' Compensation Court review panel's decision upholding the order of the trial court which awarded 12 weeks of vocational rehabilitation; awarded no additional temporary total disability benefits beyond those already paid by HEP, Inc.; and found that Stansbury had suffered a 10-percent loss of earning capacity.

Stansbury and HEP, Inc., entered into a partial settlement agreement before trial, in which the parties stipulated that Stansbury had a compensable injury; stipulated that they would compromise all claims for benefits which accrued through August 27, 1992, for a certain sum; and agreed that HEP, Inc., would pay all medical expenses incurred through August 27. The issues of whether Stansbury was entitled to additional benefits and medical expenses beyond August 27 and whether he was entitled to vocational rehabilitation were not settled. Therefore, Stansbury filed a petition, and a hearing was held on the issues. For the reasons stated below, we affirm in part and reverse and remand in part.

## STATEMENT OF FACTS

Stansbury was employed by HEP, Inc., as an apprentice plumber on May 9, 1991, when he injured his back. Stansbury filed a claim for workers' compensation benefits, which was dismissed on May 28, 1992, after a first hearing was held before a single judge of the court. In lieu of a rehearing, the parties agreed to enter into a compromise settlement of all of Stansbury's claims which accrued up to the date of the scheduled rehearing, August 27, 1992. The parties stipulated in the agreement that Stansbury had suffered a compensable injury arising out of and in the course of his employment with HEP, Inc., and that the accident occurred on May 9, 1991. In the agreement, HEP, Inc., agreed to pay all medical expenses Stansbury had incurred from May 9, 1991, to August 27, 1992. In addition, HEP, Inc., agreed to pay 4 weeks of temporary total disability benefits for the period of May 20 up to and including June 16, 1991. According to the agreement, after June 16, Stansbury had obtained part-time employment with Thornhill Amusements in Texas. The agreement provided that payment of the 4 weeks of benefits was in settlement of all Stansbury's claims for temporary total or temporary partial benefits which had accrued from the time of the accident through August 27, 1992.

The settlement agreement also provided that issues and claims for future medical bills, compensation benefits, and entitlement to vocational rehabilitation were unsettled and

therefore open for further determination. On September 1, 1993, Stansbury filed a supplemental petition, alleging that he had reached maximum medical improvement and claiming that he was entitled to additional temporary total and partial disability benefits, permanent partial disability benefits, and vocational rehabilitation.

In the evidence before us is an October 28, 1992, report from Dr. Craig A. Banta, Stansbury's attending physician, which states that Stansbury sought treatment from Dr. Banta because he was still having back pain after the accident. Dr. Banta's diagnosis was that Stansbury sustained a lumbar sprain injury with persistent muscle spasm and myofacial syndrome. Dr. Banta continued to see Stansbury and treat his back pain until December 1, 1992, when the doctor released Stansbury to light-duty work because his pain had become more manageable, but Dr. Banta recommended that Stansbury still undergo a CT scan of the spine. A scan performed on December 15 revealed herniation at both the L4-5 and L5-S1 levels. In a letter to HEP, Inc.'s insurer, Dr. Banta stated:

> Patient should not perform manual labor with frequent lifting, bending or stooping. The patient is completely employable at a light duty job. The patient does have history of background in electronics and I would feel that he would be able to perform this activity without difficulty assuming that recurrent and heavy lifting is not involved.

On February 18, 1993, Dr. Banta completed a questionnaire drawn up by Stansbury's attorney, in which Dr. Banta stated that he was capable of evaluating Stansbury's permanent impairment and that he believed Stansbury suffered a 5-percent permanent impairment of the whole body.

Also in evidence is a report from Dean N. Venter, a vocational evaluator. Venter stated that according to Stansbury's employment history, Stansbury's experience involved heavy work, including frequent lifting of up to 50 pounds and occasional lifting of up to 100 pounds. Venter noted that according to Dr. Banta, Stansbury should not perform manual labor and is completely employable at a light-duty job. In Venter's opinion, if Stansbury were limited to medium work,

his loss of earning capacity would be approximately 15 to 20 percent, and if Stansbury were limited to light duty, the loss of earning capacity would be approximately 25 to 30 percent. However, according to a report by Gina Jones, another vocational evaluator, Stansbury was capable of performing moderately heavy work.

On December 23, 1993, Venter formulated a vocational rehabilitation plan which he recommended for Stansbury because it would allow Stansbury to perform electrical repair work, and such work would be light duty. Such work, Venter stated, would reduce Stansbury's loss of earning capacity. Venter's recommended plan stated that Stansbury should obtain an associate degree in electrical technology at Southeast Community College, which would require 2 years of education.

At the hearing, Stansbury testified that after his back injury, he worked for Thornhill Amusements from June to December 1991 for 2 1/2 hours a day at $4.25 per hour. Stansbury's job with HEP, Inc., required him to work 40 hours per week, for which Stansbury earned $6 per hour, or $240 per week. Stansbury stated that he wanted to work more hours at Thornhill, but business was slow and Thornhill did not need him to work full time. In 1992, Stansbury worked in June and July for a furniture store, which paid commission. Stansbury earned about $1,000 to $1,100 per month. Stansbury was then laid off, and he received unemployment compensation. On cross-examination, Stansbury admitted that the employment market in Texas was much tighter than in Nebraska and that Texas had an unemployment rate of about 15 percent. Stansbury continued to look for work from August 1992 until more than a year later. In October 1993, Stansbury got a job installing water softeners. Stansbury works approximately 2 days per week, earning about $150 to $200 per day, or $300 to $400 per week. Stansbury testified that his back still causes him problems on his current job installing water softeners and that he suffers from muscle spasms, cramps, and numbness. However, Stansbury admitted that he has not missed any work as a water softener installer because of his symptoms. Stansbury testified that his current job requires him to occasionally lift a water softener, which weighs about 75 pounds, and that he believes he

is capable of lifting 30 to 40 pounds several times an hour over an 8-hour day.

The trial court found that Stansbury was unable to perform the work for which he has had previous training and therefore awarded Stansbury vocational rehabilitation, to be limited to a 12-week period of job placement. The trial court found that although Stansbury testified to lengthy periods of unemployment, he did not produce medical evidence to show that he was unable for physical reasons to perform remunerative employment at a like or similar wage within his restrictions, and that it was more likely that his unemployment was due to the poor economy in Texas. Therefore, the court refused to award temporary disability benefits beyond those paid by HEP, Inc., under the settlement agreement.

In addition, the court noted that there was conflicting testimony regarding the extent of Stansbury's permanent partial disability. The court stated that in consideration of the medical evidence, Venter's report, Stansbury's testimony, and his history of heavy labor, it found that Stansbury had a 10-percent loss in earning capacity. Stansbury appealed to the review panel, which upheld the trial court's order.

## ASSIGNMENTS OF ERROR

Stansbury alleges that the trial court erred when it (1) did not award the vocational rehabilitation plan submitted by Venter; (2) did not award temporary total disability benefits after August 27, 1992; and (3) found that Stansbury had suffered only a 10-percent loss of earning capacity.

## STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon 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. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

[2] 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 single judge who conducted the original hearing. *Id.*

[3] The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge. *Id.*

## ANALYSIS

*Vocational Rehabilitation Benefits.*

Stansbury argues that once the trial court has determined that a worker is entitled to vocational rehabilitation services, it is not free to fashion its own vocational rehabilitation plan. We note that Stansbury's accident occurred on May 9, 1991. Under the statute in place at the time of Stansbury's accident,

> [a]n employee who has suffered an injury covered by the Nebraska Workers' Compensation Act shall be entitled to prompt medical and physical rehabilitation services. When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

Neb. Rev. Stat. § 48-162.01(3) (Reissue 1988).

Subsection 6 of the same statute provided:

> Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or

education . . . .

Under this old statutory scheme, the compensation court made a factual determination whether vocational rehabilitation would restore the employee's ability to be employed in another position with remuneration similar to that earned prior to the injury. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). " 'If the employee has lost the ability to obtain suitable gainful employment due to a compensable injury, then, barring any other reasonable basis to deny vocational rehabilitation, he should be entitled to have the ability restored through an appropriate plan of vocational rehabilitation.' " *Id.* at 896, 464 N.W.2d at 340. In practice, often both the claimant and the employer would offer their own vocational rehabilitation experts' testimony regarding whether the employee was entitled to vocational rehabilitation and what was an appropriate plan. It is under this statutory scheme that the trial court determined Stansbury's eligibility for vocational rehabilitation and the appropriateness of the rehabilitation plan offered by Stansbury.

In 1993, the Nebraska Legislature adopted L.B. 757, which revised the workers' compensation statutes. The provision in L.B. 757 which modified the vocational rehabilitation sections in § 48-162.01 became effective on January 1, 1994. The hearing on Stansbury's petition was held on February 4, 1994.

L.B. 757 changed the procedure in 48-162.01 regarding the determination of whether an employee is entitled to vocational rehabilitation benefits and whether a certain plan is appropriate. First, the legislative bill deleted that portion of subsection 6 quoted above, which provided that the trial judge make a factual determination whether there was a "reasonable probability" that with vocational rehabilitation an employee's earning capacity would improve. Instead, under the revised version of § 48-162.01 (Reissue 1993), the statute now provides:

> If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor from the directory of vocational rehabilitation counselors established pursuant to subsection (2) of this section. If they are

> unable to agree on a vocational rehabilitation counselor, the employee or employer or his or her insurer shall notify the compensation court, and the compensation court shall select a counselor from the directory . . . . Only one such vocational rehabilitation counselor may provide vocational rehabilitation services at any one time, and any change in the choice of a vocational rehabilitation counselor shall be approved by the compensation court. The vocational rehabilitation counselor so chosen or selected shall evaluate the employee and, if necessary, develop a vocational rehabilitation plan. *It shall be a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation.*

(Emphasis supplied.)

In addition, the statute provides that there is a rebuttable presumption that an evaluation and opinion of loss of earning capacity by a vocational rehabilitation counselor, selected as above, is correct.

While neither party has assigned or briefed the question of which version of § 48-162.01 should have been applied by the trial court, we reserve the right to notice plain error. See *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

[4] The question before us is, Which version of the statute should apply to the case at hand? If the provision regarding the selection of vocational rehabilitation counselors and the presumption that such counselors' opinions are correct is a substantive change, rather than a procedural change, then the statute in force at the time of Stansbury's accident would apply. See *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990). However, if the change made by L.B. 757 to § 48-162.01 is procedural, the Workers' Compensation Court

was bound to follow the version of the statute in effect at the date of the compensation court's judgment. See *Behrens, supra*. In the case at hand, the hearing took place after the effective date of the amendment to § 48-162.01.

> It is generally considered in the law that a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. [Citations omitted.] A procedural right, on the other hand, is considered to simply be the method by which an already *existing* right is exercised.

*Smith v. Fremont Contract Carriers*, 218 Neb. 652, 665, 358 N.W.2d 211, 220 (1984) (Krivosha, C.J., concurring in the result). Accord *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988).

Under the revised statute, if the employee and employer cannot agree on a vocational rehabilitation counselor to evaluate the employee, the amended language of § 48-162.01 does not foreclose either party from offering its own vocational rehabilitation counselor's expert testimony to rebut the opinion of the court-appointed vocational rehabilitation counselor. The amendment to the statute does not take away an employee's right to vocational rehabilitation, nor does it take away that employee's right to present evidence to the court if there is a dispute over the employee's eligibility for vocational rehabilitation. The amendment to § 48-162.01 therefore changes only the method by which an employee's right to vocational rehabilitation and the right to be heard on his or her claim are exercised. Accordingly, we find that the provisions of L.B. 757 which amended § 48-162.01 are procedural changes, and thus, the court was required to apply § 48-162.01 as amended by L.B. 757, which was the version of the law as it existed at the time judgment was rendered. We must therefore reverse and remand that portion of the judgment regarding Stansbury's eligibility for vocational rehabilitation and the kind of vocational rehabilitation benefits awarded.

*Loss of Earning Capacity.*

In addition to L.B. 757's change to § 48-162.01 regarding

vocational rehabilitation plans, L.B. 757 also amended the statute to provide:

> Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. It shall be a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

As we stated above, the provision requiring parties to agree on a vocational rehabilitation counselor to provide a loss of earning power analysis or have the court appoint a counselor to provide such an analysis is a procedural change. Therefore, as we stated above, § 48-162.01 as amended by L.B. 757 should have been applied to the case at hand. We must therefore reverse and remand that portion of the judgment which makes a finding regarding loss of earning capacity.

*Temporary Total Disability Benefits.*

Stansbury alleges the trial court erred when it did not award additional temporary total disability benefits after August 27, 1992. Stansbury and HEP, Inc., had entered into a settlement agreement, in which HEP, Inc., agreed to pay Stansbury temporary total disability benefits for 4 weeks for the period of May 20 up to and including June 16, 1991. According to the agreement, after June 16, Stansbury had obtained part-time employment with Thornhill Amusements in Texas. The agreement provided that payment of the 4 weeks of benefits was in settlement of all Stansbury's claims for temporary total or temporary partial benefits which had accrued from the time of the accident through August 27, 1992. The evidence shows that Stansbury worked for Thornhill Amusements from June until December 1991, for 2½ hours a day and that Stansbury wanted to work more hours, but business was slow and Thornhill did not need him to work full time. In 1992, Stansbury worked in June and July. Stansbury was then laid off, and he received unemployment compensation. Stansbury offered no evidence to establish that his part-time work and his

time of unemployment were related to his back injury. Instead, the evidence appears to establish that Stansbury's sporadic employment history since his back injury was due to the poor economy in Texas. There is sufficient evidence in the record to support the trial court's finding that Stansbury was not entitled to temporary total disability benefits past August 27, 1992.

## CONCLUSION

Because we find that the judgment rendered by the trial court did not comply with the statutory scheme of § 48-162.01 as amended by L.B. 757, which was in force at the time judgment was rendered, we must reverse and remand that portion of the Workers' Compensation Court's judgment which provided for vocational rehabilitation benefits and determined Stansbury's loss of earning capacity, with directions for further proceedings in keeping with this opinion. However, we find that there is sufficient evidence in the record to support the trial court's determination that Stansbury was not entitled to further benefits after August 27, 1992. We therefore affirm that portion of the judgment which denied Stansbury temporary total disability benefits after August 27, 1992.

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

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## STATE OF NEBRASKA, APPELLEE, V. BARTON L. SUNDLING, APPELLANT.

531 N.W.2d 7

Filed April 25, 1995. No. A-94-1100.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Drunk Driving: Prior Convictions.** Pursuant to Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993), where a person is convicted of driving under the influence, the penalty may be enhanced if he or she has had two or more prior convictions in the past 8 years under this section or under a city or village ordinance enacted pursuant to this section.

3. **Statutes.** Where the reenactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal.
4. _____. The simultaneous repeal and reenactment of a statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term.
5. **Statutes: Drunk Driving.** The previous driving under the influence statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992), was not repealed in the strict or constitutional sense of the term, and Neb. Rev. Stat. § 60-6,196 (Reissue 1993) is a mere affirmance of the original act.
6. **Statutes: Drunk Driving: Prior Convictions.** Convictions under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) are suitable for use in enhancement proceedings under Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993) because there was no significant substantive change in content of the statutes.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Susan R. Tast for appellant.

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

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

MILLER-LERMAN, Judge.

Barton L. Sundling appeals his conviction and sentence for third-offense driving while under the influence of alcoholic liquor (DWI), Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993). For the reasons recited below, we affirm.

## FACTS

The record shows that Sundling was arraigned in the county court for Lancaster County, Nebraska, on March 23, 1994, and entered a plea of not guilty. The case was set for trial on May 31. The trial was held, and Sundling was found guilty. A presentence investigation was ordered, and Sundling was directed to return for sentencing on July 15 and for an enhancement hearing on June 9.

On June 9, an enhancement hearing was held. Over objection by Sundling's counsel, certified copies of his prior DWI convictions from the county court for Lancaster County, for which he was sentenced on July 23, 1993, were received by the court. The prior incidents occurred on December 10, 1992, and March 7, 1993. Both complaints cited Lincoln Mun. Code § 10.16.030. The county court found Sundling guilty of third-offense DWI. Sundling was sentenced to 120 days in jail and fined $500, and his driver's license was suspended for 15 years.

Sundling appealed his conviction and sentence to the district court for Lancaster County. The district court found that it was not error for the county court to receive the certified copies of Sundling's prior DWI convictions from the county court for Lancaster County. Sundling's conviction and sentence were affirmed by the district court. Sundling appeals to this court.

## ASSIGNMENTS OF ERROR

Sundling lists several assignments of error, which may be distilled into the following: It was error for the county court, as affirmed by the district court, to use DWI convictions obtained under Neb. Rev. Stat. § 39-669.07 (Cum. Supps. 1990 & 1992) to enhance the penalty for Sundling's DWI conviction under § 60-6,196.

## SCOPE OF REVIEW

[1] The issue in this case involves a question of statutory interpretation. "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 determination made by the court below." *In re Estate of Holt*, 246 Neb. 50, 53, 516 N.W.2d 608, 610-11 (1994).

## ANALYSIS

[2] Pursuant to § 60-6,196(2)(c), where a person is convicted of DWI, the penalty may be enhanced if he or she has had two or more prior convictions in the past 8 years under "this section" or under a city or village ordinance enacted pursuant to "this section." Section 60-6,196, proposed in 1993 Neb. Laws, L.B. 370, was approved by the Legislature on April 1,

1993, and thereafter signed by the Governor. Legislative Journal, 93d Leg., 1st Sess., 1307, 1388. Section 60-6,196 was previously codified at § 39-669.07 without a substantive difference in content for present purposes. Furthermore, § 60-6,196(4) reads in relevant part: "[T]he terms conviction under this section and prior conviction shall include any conviction under this section as it existed at the time of such conviction regardless of subsequent amendments to such section." At the time of Sundling's prior convictions, the DWI statutes were found in chapter 39, rather than chapter 60.

Sundling claims that prior convictions for DWI under § 39-669.07 or ordinances thereunder, before the passage of § 60-6,196, cannot be used to enhance DWI convictions under § 60-6,196 because § 60-6,196(2)(c) limits enhancement to prior convictions under "this section." Sundling argues that only prior convictions under § 60-6,196 can be used to enhance convictions under § 60-6,196(2)(c). In so arguing, Sundling relies on the statutory language noted above and on *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). We do not agree with Sundling's argument.

In *Suhr*, the Nebraska Supreme Court found that a bad check conviction under Neb. Rev. Stat. § 28-1212 (Reissue 1975) could not be used to enhance the penalty under the newer bad check statute, Neb. Rev. Stat. § 28-611(2) (Reissue 1979). In *Suhr*, the Nebraska Supreme Court found in general that there were numerous substantive changes between the previous bad check statute and the newer bad check statute. In particular, *Suhr* makes clear that, rather than being merely a transfer or an amendment to the previous bad check statute, § 28-611 was a new section, and that the previous section, § 28-1212, had been repealed. Enhancement under § 28-611(2) by reliance on a conviction under § 28-1212 was rejected in *Suhr*, because the conviction under the older statute, § 28-1212, was defined differently and, therefore, was not a prior offense under § 28-611.

The current statutory framework for DWI does not contain changes from the prior DWI statute such as were exhibited in the bad check statutes and which precluded the previous bad check conviction from serving as a prior offense for

enhancement in *Suhr*. The current DWI statute, § 60-6,196, finds its substantive counterpart in the previous DWI statute, § 39-669.07. The relocation of the DWI provisions from chapter 39 to chapter 60 is consistent with L.B. 370, § 493, which directed the Revisor of Statutes to assign new numbers to the Nebraska Rules of the Road sections being moved into a new article in chapter 60, thus collecting the Nebraska Rules of the Road into a single location. Pursuant to L.B. 370, § 495, § 39.669.07 was thereafter repealed. It has been observed that "[c]hanges made by the Revisor of Statutes in preparing supplements and reissued or replacement volumes of the Revised Statutes, under the provisions of section 49-705, R. R. S. 1943, cannot change the substantive meaning of any statute as enacted by the Legislature." *State v. Karel*, 204 Neb. 573, 576, 284 N.W.2d 12, 14 (1979). There is no claim in the instant case that the Revisor's actions altered the meaning of the DWI statutes.

[3,4] As early as 1884, the Nebraska Supreme Court stated that "where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, . . . the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal." *State v. Wish*, 15 Neb. 448, 450-51, 19 N.W. 686, 687 (1884). It has also been stated that "[t]he rule seems to be that the simultaneous repeal and re-enactment of the statute in terms, or in substance, is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term." *Bauer v. State*, 99 Neb. 747, 754, 157 N.W. 968, 970 (1916). Elsewhere it has been noted that in enacting a current statute, the Legislature "is presumed to have known the preexisting law" and that the Legislature has the power to change a provision if it so desires. *Suhr*, 207 Neb. at 561, 300 N.W.2d at 29.

[5,6] Based on the jurisprudence surrounding statutory interpretation recited above, we conclude that the previous DWI statute, § 39-669.07, was not repealed "in the strict or constitutional sense of the term" and that § 60-6,196 is a "mere affirmance of the original act." *Bauer, supra*. Thus, the DWI statutes continued in force "uninterrupted." *Wish, supra*.

Because there was no significant substantive change in content of the DWI statutes, we conclude that convictions under § 39-669.07 are suitable for use in enhancement proceedings under § 60-6,196(2)(c). Compare *Suhr, supra*. The foregoing logic also would permit enhancement of a second-offense DWI under § 60-6,196(2)(b) and enhancement elsewhere in the statutes such as, but not limited to, Neb. Rev. Stat. § 28-306(3)(b) and (c) (Cum. Supp. 1994) (motor vehicle homicide), in which reference to § 60-6,196 is made for the purpose of invoking prior DWI convictions for penalty enhancement purposes. See § 60-6,196(4).

## CONCLUSION

For the reasons recited above, we conclude that the enhancement of Sundling's sentence under § 60-6,196(2)(c) by use of DWI convictions under § 39-669.07 was not error, and we, therefore, affirm Sundling's conviction and sentence.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. HANG-NAN KAO, ALSO KNOWN AS ALAN, APPELLANT.

531 N.W.2d 555

Filed May 9, 1995. No. A-94-847.

1. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Criminal Law: Proof.** The State must prove beyond a reasonable doubt each and every element of the crime charged.
4. **Criminal Law: Public Officers and Employees.** A person commits felony bribery if he or she offers, confers, or agrees to confer any benefit upon a public servant or peace officer with the intent to influence that public servant or peace

officer to violate his or her public duty or oath of office, thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his or her official capacity. Neb. Rev. Stat. § 28-917 (Reissue 1989).

5. _____: _____. The crime of felony bribery is not committed unless the acts of the defendant *actually* influence a public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his or her official capacity.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded with directions to dismiss.

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

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

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

Hang-Nan Kao appeals his bribery conviction following a jury trial in the district court for Douglas County. Because the State failed to prove that Kao's alleged bribe resulted in actually influencing a public servant's or peace officer's action or inaction in his or her official capacity, we reverse, and remand with directions to dismiss.

## BACKGROUND

Kao, the owner of the China Wok, had various difficulties obtaining a sufficient rating from Douglas County health inspector Jeff Radcliffe to establish that Kao's restaurant was in compliance with the regulations of the state and county. After several meetings and inspections, beginning in June 1993, Radcliffe went to the restaurant at Kao's request and was given an envelope containing several "dollar bills" of an undetermined denomination and was told by Kao that he should "buy [himself] lunch." When Radcliffe realized what the envelope contained, he refused it. Radcliffe subsequently reported Kao's action to his supervisor.

Law enforcement subsequently became involved in the situation, and an undercover agent, Anthony Bonds, posing as a health inspector, was sent to the restaurant in order to see if

Kao would attempt to bribe him. Bonds made several visits to the China Wok. On his third visit, March 10, 1994, Bonds mentioned that he needed money for repairs on his truck. Kao gave him $200 and told him not to tell anyone. The following day, March 11, the agent returned with a letter from the Douglas County Health Department that he had received from his superior, which letter stated that the inspection of Kao's restaurant had been postponed from March 11 to March 18. Bonds testified that in a conversation he had with Kao which was recorded after he returned to the restaurant with the letter postponing the inspection, he asked Kao if he had done a good job, and Kao responded affirmatively. Bonds further testified that later in the conversation he sought confirmation that the $200 Kao gave him was to get Bonds to help him postpone the inspection, and Kao confirmed that it was.

Kao was charged with bribery in violation of Neb. Rev. Stat. § 28-917(1)(a) (Reissue 1989), a Class IV felony, for allegedly bribing the undercover agent posing as a health inspector on March 10. After a jury trial, Kao was found guilty and was subsequently sentenced to 2 years' probation, the first 6 months of which were to be served in the Douglas County Correctional Center. Kao appeals.

## ASSIGNMENTS OF ERROR

Kao alleges the district court erred in (1) failing to instruct the jury on all material elements of the crime, (2) finding the evidence sufficient to prove his guilt, (3) failing to sustain his motion to dismiss at the close of the State's case, and (4) imposing an excessive sentence. Because we conclude that the evidence was insufficient to support Kao's conviction, we do not address the other errors assigned.

## STANDARD OF REVIEW

[1] Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

[2] In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass

on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

## ANALYSIS

[3,4] Kao contends that the evidence was insufficient to sustain his conviction for bribery. In order for an individual to be convicted of a crime, the State must prove beyond a reasonable doubt each and every element of the crime charged. *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). Section 28-917 provides:

> (1) A person commits bribery if:
>
> (a) He offers, confers, or agrees to confer any benefit upon a public servant or peace officer with the intent to influence that public servant or peace officer to violate his public duty, or oath of office, thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his official capacity . . . .
>
> . . . .
>
> (2) It is no defense to prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

Therefore, in order to convict Kao of bribery, the State was required to prove beyond a reasonable doubt that Kao (1) offered, conferred, or agreed to confer any benefit (2) upon a public servant or peace officer (3) with the intent to influence that public servant or peace officer to violate his or her public duty or oath of office, (4) thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his or her official capacity.

The focus of our analysis is the fourth element, i.e., whether

there was sufficient evidence to prove that Bonds, or any other public servant or peace officer, was "influenc[ed] . . . in his [or her] official capacity."

Recently, in *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995), the Nebraska Supreme Court recognized that to prove a prima facie case of felony bribery, an essential element of the crime is that the public servant or peace officer was *actually* influenced by the conduct of the defendant. In *Null*, the defendant was charged with bribing the mayor and conspiring to bribe the mayor. However, the mayor was not actually influenced by any offer before him. The trial judge reduced the charge of felony bribery to the lesser-included offense of attempted bribery before submitting the case to the jury after determining "as a matter of law that the crime of bribery had not been committed because the evidence failed to establish that [the mayor] had actually been influenced by Null." *Id.* at 194, 526 N.W.2d at 224. In response to Null's argument on appeal that he was improperly charged under the felony bribery statute, § 28-917, because the misdemeanor bribery statute, Neb. Rev. Stat. § 49-14,101 (Reissue 1993), had repealed it by implication, the Supreme Court determined that both bribery statutes were in effect and that he had been properly charged under the felony statute. The court stated: "[T]here are important differences between the statutes. For example, § 28-917 requires that a public servant or peace officer be actually influenced by a defendant's attempt, whereas § 49-14,101 does not." 247 Neb. at 199, 526 N.W.2d at 227. Further, in approving the trial court's reduction of the felony bribery charge to attempted bribery, the Supreme Court stated: "The trial court did so because the State failed to establish one of the requisite elements of felony bribery, which is a showing that the public servant was actually influenced by the bribe. See § 28-917." 247 Neb. at 204, 526 N.W.2d at 229. Finally, in concluding that the successful completion of the bribe was not required to sustain a conviction of conspiracy to commit bribery, the Supreme Court stated: "The fact that [the mayor] was not actually influenced by Null's actions precluded Null's conviction for felony bribery, but not necessarily Null's conviction for conspiracy to commit felony bribery." 247 Neb.

at 204-05, 526 N.W.2d at 230.

[5] We read *Null* as a clear expression that the crime of felony bribery is not committed unless the acts of the defendant *actually* influence a public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his or her official capacity. The Supreme Court in *Null* emphasized that a conviction under § 28-917(1)(a) requires proof of more than a benefit being conferred with the intent to influence a public servant or peace officer. The public servant or peace officer must be *actually influenced*.

A reading of § 28-917(1)(a) shows that the benefit must be conferred (or agreed to be conferred or offered) with the requisite intent, "thereby influencing the public servant's . . . action or inaction." The term "thereby" ordinarily means "by means of that" or "in that connection." Webster's Encyclopedic Unabridged Dictionary of the English Language 1472 (1989). Webster's at 730 defines the verb "influence" as "to exercise influence on; affect; sway" or "to move or impel (a person) to some action" and includes the synonyms "impress, bias, direct, control" and "incite, rouse, arouse, instigate, induce, persuade." Finally, the "action or inaction" of the public servant must be "in his [or her] official capacity."

Therefore, by applying the teaching of *Null* and considering the plain and ordinary meaning of the language of § 28-917(1)(a), see *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995), it must be proven that the benefit is conferred with the intent to influence a violation of public duty or oath of office and that by those means, someone is actually swayed or induced to act or not act in his or her official capacity.

The issue before us then is whether the evidence presented is sufficient to prove that the actions taken by Bonds, his superiors, and the department of health in response to Kao's paying Bonds the $200 is sufficient evidence that Kao's alleged bribe actually influenced one or more of them in their official capacities.

The State contends the evidence shows that Kao gave Bonds, "whom he believed to be a health inspector, $200 to get the inspection of his restuarant [sic] by the department put off."

Brief for appellee at 23. The State argues that this shows that Kao conferred a benefit upon a public servant with the intent to influence that public servant, thereby establishing the first three elements of the crime. We agree. With regard to the fourth element, i.e., that the public servant was "thereby influenc[ed] . . . in his [or her] official capacity," the State contends that Bonds accepted the $200 and obtained a letter from the department of health which notified Kao that the inspection had been postponed and then confirmed that the postponement was the inaction Kao sought for the $200. The State asserts that this shows that a public servant was influenced by Kao's alleged bribe. We disagree.

Viewing the evidence most favorably to the State, we find that when Bonds received the $200, he was an undercover agent pretending to be a health inspector. That he only *pretended* to be a health inspector, and therefore obviously had no official authority to obtain a postponement, is no defense, as specifically provided under § 28-917(2). In that capacity, he took the money to his superiors, who contacted the department of health. In turn, the department of health generated a letter postponing the inspection of Kao's restaurant. The letter was not issued as a result of the alleged bribe actually swaying or influencing the department of health, but, rather, as part of the undercover scheme. It was not an action taken by the department of health in any "official capacity," but only another step in the ruse being played upon Kao. Bonds returned to Kao with the letter and obtained a positive response to questioning of Kao as to whether the postponement is what Kao had wanted. The evidence of Kao's response, elicited with the aid of the department of health letter, certainly provided evidence on the necessary element of Kao's intent to commit this crime. However, that is not the question before us.

The State's argument is that since Bonds took the money to his superiors and his superiors obtained a letter from the department of health postponing the inspection, this is sufficient to show that the money paid to Bonds by Kao influenced Bonds in his official capacity. While it is true that the payment of the $200 caused Bonds to take some action, there is absolutely no evidence that Bonds was moved or impelled to

obtain the letter from the department of health by virtue of the $200 paid by Kao. Rather, the evidence is that he did so in connection with his duties as an undercover agent and in that capacity. All action taken thereafter is part and parcel of the facade created for purposes of the undercover operation.

At most, the evidence shows that Bonds, along with the department of health, *pretended* to be influenced by the alleged bribe. Pretending to be influenced does not provide the requisite proof to satisfy the element that the alleged bribe must *actually* influence the official action under § 28-917(1)(a). See *Null, supra*.

While we have found no Nebraska Supreme Court decisions precisely addressing the issue in this factual context, we are confident that the rationale of *Null* and a clear reading of § 28-917(1)(a) will not permit a conviction to stand for felony bribery when the only evidence presented of the alleged bribe influencing someone in his or her official capacity is that an undercover agent, posing as an official, passes on money paid to him in his incognito status to his superiors, all in the perpetuation of an undercover operation. In these circumstances, it is untenable to suggest that official action has been actually influenced by the alleged bribe as intended and required by § 28-917(1)(a).

The evidence was insufficient to sustain Kao's conviction for felony bribery. Felony bribery is not committed unless the public servant or peace officer is actually influenced in his or her official capacity. We need not reach Kao's other assignments of error. We reverse the judgment and remand the matter with directions to the district court to dismiss the charge against Kao.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

# RANDALL G. DOZLER, APPELLEE, V. JACK C. CONRAD, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

532 N.W.2d 42

Filed May 16, 1995. No. A-93-390.

1. **Mandamus: Appeal and Error.** Mandamus is a law action, and conflicts in the evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong.
2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right.
4. **Judgments: Appeal and Error.** In an action at law tried without a jury, the findings of the district court have the effect of a verdict, the evidence will be considered in the light most favorable to the successful party, conflicts must be resolved in favor of the successful party, and the successful party is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
5. **Mandamus.** A writ of mandamus may be issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
6. _____. Where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied, and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law.
7. _____. In order to bar mandamus, the law remedy must afford all relief to which the plaintiff is entitled; it is not fully adequate unless it conforms to the necessities and rights of the complaining party under all the circumstances of the case, reaches the end intended, and actually compels performance of the duty in question. Furthermore, the remedy which will preclude mandamus must be equally as convenient, complete, beneficial, and effective as would be mandamus and be sufficiently speedy to prevent material injury. The existence of a tedious and ill-adapted remedy will not prevent resort to mandamus.
8. _____. In order for a writ of mandamus to issue, the performance to be compelled must be a purely ministerial act or duty imposed by law upon an appropriate party.
9. _____. An act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
10. _____. Legal or factual determinations made at the outset of the inquiry do not make the decision to act discretionary. The requirement to act upon certain factual findings is still ministerial if there is a requirement to act at all.
11. **Administrative Law: Mandamus.** Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise

of discretion lying outside the remedy of mandamus.

12. **Administrative Law: Statutes: Legislature.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. However, the agency is limited in its rulemaking authority to the powers delegated to it by the statute which it is to administer.
13. **Administrative Law.** An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
14. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain its meaning, and the words in a statute will be given their ordinary meaning.
15. **Mandamus.** Where the duty to act is ministerial, the court will grant mandamus to compel the act on the relator's compliance with all the statutory and regulatory terms and conditions.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Don Stenberg, Attorney General, and Mary L. Hewitt for appellant.

David C. Mitchell, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

## INTRODUCTION

Jack C. Conrad, the director of the Department of Motor Vehicles (Director), appeals from the order of the district court for Dodge County, Nebraska, issuing a writ of mandamus that commanded the Director to immediately dismiss all administrative license revocation (ALR) proceedings currently pending against Randall G. Dozler pursuant to Neb. Rev. Stat. § 39-669.16(4) (Cum. Supp. 1992), as in effect at that time, arising out of a March 16, 1993, arrest in Dodge County for driving while under the influence of alcohol (DWI). The writ commanded the reinstatement of Dozler's automobile operator's license immediately without payment of the reinstatement fee. As the writ of mandamus was properly entered, we affirm.

## FACTS

On March 16, 1993, Dozler was arrested in Dodge County

for DWI. At this time, the arresting officer impounded his driver's license and issued him a 30-day temporary license. In a letter on the official letterhead of the Dodge County Attorney that was dated March 17, 1993, the Dodge County Attorney's office advised Dozler that he need not appear on March 30, as the DWI charge was not being filed. On March 18, a notice advising the county court for Dodge County that the prosecuting attorney had declined to file the charges was filed with the court.

On April 2, 1993, Dozler served a document captioned "Motion to Dismiss" upon the Nebraska Department of Motor Vehicles (DMV). In this document, Dozler requested that the pending ALR proceedings before the Director be dismissed pursuant to § 39-669.16(4)(a) because the prosecuting attorney had declined to file DWI charges. Dozler also requested that his license be immediately reinstated without payment of the reinstatement fee. Copies of the letter from the Dodge County Attorney's office and the notice to the court were attached to the motion to dismiss.

On April 5, the Director issued an "Order Denying Motion to Dismiss." The Director stated that Dozler had not provided sufficient evidence that the prosecuting attorney had declined to file the DWI charges. In his order, the Director stated that pursuant to 247 Neb. Admin. Code, ch. 1, § 025.01 (1993), the letter from the prosecuting attorney's office was not sufficient evidence because "[t]he letter is addressed solely to Appellant and fails to state any reason why the Dodge County Attorney declined to file charges. Furthermore, there is nothing on [the letter] to suggest it relates to the arrest for which Appellant's operating privileges are being revoked." In addition, the Director found that the notice filed with the county court was not sufficient evidence to dismiss the pending ALR proceeding because it

> is not a letter, rather it is a pleading which the Dodge County Attorney has purportedly filed with the local County Court . . . . While a certified copy of such a pleading might be accepted in lieu of a letter, there is nothing on the face of [the notice] to suggest it relates to the arrest for which Appellant's operating privileges are

> being revoked. Further, [it] fails to state a reason why the Dodge County Attorney has declined to file a charge against Appellant....

On April 7, Dozler filed a petition for writ of mandamus with the district court for Dodge County. The petition was signed and verified by Dozler. In his verified petition, Dozler averred that he had filed a motion to dismiss with the DMV, to which motion he had attached copies of the notice to the court and the letter from the prosecuting attorney's office, and that the Director had summarily denied the motion. Dozler further averred that the prosecuting attorney had declined and continued to decline to issue a written statement on official letterhead containing the reason for declining to file the DWI charge as required by the regulation "by virtue of the fact that Neb. Rev. Stat. §39-669.16(4)(a) requires no further specificity for the declination other than that which the prosecuting attorney has already provided." He averred that the regulations related to § 39-669.16(4) are arbitrary, unreasonable, and a usurpation of the authority granted to the Director and contravene the plain meaning and intent of the statute. He averred that the DMV continued to pursue its ALR proceedings against him, that as a self-employed farmer he would be irreparably harmed if the Director continued the ALR proceedings in derogation of § 39-669.16(4)(a), and that he had no adequate remedy at law. Dozler requested that the court issue a writ of mandamus granting him relief.

On April 7, the district court issued an order of mandamus commanding the Director to immediately dismiss all ALR proceedings against Dozler and to reinstate Dozler's license immediately without payment of the reinstatement fee or to show cause why he had not done so on Monday, April 12, at 4 p.m. The court ordered that notice of the writ be served by certified mail upon the Director and the Attorney General.

A telephonic hearing was held April 12. Dozler's attorney appeared in person, and a representative of the Attorney General's office appeared via telephone as attorney for the Director. Without objection, the district court file, the letter from the Dodge County Attorney's office, and the notice filed with the county court were received into evidence. Dozler

offered a document captioned "Report to County Attorney of Warrantless Arrest" which stated that the arresting officer arrested Dozler on the charge of DWI, first offense, on March 16 at 1:15 a.m. without a warrant, and an appearance bond dated March 16, 1993. The report and appearance bond were received by the court over the objection of the Director. Over the objection of the Director, an affidavit of Dozler dated April 12, 1993, stating that the attached March 17 letter from the Dodge County Attorney's office was received by him and that the charge dismissed by the Dodge County Attorney was his first and only DWI charge, was received by the court. At the request of the Director, the court took judicial notice of the relevant rules and regulations.

On April 12, the court issued a judgment granting a peremptory writ of mandamus commanding the Director to immediately dismiss all ALR proceedings against Dozler and to reinstate Dozler's license immediately without payment of the reinstatement fee. On this same date, the court also issued a writ of mandamus commanding the same. The Director timely filed the present appeal.

## ASSIGNMENTS OF ERROR

The appellant asserts the following assignments of error: (1) The district court erred in determining that an order of mandamus, a judgment granting a peremptory writ of mandamus, and a subsequent writ of mandamus were a proper remedy for the allegations in Dozler's petition; (2) even assuming that mandamus was an appropriate remedy, the district court erred in finding that the facts alleged and presented before the Director justified the granting of the extraordinary writ; and (3) the district court erred in receiving into evidence the report to county attorney of warrantless arrest, the appearance bond, and the affidavit of Dozler.

## STANDARD OF REVIEW

[1] Mandamus is a law action, and conflicts in the evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong. *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993).

[2] As to questions of law, an appellate court has an

obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *National Acct. Sys. of Lincoln v. Vergith*, 246 Neb. 604, 521 N.W.2d 910 (1994); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

RELEVANT STATUTE AND REGULATION

Section 39-669.16(4) states:

> A person whose operator's license is subject to revocation pursuant to subsection (3) of section 39-669.15 shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee (a) upon presentation of suitable evidence to the director that within the thirty-day period following the date of arrest the prosecuting attorney responsible for the matter declined to file a complaint alleging a violation of section 39-669.07, (b) if the charge is dismissed, or (c) if the defendant, at trial, is found not guilty of violating section 39-669.07. The director shall adopt and promulgate rules and regulations establishing standards for the presentation of suitable evidence of compliance with subdivision (a), (b), or (c) of this subsection.

247 Neb. Admin. Code, ch. 1 (1993), provides:

> 025 DISMISSAL AND REINSTATEMENT The Department shall dismiss the administrative license revocation or immediately reinstate the license without payment of the reinstatement fee for those Appellants or licensees whose operator's license is subject to revocation for failure of test under Neb.Rev.Stat. §39-669.15(3) upon receipt of the Department of any of the following:
>
> 025.01 Written Statement. A written statement on official letterhead from the prosecuting attorney responsible for the matter stating that they declined to file a complaint alleging a violation of §39-669.07 within the 30-day period following the date of arrest. The letter must clearly state that the failure to file a complaint was based on one of the following grounds:

025.01A The law enforcement officer had no probable cause to believe that the person was operating or in the actual physical control of a motor vehicle; or

025.01B There was no lawful arrest effected; or

025.01C The person was not advised of the consequences if the chemical test disclosed the presence of alcohol in a concentration of 0.10 or more; or

025.01D The person was not operating or in the actual physical control of a motor vehicle while having an alcohol concentration of 0.10 or more.

025.01E If the written statement fails to state a reason for the prosecutor's failure to file a charge within 30 days or if the statement states a reason other than those specified above, it shall not be considered sufficient evidence for dismissing the administrative license revocation or for reinstatement of the license or operating privileges.

## ANALYSIS

[3,4] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). We have an obligation to reach a conclusion independent from that of the trial court regarding matters of law, *Vergith, supra*; *Upah, supra*; and *Lindsay Mfg. Co., supra*, and we will not set aside the factual findings of the trial court unless clearly wrong, *Bemis, supra*. In an action at law tried without a jury, the findings of the district court have the effect of a verdict, the evidence will be considered in the light most favorable to the successful party, conflicts must be resolved in favor of the successful party, and the successful party is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

The writ of mandamus is a remedy provided by statute in Nebraska. Neb. Rev. Stat. § 25-2156 (Reissue 1989) states in part: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a

duty resulting from an office, trust or station." Statutory authority also requires that the writ of mandamus not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. Neb. Rev. Stat. § 25-2157 (Reissue 1989).

[5] The Nebraska Supreme Court has held that a writ of mandamus may be

> issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

*Beermann*, 246 Neb. at 814, 523 N.W.2d at 524. See, also, *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994).

*Plain and Adequate Remedy at Law.*

We will first address whether there was a plain and adequate remedy available to Dozler in the ordinary course of the law which would bar mandamus as a remedy. Dozler seems to argue there was no plain and adequate remedy at law available to him because while pursuing such other remedies his 30-day temporary license would expire and his license would be revoked. The Director argues that a declaratory judgment action, an appeal, or compliance with the requirements of the regulation were all plain and adequate remedies at law.

[6,7] The Nebraska Supreme Court has repeatedly held that " 'where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy *by circuitous and dilatory action at law. . . .*' " (Emphasis supplied.) *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 692, 353 N.W.2d 267, 273 (1984) (quoting *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979)). Accord, *State ex rel. Agricultural Extension Service v. Miller*, 182 Neb. 285, 154 N.W.2d 469 (1967); *State ex rel. Herman v. City of Grand*

*Island*, 145 Neb. 150, 15 N.W.2d 341 (1944). In order to bar mandamus,

> the law remedy must afford all relief to which the plaintiff is entitled; it is not fully adequate unless it conforms to the necessities and rights of the complaining party under all the circumstances of the case, reaches the end intended, and actually compels performance of the duty in question. Furthermore, the remedy which will preclude mandamus must be equally as convenient, complete, beneficial, and effective as would be mandamus, and be sufficiently speedy to prevent material injury. The existence of a tedious and ill-adapted remedy will not prevent resort to mandamus.

52 Am. Jur. 2d *Mandamus* § 49 at 374 (1970).

The revocation of his license is the injury from which Dozler is seeking relief. Through the mandamus remedy, Dozler was granted his requested relief within the 30-day period between his arrest for DWI and the automatic revocation of his license. Based upon the above principles of law, any remedy at law must be as complete, effective, and speedy as mandamus in order to bar the remedy of mandamus.

A declaratory judgment action was a possible remedy at law available to Dozler. However, Dozler could only test the validity of the regulation in a declaratory judgment action pursuant to Neb. Rev. Stat. § 84-911 (Reissue 1987). If the court concluded the regulation was invalid, Dozler would still have to seek further relief for the reinstatement of his license or a direction to the Director to dismiss the ALR proceedings. Thus, a declaratory judgment would only be the first step to obtaining the relief Dozler sought.

In addition, the pursuit of a declaratory judgment would have allowed Dozler's license to be automatically revoked at the end of the 30-day period following his arrest. See Neb. Rev. Stat. § 39-669.15(6)(a) (Cum. Supp. 1992). After Dozler had filed a petition for declaratory judgment, the Director would have had 30 days after service to answer, see Neb. Rev. Stat. § 25-821 (Reissue 1989), discovery could have been conducted, see Neb. Ct. R. of Discovery (rev. 1992), and the case would have then been set for trial. It follows that a declaratory

judgment action would leave Dozler without a driver's license for an extended period of time. For these reasons, a declaratory judgment action would obviously have not remedied Dozler's injury in the speedy fashion afforded by a writ of mandamus.

The Director also contends that an appeal was an adequate remedy. Neb. Rev. Stat. § 39-669.18 (Reissue 1988) states: "Any person who feels himself or herself aggrieved *because of such revocation* may appeal therefrom . . . in accordance with the Administrative Procedure Act. Such appeal shall not suspend the order of revocation unless a stay thereof is allowed by a judge of such court . . . ." (Emphasis supplied.) Based upon the plain and ordinary meaning of this statute, it allows for an appeal from an order of revocation, *not* an appeal from a ruling of the Director that denied a request to dismiss the ALR proceedings. If we assume Dozler could have appealed the revocation order, the automatic revocation of his license would have become effective unless the district judge, within his discretionary powers, stayed the order of revocation. See § 39-669.18. For these reasons, an appeal pursuant to § 39-669.18 was not an adequate remedy at law.

The Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992), provides for appeals from administrative decisions in certain situations. The Administrative Procedure Act provides judicial review for "[a]ny person aggrieved by a final decision in a contested case." § 84-917(1). A contested case is defined at § 84-901(3) as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties *are required by law or constitutional right to be determined* after an agency hearing." (Emphasis supplied.) Dozler was not entitled to appeal the Director's ruling under the Administrative Procedure Act because a hearing is not required by law before the Director issues his decision regarding the dismissal of the ALR proceedings. For these reasons, neither an appeal pursuant to § 39-669.18 nor an appeal pursuant to the Administrative Procedure Act was an adequate remedy at law.

The Director also contends that Dozler could have complied with the requirements in the regulation by either obtaining a letter from the prosecuting attorney containing one of the

allowed reasons for the failure to file or a certified copy of the notice filed with the court. Even if Dozler had obtained a certified copy of the notice, the Director might not have dismissed the ALR proceedings because the regulation does not provide that a certified copy of such a notice is "sufficient evidence." See § 025.01.

In addition, an attempt to comply by obtaining a letter complying with the requirements was not an adequate remedy at law. Dozler averred in his verified petition that the prosecuting attorney refused, and continued to refuse, to supply the reason he failed to file the DWI charges. Dozler's verified petition was received as evidence, and we consider it in the light most favorable to Dozler, the prevailing party. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). Therefore, in order to comply with the requirements in the regulation, Dozler would first have had to receive a court order commanding the prosecuting attorney to comply with the regulation. Such a process would be "circuitous and dilatory" and not an adequate remedy at law. See *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984).

As the legal remedies available to Dozler were "circuitous and dilatory" at best, the writ of mandamus was an appropriate remedy for Dozler to seek.

*Clear Duty to Perform the Act.*

[8-10] The next question is whether the Director had a clear duty to dismiss the ALR proceedings against Dozler. In order for a writ of mandamus to issue, the performance to be compelled must be a purely ministerial act or duty imposed by law upon an appropriate party. See *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.*; *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). A seemingly discretionary decision to act may, in fact, be purely ministerial. *Beermann, supra*. The Nebraska Supreme Court has stated: "Legal or factual determinations made at the outset of the inquiry do not make the decision to act discretionary. The requirement to act

upon certain factual findings is still ministerial if there is a requirement to act at all." *Id.* at 815, 523 N.W.2d at 524.

Dozler urges that the requirement in § 025.01 that in order for the Director to dismiss the ALR proceedings or reinstate the license the prosecuting attorney must supply a reason named in the regulation for declining to file the DWI charge is invalid and that under § 39-669.16(4) the Director had a clear duty to dismiss the ALR proceedings.

[11] We will first address whether § 025.01 is valid. If it is valid, the Director did not have a clear duty to act because the requirements of the regulation were not satisfied. Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise of discretion lying outside the remedy of mandamus. *Smith, supra*. By mandamus a court can correct such mistake of law and compel the proper application of law. *Id.*

[12,13] The Legislature authorized the Director to "adopt and promulgate rules and regulations establishing standards for the presentation of suitable evidence of compliance with" the requirement that "within the thirty-day period following the date of arrest the prosecuting attorney . . . declined to file a complaint." § 39-669.16(4). Clearly, the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984). However, the agency is limited in its rulemaking authority to the powers delegated to it by the statute which it is to administer. *Id.* In order to be valid, a rule or regulation must be consistent with the statute under which it is promulgated. *Id.* " 'An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering. . . .' " *Beatrice Manor v. Department of Health*, 219 Neb. 141, 145, 362 N.W.2d 45, 49 (1985) (quoting *County of Dodge, supra*).

[14] When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain its meaning, and the words in a statute will be given their ordinary meaning. *World Radio Lab. v. Coopers & Lybrand*, 2 Neb. App. 747, 514

N.W.2d 351 (1994). For purposes of construction, a rule or order of an administrative agency is treated like a statute. *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

Based upon the plain and unambiguous language of § 39-669.16(4), the Legislature gave the Director the authority to adopt and promulgate rules and regulations establishing *what types of evidence* are considered sufficient to show that the prosecuting attorney has declined to file the DWI charge. The Director was not given the authority to determine what reasons are sufficient for a prosecutor's decision not to file the DWI charge and to determine that the Director will dismiss the ALR proceedings *only if* one of the four particular reasons is provided. We note that the four reasons enumerated in the regulation are the four issues that may be raised by a defendant in the administrative hearing.

As the regulation requires that the prosecuting attorney provide one of four particular reasons for the failure to file the DWI charge in order for the Director to dismiss the ALR proceedings, it is not consistent with § 39-669.16(4), and it modifies, alters, and restricts the provisions of the statute. Therefore, that part of the regulation requiring that one of the four particular reasons be given by the prosecuting attorney for his or her failure to file the DWI charge in order for the Director to dismiss the ALR proceedings is an invalid exercise of the Director's rulemaking power. Namely, the following sections of the Director's regulation are invalid: that part of § 025.01 reading, "The letter must clearly state that the failure to file a complaint was based on one of the following grounds:" and §§ 025.01A, 025.01B, 025.01C, 025.01D, and 025.01E. We conclude that these provisions of the regulation are invalid because the Director exceeded his rulemaking authority, and therefore, these provisions of the regulation have no force and effect.

We note that our clear and "common sense" reading of the statute is supported by legislative history. The legislative history shows that senators expressed concerns during a committee hearing that under the proposed provisions of the statute the ALR proceedings would continue even if the DWI prosecution

failed. Committee on Transportation, L.B. 291, 92d Leg., 1st Sess. 68-86 (Feb. 12, 1991). These senators were concerned that there could be different results in the ALR proceedings and the DWI proceedings. *Id.* Subsection (4) of § 39-669.16 was added by the Committee on Transportation to address these concerns.

We conclude that under § 39-669.16(4) and the remaining part of the regulation the Director has an absolute duty to dismiss the ALR proceedings upon the existence of certain facts, i.e., the presentation of sufficient evidence that the prosecuting attorney declined to file the DWI charge. Once this requirement is satisfied, § 39-669.16(4) requires that "[a] person whose operator's license is subject to revocation . . . shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee," and the Director has no discretion to refuse to dismiss the proceedings or reinstate the license.

*Clear Right to the Relief Sought.*

[15] The next question is whether Dozler satisfied his burden of proof for the writ. See *State ex rel. Hilt Truck Line v. Peterson*, 215 Neb. 81, 337 N.W.2d 133 (1983). The duty to act must be actually due from the respondent at the time of the application. *State ex rel. Boyer v. Grady*, 201 Neb. 360, 269 N.W.2d 73 (1978). Where the duty to act is ministerial, the court will grant mandamus to compel the act on the relator's compliance with all the statutory and regulatory terms and conditions. See *Peterson, supra.*

Dozler presented evidence that he filed a motion to dismiss with the Director that was accompanied by a letter dated March 17, 1993, from the prosecuting attorney's office on official letterhead which stated that the DWI charge was not being filed. This evidence was sufficient under the remaining portion of § 025.01 because it was a "written statement on official letterhead from the prosecuting attorney . . . stating that they declined to file a complaint alleging a violation of §39-669.07 within the 30-day period following the date of arrest."

The Director's argument that the letter was not "sufficient evidence" because it did not contain a reason for the failure to file has no merit because we concluded above that those

provisions of the regulation are invalid. The Director also argues that the letter was addressed only to Dozler and for this reason did not satisfy the requirements of the regulation. However, there is no language in the statute or the regulation requiring that a letter meeting all other requirements be addressed to the Director or anyone else. Therefore, this argument has no merit.

The Director argues that the letter failed to establish that the prosecuting attorney's actions were related to the March 16, 1993, arrest for which the ALR proceedings were pending. In issuing the writ of mandamus, the district court obviously found that the prosecuting attorney's actions were related to the March 16 arrest. Dozler's verified petition, received into evidence without objection, stated that the ALR proceedings were related to the March 16 arrest in Dodge County. The Director offered no evidence to the contrary. The district court was not clearly wrong in concluding that Dozler had a right to the issuance of the writ of mandamus.

Because the evidence offered and received without objection satisfied Dozler's burden of proof for the writ, we need not address whether the district court improperly received the report to county attorney of warrantless arrest, the appearance bond, and the affidavit of Dozler.

## CONCLUSION

The writ of mandamus is an appropriate remedy for the relief sought in the case before us. Dozler had no plain and adequate remedy available in the ordinary course of the law. The Director had a clear duty to dismiss the ALR proceedings. Dozler had a clear right to the relief sought. For these reasons, we affirm the district court's issuance of the writ of mandamus.

AFFIRMED.

# IN RE INTEREST OF SHEA B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SHEA B., APPELLANT.

532 N.W.2d 52

Filed May 16, 1995. No. A-94-623.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile proceedings de novo on the record and is thus required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, an appellate court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of facts over another.
2. **Statutes: Legislature: Intent: Presumptions.** The Legislature, in enacting an amendatory statute, is presumed to have known the preexisting law, and it is presumed that the language was intentionally changed for the purpose of effecting a change in the law itself.
3. **Theft: Value of Goods.** Value is an essential element of the crime of theft by receiving stolen property.
4. **Theft: Value of Goods: Witnesses.** In theft cases, an owner may give testimony relating to value.
5. **Motor Vehicles: Value of Goods: Witnesses.** An owner may testify as to the value of a vehicle involved in an accident.
6. **Insurance: Value of Goods: Witnesses: Proof.** The amount of insurance reimbursement commonly provides proof in addition to an owner's testimony regarding value.
7. **Insurance: Value of Goods: Proof.** Only where there is no evidence to establish the basis of reimbursement by an insurance company will reference to insurance proceeds be found insufficient.
8. **Criminal Law: Weapons: Words and Phrases.** Neb. Rev. Stat. § 28-1202(1) (Reissue 1989) does not require possession, but only that an individual carry the weapon. Carrying arms or weapons is defined as wearing, bearing, or carrying them upon the person or in the clothing or in a pocket for the purpose of use or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Krista L. Tushar for appellant.

James S. Jansen, Douglas County Attorney, and Ray W. Daniel for appellee.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired.

MILLER-LERMAN, Judge.

Shea B., a boy aged 14, appeals from the order of the separate juvenile court of Douglas County adjudicating him a child as defined under Neb. Rev. Stat. § 43-247(1) and (2) (Reissue 1993). The issues on appeal in this case involve the sufficiency of the evidence in support of the court's conclusion that, by proof beyond a reasonable doubt, Shea had violated Neb. Rev. Stat. § 28-517 (Reissue 1989), by receiving stolen property valued at over $1,500, and Neb. Rev. Stat. § 28-1202(1) (Reissue 1989), by carrying a concealed weapon. Because we find the evidence sufficient, we affirm the order of adjudication.

## SCOPE OF REVIEW

[1] The Nebraska Supreme Court has recently iterated that an appellate court reviews juvenile proceedings

> "de novo on the record and is thus required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, [an appellate] court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of facts over another." *In re Interest of R.G.*, 238 Neb. 405, 424, 470 N.W.2d 780, 793 (1991). See *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988).

*In re Interest of J.A.*, 244 Neb. 919, 923, 510 N.W.2d 68, 72 (1994).

## FACTS

An adjudication hearing was conducted on June 10, 1994, on the charges indicated above and others which are not the subject of this appeal. Seven witnesses, including Shea, testified.

Linda Harris testified that unidentified persons had attempted to steal her car in October 1993, and the car was damaged in the process. Ebony Dishmon testified that she witnessed the attempted theft of Harris' car and that Shea was one of the youths involved in the incident. Henry Elker testified that on December 8, 1993, his 1987 Nissan Sentra was stolen from his driveway while warming up on a cold morning, that he

did not see the perpetrators, and that the insurance company paid him $3,500 or $3,700 in settlement.

Officer Brian Smith of the Omaha Police Division testified that he was investigating the Harris incident when on December 9, 1993, he learned that Shea, a suspect in the Harris incident, had been arrested at McMillan Junior High School on charges of carrying a concealed weapon. Smith intercepted the officers making the arrest and interviewed Shea at police headquarters at 505 South 15th Street in Omaha. A rights advisory form, read by Smith to Shea, was received in evidence. Smith testified that Shea admitted to him in the interview that he had the keys to the Elker vehicle, that another juvenile had stolen the car, that Shea had been driving the Elker vehicle and told the police where the vehicle could be found, and that the Elker Nissan was found in the obscure location indicated by Shea.

Thomas Lowndes, an assistant principal at McMillan Junior High School, testified that on December 9, he had received information that a student had told a counselor that Shea had a knife, and that together with a security officer, Lowndes opened Shea's locker and found a 10 1/2-inch knife in Shea's coat in the locker. Lowndes stated that upon his confronting Shea, the juvenile admitted that he brought the knife to school because "[p]eople keep messing with me." The police and Shea's mother were called. Lowndes stated that it was possible for students to get combinations to other students' lockers. Lowndes also stated that the knife was not within Shea's reach when found in the locker. Lowndes testified that the students were wearing coats to school on December 9.

Officer Mark Hanner of the Omaha Police Division stated that he responded to a radio call to go to McMillan Junior High School on December 9 in connection with a weapons charge and that when he went to the school's office, Lowndes recited the circumstances of finding the knife and gave the officer the weapon. After checking with police headquarters, Hanner arrested Shea for carrying a concealed weapon and transported him to police headquarters.

Shea testified on his own behalf. He denied participating in the attempted theft of the Harris vehicle. In connection with the Elker car theft, he testified that he was holding the keys so

another youth, "Ramone," could go to gym class. Shea testified that Ramone had indicated that the keys were to his aunt's car. Shea denied having told Smith that he had driven the Elker vehicle. Shea did not testify regarding the weapons charge.

## ASSIGNMENTS OF ERROR

Shea claims that the evidence is insufficient to support a finding that he (1) received stolen property valued at over $1,500 and (2) carried a concealed weapon. Shea, therefore, claims that he was improperly adjudicated.

## ANALYSIS

*Receipt of Stolen Property Valued at Over $1,500.*

Although an adjudication is not a criminal proceeding, we take guidance from the criminal law of this state. Section 28-517 states, "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." A theft constitutes a Class III felony when the value of the thing involved is over $1,500. Neb. Rev. Stat. § 28-518(1) (Cum. Supp. 1994). Section 28-518(8) provides, "In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." In a juvenile proceeding, the applicable juvenile statute provides that the criminal burden of proof shall apply:

> After hearing the evidence on such question, the court shall make a finding and adjudication, to be entered on the records of the court, whether or not the juvenile is a person described by subdivision (1), (2), (3)(b), or (4) of section 43-247 based upon proof beyond a reasonable doubt.

Neb. Rev. Stat. § 43-279(2) (Reissue 1993).

On appeal, Shea argues that the evidence is insufficient as to the value of the Elker vehicle. The State argues that the value of the Elker car was adequately proven. In the alternative, the State argues that value is not an element of a theft offense, but only relates to grading of offenses in a criminal case. In support

of this argument, the State cites *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). The State further contends that in this juvenile proceeding where there is satisfactory proof that Shea received stolen property, the grading of the theft is irrelevant because the juvenile upon being adjudicated becomes subject to a disposition involving a rehabilitation plan in his best interests and is not subject to a conventional criminal sentence.

With respect to the theft, we agree with the trial court that there was proof beyond a reasonable doubt that Shea received stolen property. Although Shea denied driving the Elker car, Smith testified that Shea had Elker's keys, admitted he had driven the vehicle, and directed the police to an obscure location where the Elker car was found. Shea's knowledge that the vehicle was stolen could be inferred from the circumstances. See *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992).

With respect to the value of Elker's car, a 1987 Nissan Sentra, the evidence is as follows: Elker testified that "[t]he insurance company paid my loan off which was right around [$]3,500, $3,700." Elker further testified that he had purchased the vehicle "brand new" in December 1987.

Under older cases, the value of the stolen goods was deemed an essential element of a theft crime. See, e.g., *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971). However, in 1989, the Nebraska Supreme Court clearly held that the value of stolen property was not an element of the crime because value was not specified by the statute defining theft, and, therefore, value was important only in determining the penalty. *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). Thus, in criminal cases where value was not considered an element and where the proof of value was found insufficient on appeal, the Nebraska Supreme Court upheld the conviction notwithstanding a direction to remand the cause for a retrial on value. See, e.g., *State v. Wright*, 231 Neb. 410, 436 N.W.2d 205 (1989) (holding that where proof was sufficient to support a finding of receipt of a stolen vehicle, the conviction would be upheld, but that because sales contract did not meet business records exception and was inadmissible, proof was insufficient on value, and cause would be remanded for a new trial on the issue of the value of the stolen property).

In *Garza, supra*, cited by the State, the Nebraska Supreme Court found that the items in question had been shoplifted by the defendant and that their value went only to grading the offense. The court held that price tags of $85, $170, $130, and $152 on the shoplifted goods were insufficient proof of value, but concluded, nevertheless, that the clothing items in question had some intrinsic value that translated into nominal market value. Accordingly, the Nebraska Supreme Court in *Garza* remanded the cause to the district court with a direction to impose a sentence for misdemeanor theft of property with a value less than $100, a Class II misdemeanor.

[2,3] In 1992, the Nebraska Legislature passed 1992 Neb. Laws, L.B. 111, which added § 28-518(8) to the article including criminal theft statutes. Section 28-518(8) provides: "In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." The plain language of § 28-518(8) reinserts "value" as an element of theft by receiving stolen property under § 28-517. The legislative history corresponding to the introduction of the amendment which became § 28-518(8) is consistent with this reading. Floor Debate, L.B. 111, Judiciary Committee, 92d Leg., 2d Sess. 8968 (Feb. 13, 1992). It has been stated that

> [t]he Legislature, in enacting [an amendatory] statute, is presumed to have known the preexisting law, and [it is presumed] that the language was intentionally changed for the purpose of effecting a change in the law itself. In any event, the Legislature has the power to change the above provisions if it so desires.

*State v. Suhr*, 207 Neb. 553, 561, 300 N.W.2d 25, 29 (1980). Accordingly, we conclude that value is currently an essential element of the crime of theft by receiving stolen property.

The testimony regarding value of the stolen 1987 Nissan recited above shows that Elker bought the vehicle new in 1987, and in answer to the question asking Elker for his opinion as to the value of the car, he indicated that he received $3,500 or $3,700 from the insurance company to pay off the loan after the car was stolen. Shea argues that this evidence is insufficient proof of value. We do not agree.

[4-7] In theft cases, it has long been the law that an owner may give testimony relating to value. *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982). It is also the case that an owner may testify as to the value of a vehicle involved in an accident. *Kristensen v. Reese*, 220 Neb. 668, 371 N.W.2d 319 (1985). The amount of insurance reimbursement commonly provides proof in addition to an owner's testimony regarding value. See, e.g., *State v. Taylor*, 196 Conn. 225, 492 A.2d 155 (1985). Only where there is no evidence to establish the basis of reimbursement by an insurance company will reference to insurance proceeds be found insufficient. *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971). Given the facts of this case and applicable law, we find that the trial court properly concluded that Shea violated § 28-517 by receiving stolen property valued at over $1,500.

Under § 43-247 of the Nebraska Juvenile Code,

> [t]he juvenile court in each county . . . shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance;
>
> (2) Any juvenile who has committed an act which would constitute a felony under the laws of this state.

There is proof beyond a reasonable doubt that Shea's actions "would constitute a felony under the laws of this state." Therefore, we conclude that Shea was properly adjudicated under § 43-247(2).

*Carrying a Concealed Weapon.*

Shea claims on appeal that the evidence is insufficient to support a finding that he carried a concealed weapon. Although we recognize that this is a juvenile proceeding, we take guidance from the criminal law of this state in evaluating this assignment of error.

Under § 28-1202(1) and (3), it shall be a Class I misdemeanor if a person "carries a weapon or weapons concealed on or about his or her person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or

any other deadly weapon." The evidence in this case shows that the knife in question was a black-handled stainless steel hunting knife with a total length of 10½ inches and a sawtooth blade. The knife was received in evidence, and the record contains a photograph thereof. There is no doubt that the knife was a "weapon" under § 28-1202(1).

Lowndes testified without objection that Shea "admitted to bringing the knife to school," that the knife was found in Shea's coat in a locker, that the children were wearing coats to school on December 9, 1993, and that "[w]hen asked why [he brought the knife], he [Shea] stated, People keep messing with me. And we [school officials] took from that that he brought it for protection." Shea did not testify regarding the allegation of carrying a concealed weapon.

On appeal, Shea argues that the evidence is insufficient to support a finding that he carried a concealed weapon because the record is devoid of evidence regarding the manner in which the knife got to school. Specifically, Shea claims that the evidence is insufficient on the element that the weapon, which according to Lowndes he "admitted to bringing . . . to school," was concealed.

In support of his appellate argument, Shea relies on cases, not repeated here, involving solely circumstantial evidence in which the inferences were taken in favor of the accused on appeal. We find those cases inapposite because the evidence in this case does not consist exclusively of circumstantial evidence. Compare *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995).

Shea also relies on *In Interest of O.B.*, 851 S.W.2d 718 (Mo. App. 1993), in which a juvenile originally alleged to have carried a concealed weapon was found to have violated Missouri's criminal statute prohibiting carrying a gun into a school. This case is inapposite because the charge in the petition in the instant case was not amended, nor did the State seek to proceed under the Student Discipline Act, see Neb. Rev. Stat. § 79-4,180 (Reissue 1994), or other statutory provisions.

[8] In a criminal case, one violates § 28-1202(1) by carrying a concealed weapon. It has been held that § 28-1202(1)

> does not require possession . . . but only that an individual

> carry the weapon. Black's Law Dictionary 214 (6th ed. 1990) defines carrying arms or weapons as wearing, bearing, or carrying them "upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person."

*State v. Blackson*, 1 Neb. App. 94, 98, 487 N.W.2d 580, 583 (1992).

Based on the direct and indirect evidence in the record and relevant jurisprudence, we find that the evidence and the inferences properly taken therefrom sufficiently support the conclusion that the knife was a weapon for purposes of § 28-1202(1), that Shea carried it to school, and that it was concealed in his coat at the time of the offense. The fact that the weapon was not within Shea's reach at the time it was found in his locker is of no consequence. See *State v. Saccomano*, 218 Neb. 435, 355 N.W.2d 791 (1984) (upholding a conviction for carrying a concealed weapon where the defendant had been stopped for driving while intoxicated and was in jail when the car was searched and where the search of the vehicle produced a gun under the front seat). Thus, the trial court properly concluded that Shea violated § 28-1202(1) and that jurisdiction existed under § 43-247(1).

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. GARY L. BORLAND, APPELLANT.

532 N.W.2d 338

Filed May 16, 1995. No. A-94-1009.

1. **Speedy Trial: Complaints: Appeal and Error.** As a general rule, the trial court's determination of whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by the appellate court unless the determination was clearly erroneous.
2. **Speedy Trial: Waiver.** The burden is upon the State to bring accused persons to trial within the time provided by law, and if a defendant is not brought to trial

within the 6 months provided for in Neb. Rev. Stat. § 29-1207 (Reissue 1989), the defendant is entitled to an absolute discharge from the offense in the absence of an express waiver or a waiver of time as provided for in the speedy trial statute.

3. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) is applicable when the defendant is not tried within 6 months.
4. _____: _____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
5. **Speedy Trial.** When a defendant is aware of the scheduled trial date and fails to appear on that date, the Nebraska speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court.
6. **Speedy Trial: Pretrial Procedure.** A defendant must accept delay as a consequence of making pretrial motions, where the delay is not inordinate or unreasonable.
7. **Speedy Trial.** Judicial delay, absent a showing of good cause, does not suspend a defendant's right to a speedy trial.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired.

SIEVERS, Chief Judge.

This case presents speedy trial issues under the statutory guarantee that every person charged with an offense shall be brought to trial within 6 months as provided in Neb. Rev. Stat. § 29-1207 (Reissue 1989). Gary L. Borland was charged with driving while his license was under a 15-year suspension in violation of then applicable Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990), now codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993). That Borland drove a motor vehicle while under a 15-year suspension on or about September 1, 1992, as charged, is not disputed. Borland's only contention on appeal is that his right to a speedy trial was violated, which requires reversal of his conviction.

Nebraska's speedy trial statute, § 29-1207, requires that

every person indicted or informed against for any offense shall be brought to trial within 6 months, which shall commence to run from the date the information is filed. Subsection (4) of the statute provides that certain periods of time shall be excluded from the computation of the date by which a defendant must be tried. The statutory provisions which could conceivably result in excludable time periods in the instant case are as follows:

> (a) The period of delay resulting from other proceedings concerning the defendant . . . ; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant[.]

§ 29-1207(4).

Borland was charged by an information filed October 9, 1992, and he was convicted at a trial on September 12, 1994, almost 2 years later. The following "table" sets forth the events and the dates of their occurrence during the 2 years at issue in this case:

| | |
|---|---|
| October 9, 1992 | Information filed in Lancaster County charging driving under suspension |
| 69 days ↓ | |
| December 17, 1992 | Borland fails to appear for docket call, bench warrant ordered |
| 113 days ↓ | |
| April 9, 1993 | Bench warrant issued |
| 375 days ↓ | |
| April 19, 1994 | Borland arraigned in Lancaster County District Court on failure to appear charges |
| 45 days ↓ | |
| June 3, 1994 | Borland files motion to dismiss on speedy trial grounds |
| 74 days ↓ | |

| | |
|---|---|
| August 16, 1994 | Motion to dismiss overruled |
| 24 days ↓ | |
| September 9, 1994 | Motion for discharge on speedy trial grounds filed by Borland |
| 3 days ↓ | |
| September 12, 1994 | Motion overruled, stipulated evidence bench trial, Borland found guilty |

We determine the "final date" by which Borland must have been tried by excluding the date the information was filed, counting forward 6 months, backing up 1 day, and then adding the excludable time periods to that date. See, *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Using this method, we determine whether more than 6 includable months have passed between the filing of the information on October 9, 1992, and the trial held on September 12, 1994. If so, Borland is entitled to an absolute discharge, as under § 29-1207 no showing of prejudice from the delay is necessary to gain discharge. See *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987).

Borland argues that the 113 days from his failure to appear on December 17, 1992, to the issuance of the bench warrant on April 9, 1993, is chargeable to the State, and therefore not excludable, because of the district court's failure to issue a bench warrant on December 17 or within a reasonable time thereafter. To buttress this contention, Borland points to his testimony that in mid-January 1993, in response to a letter from his counsel about his failure to appear, he went to the Lancaster County sheriff's office, as well as the Lincoln Police Department, in an attempt to resolve the matter of the warrant for his failure to appear. Borland testified that he was told upon his inquiry at each place that there was no warrant for him. The warrant was not actually issued for Borland's failure to appear on December 17, 1992, until April 9, 1993, and thus such a response would not be surprising. Therefore, given his attempt to resolve the matter promptly, Borland argues that he should not be charged with the time during which the State was less than prompt in securing the issuance of a warrant. The State

counters with the doctrine that under *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988), when a defendant is aware of a scheduled trial date and fails to appear, the speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court. According to the State, the entire 488 days from December 17, 1992, to April 19, 1994, is chargeable to the "absence or unavailability" of Borland and thus is excludable under § 29-1207(4)(d).

The district court held in its ruling of August 16, 1994, that this 488-day time period resulted from "the absence or unavailability of defendant" and thus was excludable. In its August 16 ruling, the district court did not specifically address the 74 days during which it had under submission Borland's motion to dismiss on speedy trial grounds. However, when a different judge of the Lancaster County District Court ruled on the September 9, 1994, motion for discharge, the time between the first motion to dismiss and the ruling thereupon of August 16 was held to be chargeable to Borland. Although not specifically so stating, the district court apparently made the same ruling with respect to the 3 days during which the second speedy trial motion to discharge filed September 9 was under submission.

The sole assignment of error before us is that the district court erred in holding that the "speedy trial clock" had not run.

## STANDARD OF REVIEW

[1] In *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992), the Supreme Court briefly addressed the matter of the standard of review of a trial court's determination of a motion to discharge on speedy trial grounds. The *Richter* court said that as a general rule, the trial court's determination of whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by the appellate court unless the determination was clearly erroneous.

## ANALYSIS

[2-4] The burden is upon the State to bring accused persons to trial within the time provided by law, and if a defendant is not brought to trial within the 6 months provided for in

§ 29-1207, the defendant is entitled to an absolute discharge from the offense in the absence of an express waiver or a waiver of time as provided for in the speedy trial statute. *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982). The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) is applicable when the defendant is not tried within 6 months. *State v. Beck, supra*. See, also, *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. McKenna, supra*.

The first timeframe we analyze is from December 17, 1992, when Borland failed to appear and a bench warrant was ordered, until April 9, 1993, when the warrant was finally issued, a total of 113 days. There are two parts to this issue: (1) whether the delay in the issuance of the warrant makes the time chargeable to the State and (2) whether Borland's alleged attempt to deal with his failure to appear by contacting the Lancaster County Sheriff and the Lincoln Police Department makes the time chargeable to the State.

The only authority cited by Borland for the proposition that the delay in the issuance of the warrant makes the time chargeable to the State is *People v. Sims*, 59 A.D.2d 546, 398 N.Y.S.2d 440 (1977). However, *Sims* is clearly distinguishable. In *Sims*, there was a delay of 7 months between the filing of a sealed indictment from a grand jury and the signing of an arrest warrant for the defendant because of the neglect of either the county clerk's office or the district attorney's office. A sealed indictment is intended to prevent the defendant from knowing about the pendency of the charges. Thus, the 7 months between filing of the sealed indictment and the warrant for the arrest of the defendant can only be chargeable to the State. Since only the State knows of the pendency of the charges, it seems axiomatic that a court could not logically attribute any delay between indictment and warrant to the defendant, as there is no "absence or unavailability" for trial because of the defendant's action or inaction. Although *Sims* does not help Borland, we think the focus in Nebraska speedy trial cases on the

defendant's having proper notice is nonetheless quite consistent with *Sims*.

In *State v. Groves*, 238 Neb. 137, 469 N.W.2d 364 (1991), the Supreme Court held that a 90-day period between the date the defendant failed to appear in district court and the date of his arrest was not chargeable to the defendant, which entitled him to dismissal on speedy trial grounds. In *Groves*, the defendant was told in writing to appear in the county court when in reality he was to appear in the district court, and when he did not, a capias was issued for his arrest. There was no other evidence in the record to establish the defendant knew he was to appear on a certain date in district court. Accordingly, the court in *Groves* held:

> If the State is to complain of a defendant's failure to appear at a certain time and place as ordered, the State must first obtain a court order directing defendant where and when to appear. The State cannot shift that burden by obtaining an order specifically directing the defendant to appear in the wrong place, and then contending that defendant should know the proper place to appear. If the State is to enforce a court's written orders, those orders should be accurate. We stated in *State v. Beck, supra*, at 704, 325 N.W.2d at 150: "This court has previously held: '[T]he primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.' *State v. Bolton*, [210 Neb. 694, 697, 316 N.W.2d 619, 621 (1982)]; *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980)."

238 Neb. at 141, 469 N.W.2d at 367.

In *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992), the Supreme Court found that the defendant did not have proper notice of the date when he was to appear in district court, and thus, the speedy trial clock was not tolled. The court held that a criminal defendant must be properly notified of the need to appear in court at a given date and time before the failure to do so can initiate an excludable period. Accordingly, the State was

required to prove by a preponderance of the evidence that Richter had notice of the hearing for which he failed to appear.

Borland does not argue that he did not have notice of the December 17 docket call at which he was to appear. The record establishes the court's order for the appearance of Borland and his counsel for the December 17 docket call. Borland admits that he was not there. Thus, when Borland failed to appear on December 17, an excludable period of time began.

We now turn to the question of when this excludable time period ended. We begin with the matter of whether Borland's appearance at the sheriff's office and the police department in mid-January ended the excludable time period which began with his failure to appear on December 17. Borland argues that *State v. Groves, supra*, and *State v. Richter, supra*, are favorably analogous to his position. The State gave erroneous directions in *Groves* as to the court where the defendant was to appear, and in *Richter*, the failure to serve the complaint by a method other than regular mail caused a finding of a lack of notice and a discharge on speedy trial grounds. Borland claims these cases represent the functional equivalent to his visit to the police department and the sheriff's office where he was told there were no warrants for him.

We reject Borland's argument in light of his testimony that he had appeared on this felony driving while under suspension charge several times prior to his failure to appear on December 17, he knew that there was a felony charge pending against him, and that there would be a "trial or something to dispose of it before it was done." Also, Borland admitted in his testimony on the motion to dismiss that he did not contact his attorney after he received the letter or after he had been to the county sheriff and Lincoln Police Department. Borland also admitted that he had previously had warrants issued against him. Borland stated that he spoke to "a speaker thing in the lobby" and that he did not speak with anyone face to face. He testified that he just told them his name, and it took 10 to 15 minutes, like "they were running a check."

Borland's evidence merely establishes that at the time he checked, there was not a warrant then outstanding. However, Borland's argument does not equate to the scenarios in *Groves*

or *Richter* where the State sought to exclude from the speedy trial calculation the time period initiated by a failure to appear when the notice to appear was defective or service of the underlying complaint was not lawfully undertaken. Borland's visit to the sheriff's office and the police department and the absence of a warrant at that time did not mean that his failure to appear on December 17, in violation of the court's order to appear, was forgiven or forgotten. Moreover, the above admissions from Borland's testimony establish that he knew that such was not the case and that there would still be a day of reckoning on this serious charge.

Additionally, *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988), clearly cuts against Borland's argument. In *McKenna*, the defendant was charged on September 11, 1985, with second-offense driving while under the influence and was not tried until November 17, 1986, clearly more than 6 months later. An arraignment date was scheduled for September 25, 1985, and rescheduled three times, with the last date being November 4, 1985. McKenna was notified of this date by ordinary mail, but the previous reschedulings had occurred through a series of letters between the court and McKenna which concerned her difficulty in getting from her home in Lincoln to O'Neill for arraignment. McKenna appeared on November 4 with counsel, and the matter was set for trial on November 25. The matter was rescheduled to December 2, and notice was sent to her court-appointed attorney via ordinary mail, but McKenna failed to appear on that date. A bench warrant was issued the following day. The court's opinion in *McKenna* specifically observes that the record is silent as to whether service of the warrant was attempted and, if so, the result. The bench warrant was reissued on June 6, 1986. The court again noted that the record was silent as to whether service of this second warrant was attempted. McKenna appeared in the Holt County Court on October 28, 1986, with her counsel and explained to the court that she could not afford to travel from Lincoln and thus could not appear. She admitted that she had not contacted the court and did not have an excuse for her inaction.

Before the Supreme Court, McKenna argued that she should have been considered as " 'available' " for trial because any

defects in the proceedings were "the sole result of the failure of the State to serve the bench warrant in a timely fashion." 228 Neb. at 36, 421 N.W.2d at 24. We consider this argument to be the equivalent of Borland's argument that the 113 days between his failure to appear and the issuance of the bench warrant should not be excluded because of the failure of the trial court to immediately issue a bench warrant. In *McKenna*, the Supreme Court found that the defendant's failure to appear for her scheduled trial on December 2, 1985, was clearly "inaction," making her unavailable or absent under § 29-1207(4)(d). The court in *McKenna* then held:

> It should be noted that in both *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982), and *State v. Bennett*[, 219 Neb. 601, 365 N.W.2d 423 (1985)], the defendants were eventually brought into court pursuant to warrants for their arrest. The period of time between Beck's failure to appear and the successful execution of the warrant was over 8 months. While the opinion in *Beck* does not note whether a second bench warrant was issued after the initial 6-month period, it would appear that the situation in that case is similar to the fact pattern here. That same pattern is repeated in *Bennett*, where the period of time between his failure to appear and his arrest was 6 months. In neither of these cases did the court construe any delay in executing the warrant as bearing on the issue of whether the State violated the defendant's right to a speedy trial. Rather, as may be inferred from *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), *it would appear that the defendant had an affirmative duty to contact the court to reschedule the trial date.*

(Emphasis supplied.) 228 Neb. at 36, 421 N.W.2d at 24. If the failure to serve an issued warrant on an absent defendant does not inure to the defendant's benefit in a speedy trial calculation, then logic dictates that neither would a failure to immediately issue a warrant for a nonappearing defendant. Borland cannot shift the consequences of his failure to appear to the State by arguing that the State's response was not prompt or heavy-handed enough. Borland's argument that the time during which he was absent but "unarrested" on the warrant is

excluded because the State did not drag him back to court lacks logical coherence.

In our view, Borland also had a duty to contact the trial court to reschedule his proceedings once he failed to appear on December 17. Admittedly, he testified to taking some action, by contacting the sheriff and the police. However, that action is insufficient because he did not contact the court, whose order he had disobeyed by failing to appear, and reschedule his appearance. Thus, there is inaction in this case, in the same sense that there was in *McKenna*.

[5] As was said in *McKenna*, "[W]hen a defendant is aware of the scheduled trial date and fails to appear on that date, the Nebraska speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court." 228 Neb. at 35, 421 N.W.2d at 24. Borland's visit to the sheriff's office and the Lincoln Police Department is not an appearance in court, and after he failed to appear in court on December 17, 1992, Borland did not appear in Lancaster County District Court until April 19, 1994. Therefore, this time period of 16 months 1 day is chargeable to Borland and excludable in the speedy trial calculation.

The speedy trial calculation at this point is October 9, 1992, to April 9, 1993, under *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991), plus the 16 months 1 day discussed above, which makes the final permissible trial date August 10, 1994. Since Borland was not tried until September 12, 1994, we must now address his claim that the time period during which his motion to dismiss on speedy trial grounds was pending is excludable. This is the 75 days from the filing of the motion on June 3 to its overruling on August 16, 1994. If that time period is excludable, then the final date by which Borland had to be tried was October 23, 1994, and there is no speedy trial problem here.

Borland cites no authority for the proposition that the timeframe during which the trial court has a motion to dismiss or discharge on speedy trial grounds under submission is an automatically excludable period, and our research reveals that the law is otherwise. Section 29-1207(4)(a) excludes the delay consequent to the time from filing until final disposition "of

pretrial motions of the defendant." The statute includes a list of such pretrial motions, including motions to quash, demurrers, and pleas in abatement, but we do not read the list as being all-inclusive.

[6,7] In *State v. Ebert*, 235 Neb. 330, 335, 455 N.W.2d 165, 169 (1990), the Supreme Court performed a speedy trial calculation and said: "Excluding the 68-day continuance occasioned by the defendant's own motion for discharge, the defendant was tried within 180 days of his request [that the case be reset for arraignment]." A defendant must accept delay as a consequence of making pretrial motions, where the delay is not inordinate or unreasonable. *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986). Judicial delay, absent a showing of good cause, does not suspend a defendant's right to a speedy trial. *Id.* See, also, *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

Here there is no claim that the time during which the matter was under submission was an inordinate amount of time for such a motion. *State v. Ebert, supra*, allowed a 68-day interval, and the 75 days here from the filing of the motion to its resolution equates quite precisely with *Ebert*. Thus, the time between submission of the motion and when it was decided is excludable, making the final permissible trial date well after September 12, 1994.

Borland's claim that his conviction must be reversed on speedy trial grounds is without merit.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. TERRY L. HEMMER, APPELLANT.

531 N.W.2d 559

Filed May 23, 1995. No. A-94-867.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent from that of the trial court in a judgment under review.

2. **Pleas: Waiver: Indictments and Informations.** A plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information is insufficient to charge a crime.
3. **Criminal Law: Intent: Words and Phrases.** Intentionally means "willfully" or "purposely," and not accidentally or involuntarily.
4. **Criminal Law: Intent.** A person acts purposely with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
5. **Criminal Law: Statutes: Words and Phrases.** The meaning of the word "know" or "knowingly" in a penal statute varies in the context in which it is used.
6. _____: _____: _____. The meaning of "knowingly" in a criminal statute commonly imports a perception of facts required to make up the crime.
7. **Criminal Law: Proof.** When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
8. **Criminal Law: Words and Phrases.** Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
9. **Criminal Attempt: Intent.** Where a particular result is an element of the underlying crime, Neb. Rev. Stat. § 28-201(1)(a) and (b) (Reissue 1989) requires that the actor intended the result.
10. _____: _____. Under Neb. Rev. Stat. § 28-201(2) (Reissue 1989), the actor can be convicted of criminal attempt if he *knows* that his conduct will produce the result. In other words, the actor can be convicted of attempt if he is aware of the high probability that such result will occur.
11. **Criminal Attempt.** One cannot commit the crime of attempt where the underlying crime contains only a reckless mens rea.
12. **Criminal Law: Assault: Police Officers and Sheriffs.** There is no crime in the State of Nebraska for attempted *reckless* assault on a peace officer in the second degree.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Reversed.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

In this case we determine whether the crime of attempted reckless assault on an officer in the second degree exists under the laws of this state. See Neb. Rev. Stat. §§ 28-930(1)(b) and 28-201 (Reissue 1989). Defendant, Terry L. Hemmer, was charged with such crime in the district court for Pierce County and pled no contest to the charge. Hemmer claims on appeal that the information was insufficient to charge a crime and that his sentence was excessive. We find that the crime of attempted reckless assault on an officer in the second degree does not exist in this state, and we, therefore, reverse Hemmer's conviction.

## FACTUAL BACKGROUND

The factual background for this case is taken from the factual basis for Hemmer's plea, which was supplied by the Deputy Pierce County Attorney during the district court proceedings. According to the factual basis, on January 15, 1994, a Platte County sheriff's deputy attempted to stop Hemmer for a speeding violation. When Hemmer would not stop, a high-speed chase ensued. The chase continued from Platte County through Madison County and into Pierce County, at which time there were 8 to 10 law enforcement officers from four different law enforcement agencies involved in the chase.

During the chase, Hemmer ran two roadblocks set up by police. One roadblock had been set up by the Pierce County sheriff in the town of Osmond. As Hemmer's vehicle was being chased through Osmond by a State Patrol trooper, the sheriff parked his vehicle in the middle of a street in the path of the pursuit and exited the vehicle. The sheriff then attempted to "flag the Hemmer vehicle down" as it approached, but when Hemmer's vehicle did not stop, the sheriff was forced to "dive into a snowbank" to avoid being struck. Hemmer was later apprehended in a rural area after his vehicle ran out of gas.

On March 2, 1994, Hemmer was charged with several crimes relating to the incident, including attempted assault on an officer in the second degree. With regard to this charge, the information alleged that Hemmer attempted to "*intentionally*

*or recklessly* cause bodily injury with a dangerous instrument to a peace officer." (Emphasis supplied.) On March 22, Hemmer filed a motion to quash the attempted assault charge, alleging that it is "legally impossible to commit the crime of attempting to recklessly cause bodily injury with a dangerous instrument to a peace officer."

Subsequently, a plea agreement was reached under which the information was amended to charge only one crime, attempt to "*recklessly* cause bodily injury . . . to a peace officer." (Emphasis supplied.) See § 28-930(1)(b). The plea agreement called for Hemmer to plead guilty to this charge. The court accepted Hemmer's plea and found him guilty as charged in the amended information. The court subsequently sentenced Hemmer to 9 months' imprisonment and ordered him to pay court costs. Hemmer thereafter timely appealed to this court.

## ASSIGNMENTS OF ERROR

Hemmer claims that the trial court erred in (1) accepting his plea and finding him guilty based upon an insufficient information, (2) imposing an excessive sentence, and (3) not sentencing him to probation. Because our resolution of the first assigned error is determinative of this appeal, we will not address Hemmer's second and third assigned errors. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

## STANDARD OF REVIEW

[1] The issues raised by Hemmer's first assigned error are questions of law. Regarding questions of law, an appellate court has an obligation to reach a conclusion independent from that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

## DISCUSSION

[2] Hemmer pled no contest to the charge of attempting to recklessly assault an officer in the second degree. A plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information is insufficient to charge a crime. *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991).

Criminal attempt is defined by § 28-201 as follows:

(1) A person shall be guilty of an attempt to commit a crime if he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

Assault on an officer in the second degree is defined in § 28-930 as follows:

(1) A person commits the offense of assault on an officer in the second degree if he or she:

(a) Intentionally or knowingly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties; or

(b) Recklessly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

(2) Assault on an officer in the second degree shall be a Class III felony.

Under the amended information, Hemmer was only charged with attempt to "recklessly cause bodily injury with a dangerous instrument to a peace officer." See § 28-930(1)(b).

Hemmer claims that it is legally impossible to commit a crime of attempt to recklessly cause bodily injury because the attempt statute requires that the actor intentionally attempt to commit

the underlying crime. Before addressing this argument, we find it necessary to clarify the levels of culpability that are involved in the two statutes at issue in this case.

The attempt statute mentions two levels of culpability, "intentional" and "knowing." See § 28-201(1) and (2). The crime of assault on a peace officer in the second degree has three potential levels of culpability: intentional, § 28-930(1)(a); knowing, § 28-930(1)(a); and reckless, § 28-930(1)(b). However, the information only charged Hemmer with attempted "reckless" assault on an officer in the second degree.

[3,4] The Nebraska Supreme Court has stated that "[i]ntentionally means 'willfully' or 'purposely,' and not accidentally or involuntarily." *State v. Coca*, 216 Neb. 76, 81, 341 N.W.2d 606, 610 (1983). "Purposely" is defined in the Model Penal Code as follows:

> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Model Penal Code § 2.02(2)(a) at 225 (1985).

[5-7] The Nebraska Supreme Court has also discussed the definition of "knowing," stating, "The meaning of the word 'know' or 'knowingly' in a penal statute varies in the context in which it is used." *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 811-12, 331 N.W.2d 526, 530 (1983). In *State v. LaFreniere*, 240 Neb. 258, 262-63, 481 N.W.2d 412, 414-15 (1992), the court stated:

> "The meaning of 'knowingly' in a criminal statute commonly imports a perception of facts required to make up the crime. . . ." . . .
>
> . . . " 'When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.' "

[8] "Recklessly" is the only degree of culpability defined in the Nebraska Criminal Code. The criminal code defines "recklessly" nearly the same as it is defined by the Model Penal Code:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Neb. Rev. Stat. § 28-109(19) (Cum. Supp. 1994). See Model Penal Code § 2.02(2)(c) (1985).

[9] In *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981), the Nebraska Supreme Court discussed the attempt statute and the requisite mental states that accompany § 28-201(1)(a), (1)(b), and (2). In its discussion, the court indicated that where a particular result is an element of the underlying crime, subsections (1)(a) and (b) of the attempt statute require that the actor intended the result, i.e., an intentional mens rea. The court then stated:

> Subsection (2) of § 28-201 . . . as applied to the defendant in this case, . . . adds nothing to subsections (1)(a) and (b). It simply restates that if one purposefully and with . . . premeditated malice intends to kill another and engages in conduct which constitutes a substantial step in a course of conduct *intending to cause such death*, the actor is guilty of attempted murder in the first degree. It does appear to cover an additional situation not applicable here: where the actor *does not intend to cause the specific result* but engages in conduct which is *known* by him in the natural progression of events to cause such result . . . .

(Emphasis supplied.) (Emphasis in original.) *Sodders*, 208 Neb. at 507-08, 304 N.W.2d at 65.

[10] The above discussion indicates that where a particular result is an element of the underlying crime, § 28-201(1)(a) and

(b) requires that the actor intend such result for a conviction of criminal attempt. In other words, it must be the actor's conscious object to cause such result. Under § 28-201(2), however, the actor can be convicted of criminal attempt if he *knows* that his conduct will produce the result. In other words, the actor can be convicted of attempt if he is aware of the high probability that such result will occur, even if he does not intend such result.

The underlying crime, as charged in this case, does not contain an intentional or a knowing state of mind as an element, as is required by § 28-201. As charged in the amended information, the crime is not an intentional or knowing one, but, rather, a reckless one. As the Supreme Court stated in *Sodders*, the attempt statute only applies to crimes committed knowingly or intentionally. The attempt statute thus does not apply to a crime such as an attempt to *recklessly* cause bodily injury to a peace officer because the mens rea of "reckless" does not rise to the level of "knowing" or "intentional" as required by the attempt statute. See § 28-201. This result reflects the position taken by the Model Penal Code.

The comment to § 5.01 of the Model Penal Code discusses the issue of whether the law of attempt should be applied to cases where the underlying crime contains a reckless mens rea and has a result as an element:

> Cases will arise where the defendant engaged in conduct that recklessly or negligently created a risk of death, but where the death did not result. Should the law of attempts encompass such cases?
>
> The approach of the Model Code is not to treat such behavior as an attempt. Instead the Code creates a separate crime, a misdemeanor, for recklessly placing another person in danger of death or serious bodily injury. The Institute's judgment was that the scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility. While it was believed that the reckless creation of risk of death or serious bodily harm was grave enough for general coverage, even for this

> behavior misdemeanor penalties seemed more apt than the severer sanctions attached to felony attempts.

Model Penal Code § 5.01, comment at 303-04 (1985).

[11] A majority of other jurisdictions addressing this issue has also held that one cannot commit the crime of attempt where the underlying crime contains only a reckless mens rea. See, e.g., *People v. Foy*, 155 Misc. 2d 81, 587 N.Y.S.2d 111 (1992); *Minshew v. State*, 594 So. 2d 703 (Ala. Crim. App. 1991); *State v. Dunbar*, 117 Wash. 2d 587, 817 P.2d 1360 (1991) (en banc); *Wells v. State*, 555 N.E.2d 1366 (Ind. App. 1990); *People v. Coleman*, 131 Ill. App. 3d 76, 475 N.E.2d 565 (1985); *State v. Zupetz*, 322 N.W.2d 730 (Minn. 1982); *State v. Smith*, 21 Or. App. 270, 534 P.2d 1180 (1975); *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490 (1970). Cf. *State v. Tagaro*, 7 Haw. App. 291, 757 P.2d 1175 (1987). But, see, *People v. Thomas*, 729 P.2d 972 (Colo. 1986) (en banc); *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983).

[12] After reviewing the above authority, we conclude that there is no crime in the State of Nebraska for attempted *reckless* assault on a peace officer in the second degree. We note, however, that our decision in no way affects the validity of the crimes of attempted *intentional* or *knowing* assault on a peace officer in the second degree. See § 28-930(1)(a).

## CONCLUSION

The crime of attempted reckless assault on a peace officer in the second degree is not a crime under the statutes and case law of Nebraska. Hemmer, therefore, correctly asserts that the amended information was insufficient to charge a crime, and accordingly, we reverse his conviction.

REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. TIMOTHY G. MCGURK, APPELLANT.

532 N.W.2d 354

Filed May 30, 1995. No. A-93-521.

1. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Postconviction: Effectiveness of Counsel: Proof.** Nebraska law applies the following two-pronged test for determining the effectiveness of counsel in a postconviction case: (1) whether the attorney, in representing the defendant, performed at least as well as an attorney with ordinary training and skill in criminal law in the area and (2) whether the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
5. _____: _____: _____. A postconviction defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense in such a way that the defendant was denied a fair trial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
6. _____: _____: _____. A postconviction appellant must show counsel's deficient performance and prejudice to the defendant.
7. **Right to Counsel: Effectiveness of Counsel: Presumptions.** Prejudice will be presumed (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.
8. **Conflict of Interest: Effectiveness of Counsel: Presumptions.** Prejudice will be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel.
9. **Right to Counsel: Effectiveness of Counsel.** The exceptions in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), permit finding a constructive denial of counsel in only a very narrow spectrum of cases.
10. **Right to Counsel: Effectiveness of Counsel: Presumptions: Proof.** Unless a defendant can show that his case is squarely governed by *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), he must rebut a presumption that *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), should apply.
11. **Criminal Law: Constitutional Law.** Petty crimes or offenses, as opposed to

serious crimes or offenses, do not give rise to the Sixth Amendment right to jury trial.

12. **Criminal Law: Constitutional Law: Sentences.** The severity of the maximum authorized penalty is the most objective indication of the seriousness of the crime, and a maximum authorized prison term of more than 6 months implicates the right to jury trial, whereas a term of 6 months or less presumptively does not.
13. **Effectiveness of Counsel.** An attorney has a duty to investigate the facts of his client's case and to research the law applicable to those facts.
14. _____. Counsel is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.
15. **Drunk Driving: Effectiveness of Counsel.** An attorney representing a defendant charged with driving while under the influence of alcohol, third offense, whose case was tried in Nebraska in 1991 should have known of or have discovered the rules of law in *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), before proceeding to trial with his or her client, notwithstanding the practice of other attorneys.
16. **Effectiveness of Counsel: Proof.** Even where counsel's representation was deficient, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
17. **Criminal Law: Judgments: Effectiveness of Counsel: Proof.** The additional prejudice requirement is based on the conclusion that an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
18. **Effectiveness of Counsel: Proof.** Even if a defendant shows that particular errors of counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense.
19. _____: _____. Proof of prejudice is required to succeed in establishing a claim of ineffective assistance of counsel.
20. _____: _____. In order to satisfy the prejudice prong of the analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must first make an allegation of the nature and effect of the requisite prejudice.
21. **Postconviction: Proof.** For a postconviction motion to succeed, a defendant must allege facts which, if proved, constitute a denial of a constitutional right.
22. _____: _____. A claim of prejudice will not succeed where the claim is merely speculative.
23. **Effectiveness of Counsel: Proof.** In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove prejudice resulted from counsel's allegedly deficient performance.
24. **Effectiveness of Counsel: Records: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must demonstrate prejudice was suffered, and the record must affirmatively support the claim.
25. **Effectiveness of Counsel: Proof: Words and Phrases.** A reasonable probability

is a probability sufficient to undermine confidence in the outcome. A defendant claiming ineffective assistance of counsel must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In making this determination, a court must consider the totality of the evidence before the judge or jury.

26. **Effectiveness of Counsel.** In making predictions of the outcome at a possible trial, where necessary, such predictions should be made objectively, without regard for the idiosyncrasies of the particular decisionmaker.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of District Court affirmed.

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired.

MILLER-LERMAN, Judge.

Timothy G. McGurk appeals the Lancaster County District Court's affirmance of the county court's denial of his motion for postconviction relief. For the reasons recited below, we affirm.

## BACKGROUND

On September 28, 1990, Officer Michael Johnston of the Lincoln Police Department arrested McGurk for driving while under the influence of alcohol (DWI). Following McGurk's arrest, the State filed a complaint charging McGurk with DWI, third offense. McGurk pleaded not guilty to the charges, and the case proceeded to trial.

The record reflects that at no time prior to trial did McGurk's trial counsel inform him of the availability of a jury trial for DWI, third offense, cases in Nebraska, notwithstanding the holding in *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), which had been decided May 23, 1990. Consequently, McGurk did not request a jury trial, and McGurk's case was tried to the court on January 8, 1991.

The trial testimony covers about 130 transcribed pages. Johnston testified that while on an unrelated traffic stop he witnessed McGurk drive by and remain a lengthy time at a stop sign. After completing the traffic stop, Johnston followed McGurk and witnessed McGurk make a wide turn and "weave back and forth within the lane touching center line." Johnston stopped McGurk. Following the stop, Johnston saw that McGurk's eyes were bloodshot and watery, his face was flushed, and he smelled of alcohol. Johnston asked McGurk to exit his vehicle to perform field sobriety tests. According to Johnston, McGurk was wobbly and held onto the vehicle to maintain his balance. McGurk refused to perform field sobriety tests. Johnston opined that McGurk was intoxicated and arrested him. After Johnston took McGurk to the jail at 9th and J Streets, McGurk was tested on an Intoxilyzer, which measured a blood alcohol content of .282. Ronald Ritenour, a correctional officer at the Lancaster County correctional facility, testified as to McGurk's uncooperativeness at the jail. Rex Thompson testified regarding the maintenance of the Intoxilyzer. McGurk testified and denied making a wide turn. McGurk admitted having about five beers in the late afternoon and one beer later that night prior to arrest at approximately 12:51 a.m. on September 28, 1990. McGurk's citation charged McGurk with DWI, in violation of Lincoln Mun. Code § 10.52.020. Following closing arguments, the trial judge found McGurk guilty.

An enhancement hearing was held on January 22, 1991. Following the enhancement hearing, at which evidence of two previous DWI convictions was received, the trial court sentenced McGurk for DWI, third offense, to 3 months in jail; fined him $500 plus costs; and revoked his driver's license and all driving privileges in the State of Nebraska for a period of 15 years. The Lancaster County District Court affirmed McGurk's conviction and sentence on July 8, 1991.

McGurk filed a direct appeal of his conviction and sentence to the Nebraska Supreme Court. The issues McGurk asserted on direct appeal generally challenged the probative value of the evidence at the enhancement hearing and the propriety of his prior DWI offenses, as used to enhance the September 28, 1990,

offense. McGurk did not assert a direct appellate claim surrounding his right to a jury trial. The Supreme Court affirmed the decision of the district court by memorandum opinion dated October 28, 1992. On October 30, 1992, the Supreme Court, referring to *Richter, supra*, recognized the right to a jury trial in DWI, third offense, cases. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). There is an indication in the record that McGurk also sought habeas corpus relief in 1992, in the U.S. District Court for the District of Nebraska, and the petition was voluntarily dismissed.

Following his direct appeal, McGurk began to serve his sentence on January 11, 1993. McGurk filed a motion for postconviction relief in the Lancaster County Court on January 14, 1993, in which he alleged that "his conviction was obtained in violation of his right to a trial by jury" and that his trial and appellate counsel had been ineffective by failing to inform him of his right to a jury trial and by failing "to preserve and challenge" McGurk's right to a jury trial. See, U.S. Const. amend. VI; Neb. Const. art. I, § 6.

The county court granted McGurk an evidentiary hearing on his postconviction motion. The evidence adduced at the hearing included an affidavit from McGurk's trial and appellate counsel which stated that counsel did not know of or advise McGurk of McGurk's right to a jury trial under *Richter*. McGurk testified that he was not advised by trial counsel of his right to a jury trial. McGurk testified as follows:

> Q Okay. You had occasion, no matter how brief, to discuss things with [trial counsel] before you went to trial?
>
> A Very briefly.
>
> Q Okay. During the totality of those interactions with [trial counsel], either by phone or in person, did [trial counsel] ever mention to you that you may have a right to jury?
>
> A No, he did not.
>
> Q I take it therefore, that there was no discussion of whether you should present this case to a jury, or to the bench?
>
> A None, whatsoever.
>
> . . . .

> Q Did you ever indicate to [trial counsel], at any time, that you wanted to waive your right to a jury trial?
>
> A No.

At the postconviction hearing, the State offered exhibit 7, over a relevancy objection, which purported to show that attorneys in Lancaster County who represented defendants in DWI, third offense, cases during the relevant time period frequently did not request jury trials. Exhibit 7 was a tabulation prepared by the State regarding about 40 cases in the relevant timeframe.

At the postconviction hearing, the State argued that McGurk's trial and appellate counsel's performance was comparable to that of other attorneys and that McGurk did not suffer prejudice by virtue of trial counsel's alleged deficiency because the evidence against McGurk was "overwhelming, or at least certainly beyond a reasonable doubt." The State also observed that trial counsel's postconviction affidavit did not suggest how he would have tried the case differently to a jury or that "he had any significant defenses that would have been persuasive to a jury."

McGurk's counsel argued at the postconviction hearing that the absence of advice regarding a right to a jury trial denied McGurk a "fundamental bedrock right" and that a new trial is appropriate without regard to whether or not McGurk was prejudiced by trying his case to the court. McGurk's postconviction counsel argued that a reversal and remand were required to give McGurk "the possibility to cho[o]se to present his case to a jury." McGurk's postconviction counsel noted that "there are factual issues to be decided, and that it's perchance a jury may have decided it otherwise." Elsewhere, McGurk's postconviction counsel argued that it was "remotely possible" that a jury would disagree with the court in deciding the factual issues in the case.

Following the evidentiary hearing, the county court denied McGurk's request for postconviction relief. In denying the request for postconviction relief, the county court stated:

> Upon consideration of the caliber of the representation and the skills of the attorneys referred to in Exhibit 7 and in the arguments, the Court cannot find that [McGurk's

> trial counsel] was incompetent or ineffective by not demanding a trial by jury. . . . [T]he Court was aware that very few attorneys were even making demands for jury trials at that time and under those circumstances.

On appeal, the district court affirmed the county court's denial of postconviction relief. McGurk appeals to this court.

## ASSIGNMENTS OF ERROR

McGurk assigns as error the failure of the trial court as affirmed by the district court to grant postconviction relief, claiming that McGurk's conviction is unconstitutional because it was obtained in violation of his right to a jury trial and his right to effective assistance of counsel. He also claims that the trial court improperly received exhibit 7. In view of our ruling, the issue of the admissibility of exhibit 7 is moot.

## SCOPE OF REVIEW

[1,2] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994); *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *Barrientos, supra*.

[3] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

## ANALYSIS

*Postconviction Statute.*

Section 29-3001 of the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992), provides in pertinent part:

> A prisoner in custody under sentence and claiming a

> right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

McGurk alleged in his postconviction pleading filed January 14, 1993, that he began serving his sentence on January 11. He was, therefore, in custody at the time of filing for relief as required by the statute and case law. See, e.g., *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988). See, also, *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993). The remainder of his sentence, the 15-year driver's license revocation, is still in effect. McGurk still has an interest in the litigation, and a benefit would flow to him were he successful in this postconviction case. Compare *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993). Indeed, the seriousness of a 15-year driver's license revocation was a basis for concluding that persons charged with third-offense DWI were entitled to a jury trial in *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), and *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). The essence of McGurk's postconviction claim is that he was denied his constitutional right to a jury trial due to the ineffective assistance of his trial counsel.

*Ineffectiveness of Counsel in Postconviction Actions: Application of* Strickland.

[4-6] The State refers us to *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), which generally sets forth the following two-pronged test for determining the effectiveness of counsel in a postconviction case: (1) whether the attorney, in representing the defendant, performed at least as well as an attorney with ordinary training and skill in criminal law in the area and (2) whether the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. The two-pronged test in *Nielsen* was derived from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). In summarizing the holding in *Strickland*, the *Nielsen* court stated:

> Under *Strickland*, a [postconviction] defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense in such a way that the defendant was denied a fair trial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

243 Neb. at 212, 498 N.W.2d at 536. Thus, under *Strickland*, a postconviction appellant must show counsel's deficient performance and prejudice to the defendant.

McGurk argues that the failure of counsel to advise him of his right to a jury trial denied him a "fundamental bedrock right." McGurk's argument continues that an analysis of prejudice is inappropriate due to the gravity of the deprivation. McGurk's vocabulary is reminiscent of the expression "structural defects" found in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). However, the Court noted in *Fulminante* that an analysis of harmfulness remains appropriate in such cases and that "constitutional error does not automatically require reversal of a conviction, [and] most constitutional errors can be harmless." 499 U.S. at 306. See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[7,8] McGurk next argues that to the extent prejudice must be established, it should be presumed in this case. We do not agree. We are aware of the analysis and holding in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the direct appeal, ineffective assistance of counsel, companion case to *Strickland*. Under *Cronic*, counsel is presumed to be competent, but under certain specified circumstances prejudice to the accused is presumed. The text of *Cronic* lists the following three circumstances in which prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness

without inquiry into counsel's actual performance at trial. According to footnote 28 in *Cronic*, it appears that prejudice will also be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel.

A review of relevant jurisprudence shows that based on *Cronic*, the Supreme Court of New Hampshire in *State v. Anaya*, 134 N.H. 346, 592 A.2d 1142 (1991), presumed prejudice based on a failure of the adversarial process where defense counsel in closing argument repeatedly asked for a conviction of a lesser charge rather than arguing defendant's innocence. Similarly, based on *Cronic*, the U.S. Court of Appeals for the Sixth Circuit, in *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), presumed prejudice based on absence of counsel where defense counsel refused to participate in any aspect of the trial because he erroneously believed that participating would waive defendant's pretrial motions or render their denial harmless error.

[9,10] Although we recognize those instances where prejudice was presumed under *Cronic*, it has generally been observed that the *Cronic* exceptions permit finding a "constructive denial of counsel . . . in 'only a very narrow spectrum of cases . . . .' " *Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986). See *Martin v. McCotter*, 796 F.2d 813 (5th Cir. 1986), *cert. denied* 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 985 (1987). See, also, *Hollenback v. U.S.*, 987 F.2d 1272 (7th Cir. 1993). Indeed, it has been stated that unless a defendant "can show that the instant case is squarely governed by *Cronic*, he must rebut a presumption that *Strickland* should apply." *Woodard v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990). Our understanding that *Cronic* has a narrow application is consistent with the language of the *Cronic* opinion to the effect that pursuit of claims based on specified errors should be evaluated under *Strickland*. The record and relevant jurisprudence do not support a claim that the performance of McGurk's trial counsel justifies the presumption of prejudice under *Cronic*, and we, therefore, consider defense counsel's performance under the standard announced in *Strickland*.

*Deficiency of Counsel.*

The record is undisputed that McGurk was not advised of his right to a jury trial prior to the time his case was tried to the bench on January 8, 1991.

On May 23, 1990, over 7 months prior to McGurk's trial, the U.S. Court of Appeals for the Eighth Circuit decided *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). In *Richter*, the defendant petitioned for a writ of habeas corpus, challenging the denial of his request for a jury trial in a DWI, third offense, case tried in Nebraska. *Richter* did not involve the issue of ineffective assistance of counsel.

In *Richter*, the Eighth Circuit analyzed a defendant's right to a jury trial for third-offense DWI under Nebraska law. Specifically, the *Richter* analysis involved (1) Neb. Rev. Stat. § 39-669.07 (Reissue 1988) (currently codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)), which authorizes cities and villages to pass DWI ordinances and provides that in the case of a conviction of third-offense DWI, the ordinance must include a 15-year driver's license revocation provision, in addition to any other penalties; (2) Neb. Rev. Stat. § 24-533 (Reissue 1985), which provided that the county courts of Nebraska shall have jurisdiction over prosecutions for violations of city and village ordinances; and (3) Neb. Rev. Stat. § 24-536 (Reissue 1985), which disallowed jury trials for prosecutions under city and village ordinances.

[11,12] The *Richter* court analyzed the foregoing statutes in light of the U.S. Supreme Court decision in *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989). *Blanton* held that certain "petty" crimes or offenses, as opposed to "serious" crimes or offenses, do not give rise to the Sixth Amendment right to jury trial. *Blanton* further indicated that " 'the severity of the maximum authorized penalty' " is the most objective indication of the seriousness of the crime and that a maximum authorized prison term of more than 6 months implicates the right to jury trial, whereas a term of 6 months or less presumptively does not. *Id.*, 489 U.S. at 541.

In *Richter*, the defendant charged with DWI, third offense, faced a maximum possible prison term of 6 months and a 15-year driver's license revocation. Pursuant to *Blanton*, the

*Richter* court concluded that "the 15-year license revocation, considered together with the maximum six month prison term, is a severe enough penalty to indicate that the Nebraska legislature considers third-offense DWI a serious crime." 903 F.2d at 1204. Accordingly, the *Richter* court found that the defendant was unconstitutionally denied his demand for a jury trial. The *Richter* court further stated that § 24-536, which disallowed jury trials for prosecutions under city and village ordinances, was unconstitutional as applied to the facts of that case. The *Richter* court granted conditional habeas corpus relief, with the expectation that the state court would vacate the judgment and grant a new trial. Apparently because there was no issue of ineffectiveness of counsel, no analysis of prejudice is contained in *Richter*. Based on the Eighth Circuit's decision in *Richter*, as of May 23, 1990, defendants charged with third-offense DWI in Nebraska were entitled to a trial by jury.

The State argues that notwithstanding the holding in *Richter*, McGurk's trial counsel performed at least as well as other attorneys in the area at the given time and, therefore, that counsel's performance was not deficient. The State relies primarily on exhibit 7 in support of this argument. We believe that the State's analysis is inappropriate in this case.

[13-15] An attorney has a duty "to investigate the facts of his client's case and to research the law applicable to those facts." *People v. Ledesma*, 43 Cal. 3d 171, 222, 729 P.2d 839, 871, 233 Cal. Rptr. 404, 436 (1987). The Eighth Circuit decided *Richter* over 7 months before McGurk's trial, and McGurk's trial counsel could have readily discovered the *Richter* opinion by standard research techniques. In this regard, it has been observed: "Counsel 'is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' " *People v. McCary*, 166 Cal. App. 3d 1, 8, 212 Cal. Rptr. 114, 117-18 (1985) (quoting *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975)). Pursuant to the foregoing, we conclude that an attorney representing a defendant charged with DWI, third offense, whose case was

tried in Nebraska in 1991 should have known of or have discovered the rules of law in *Richter* before proceeding to trial with his or her client, notwithstanding the practice of other attorneys. McGurk has established that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

*Prejudice to McGurk.*

[16-18] In *Strickland*, the U.S. Supreme Court noted that even where counsel's representation was deficient, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694. The additional "prejudice" requirement is based on the conclusion that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691. Thus, "[e]ven if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense." *Id.*, 466 U.S. at 693.

[19] In Nebraska, the Supreme Court has long held that proof of prejudice is required to succeed in establishing a claim of ineffective assistance of counsel. See, e.g., *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979). Thus, in a pre-*Strickland* case, *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981), the Supreme Court held that counsel's advice to waive a jury and try a case to the court was not unreasonable in the absence of proof of prejudice.

*Allegation of Prejudice.*

[20] In order to satisfy the prejudice prong of the *Strickland* analysis, a defendant must first make an allegation of the nature and effect of the requisite prejudice. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In *Hill*, the U.S. Supreme Court held that the district court did not err in denying habeas corpus relief without a hearing where the petitioner's allegations were insufficient to satisfy the prejudice requirement of the *Strickland* test. In *Hill*, the petitioner

claimed that he received ineffective assistance of counsel because his counsel failed to correctly advise him regarding parole eligibility prior to the entry of his guilty plea. However, the petitioner did not allege that had counsel properly informed him about his parole eligibility date he would not have pleaded guilty and would have insisted on going to trial, nor did he allege any special circumstances that could support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty. See, *Jackson v. Dutton*, 861 F.2d 720 (table), 1988 WL 114805 (unpublished opinion) (6th Cir. 1988), *cert. denied* 489 U.S. 1027, 109 S. Ct. 1158, 103 L. Ed. 2d 217 (1989) (affirming denial of habeas corpus relief where petitioner failed to allege that he would have accepted a plea bargain rather than gone to trial had counsel properly advised him); *Craker v. McCotter*, 805 F.2d 538 (5th Cir. 1986) (reversing grant of habeas corpus relief where petitioner failed to allege in his petition that had counsel effectively assisted him, he would have rejected a plea offer and insisted on going to trial). Compare *United States v. Giardino*, 797 F.2d 30 (1st Cir. 1986) (vacating denial of motion under 28 U.S.C. § 2255 (1988) seeking to set aside a guilty plea where defendant explicitly alleged that he would not have pleaded guilty, but would have gone to trial, had his counsel properly informed him regarding the availability of favorable testimony of an alleged accomplice).

[21,22] In Nebraska, the Supreme Court has stated repeatedly that for a postconviction motion to succeed, a defendant must allege facts which, if proved, constitute a denial of a constitutional right. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). A claim of prejudice will not succeed where the claim is merely speculative. See *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

In the instant case, McGurk did not allege in his petition for postconviction relief that had he known of his right to a jury trial he would have demanded a trial by jury, nor did McGurk allege that had his case been tried to a jury rather than to the court, his strategy, defenses, proofs, or other tactics would have been different and that he verily believed that the outcome would have been favorable. In his postconviction motion,

McGurk merely makes the conclusory allegation that "his conviction was obtained in violation of his right to a trial by jury." In view of the requirement of pleading requisite prejudice, this allegation is inadequate. Nonetheless, the trial court liberally construed the pleading requirement in conducting a hearing on the postconviction motion.

*Proof of Prejudice.*

[23,24] In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove prejudice resulted from counsel's allegedly deficient performance. In *State v. Hochstein*, 216 Neb. 515, 519-20, 344 N.W.2d 469, 473 (1984), the Supreme Court denied relief and stated: "[The defendant] is unable to establish in any meaningful way how those failures [of counsel], if in fact they occurred, prejudiced [him] or, if handled in another manner, would have produced a different result. His claims at best are mere assertions." See *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992) (denying postconviction relief where defendant failed to prove he was prejudiced by counsel's failure to file direct appeal in a timely manner). Indeed, it has been held in a nonpostconviction case that "to sustain a claim of ineffective assistance of counsel, the defendant must demonstrate prejudice was suffered, and the record must affirmatively support the claim." *State v. Jones*, 241 Neb. 740, 745-46, 491 N.W.2d 30, 33-34 (1992). See, *Matematico v. U.S.*, No. CV-91-4530, 1992 WL 100202, at *1 (E.D.N.Y. Apr. 22, 1992) (denying defendant's motion under § 2255 to vacate sentence based on ineffective assistance of counsel where defendant asserted that she would not have pleaded guilty had she known that by pleading guilty she put her real estate broker's license at risk and where she made "no attempt to show that consideration of her real estate license would have played any role in surrendering her right to a trial by jury"); *People v. Maxwell*, 148 Ill. 2d 116, 592 N.E.2d 960 (1992), *cert. denied* 506 U.S. 977, 113 S. Ct. 471, 121 L. Ed. 2d 377 (affirming convictions and sentences where even assuming counsel's performance was deficient, defendant failed to establish prejudice by waiving sentencing jury). Compare, *U.S. v. Thompson*, 27 F.3d 671 (D.C. Cir. 1994),

*cert. denied* ____ U.S. ____, 115 S. Ct. 650, 130 L. Ed. 2d 554; *Woodard v. Collins*, 898 F.2d 1027 (5th Cir. 1990); *People v. Huynh*, 229 Cal. App. 3d 1067, 281 Cal. Rptr. 785 (1991).

In the instant case, McGurk offered no proof regarding prejudice. The affidavit of his trial counsel states that he did not advise McGurk of his right to a jury trial under *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). The affidavit does not suggest that had trial counsel been aware of *Richter*, a jury demand would have been made, and the case would have proceeded differently and would have resulted in an acquittal. McGurk confirmed in his testimony that he was not advised of his right to a jury trial. He did not state that he would have demanded a jury trial at the time had he been properly advised or upon reflection that he would demand jury trial if granted a remand. During oral argument at the postconviction hearing, counsel stated that a remand would provide McGurk with "the possibility to cho[o]se to present his case to a jury." In sum, the evidence does not demonstrate that McGurk would have demanded a jury initially, that he would insist on a jury trial upon a remand, or that the strategy and outcome would have differed had he known of *Richter*.

[25,26] In meeting the prejudice standard, *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), states, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Instead, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694. In making this determination, a court "must consider the totality of the evidence before the judge or jury." *Id.*, 466 U.S. at 695. In commenting on *Strickland* in *Hill v. Lockhart*, 474 U.S. 52, 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), the U.S. Supreme Court stated that in making "predictions of the outcome at a possible trial, where necessary, [such predictions] should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.' " (Quoting *Strickland, supra.*)

In Nebraska, the Supreme Court has denied postconviction

relief based on ineffective assistance of counsel for lack of prejudice and stated: "Under the facts of the case, there is no reasonable probability that a jury would not have returned a verdict of guilty of first degree murder." *State v. Escamilla*, 245 Neb. 13, 27, 511 N.W.2d 58, 67 (1994). In *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992), the Supreme Court denied postconviction relief where the trial evidence was "overwhelming," without consideration of alleged deficiencies by counsel for alleged failure to investigate and to move to suppress a confession. See *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990). See, also, *Stewart v. Grammer*, No. CV86-L-51, 1987 WL 43122 (D. Neb. Oct. 20, 1987), *aff'd* 871 F.2d 1091 (8th Cir. 1988) (table) (magistrate recommendation to deny habeas corpus relief for lack of prejudice where evidence was overwhelming).

In the instant case, an objective review of the totality of the record shows that the evidence that McGurk was driving while intoxicated was overwhelming. The postconviction hearing evidence does not establish prejudice by virtue of the fact that McGurk's case was tried to the court rather than to a jury. The record does not undermine the outcome. Although there may be a case where the outcome of trial to a jury rather than to the court would be different, nothing in the record of McGurk's trial or of the postconviction hearing meets the *Strickland* test that there be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694. McGurk has not established prejudice as required for relief under *Strickland*.

## CONCLUSION

Based on the foregoing, we conclude that although trial counsel's performance was deficient, McGurk did not establish prejudice as a result of that deficiency, and none will be presumed. Accordingly, the county court's order denying postconviction relief, as affirmed by the district court, is affirmed.

AFFIRMED.

# JEANNETTE M. EICHORN, APPELLANT AND CROSS-APPELLEE, V. EICHORN TRUCKING, INC., AND GREAT WEST CASUALTY COMPANY, APPELLEES AND CROSS-APPELLANTS, AND STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEE AND CROSS-APPELLEE.

532 N.W.2d 345

Filed May 30, 1995. No. A-94-783.

1. **Workers' Compensation: Appeal and Error.** A decision by the Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, an appellate court determines that those findings are clearly erroneous.
2. _____: _____. Pursuant to Neb. Rev. Stat. § 48-185 (Supp. 1991), 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.
3. **Appeal and Error.** With respect to questions of law, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Second Injury Fund.** Neb. Rev. Stat. § 48-128 (Reissue 1988) clearly requires, as a condition to entitlement to compensation from the Second Injury Fund, that the employee be entitled to receive compensation on the basis of the combined disabilities.
5. _____: _____. Neb. Rev. Stat. § 48-128 (Reissue 1988) does not exist to increase or to create rights to compensation benefits beyond those to which an employee is otherwise entitled. Rather, § 48-128 merely provides a means to shift and apportion benefits between the employer and the Second Injury Fund.
6. _____: _____. Second injury funds were created to encourage employers to hire the handicapped and to therefore be secure in knowing that if a work-related accident occurs, the employer and its insurance carrier are liable only for those injuries which would have resulted had there been no preexisting disability.
7. **Workers' Compensation: Second Injury Fund: Proof.** It is the employer's burden to prove apportionment between the portion of the injury for which the Second Injury Fund is liable and the portion for which the employer is liable.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John F. Simmons, of Simmons, Olsen, Ediger & Selzer, P.C., for appellant.

Don Stenberg, Attorney General, and Lynne R. Fritz for appellee Second Injury Fund.

Raymond P. Atwood, Jr., of Healey & Wieland Law Firm, for appellees Eichorn Trucking, Inc., and Great West Casualty Company.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Jeannette M. Eichorn appeals an order of a rehearing panel of the Nebraska Workers' Compensation Court finding that she was entitled to workers' compensation benefits based upon a 5-percent permanent impairment to her right hand and dismissing the Nebraska Second Injury Fund. Eichorn does not challenge the award against her employer and its insurer. Rather, she claims entitlement to additional benefits from the fund based upon her being permanently and totally disabled. For the following reasons, we affirm the judgment of the Workers' Compensation Court rehearing panel.

## FACTUAL BACKGROUND

Eichorn had worked as a manager, waitress, and cook for various restaurants for 15 to 20 years when, in 1978, she first experienced numbness and a tingling pain in her right hand. She sought medical attention for the problem in September 1981. Carpal tunnel surgery was performed on Eichorn's right hand in January 1982. Eichorn returned to work and subsequently began having problems with her left hand. Carpal tunnel surgery was performed on Eichorn's left hand in November 1982. Once again, Eichorn returned to work, but soon thereafter her right hand began troubling her again. A second carpal tunnel surgery was performed on her right hand in April 1983. After this surgery, Eichorn did not return to work.

In February 1984, Dr. Robert L. Horner, a hand surgeon, concluded that Eichorn had a "moderate permanent impairment of both hands" that "probably amounts to approximately 10 percent bilaterally." Eichorn's claim based on 10 percent of the scheduled compensation resulted in a lump-sum settlement which was approved in May 1985. No loss of earning power was then determined.

Eichorn assumed part-time secretarial duties for her family's business, Eichorn Trucking, Inc., in 1985 and switched to full time in 1986. The pain in her hands increased in frequency and

intensity until she finally quit working in July 1990. In August 1990, a third carpal tunnel surgery was performed on her right hand.

Over the next 2 years, Eichorn was examined numerous times by several doctors. The consensus of the doctors was that she had suffered an additional 5-percent impairment to her right hand due to her secretarial work at Eichorn Trucking, resulting in a 15-percent impairment to the right hand. Although one of the doctors who examined her reported that "[f]rom purely an objective standpoint, I feel that she should be encouraged to resume all usual activities," the consensus of the doctors who found disability in the right hand was that Eichorn could not resume her secretarial duties at Eichorn Trucking. In a report dated January 13, 1992, Gary Phillips, Ph.D., a rehabilitation consultant, concluded that Eichorn suffered from a vocational disability of 92 percent, but in the Scottsbluff area, it amounted to a 100-percent disability. In a letter dated March 16, 1992, Phillips concluded, after reviewing Eichorn's earlier medical records, that as of February 20, 1984, Eichorn had suffered a 43-percent loss in earning power.

## PROCEDURAL BACKGROUND

Eichorn filed a petition in the Workers' Compensation Court on August 28, 1991, seeking disability benefits from Eichorn Trucking and its insurer, Great West Casualty Company. The court granted the defendants' cross-petition to join the Second Injury Fund as a defendant.

In its judgment of December 22, 1992, affirming the findings and order of the single-judge, a three-judge rehearing panel found that Eichorn was entitled to disability benefits from Eichorn Trucking and Great West, but that the disability payments already made to her exceeded the benefits to which she was entitled and therefore eliminated a further award to her. The court further determined that Eichorn had a preexisting permanent partial disability of 10 percent to each hand, but because that preexisting disability did not result in compensation payable for a period of 90 weeks or more, the Second Injury Fund should be dismissed as a party defendant.

Eichorn then appealed to this court, asserting several

assignments of error, including dismissal of the fund. In a memorandum opinion dated November 12, 1993, we noted plain error and remanded the cause. We stated:

> The liability of the Fund is not an issue in this case until there has been a finding that because of a prior injury combined with the injury sustained during her employment at Eichorn Trucking, the claimant is entitled to disability compensation in excess of that already provided by Eichorn Trucking and Great West. If such a finding is made, then the responsibility rests with Eichorn Trucking and Great West to prove that the Fund is liable for the amount of disability compensation resulting from injury sustained by the claimant prior to her employment at Eichorn Trucking. . . .
>
> This case was put on the wrong track when the Workers' Compensation Court prematurely injected into the case the issue of the potential liability of the Fund. The court acknowledged that there was evidence in the record to support the claimant's contention that she had suffered a significant loss of earning power prior to her employment at Eichorn Trucking. Nonetheless, because the court was not convinced that the claimant's previous condition would activate the liability of the Fund under § 48-128, the court apparently refused to consider evidence of prior impairment in determining the extent of the claimant's current disability.
>
> The potential liability of the Fund was irrelevant to the issue of the extent of the claimant's current disability.

Our opinion recognized that Eichorn should only have been "arguing about the accuracy of that comprehensive determination of disability and compensation" and that it "should be left to Eichorn Trucking, Great West, and the Fund to litigate the issue of the degree to which the Fund may be liable for [Eichorn's] disability compensation."

The cause was remanded with directions for the Workers' Compensation Court to determine the extent of Eichorn's disability and the compensation to which she was entitled by considering evidence of her prior disability in combination with the disability sustained at Eichorn Trucking.

## PANEL'S FINDINGS

Pursuant to our mandate, the rehearing panel found that Eichorn did have a preexisting permanent partial disability as a result of the two 10-percent member impairments to her hands; that Eichorn Trucking knew of this before the last injury occurred; and that as a result of the injuries to her right hand from the Eichorn Trucking employment, Eichorn had sustained an additional 5-percent permanent partial impairment to her right hand. In specific response to the directions by this court to consider evidence of prior impairment in combination with the impairment sustained at Eichorn Trucking and to make a comprehensive determination of the extent of Eichorn's disability, the rehearing panel found that "the 5 percent impairment suffered by the plaintiff on July 26, 1990 combined with her preexisting disability to render the plaintiff totally disabled." The rehearing panel also concluded 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.

The rehearing panel, again reasoning that the Second Injury Fund must be dismissed, construed Neb. Rev. Stat. § 48-128 (Reissue 1988). In pertinent part, that statute provides:

> No condition shall be considered a preexisting permanent partial disability under this section unless it would support a rating of twenty-five percent loss of earning power or more or support a rating which would result in compensation payable for a period of ninety weeks or more for disability for permanent injury as computed under subdivision (3) of § 48-121.

In concluding that the Second Injury Fund should be dismissed, the rehearing panel acknowledged Phillips' March 16, 1992, letter which concluded that Eichorn's preexisting 10-percent impairment to each hand resulted in an earning power loss in excess of 25 percent. Nevertheless, the court was

> persuaded by the arguments of the Nebraska Second Injury Fund that the Unicameral intended that schedule injuries meet the test of compensation payable for a period of 90 weeks or more. The plaintiff's preexisting

> disability consisted of a rating of 10 percent of each hand which would afford her compensation for a combined period of 35 weeks. . . . Thus, the Second Injury Fund should be dismissed as a party defendant because the plaintiff's preexisting disability was from schedule injuries, and was insufficient.

The court awarded Eichorn compensation based only upon the 5-percent permanent impairment to her right hand, a scheduled member, along with the vocational rehabilitation benefits necessary to restore her to suitable employment. In doing so, it concluded that under Nebraska case law, this was the extent of compensation which Eichorn was entitled to recover from Eichorn Trucking. Eichorn appeals from this order, and Eichorn Trucking and Great West cross-appeal.

## ASSIGNMENT OF ERROR

Eichorn's sole assignment of error on this appeal is that the Workers' Compensation Court erred in determining that she was not entitled to recover against the Second Injury Fund for additional benefits based upon her total disability.

## STANDARD OF REVIEW

We note that this case was initially heard prior to the effective date of the recent amendments to the Nebraska Workers' Compensation Act. See 1992 Neb. Laws, L.B. 360. Under the former procedure, the Workers' Compensation Court rehearing panel was the fact finder.

[1,2] A decision by the Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, an appellate court determines that those findings are clearly erroneous. *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992); *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992). Pursuant to Neb. Rev. Stat. § 48-185 (Supp. 1991), 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. *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991).

[3] With respect to questions of law, an appellate court is obligated to make its own determination. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

## ANALYSIS

Eichorn's argument is that the findings of fact by the rehearing panel entitle her to an award against the Second Injury Fund for any additional disability suffered by her as a result of her subsequent compensable injury occurring while employed by Eichorn Trucking.

The thrust of Eichorn's appeal is that the rehearing panel's interpretation of § 48-128 was incorrect and that since her preexisting earning-power loss exceeded 25 percent, her preexisting permanent disability qualifies her for compensation from the Second Injury Fund for total disability. The Second Injury Fund eagerly joins issue with Eichorn.

The employer and the insurer feign disinterest, as no one is challenging the award against them based upon a 5-percent member impairment to the right hand. Their position is that they agree with the rehearing panel's award, *unless* we were to increase the award against them, in which event they would join Eichorn in arguing that the Second Injury Fund should not have been dismissed, but that disability beyond 5 percent to Eichorn's hand should be compensated for out of the Second Injury Fund.

Eichorn's assigned error does not address the award against Eichorn Trucking of "8.75 weeks for a 5 percent permanent impairment to her right hand." That award is obviously based upon an impairment to a scheduled member under Neb. Rev. Stat. § 48-121(3) (Reissue 1988).

In making this award, the rehearing panel reasoned that the employer could not be liable for the partial loss of use of multiple members under § 48-121(3) because the provision of that statute addressing that subject applied only to losses of use which are the consequence of injuries sustained in a single

compensable accident, based upon *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988). The rehearing panel concluded that since Eichorn's injury at Eichorn Trucking was to a scheduled member, her compensation must be based upon her loss of physical function to that member and not upon any loss of earning capacity, citing *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983).

At oral argument, Eichorn confirmed that she is not challenging the award against the family corporation and its insurer and is not seeking benefits from Eichorn Trucking for more than a 5-percent impairment to a scheduled member, despite the finding of total disability. Thus, for purposes of this appeal, we accept Eichorn's concession and express no opinion regarding the propriety of that award.

It is true that the findings of the rehearing panel in many respects track those necessary for application of the Second Injury Fund statute, § 48-128, which provides in pertinent part:

> 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 a special trust fund created for that purpose, which . . . shall be known as the Second Injury Fund.

(Emphasis supplied.)

[4] As emphasized above, § 48-128 clearly requires, as a condition to entitlement to compensation from the fund, that the employee be "entitled to receive compensation on the basis of the combined disabilities." The "combined disabilities" are those from the preexisting condition and the subsequent compensable injury.

Although concluding that Eichorn's 5-percent impairment from the July 26, 1990, Eichorn Trucking accident combined with the preexisting disability to render Eichorn totally disabled and further finding that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from her last injury considered alone and of itself, the panel did not find that Eichorn was entitled to receive compensation *on the basis of the combined disabilities*. Indeed, it found just the opposite—that she was *not* entitled to compensation for the combined disabilities, concluding instead that she was legally entitled to no more than the 5-percent additional member impairment caused by the accident at Eichorn Trucking. We believe this finding is fatal to Eichorn's claim against the fund.

Eichorn candidly asserts that in this case "there is no question of shifting the employer's burden to the Fund, the issue here is the direct liability of the Fund for benefits for which the employer is not liable." Brief for appellant at 25. Eichorn cites *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 127 N.W.2d 186 (1964), and *Runyan v. State*, 179 Neb. 371, 138 N.W.2d 484 (1965), for the proposition that she can successfully recover benefits from the Second Injury Fund for total disability even though Eichorn Trucking is not liable for her total disability because her injuries were limited to scheduled members. *Runyan v. State, supra*, applied a former version of § 48-128 which required, inter alia, a finding that the worker be permanently and totally disabled as a result of the subsequent injury before any liability could be imposed against the Second Injury Fund and was significantly different from § 48-128 (Reissue 1988). See 1955 Neb. Laws, ch. 186, § 4, p. 532. Notably absent from the prior version of the statute was the requirement that the employee be "entitled to receive compensation on the basis of the combined disabilities."

We have found no cases citing *Runyan v. State* for the proposition that an impaired worker is entitled to successfully prosecute an independent action directly and separately against the Second Injury Fund to recover additional compensation when there is no finding that the employee is entitled to receive compensation on the basis of a combination of the preexisting disability and the disability associated with a subsequent compensable accident.

[5] From a plain reading of § 48-128 and Nebraska case law construing and applying that statute, we are led to the inescapable conclusion that § 48-128 does not exist to increase or to create rights to compensation benefits beyond those to which an employee is otherwise entitled. Rather, § 48-128 merely provides a means to shift and apportion benefits between the employer and the fund.

From a historical prospective, the genesis of second injury fund statutes is traceable to the rule requiring employers to bear the full cost of total disability for employees with preexisting disabilities. As noted by Prof. Arthur Larson, such rules provided "employers . . . a strong financial incentive to discharge all handicapped workers who might bring upon them this kind of aggravated liability." 2 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 59.31(a) at 10-492.397 (1994). Professor Larson notes:

> It has been said, for example, that within the thirty days following announcement of the non-apportionment rule in *Nease v. Hughes Stone Company* [114 Okla. 170, 244 P. 778 (1925)], between seven and eight thousand one-eyed, one-legged, one-armed, and one-handed men were displaced in Oklahoma.

2 Larson & Larson, *supra*, at 10-492.397 to 10-492.398.

[6] The Supreme Court has recognized that such funds were created to encourage employers to hire the handicapped, secure in the knowledge that if a work-related accident occurs, the employer and its insurance carrier are 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) (citing 2 Arthur Larson, The Law of Workmen's Compensation § 59.31(a)

(1987)); *Lozier Corp. v. State*, 1 Neb. App. 567, 501 N.W.2d 313 (1993).

[7] Absent the provisions of § 48-128, an employer is liable for all compensation benefits to which an employee is entitled. Therefore, the statute is for the benefit of the employer, as the employee has no interest in *who* pays the money, so long as he or she receives it. *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984). Because the statute benefits the employer, it is the employer's burden to prove apportionment between the portion of the injury for which the fund is liable and the portion for which the employer is liable, and generally the fund's involvement comes by virtue of the employer joining the fund in a manner akin to making it a third-party defendant. *Id.* See, also, *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); *Lozier Corp., supra.*

In *Lozier Corp.*, this court recognized:

> [T]he controlling principle is that in the event of a compensable injury, an employer is required to bear the cost for all workers' compensation benefits from the date of the injury....
>
> The exception to this requirement is the Second Injury Fund, § 48-128, which allows the employer of an injured employee to shift some of the liability for benefits for an injured employee to the Second Injury Fund. However, certain conditions, as set forth in § 48-128, must be met before the shift can occur. It is this shift of liability which is intended to encourage employers to hire those with preexisting disabilities.

1 Neb. App. at 573, 501 N.W.2d at 317.

Section 48-128 benefits the employer by shifting liability to the fund. Before a "shift" in this burden can occur, the employee must first be found to be entitled to receive compensation benefits as a result of the combined disabilities. If, as in Eichorn's case, the employee is found not to be entitled to benefits for the combined disabilities and the employer is thus liable only for the disability resulting from the subsequent last injury, there is nothing to shift to the fund and § 48-128 has no application.

It is axiomatic that it is the employee's burden, in the first

instance, to prove that he or she suffered a compensable injury and the compensation to which he or she is entitled, including whether he or she is entitled to compensation on the "basis of the combined disabilities." That issue is distinct from that of the fund's liability.

The importance of considering the employee's right to compensation separate from the Fund's liability is illustrated in *Benson, supra*. That case presented two issues on appeal—the first was the employee's right to compensation for total disability when he suffered an injury at work, and the second was whether the fund was liable for some part of the injury and resulting disability. The court noted: "These issues are separate and distinct and should be so viewed." 217 Neb. at 867, 354 N.W.2d at 130. The Supreme Court concluded that the employee had met his burden of proving that a work accident aggravated preexisting back injuries, rendering him totally disabled, and that the employer had failed to show that the total disability would have prevailed notwithstanding the work accident. It then went on to address the liability, if any, of the fund. It affirmed the dismissal of the fund, but reversed in part with directions to enter an award for the employee for total disability benefits. Thus, the employee's right to compensation was considered independent and separate from the liability of the fund and vice versa.

Eichorn's right to compensation was, similarly, an issue independent from the fund's obligation to bear a portion of the burden of that compensation. The rehearing panel found that Eichorn was entitled only to those compensation benefits arising from her injury at Eichorn Trucking, i.e., an additional 5-percent impairment to her right hand. Eichorn does not challenge that award, but, rather, insists that § 48-128 exists to enhance her compensation entitlements beyond those for which she was otherwise entitled to recover from her employer. Such a result is inconsistent with the purpose of § 48-128 and a clear reading of its terms.

Therefore, even were we to adopt Eichorn's construction of § 48-128, an issue which we need not decide, see *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994), she is not entitled to compensation from the fund under the circumstances she

presents on this appeal. Our prior memorandum opinion suggests nothing to the contrary. Indeed, we stated in that opinion:

> The liability of the Fund is not an issue in this case until there has been a finding that because of a prior injury combined with the injury sustained during her employment at Eichorn Trucking, the claimant is entitled to disability compensation in excess of that already provided by Eichorn Trucking and Great West.

## CONCLUSION

Eichorn accepts the award of the rehearing panel determining the benefits to which she is entitled from Eichorn Trucking. That award was limited to compensation only for her injury at Eichorn Trucking. Because Eichorn was not found to be entitled to receive compensation on the basis of the combined disabilities, a necessary condition to trigger the applicability of § 48-128 has not been met. There being no compensation due for "additional disability," dismissal of the Second Injury Fund was a correct result.

AFFIRMED.

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# IN RE INTEREST OF ELIZABETH I. HEADRICK, ALSO KNOWN AS JEANETTE KAY WEBB, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.

# ELIZABETH I. HEADRICK, ALSO KNOWN AS JEANETTE KAY WEBB, APPELLANT, V. ADAMS COUNTY MENTAL HEALTH BOARD, APPELLEE.

532 N.W.2d 643

Filed June 6, 1995. No. A-94-745.

1. **Mental Health: Final Orders: Evidence: Appeal and Error.** The district court's review of an appeal from a mental health board is de novo on the record, and on further appeal, an appellate court will not interfere with a final order made by the district court unless the appellate court finds, as a matter of law, that the order is not supported by clear and convincing evidence.

2. **Mental Health.** Before a person may be committed for treatment by a mental health board, it is necessary that the person be found to be mentally ill and that the person present a substantial risk of harm to others or to herself.
3. **Mental Health: Appeal and Error.** When reviewing a decision from a mental health commitment hearing, the focus must be on the subject's condition at the time of hearing, not when the subject of the commitment hearing was initially taken into custody.
4. **Mental Health: Evidence: Proof.** Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition, but in order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.
5. **Evidence: Words and Phrases.** Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt.
6. **Rules of Evidence: Mental Health.** Neb. Rev. Stat. § 83-1059 (Reissue 1994) makes the general rules of evidence applicable in civil proceedings also applicable in all hearings held under the Nebraska Mental Health Commitment Act.
7. **Mental Health: Expert Witnesses.** To support commitment in civil mental health commitment proceedings, when a medical professional testifies, he or she must testify that the subject is both mentally ill and a danger to himself or others to a reasonable degree of medical certainty.
8. _____: _____. Just as medical opinions are to be based on reasonable medical certainty, so must psychological opinions be based on reasonable psychological certainty.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and vacated.

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

Nathan B. Cox, Deputy Adams County Attorney, for appellee.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

The Adams County Attorney's office filed a petition before the Adams County Mental Health Board (Board), alleging that Elizabeth I. Headrick, also known as Jeanette Kay Webb, was a mentally ill and dangerous person within the meaning of Neb. Rev. Stat. § 83-1009 (Reissue 1994). At a hearing held on April 1, 1993, the Board found that Webb was mentally ill and

"dangerous to herself" and ordered that she undergo inpatient alcohol treatment at the Hastings Regional Center. It was further ordered that "at such time as the Director of the inpatient treatment facility determines that inpatient treatment is no longer necessary, this commitment shall not terminate; rather, it shall continue on an outpatient basis . . . ." On April 28, 1993, Webb appealed the Board's decision to the district court for Adams County, but for reasons not apparent in the record a hearing was not held in the district court until 1 year later, on April 28, 1994. The district court affirmed the decision of the Board by its order of July 14, 1994. This appeal timely followed.

On appeal to this court, Webb asserts four assignments of error, but there is actually only one assignment, which we have restated: The district court erred by finding that the decision of the Board was supported by clear and convincing evidence.

[1,2] The district court's review of an appeal from a mental health board is de novo on the record, and on further appeal, an appellate court will not interfere with a final order made by the district court unless the appellate court finds, as a matter of law, that the order is not supported by clear and convincing evidence. *In re Interest of Vance*, 242 Neb. 109, 493 N.W.2d 620 (1992). Before a person may be committed for treatment by a mental health board, it is necessary that the person be found to be mentally ill *and* that the person present a substantial risk of harm to others or to herself. § 83-1009. *In re Interest of Vance, supra.*

On March 31, 1993, the Adams County Attorney's office filed a petition alleging that Webb was a mentally ill and dangerous person. It should be noted that although the petition refers to the subject as "Elizabeth I. Headrick, a/k/a Jeanette Kay Webb," the subject's name is actually Jeanette Webb, and we shall refer to her by that name. A number of witnesses testified at the hearing before the Board on April 1, including Webb.

On March 29, Officers Mark Hinrichs and Brad Consbruck of the Hastings Police Department were directed to 738 North Burlington on a report of a breaking and entering at apartment No. 3. The officers detected no signs of forced entry at

apartment No. 3. Consbruck heard raised voices and what appeared to be an exchange of vulgarities coming from the apartment. He knocked on the door, and a woman wearing a nightgown, later identified as Webb, answered. There were two other women in the apartment besides Webb.

Consbruck attempted to speak to Webb, but she immediately became irate and upset at the fact that the officers were there. It appeared that apartment No. 3 was Webb's residence. Webb told Consbruck that her name was Elizabeth Headrick. Consbruck described Webb as having mood swings, alternating periods of calm with periods of being upset. When asked if she was going to hurt herself, Webb said it was none of their business. According to Consbruck, Webb demanded to know what the officers were doing there, and she continually asked Consbruck for his "license number and . . . name."

Hinrichs noticed that the other women in the apartment fit the descriptions of the suspects that were allegedly breaking into apartment No. 3. One of these women, later identified as Sydney Titman, spoke to Hinrichs. After conversing with Titman, Hinrichs talked with Webb. He disclosed the details of his conversation with Titman to Webb, and she became very angry. According to Hinrichs, Webb looked at Titman and stated that she was no longer a friend of Webb's. The record would allow the inference that these two women were acquaintances of Webb's who had entered her apartment because of concern for her. Little else about the background for the officers' visit can be garnered from the evidence, since neither of these two women was called to testify and the hearsay objection to the police officer's conversation with Titman was sustained.

Hinrichs testified that Webb "bolted off . . . towards Ms. Titman rather quickly"; that she kicked the officer who separated her from Titman; and that she then tried to head toward Titman, but was restrained. The officers detected a strong odor of an alcoholic beverage coming from Webb's person and breath.

Hinrichs placed Webb in protective custody because "[i]t was obvious that she was intoxicated and we felt that she would be a danger to herself or others by her actions and we felt that it was

— that she needed to be placed in emergency protective custody." When asked in what manner she was dangerous to herself, he responded, "By the attacks that she made [on] the officers and in attempting to attack the other, Ms. Sydney Titman, and statements that I had obtained during my investigation. . . ." Webb was taken to Mary Lanning Memorial Hospital and placed in emergency protective custody.

At the hospital, Webb kicked Hinrichs when he attempted to take her to a room. While at the hospital, Webb stated that she was an employee of the hospital, but then she denied being employed at the hospital. She did not indicate in what capacity she was employed at the hospital. The record reflects that Webb is a registered nurse and that she was employed at Mary Lanning Memorial Hospital.

Dr. Dorothy VanMetre, a clinical psychologist with Mary Lanning Memorial Hospital, testified at the hearing. Dr. VanMetre testified that she evaluates emergency protective custody cases. Dr. VanMetre interviewed Webb the day before the hearing. She did a series of tests on Webb such as the suicide probabilities scale, the Beck Depression Inventory, and the Minnesota Multiphasic Personality Inventory (MMPI). Dr. VanMetre testified that on the suicide probabilities scale, Webb had a low score on every part thereof; on the Beck Depression Inventory, Webb revealed only mild depression; and on Webb's MMPI, the scores for addiction, paranoia, and sociopathy were elevated. However, Webb's score for depression was not elevated on her MMPI.

Dr. VanMetre testified that Webb was not cooperative. When Dr. VanMetre asked about Webb's employment, she denied being a nurse and said that she was a waitress. Webb indicated that she had been in a treatment program previously, but she stated that she was not an alcoholic. Webb admitted that she had consumed some alcohol on March 29.

While she was at the hospital, the following medication was prescribed for Webb: Valium about every hour or two, a nicotine patch, sleeping pills, and Tylenol. Dr. VanMetre stated that Webb took seven or eight Valium tablets each 8-hour period, and it seemed to calm her down. Webb asked Dr. VanMetre about the dosage of Valium she was receiving, and

when Dr. VanMetre informed her of the dosage, she said, " 'That won't even do anything for me.' " Dr. VanMetre indicated that when a patient requires that much Valium to obtain the effects, it suggests that the patient has built up a tolerance for it.

It was Dr. VanMetre's opinion that Webb had an addiction to alcohol, that the pattern of dosages of Valium (the dosages recited above were interpreted by Dr. VanMetre from the hospital chart) would be consistent with addiction to Valium, and that "she's paranoid about a lot of things and sociopathic." Other than what can be inferred from Webb's behavior as detailed in the testimony, the record does not contain any evidence of how the paranoia and sociopathy, which Dr. VanMetre diagnosed, were manifested. Because of its importance to the resolution of this case, we quote at length from Dr. VanMetre's testimony on the ultimate issue of dangerousness, bearing in mind that the Board's finding was that Webb was dangerous to herself—there was no finding of danger to others.

> Q- Based on the history, the studies, your own observations and interviews with her, do you have an opinion to a reasonable degree of professional psychological certainty as to the mental condition of the Subject, Elizabeth Ioni Headrick or Jeanette Kay Webb?
>
> A- Well, I believe she is like what the MMPI showed. I think she does have an addiction to alcohol and I think she has a lot — she's paranoid about a lot of things and sociopathic.
>
> Q- In your opinion, could these conditions present a substantial risk of harm to herself or other persons?
>
> A- Yes, they could.
>
> Q- And if a person were working as a registered nurse and suffering from these conditions, would that sufficiently impair her job performance and she might become a danger to patients in her care?
>
> . . . .
>
> A- Yes, I believe so.

Dr. VanMetre recommended that Webb be treated for her chemical dependency as an inpatient at the Hastings Regional

Center, saying that it was the least restrictive option available to treat her.

Webb testified at the hearing quite consistently with the testimony of the officers as to the events at her apartment. She testified that the two women entered her apartment that night by using a credit card, because they were allegedly concerned about her. Webb stated that she was surprised to see the women in her apartment, she became very angry when she saw them, and "there were words." She was also angry and confused when the police showed up. Webb also testified that she did not want to go to Mary Lanning Memorial Hospital because she was employed as a nurse there and this incident could "ruin" her, apparently because she was on a restricted license which prohibits her from consuming any alcohol. Webb admitted that she consumed several beers and a "drink" in her apartment that night. Webb indicated that she was in counseling at South Central Counseling for her alcohol problem, that she was currently in Alcoholics Anonymous, and that it was not her intention to go out and drink alcohol. Webb related that she had not consumed alcohol between June 5, 1991, and March 29, 1993.

Pursuant to § 83-1009, a mentally ill and dangerous person is one who presents

> (2) [a] substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

[3,4] When reviewing a decision from a mental health commitment hearing, the focus must be on the subject's condition at the time of hearing, not when the subject of the commitment hearing was initially taken into custody. *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990). Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition, but in order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be,

therefore, probative of that issue. *Id.*

[5] As we earlier recited, the standard for a civil commitment of a mentally ill and dangerous person is by "clear and convincing evidence." Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt. *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993). It is well established that the mere recitation of past acts, in the absence of a showing that such clearly form the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill and dangerous person. See *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989). See, also, *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981); *Matter of Lucas*, 31 Or. App. 947, 571 P.2d 1275 (1977).

The record from the hearing in this case consists of only 53 pages of testimony and no exhibits. It is true that there is evidence of Webb's aberrant and antisocial behavior on March 29, 1993, including uncontrolled anger, kicking at people, attempting to bite the officers, and attempting to conceal her true identity. However, standing alone, such conduct does not provide the foundation for a prediction of Webb's future dangerousness to herself. The prediction of future dangerousness is the fundamental *predicate* for a deprivation of liberty by an involuntary commitment. This is true even if the subject's behavior is angry, strange, drunken, or uncooperative. There still must be evidence to support a prediction of future dangerousness, notwithstanding the recitation of Webb's behavior exhibited on March 29.

[6,7] Neb. Rev. Stat. § 83-1059 (Reissue 1994) makes the general rules of evidence applicable in civil proceedings also applicable in all hearings held under the Nebraska Mental Health Commitment Act. Importantly, to support commitment in civil mental health commitment proceedings, when a medical professional testifies, he or she must testify that the subject is both mentally ill and a danger to himself or others to *a reasonable degree of medical certainty*. *In re Interest of Tweedy*, 241 Neb. 348, 488 N.W.2d 528 (1992). *In re Interest of*

*Tweedy* involved the attempted mental health commitment of a pedophile, which revolved around the issue of whether he would reoffend. The Supreme Court reversed the district court after quoting extensively from a psychologist's testimony and then summarizing as follows: "Dr. Bohn would not testify to a reasonable degree of medical or psychological certainty that there was a substantial likelihood Tweedy would recidivate." *Id.* at 354, 488 N.W.2d at 532. Although the court acknowledged that Tweedy admitted to a lingering attraction toward young boys, it stated that a "residual attraction does not, in and of itself, translate into guaranteed recidivism. We cannot infer that activity when the expert witness will not testify, to a reasonable degree of certainty, to an opinion as to the offender's dangerousness." *Id.* at 354, 488 N.W.2d at 532-33. The Supreme Court has said that the actual assessment of the likelihood of danger calls for an exercise of medical judgment, but the sufficiency of the evidence to support such a determination is fundamentally a legal question. See *In re Interest of Blythman, supra.*

The problem in the instant case is the same as was present in *In re Interest of Tweedy*—the necessary medical testimony is not present. On the question of whether the conditions she diagnosed in Webb, i.e., chemical dependency, paranoia, and sociopathy, presented a substantial risk of harm to Webb or others, Dr. VanMetre testified that "they could." With respect to whether these conditions would impair Webb's job performance and whether she "might become a danger to patients in her care," Dr. VanMetre answered affirmatively. The words "could" and "might" lack certainty and connote only that such things may happen or are possible. Thus, as a matter of law, the opinions of Dr. VanMetre lack psychological certainty, which is the evidential cornerstone for the deprivation of freedom under the Nebraska Mental Health Commitment Act.

[8] Psychological evidence based on possibility is no less speculative and conjectural than like testimony by other experts. Just as medical opinions are to be based on reasonable medical certainty, see *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983), so must psychological opinions be

based on reasonable psychological certainty. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988). In *Caradori, supra*, the court found that a doctor's opinion in a worker's compensation case that the disability "could" have been caused by the accident was insufficient to carry the worker's burden of proof of a causal connection between the injury, the employment, and the disability. Webb's liberty is at stake. Therefore, Dr. VanMetre's opinion on the key issue of dangerousness, stated as "could" be, is no less deficient than the doctor's opinion in *Caradori*. Furthermore, there was no evidence of any threatened harm by Webb to herself, and the testing for suicide revealed a low risk.

Thus, although Webb may well be troubled and even mentally ill, there was no clear and convincing evidence to justify the Board's conclusion that Webb represented a substantial risk of serious harm to herself in the near future as required by § 83-1009. To deprive Webb of her liberty on the meager evidence presented at this hearing is a travesty. The order of the district court upholding the Board's commitment is reversed, and the order of commitment is vacated.

REVERSED AND VACATED.

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## IN RE INTEREST OF ROY R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROY R., APPELLANT.

533 N.W.2d 107

Filed June 6, 1995. No. A-94-1015.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Juvenile Courts: Jurisdiction.** The juvenile court has jurisdiction of any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance. Neb. Rev. Stat. § 43-247(1) (Reissue 1993).

3. **Minors: Words and Phrases.** A juvenile is any person under the age of 18. Neb. Rev. Stat. § 43-245(5) (Reissue 1993).
4. **Trial: Juries: Evidence.** A jury can consider the physical appearance of a defendant in determining his age, but it cannot fix the age of the defendant by merely observing him during the trial without the benefit of other relevant evidence.
5. **Trial: Evidence: Appeal and Error.** A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and W.E. Madelung for appellant.

William C. Peters for appellee.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

Roy R. appeals the judgment and order of the county court for Scotts Bluff County, sitting as a juvenile court, which found that he had violated the law and was a child within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 1993) for having committed an act of vandalism by spray-painting the windows of the stadium announcer's booth at the Gering Junior High School. The order placed Roy on probation for a period of 4 months, required him to perform 5 hours of community service, and ordered him to pay costs. For the reasons recited below, we affirm.

## ASSIGNMENT OF ERROR

Roy contends that the court erred in finding sufficient evidence to assert its jurisdiction over him and adjudicate him as a juvenile within the meaning of § 43-247(1) because the State failed to prove his date of birth beyond a reasonable doubt.

## SCOPE OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in

conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

## FACTS

A petition was filed in the county court for Scotts Bluff County, sitting as a juvenile court, on July 1, 1994, alleging that Roy was a person as defined by § 43-247(1), which states: "The juvenile court in each county as herein provided shall have jurisdiction of: (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance."

The petition alleged that Roy, born February 16, 1980, had vandalized property of the Gering Junior High School on June 23, 1994, by spray-painting the windows in the stadium announcer's booth. When the county judge first read the petition on August 4, 1994, Roy was informed of his rights and the procedures to be followed in the court. The public defender was appointed to represent Roy.

On October 13, 1994, a contested adjudication hearing was held before the county judge. At the hearing, testimony was adduced from Gary Schmucker, director of school business services for Gering Public Schools, that two boys were brought to his office, located under the stadium, after he received reports of vandalism. Although Schmucker was unable to positively identify Roy as being one of those boys brought to his office, he was able to generally describe the appearance of the alleged vandals and observed that they were "about 14 years" of age. Lt. George Holthus of the Gering Police Department identified Roy as the same individual who was detained by Schmucker and subsequently brought to the police station. Holthus testified that through the completion of a juvenile probation form, Roy indicated that he was 5 feet 6 inches tall and weighed 100 pounds. The defense presented no evidence.

Upon the conclusion of the evidence, the county judge determined that the State had established its case. The court

specifically mentioned the reference to Roy "being approximately 14 years of age." The court found that the State had proved beyond a reasonable doubt that Roy was a child described under § 43-247(1) and sentenced him to 4 months of probation, required him to perform 5 hours of community service, and ordered him to pay the costs of the case. This appeal followed.

## ANALYSIS

On appeal, Roy solely "contends that proof of age, a necessary element of the allegation was not proven beyond a reasonable doubt, and thus the Juvenile Court did not have jurisdiction to adjudicate the Appellant as alleged." Brief for appellant at 5.

[2,3] Section 43-247(1) provides that the juvenile court has jurisdiction of "[a]ny juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance." Neb. Rev. Stat. § 43-245(5) (Reissue 1993) defines a juvenile as "any person under the age of eighteen." Further, Neb. Rev. Stat. § 43-279(2) (Reissue 1993) provides:

> If the juvenile denies the petition or stands mute the court shall . . . consider only the question of whether the juvenile is a person described by section 43-247. After hearing the evidence on such question, the court shall make a finding and adjudication, to be entered on the records of the court, whether or not the juvenile is a person described by subdivision (1) . . . of section 43-247 based upon proof beyond a reasonable doubt.

[4] Roy asserts that "proof of age, by competent evidence of date of birth, was not presented to the Juvenile Court by the State." Brief for appellant at 6. Although the State did not adduce evidence regarding the specific date of his birth, it did present evidence regarding Roy's age through the testimony of Schmucker, who stated that the boys were "about 14 years" old, and Holthus, who testified that Roy indicated he was "5'6" and weighs 100 pounds." In addition, Roy appeared in court and the judge had the opportunity to observe his demeanor and his

physical appearance. The Nebraska Supreme Court has recognized that a jury can consider the physical appearance of a defendant in determining his age, but cannot fix the age of the defendant by merely observing him during the trial without the benefit of other relevant evidence. See *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978). While the fact finder cannot fix the age of the defendant by merely observing him during trial without other relevant evidence, in the present action, the county judge, sitting as the fact finder, *did* have "the benefit of other relevant evidence"—the testimony of Schmucker and Holthus. Although the evidence presented may not have been sufficient to fix Roy's age at precisely 14, it was sufficient to prove that he was under the age of 18 years.

As long as Roy was under 18 years of age, the juvenile court was vested with at least concurrent jurisdiction over him. See § 43-247. We believe the evidence before the judge was sufficient to establish that Roy was under 18 years of age and that the juvenile court, therefore, had jurisdiction pursuant to § 43-247. See, e.g., *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987) (although dicta, Supreme Court observed that proof of age was established where the evidence, received without objection, was that minors depicted in a pornographic film were approximately 10 to 13 years of age and that in another film they were between the ages of 13 and 16 where the law made it unlawful to depict children under the age of 16 in such films).

[5] Frankly, we do not understand the point of Roy's appeal when we recognize that the alternative to the juvenile court's having jurisdiction is that Roy would face criminal charges in the general court system. Further, we observe that Roy's failure to object to the admission of Schmucker's testimony that he was "about 14 years" old indicates that he was not seriously contesting the State's proof of his juvenile status. Roy provided no contradictory evidence. This failure to object to the admission of such evidence may very well have been a matter of common trial tactics of not requiring the State to jump through hoops to establish Roy's age by other means, as trial counsel recognized that proof of Roy's actual date of birth could easily be otherwise obtained and admitted into evidence. A defendant

may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received. *State v. Burke, supra*. Although offering a birth certificate may be a more precise method to establish that one is a juvenile, we do not find its omission fatal in this case.

## CONCLUSION

Upon our de novo review, we find that there is sufficient evidence to conclude that Roy was under the age of 18, and he was, therefore, properly adjudicated pursuant to § 43-247. We affirm the judgment and order of the county court for Scotts Bluff County, sitting as a juvenile court, in this matter.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLANT, V. JOHN WIEMER, APPELLEE.

533 N.W.2d 122

Filed June 13, 1995. No. A-94-052.

1. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Postconviction.** Claims which could have been litigated in a first postconviction case may not be litigated in a second postconviction case. However, dismissal of subsequent postconviction claims is contingent on the previous motion for postconviction relief having been judicially determined.
5. _____. Consideration of a second postconviction motion is proper where the first postconviction motion was dismissed because the defendant was in federal rather than Nebraska custody.
6. **Postconviction: Appeal and Error.** For postconviction purposes, issues raised on direct appeal but disposed of procedurally have not been litigated.

7. **Due Process.** Procedural due process requires that an individual charged be notified of the charge and given a reasonable opportunity to be heard and to present any defense to the charge.
8. **Indictments and Informations.** An information may be amended before a verdict or finding if no new additional or different offense is charged and the substantive rights of the defendant are not prejudiced.
9. **Indictments and Informations: Sexual Assault.** An information charging sexual assault on a child may be amended to expand the dates based on the trial evidence.
10. **Pleas.** A plea of no contest, or nolo contendere, is equivalent to a plea of guilty for convicting and sentencing a defendant.
11. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
12. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel: Jurisdiction.** The only exceptions to the rule that a guilty or no contest plea waives every defense are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
13. **Postconviction: Effectiveness of Counsel: Proof.** The two-pronged test for determining the effectiveness of counsel in a postconviction case is as follows: (1) whether the attorney, in representing the defendant, performed at least as well as an attorney with ordinary training and skill in criminal law in the area and (2) whether the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
14. _____: _____: _____. A postconviction defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense in such a way that the defendant was denied a fair trial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
15. _____: _____: _____. To be successful on a claim of ineffectiveness of counsel, a defendant seeking postconviction relief must show counsel's deficient performance and prejudice to the defendant.
16. **Effectiveness of Counsel: Proof.** The defendant has the burden of demonstrating ineffectiveness of counsel, and the record must affirmatively support the claim.
17. **Postconviction: Effectiveness of Counsel: Judges.** The question of whether counsel performed in accordance with the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is a legal matter concerning which judges are required to be their own experts; judging the law is one of the more important judicial functions.
18. **Pleas: Effectiveness of Counsel.** A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.
19. **Effectiveness of Counsel: Proof.** Even where counsel's representation was deficient, the defendant must show that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different.

20. **Judgments: Effectiveness of Counsel: Proof.** The additional prejudice requirement is based on the proposition that an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
21. **Effectiveness of Counsel: Proof.** Even if a defendant shows that particular errors of counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense.
22. _____: _____. Proof of prejudice is required to succeed in establishing a claim of ineffective assistance of counsel.
23. _____: _____. Proof of a deficient performance must be accompanied by proof of prejudice to succeed in an ineffective assistance of counsel claim.
24. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
25. **Postconviction: Effectiveness of Counsel: Proof.** In meeting the prejudice standard, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), states, it is not enough for the defendant to show that counsel's errors had some conceivable effect on the outcome of the proceeding.
26. **Effectiveness of Counsel: Proof: Words and Phrases.** A defendant claiming ineffective assistance of counsel must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making this determination, a court must consider the totality of the evidence before the judge or jury.
27. **Effectiveness of Counsel.** The court may evaluate an ineffectiveness of counsel claim for deficient performance by counsel and for prejudice in any order.
28. **Constitutional Law: Criminal Law: Limitations of Actions.** An extended statute of limitations properly applies to crimes where the statute of limitations had not yet run on the alleged acts at the time a new statute of limitations law took effect. These extensions do not violate the ex post facto clause.
29. **Sexual Assault: Limitations of Actions.** In deciding whether a charge of first degree sexual assault is time barred, the question is whether the original limitations period had run before the new law extending the limitations period became effective.
30. **Limitations of Actions: Pleas: Waiver.** The statute of limitations is an affirmative defense and can be waived by a guilty plea.
31. **Criminal Law: Limitations of Actions.** The statute of limitations is a defense and must be asserted at trial by the defendant in criminal cases.
32. **Limitations of Actions: Waiver: Jurisdiction.** Cases holding that the statute of limitations is not waiveable generally reason that the statute of limitations is jurisdictional.
33. **Lesser-Included Offenses: Limitations of Actions: Jury Instructions: Waiver.** In order for the court to charge a jury on a lesser-included offense which is time

barred, a defendant must explicitly waive the statute of limitations.

34. **Limitations of Actions: Waiver.** The statute of limitations can, under proper circumstances, be waived.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded.

Charles W. Campbell, York County Attorney, for appellant.

Richard Douglas McClain, P.C., for appellee.

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

MILLER-LERMAN, Judge.

The State appeals the order of the York County District Court granting John Wiemer's motion for postconviction relief. For the reasons recited below, we reverse, and remand for a hearing.

## BACKGROUND

On December 17, 1990, the State filed an information against Wiemer charging him with three counts of sexual assault in the first degree, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), each a Class II felony, punishable by up to 50 years' imprisonment. Each count charged that Wiemer's daughter had been subjected to sexual penetration by Wiemer. The offenses were alleged to have occurred during the period of June 15 to July 7, 1986. According to an interview with the daughter in 1990, conducted by her counselors at Boys Town, she alleged that she was assaulted while her mother was in Holland for 3 weeks. The State amended the information on December 21, 1990, alleging that the offenses occurred during an expanded timeframe from June 1 to September 30, 1986. Wiemer pled not guilty.

As a result of plea negotiations, the State filed a second amended information on March 22, 1991. The second amended information, to which Wiemer pled no contest, charged one count of incest, in violation of § 28-703 (Reissue 1989), a Class III felony, punishable by 20 years' imprisonment, a $25,000 fine, or both. The act of incest was alleged to have occurred during the period from June 1 to September 30, 1986.

At the hearing to accept the plea, the court asked the State to recite the factual basis for the prosecution and conviction. The prosecutor recited the following factual basis:

> Judge, the basis for the charge would be evidence that during August through September of 1986, that Mr. Wiemer engaged in sexual intercourse with his daughter . . . at their residence located at . . . York County, Nebraska, and this occurred during a period while Mr. Wiemer's wife [the mother] was away in Holland on vacation.

The court asked Wiemer if his plea of no contest was made "solely and only because of the fact [that Wiemer did] not contest the things that [the prosecutor] just related into the record." The court also asked, "Do you disagree with any of the facts that [the prosecution] just related into the record?" Counsel for Wiemer responded, "Your Honor, my understanding in discussing with the defendant that he may not agree with the facts as related into the record, but he is not going to challenge them as presented." The court queried, "He may not agree but he doesn't want to challenge them?" Defense counsel replied, "Correct, Your Honor."

Wiemer's plea of no contest was accepted, and he was found guilty of one count of incest. On May 21, 1991, Wiemer was sentenced to not less than 6 nor more than 20 years in the Nebraska Department of Correctional Services, with credit for time served. A direct appeal was not taken.

On July 30, 1992, Wiemer filed a pro se motion for postconviction relief. Wiemer voluntarily withdrew the motion, and it was dismissed without prejudice on October 9, 1992.

On September 15, 1993, the current postconviction motion was filed by counsel on Wiemer's behalf. The essence of Wiemer's postconviction motion is that he was denied due process because his trial counsel was ineffective. Wiemer claims that trial counsel was ineffective because he did not raise the defense of the statute of limitations, or if it was raised and denied, he was ineffective in failing to appeal such a denial. The record before this court does not show whether or not the defense of the statute of limitations was raised in any manner at the trial level.

On October 4, 1993, the State filed a demurrer to the postconviction motion, contending that Wiemer's postconviction motion asserted a violation of the statute of limitations, which is a claim of a statutory violation, as opposed to a constitutional violation, and which does not render Wiemer's conviction void or voidable under either the Nebraska or U.S. Constitution, as required for postconviction relief. The district court took the demurrer under advisement. On January 4, 1994, Wiemer filed a motion requesting a ruling on the State's demurrer. On January 4, the district court issued an order granting Wiemer's motion for postconviction relief.

The district court's order granting postconviction relief noted that the crime of incest, to which charge Wiemer pled no contest and of which he was convicted, has a 3-year statute of limitations, Neb. Rev. Stat. § 29-110 (Reissue 1985), and concluded that "the Statute of Limitations ran on all of the charges of all of the Informations on September 30, 1989, under that statute. The facts offered by the State to support a finding of guilt upon the defendant's plea of nolo contendere show acts prior to September 30, 1986." Based on these findings and conclusions, the district court granted postconviction relief and vacated the conviction and sentence. The district court dismissed the information with prejudice and ordered Wiemer released. The State appeals to this court.

## ASSIGNMENTS OF ERROR

The State assigns the following errors: (1) The trial court erred in granting postconviction relief without an evidentiary hearing, (2) the trial court erred in failing to find that Wiemer waived his statute of limitations claims by pleading no contest, and (3) the trial court erred in finding that Wiemer's conviction was barred by the statute of limitations.

## SCOPE OF REVIEW

[1,2] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670

(1994); *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Barrientos, supra.*

[3] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

## ANALYSIS

Certain general principles of law are set forth before analyzing this appeal:

*Postconvicion Motion.*

Section 29-3001 of the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1994), provides in pertinent part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Section 29-3001 of the Nebraska Postconviction Act further provides that the trial court need not entertain a second motion or successive motions for postconviction relief and that "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . . ."

*Propriety of Second Postconviction Motion.*

[4-6] The State notes in its brief that Wiemer previously filed a postconviction motion, and it suggests that the district court improperly considered Wiemer's second postconviction motion. The State correctly notes that claims which could have

been litigated in a first postconviction case may not be litigated in a second postconviction case. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). See, also, *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995). However, dismissal of subsequent postconviction claims is contingent on the previous "motion for postconviction relief [having] been judicially determined." *State v. Lindsay*, 246 Neb. at 106, 517 N.W.2d at 106. Accord *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). See, *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991) (holding that consideration of second postconviction motion was proper where first postconviction motion was dismissed because defendant was in federal rather than Nebraska custody); *State v. Svoboda*, 199 Neb. 452, 259 N.W.2d 609 (1977) (holding that for postconviction purposes, issues raised on direct appeal but disposed of procedurally had not been "litigated"). Accordingly, we conclude that because Wiemer's first postconviction motion was not judicially determined, the district court's consideration of Wiemer's second postconviction motion was proper.

*Propriety of Amended Information.*

[7-9] Procedural due process requires that an individual charged be notified of the charge and given a reasonable opportunity to be heard and to present any defense to the charge. See *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988). We recognize that an information may be amended before a verdict or finding if no new additional or different offense is charged and the substantive rights of the defendant are not prejudiced. See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). Indeed, an information charging sexual assault on a child may be amended to expand the dates based on the trial evidence. *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). Accordingly, we find no impropriety in the State's having amended the original information.

*Effect of No Contest Plea.*

[10-12] A plea of no contest, or nolo contendere, is equivalent to a plea of guilty for convicting and sentencing a defendant. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989); *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983). It has

been held that the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991). Further, "[t]he only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction." *Id.* at 574, 477 N.W.2d at 22-23. See, also, *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992). Accordingly, we conclude that Wiemer's no contest plea had the effect of a guilty plea and that the plea did not waive Wiemer's claim of ineffective assistance of counsel.

*Ineffective Assistance of Counsel.*

[13-15] *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), generally sets forth the two-pronged test for determining the effectiveness of counsel in a postconviction case as follows: (1) whether the attorney, in representing the defendant, performed at least as well as an attorney with ordinary training and skill in criminal law in the area and (2) whether the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. The two-pronged test in *Nielsen* was derived from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In summarizing the holding in *Strickland*, the *Nielsen* court stated:

> Under *Strickland*, a [postconviction] defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense in such a way that the defendant was denied a fair trial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

243 Neb. at 212, 498 N.W.2d at 536. Thus, under *Strickland*, to be successful, a defendant seeking postconviction relief must show counsel's deficient performance and prejudice to the defendant.

[16-18] It has been held that the defendant has the burden of demonstrating ineffectiveness of counsel, and the record must affirmatively support the claim. *State v. Domingus*, 234 Neb.

267, 450 N.W.2d 668 (1990). The Nebraska Supreme Court has stated:

> The question of whether counsel performed in accordance with the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is a legal matter concerning which judges are required to be their own experts; judging the law is one of the more important judicial functions.

*State v. Joubert*, 235 Neb. 230, 243, 455 N.W.2d 117, 126 (1990). It has also been held that "[a] plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases." *State v. Escamilla*, 245 Neb. 13, 20, 511 N.W.2d 58, 63 (1994).

[19-21] In *Strickland v. Washington, supra*, the U.S. Supreme Court noted that even where counsel's representation was deficient, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The additional "prejudice" requirement is based on the proposition that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691. Thus, "[e]ven if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense." *Id.*, 466 U.S. at 693.

[22-24] In Nebraska, the Supreme Court has long held that proof of prejudice is required to succeed in establishing a claim of ineffective assistance of counsel. See, e.g., *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979). Proof of a deficient performance must be accompanied by proof of prejudice to succeed in an ineffective assistance of counsel claim. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984). "In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial." *State v. Escamilla*, 245 Neb. at 21, 511 N.W.2d at 63-64. See, also, *State v. Wakeman*,

231 Neb. 66, 434 N.W.2d 549 (1989).

[25-27] In meeting the prejudice standard, *Strickland v. Washington, supra*, states, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693. Instead, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694. In making this determination, a court "must consider the totality of the evidence before the judge or jury." *Id.*, 466 U.S. at 695. Under *Strickland*, the court may evaluate an ineffectiveness of counsel claim for deficient performance by counsel and for prejudice in any order.

*Applicable Statute of Limitations.*

At the time Wiemer allegedly committed the acts charged in the information, the statute of limitations for first degree sexual assault was 3 years, and the statute of limitations for incest was 3 years. § 29-110 (Reissue 1985). The statute of limitations for incest remained at 3 years throughout the relevant period. In 1989, the Nebraska Legislature amended § 29-110 and changed the limitations period for first degree sexual assault to 5 years, with an effective date of August 25, 1989. § 29-110 (Reissue 1989). The Legislature again amended § 29-110 in 1990, extending the limitations period for first degree sexual assault to 7 years, effective April 15, 1990. § 29-110 (Cum. Supp. 1992).

[28,29] In *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994), the Nebraska Supreme Court stated that an extended statute of limitations properly applies to crimes where the statute of limitations had not yet run on the alleged acts at the time a new statute of limitations law took effect. These extensions do not violate the ex post facto clause. *Id.* Thus, under *Hirsch*, in deciding whether a charge of first degree sexual assault is time barred, the question is whether the original limitations period had run before the new law extending the limitations period became effective. Pursuant to

*Hirsch*, acts of first degree sexual assault committed on or after August 25, 1986, were not time barred when the statute of limitations was extended to 5 years and, therefore, were subject to prosecution under the new 5-year law. However, acts of first degree sexual assault committed on or before August 24, 1986, would have been time barred on August 25, 1989, and, therefore, were not subject to the extended statute of limitations. In the instant case, an information charging first degree sexual assault filed in 1990, alleging acts of first degree sexual assault on or prior to August 24, 1986, was subject to challenge as being time barred and was subject to dismissal if the evidence showed that the acts were in fact committed on or before August 24, 1986.

Wiemer claims in his postconviction motion that his trial counsel was ineffective because he failed to assert and demonstrate that the action was barred by the statute of limitations. The import of Wiemer's postconviction pleadings is that the factual basis for the plea, as recited by the State, is that the acts charged took place while the victim's mother was in Holland for 3 weeks, and that competent counsel would have demonstrated that those 3 weeks occurred prior to August 24, 1986.

The State asserts that the acts allegedly committed by Wiemer between August 25 and September 30, 1986, were not time barred based on *Hirsch* and that the first amended information, which included this period, was not deficient. The State also notes that the incest charge, which bears a 3-year statute of limitations that was not extended, was time barred when filed on March 22, 1991, but that Wiemer waived the statute of limitations defense as to incest by pleading no contest to the incest charge.

*Waiver of Statute of Limitations.*

The State asserts that Wiemer obtained a favorable plea agreement and knowingly and voluntarily waived his statute of limitations defense. The State cites authority from other jurisdictions in which it is concluded that the statute of limitations is nonjurisdictional and waivable. In contrast, Wiemer argues that the statute of limitations is jurisdictional

and cannot be waived, or if the limitations period is waivable, the record must demonstrate a knowing and deliberate waiver.

[30-32] The jurisdictions are split on the issue of whether a guilty plea waives the statute of limitations defense. The weight of authority is that the statute of limitations is an affirmative defense and can be waived by a guilty plea. See, e.g., *Hubbard v. State*, 110 Nev. 671, 877 P.2d 519 (1994); *Longhibler v. State*, 832 S.W.2d 908 (Mo. 1992); *Conerly v. State*, 607 So. 2d 1153 (Miss. 1992); *State v. Cole*, 452 N.W.2d 620 (Iowa App. 1989); *State v. Johnson*, 422 N.W.2d 14 (Minn. App. 1988); *People v Dickson*, 133 A.D.2d 492, 519 N.Y.S.2d 419 (1987); *State v. Littlejohn*, 199 Conn. 631, 508 A.2d 1376 (1986); *People v Allen*, 192 Mich. App. 592, 481 N.W.2d 800 (1992); *State v. Brown*, 43 Ohio App. 3d 39, 539 N.E.2d 1159 (1988). The majority of the federal circuits have also held that the statute of limitations is a waivable defense. See *Longhibler v. State, supra* (citing in footnote 1 a collection of cases supporting this proposition). The majority of these cases rely on the Supreme Court holding in *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135, 38 S. Ct. 41, 62 L. Ed. 2d 193 (1917), which states that the "statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." We agree with the reasoning of these cases and conclude that the statute of limitations is a waivable defense. For the sake of completeness, we note that the cases holding that the statute of limitations is not waivable generally reason that the statute of limitations is jurisdictional. See, e.g., *Speigner v. State*, No. CR 93-1242, 1994 WL 717034 (Ala. Crim. App. Dec. 29, 1994); *People v. Ognibene*, 12 Cal. App. 4th 1286, 16 Cal. Rptr. 2d 96 (1993).

[33,34] In Nebraska, the Supreme Court has held in a criminal case that in order for the court to charge a jury on a lesser-included offense which is time barred, a defendant must explicitly waive the statute of limitations. *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990). See *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). From *Keithley*, we infer generally that in Nebraska, the statute of limitations can, under proper circumstances, be waived, and based on the weight of authority outside Nebraska, we conclude that the statute of limitations is a waivable defense.

*Ineffectiveness of Counsel: Postconviction Relief.*

In granting relief in this postconviction case, the district court found that the statute of limitations was a "substantive element" and that the State failed to prove the alleged acts were committed within the applicable limitations period. We find this ruling to be in error.

Based on the principles recited above, we conclude that in a proper case, Wiemer could knowingly and voluntarily waive his statute of limitations defense by a guilty or no contest plea to incest, even though the statute of limitations had admittedly run. We further conclude, based on *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994), and the statutory extensions, that criminal acts of first degree sexual assault, if any, on or after August 25, 1986, were not time barred. However, based on *Hirsch* and the statutes, acts of first degree sexual assault on or before August 24, 1986, were time barred.

Acts of first degree sexual assault on or prior to August 24, 1986, were time barred under the original information and amended information. The State's factual basis for the plea and the theory of the State's case was that Wiemer committed criminal acts "during a period while Mr. Wiemer's wife [the mother] was away in Holland on vacation." Wiemer claims in this postconviction proceeding that the time during which the mother was in Holland was a finite provable period, apparently on or prior to August 24, 1986, and that had he gone to trial, defense counsel could have established the dates of this discrete period. Wiemer continues that the evidence would show that the alleged acts would have occurred before August 24, 1986, and were thus time barred, precluding a conviction. Where, as here, it is alleged in a postconviction proceeding that the timeframe for the commission of the charged acts can be demonstrated to have occurred during a period which is time barred, we conclude that counsel would be deficient in not challenging the allegations in the charging document. Because the trial court did not conduct a hearing, we are unable to determine on this record when the 3-week time period occurred and Wiemer's possible entitlement to relief.

## CONCLUSION

In this postconviction case, Wiemer claims that he was prejudiced by his trial counsel's failure to challenge the statute of limitations. Wiemer claims that counsel's failure to try the case, where the exculpatory period could have been readily proven, had an adverse effect on the defense and resulted in prejudice. Based on the files and records of the case, Wiemer was entitled to a hearing under § 29-3001. Based on our review of the law and record in this case, we conclude that the trial court erred in its legal conclusion that the statute of limitations had expired on acts alleged in all three informations. We further conclude that Wiemer's postconviction allegations are sufficient to require a hearing under § 29-3001 to determine if counsel's actions had an adverse effect on the defense. We anticipate that the postconviction hearing will examine, inter alia, the dates of the mother's trip to Holland for the purpose of determining whether the alleged acts were time barred. For the foregoing reasons, we reverse, remand for a postconviction hearing, and vacate the order of release from custody.

REVERSED AND REMANDED.

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## STATE OF NEBRASKA, APPELLEE, V. ALVIN G. MORRIS, APPELLANT.

533 N.W.2d 110

Filed June 13, 1995. No. A-94-828.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

3. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, after the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge the trial court's overruling of the motion for dismissal or for a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
4. **Constitutional Law: Criminal Law: Trial: Prosecuting Attorneys: Witnesses.** In the course of a criminal trial before a jury, the act of a prosecutor in calling a witness to the stand with advance knowledge that the witness will invoke the Fifth Amendment may or may not call for a mistrial; each case must be decided in the light of its own facts and circumstances, and consideration must be given to the motive of the prosecutor in calling the witness and to the likelihood of the jury's drawing unwarranted inferences against the defendant from the fact that the witness has declined to testify on constitutional grounds.
5. **Trial: Motions for Mistrial.** When a party has knowledge during a trial of irregularity or misconduct, he must timely assert his right to a mistrial.
6. **Trial: Photographs: Videotapes.** The admission of photographs or videotapes of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
7. **Trial: Evidence: Appeal and Error.** An appellant claiming reversible error as the result of admission of evidence must have made a timely objection stating the specific ground of objection, if a specific ground was not apparent from the context.
8. _____: _____: _____. Generally, a party is barred from asserting a different ground for an objection to the admission of evidence on appeal than was offered before the trier of fact.
9. **Appeal and Error.** An issue not properly presented to and passed upon by the trial court may not be raised on appeal.

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

Christopher E. Kelly, of Fellman, Moylan, Natvig, Steichen & Kelly, for appellant.

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

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

SIEVERS, Chief Judge.

As the result of a jury trial in the district court for Douglas County, Alvin G. Morris was convicted of manslaughter in

connection with the death of Gregory Kowal. Morris was subsequently determined to be a habitual criminal and was sentenced to a term of incarceration of 20 to 25 years, with credit for 335 days served. Morris appeals his conviction to this court and assigns numerous errors. For the reasons cited below, we affirm.

## FACTS

On August 13, 1993, at approximately 9:30 p.m., the victim, Kowal, met three friends at Three Cheers, a bar in Omaha, Nebraska. That evening, Kowal cashed a $50 check at the bar and was seen wearing a gold watch and a Black Hills Gold ring. A friend of Kowal, Gregory Bourne, testified that Kowal had driven to the bar himself that night in his blue Geo Metro. Bourne also testified that Kowal smoked Camel filter cigarettes. Kowal left the bar alone around midnight and was later seen at Gilligan's, another bar in Omaha, located approximately four to five blocks from Kowal's apartment. Kowal told the bartender there that he was going to have one drink and then go home; however, the bartender did not see Kowal leave the bar.

A body, later identified as Kowal's, was discovered Saturday morning, August 14, on the steps outside a home near 35th and Parker Streets in Omaha. Kowal's body was first seen at approximately 6:30 a.m. However, the police were not called until 8:30 a.m. James Wilson, a City of Omaha police officer assigned to the homicide-assault unit, testified that based on his investigation, Kowal's body had been in that location anywhere from 6 to 8 hours. Police did not find any cash, a watch, or other jewelry on the body.

Blaine Rothman, a pathologist, performed an autopsy on Kowal and testified that the cause of Kowal's death was a single stab wound to the chest which penetrated the right side of the heart. In addition to the stab wound, Rothman found recent facial injuries, including a blackened right eyelid, an abrasion on the forehead, and a swollen lip. Rothman testified that a stab wound such as he found would cause a person to lose consciousness in 20 to 30 seconds and that death would occur in 2 to 3 minutes. Rothman further testified that a blade of 6

inches or more would have the capacity to cause the injury sustained by Kowal. A chemical analysis of Kowal's blood revealed that he was intoxicated at the time of his death, with a blood alcohol level of .218 gram per 100 milliliters.

On the same Saturday that Kowal's body was found, Virgil Combs, a U.S. Postal Service employee, saw a blue Geo Metro hidden in weeds in an alley near 17th and Lake Streets in Omaha at about 1 or 1:30 p.m. Since he suspected that the vehicle was stolen and would soon be stripped, Combs notified the police of the vehicle's location. At the time Combs saw the vehicle, the windows were intact and all tires were on the vehicle. At approximately 4 p.m., Omaha police officer Robert Sedlacek investigated the blue Geo Metro in the area of 17th and Lake Streets. Sedlacek noticed that the doors of the vehicle were locked, the windows were intact, and all four tires were still on the vehicle. However, Sedlacek noticed that the vehicle's radio was missing. Sedlacek ran a check on the vehicle and determined that the owner of the vehicle was Kowal. However, because the vehicle had not been reported stolen, Sedlacek determined that he did not have enough cause to tow it. Sedlacek returned to the area to check on the vehicle at approximately 10 p.m. At that time, the back window of the vehicle had been smashed in and all four tires had been removed. Although the vehicle still had not been reported stolen, Sedlacek decided to have the vehicle towed for safekeeping. As the vehicle was being prepared for towing, Sedlacek received a report that police were looking for a blue Geo Metro which was owned by the victim of a recent homicide. At that point, Sedlacek stopped the tow order and secured the scene where the vehicle was located.

In the area where the car was found, police investigators found some clothing items, registration papers, empty cigarette packages, and Camel "coupons." A fingerprint impressed on a Camel coupon found in the area where the blue Geo Metro was located was later identified as an exact match of Morris' left ring finger.

David Costello of the Omaha Police Division testified that a Kenwood cassette player was pawned at Cashmaster Loans pawnshop at approximately 12:20 p.m. on August 14, 1993, by

Raymond Thomas. Thomas is Morris' brother. Kowal's friend Bourne testified at trial that Kowal had a Kenwood cassette player installed in the blue Geo Metro.

Sheila Toles testified that on August 14, 1993, at her boyfriend's request, she gave Thomas and Morris a ride to an area near 17th and Lake Streets "to pick up [their] tires." Upon arrival, Toles saw a blue Geo Metro. Morris told Toles that he had been in the car the night before. Although Toles remained in her car, she heard the sound of glass breaking and saw Morris and Thomas put four tires in her trunk. After an unsuccessful attempt to pawn the tires, Toles took the men and the tires to their sister's house at around 6:20 or 6:30 p.m.

Walter Bray, a twice-convicted felon, testified at trial under a grant of immunity from further prosecution save the robbery charge arising out of this incident for which he was awaiting trial at the time of his trial testimony. We recount Bray's testimony in extensive detail. In August 1993, Bray had no permanent address but had been staying with some friends in a vacant apartment building. At approximately 11 p.m. on August 13, near 18th and Leavenworth Streets, Bray came across Morris. Although Bray had not seen Morris for approximately 4 1/2 years, he recognized Morris when he saw him that evening. Morris suggested to Bray that they "go make some money" and asked Bray to come along and "watch [his] back." Bray testified that he was under the impression that they were going to "hustle fags or . . . [r]ip them off some type of way." Morris and Bray spotted a man sitting in a car by himself near Gilligan's. Morris approached the driver and made him get out of the car and empty his two front pockets. Bray identified pictures of Kowal and the blue Geo Metro as the person and vehicle they approached near Gilligan's. When Morris saw that his pockets were empty, he pushed Kowal into the backseat of the car. Bray also saw Morris pick up a watch from the ground right by the driver's door of the vehicle and saw Morris take Kowal's wallet from Kowal's back pocket. Morris got into the front seat of the car and told Bray to get into the backseat with Kowal.

Bray testified that as Morris drove north on 18th Street, Morris asked Kowal, "[W]here is the fucking money at[?]"

Kowal stated that he did not have any money on him and that they would have to go to his apartment to get it. Kowal gave an address that sounded to Bray like it was located in west Omaha. Morris called Kowal a liar and stated that the address given was an "address where cops live at." Morris also made Kowal give him the ring he was wearing. Morris continued driving, and at some point Kowal stated that "you guys will never get away with this." About 15 seconds later, Kowal tried to grab Morris around the neck. Bray reached to grab Kowal, and Kowal turned and started fighting with Bray. Bray "popped" Kowal in the face a "couple times" and then grabbed his hands to subdue him.

Morris next told Kowal that "if you don't tell me where this fucking money's at . . . I'm going to have to stop this car and I'm going to cut your fucking nuts off." At this point, because he was concerned that something worse was going to happen, Bray asked Morris to let him out of the car. Morris continued driving until he reached the area of 33d and Blondo Streets, where he stopped the car and told Bray that this is where he could get out. As Bray started getting out of the car, Kowal started crying, told Morris that he just wanted to get out now, and asked if Morris was going to kill him. When he got out of the car, Bray saw something that looked like a steak knife in Morris' hand. Bray could tell that it was not a pocketknife and that the blade was about 6 inches long and looked silver. Before he left, Morris told Bray to come by his mother's home at 16th and Corby Streets the next day. Bray denied stabbing Kowal or having in his possession any of the items which he said Morris took from Kowal.

Bray testified that the following day, near 17th and Lake Streets, he saw Morris with Thomas stripping Kowal's car. Bray testified that around 3 p.m., he saw Morris and Thomas take the tires and the radio from the car. Bray did not talk to Morris at that time. However, 2 or 3 days later, Bray saw Morris and Thomas about to enter Sol's Pawn Shop. At that time, Bray asked Morris about Kowal by asking, "[W]hatever happened with that guy that you was with when I left[?]" Morris told Bray, "[M]an, I had to do him." Bray testified that he took this to mean that Morris had to kill him. Morris told Bray, "I had to

do it, man, because that faggot mother fucker was coming back on us." Morris also said, "[D]on't worry about it, man. . . . [W]e ain't got nothing to worry about, man. . . . I took and I cleaned the car up and everything." Morris also warned Bray, "[D]on't tell nobody about this. This is something that we got to die and take to our grave with us."

The last time that Bray saw Kowal alive was when he got out of the car at 33d and Blondo. Bray testified that Blondo is one block north of Parker. Kowal's body was found near 35th and Parker.

After Bray and Morris were both arrested and held in jail in connection with this incident, Bray encountered Morris several times. Each time Morris told Bray to be quiet and that "[t]hey ain't got nothing on us. Just be quiet."

Officer Wilson testified that after Morris was brought in for questioning with regard to Kowal's death, Morris told police that "you probably got me all over that car but I didn't have anything to do with the homicide." Morris also admitted to Wilson that he and his brother had removed the stereo and tires from a vehicle at 17th and Lake Streets, pawned the stereo, and sold the tires to an individual. Morris told Wilson that as he was walking toward his mother's house on Saturday morning, August 14, he saw the blue vehicle belonging to Kowal. Morris went to his mother's house, contacted Thomas, and made preparations to go over and take items from the car. Morris told Wilson that they removed and pawned the car stereo first and then later returned to remove the vehicle's tires. Morris denied to Wilson that he had any knowledge of the homicide.

Morris was charged with first degree murder, use of a knife to commit a felony, and being a habitual criminal. Morris was found guilty of manslaughter and was acquitted of the weapons charge. At an enhancement hearing, Morris was found to be a habitual criminal and was sentenced to 20 to 25 years' imprisonment for the manslaughter conviction. This appeal followed.

## ASSIGNMENTS OF ERROR

On appeal to this court, Morris assigns the following errors: (1) The trial court erred in submitting the case to the jury as

there was insufficient evidence upon which to base a conviction, (2) the trial court erred in allowing the prosecutor to call Thomas as a witness when the State knew in advance that Thomas would refuse to testify and would assert his Fifth Amendment right against self-incrimination, (3) the trial court erred in admitting a videotape of Kowal's body into evidence, and (4) the trial court erred in allowing out-of-court statements of Thomas into evidence.

## STANDARD OF REVIEW

[1] In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993).

## ANALYSIS

*Failure to Dismiss Case Based on Insufficient Evidence.*

Morris first argues that since there was insufficient evidence to present a jury issue in this case, the trial court erred in overruling his motion to dismiss. Morris made a motion to dismiss at the close of the State's evidence. After the trial court overruled this motion, Morris presented his defense through the testimony of his mother. Morris did not renew his motion to dismiss or make a motion for directed verdict after he rested.

[3] The Nebraska Supreme Court has previously held that a defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal

prosecution, and who, after the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge the trial court's overruling of the motion for dismissal or for a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994). Since Morris elected to present evidence in his defense after his motion to dismiss was overruled, he waived his right to challenge on appeal the trial court's ruling on his motion to dismiss.

On appeal to this court, Morris does not separately assign error with regard to the sufficiency of the evidence to sustain his conviction. However, our extensive review of the record reveals that the evidence is sufficient to support the jury's verdict. In fact, the trial testimony of Bray alone, if believed by the jury, is sufficient evidence to sustain Morris' conviction.

*Witness Invoking Fifth Amendment Right in Jury's Presence.*

Morris also maintains that the trial court erred by allowing the prosecution to call Thomas to testify before the jury when the State knew he would refuse to testify and would invoke his Fifth Amendment right against self-incrimination. The record of proceedings outside the jury's presence reveals that early in the investigation of Kowal's death, Thomas made a statement to police that implicated Morris in the crime. However, Thomas subsequently recanted this statement by an affidavit. Prior to trial, Morris made an oral motion in limine seeking to exclude the testimony of Thomas. Morris argued that if the prosecution called Thomas as a witness, it would be doing so for the purpose of getting otherwise inadmissible information to the jury through impeachment testimony. Morris argued that this would be done in bad faith, since the State was on notice that Thomas intended to refuse to testify.

During the trial, but outside the presence of the jury, the prosecutor informed the trial judge that Thomas had appeared pursuant to subpoena. The prosecutor asked for a hearing, outside the presence of the jury, to determine Thomas' intentions with regard to his testimony. The prosecutor also made a motion for the trial court to grant Thomas immunity, in

the event Thomas elected to invoke his Fifth Amendment rights. Still outside of the presence of the jury, Thomas informed the judge that he intended to refuse to answer any questions on Fifth Amendment grounds even if he were granted immunity from prosecution. The trial judge granted Thomas immunity.

The trial judge overruled Morris' motion in limine and, over defense counsel's objection, sustained the prosecution's motion to have Thomas invoke his Fifth Amendment rights in front of the jury. In the presence of the jury, Thomas answered the prosecutor's questions with regard to his name, age, and the fact that he was Morris' brother. After these preliminary questions, Thomas refused, as he had done in chambers, to answer any questions on Fifth Amendment grounds. The trial judge then reminded Thomas that he had been granted full immunity from any possible prosecution that could be made against him from his testimony. The following question and answer then took place:

> Q. [Prosecutor] Did you have a conversation with your brother, Alvin Morris, regarding the homicide of Gregory Kowal?
>
> A. [Thomas] Yeah. And I respectfully refuse to answer the question for the reason it may incriminate me, and I assert my right against compulsory self-incrimination under the Fifth Amendment to the US Constitution and Article I, Section 12, of the Constitution of Nebraska.

Thomas was immediately held in contempt of court, and the trial judge ordered the sheriff to take him into custody, which was done in front of the jury.

Morris now argues on appeal that "[t]he jury in this case was allowed to draw inferences of guilt against the Appellant when his brother was called to the stand and refused to answer ['because it may incriminate me'] when asked about the involvement of the Defendant in the death of Kowal," which "clearly worked to the prejudice of the Appellant." Brief for appellant at 29.

We do not find any Nebraska cases which directly address whether reversible error is committed when the prosecution calls a witness who it knows will take the Fifth Amendment.

However, there is instructive case law from other jurisdictions. The U.S. Supreme Court has held that to determine whether reversible error occurs as the result of a witness' assertion of his or her Fifth Amendment rights in the presence of the jury, courts must conduct two inquiries:

> First . . . error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . [S]econd . . . in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case.

*Namet v. United States*, 373 U.S. 179, 186-87, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Given the detailed presentation of interlocking evidence showing Morris' involvement in Kowal's death, and the single question posed to Thomas before the jury, we hold that the first category of inquiry detailed in *Namet* is not involved in this case.

In *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976), an appeal of a conviction for jury tampering, the defendant argued, inter alia, that the trial court erred when it overruled his motion for mistrial when a witness was called to the stand and invoked his privilege against self-incrimination in the presence of the jury. Through his attorney, the witness, Frank J. Ryan, informed counsel for the government before trial that he would refuse to testify on Fifth Amendment grounds unless he was granted immunity. However, when Ryan was called to testify at trial, he had not yet been granted immunity from further prosecution. When called, Ryan answered questions with regard to his name and address. At that point, the trial judge intervened and advised Ryan of his privilege against self-incrimination. When Ryan was asked another question by the government, he immediately invoked the Fifth Amendment. In chambers, the defendant moved for dismissal of the charge or, in the alternative, for a mistrial. After taking the matter under advisement, the trial judge overruled the motion for mistrial. After additional proceedings in chambers, Ryan was granted immunity. Thereafter, Ryan testified in front of the jury after the judge instructed the jury that it should give

no consideration to Ryan's original refusal to testify.

[4] On appeal, the defendant argued that he was prejudiced by Ryan's claim of privilege in front of the jury. The defendant contended that the government knew that Ryan would invoke the Fifth Amendment and that having Ryan claim this privilege in front of the jury was an act of bad faith that was done with the intent to prejudice the defendant. The Eighth Circuit Court of Appeals held that

> [i]n the course of a criminal trial before a jury, the act of a federal prosecutor in calling a witness to the stand with advance knowledge that the witness will invoke the fifth amendment may or may not call for a mistrial; each case must be decided in the light of its own facts and circumstances, and consideration must be given to the motive of the prosecutor in calling the witness and to the likelihood of the jury drawing unwarranted inferences against the defendant from the fact that the witness has declined to testify on constitutional grounds.

*United States v. Quinn*, 543 F.2d at 650. The *Quinn* court upheld the decision of the district court and held that under the facts and circumstances of that case, the episode involving Ryan's claim of privilege before the jury did not call for a mistrial either on a theory of prosecutorial misconduct or on a theory of actual or potential prejudice.

In *U.S. v. Victor*, 973 F.2d 975 (1st Cir. 1992), the defendant was charged with and convicted of tampering with a federal witness in violation of 18 U.S.C. § 1512(b). On appeal, in addition to claiming that the evidence was insufficient to support his conviction, the defendant argued that the assertion by a witness of his Fifth Amendment rights before the jury constituted reversible error. Counsel for witness Dana Richardson informed the assistant U.S. attorney before trial that Richardson was angry and "would, at some point, invoke his Fifth Amendment rights." *U.S. v. Victor*, 973 F.2d at 978. Although the government had prepared an immunity request for Richardson, the government did not intend to present it to the court until Richardson was asked substantive questions about his relationship with the defendant, since the government " 'did not anticipate that the privilege would be invoked in

response to preliminary questioning.' " *Id.* at 979. At trial, after answering a preliminary question, Richardson invoked his Fifth Amendment rights and refused to testify further. At that point, Richardson was immunized and testified fully.

On appeal, the defendant argued that the government's knowing and intentional tactic of calling Richardson to the stand to invoke his Fifth Amendment rights prejudiced the defendant and was reversible error. Applying the test stated in *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963), the First Circuit Court of Appeals set forth other factors that may be considered in determining whether reversible error has occurred as the result of the prosecution's forcing, and the trial court's allowing, a witness to assert his or her Fifth Amendment rights in the presence of the jury, including

> the prosecution's intent in calling the witness; the number of questions which elicit an assertion of the privilege, whether either side attempted to draw adverse inferences in closing argument or at any time during the trial from the witness' refusal to testify; whether the inferences relate to central issues or collateral matters; and whether the inferences constitute the only evidence bearing upon the issue or are cumulative of other evidence.

*U.S. v. Victor*, 973 F.2d at 979. The *Victor* court concluded that under the facts and circumstances of that case, there was no prosecutorial misconduct, since there was no conscious and flagrant attempt by the government to build its case out of inferences arising from Richardson's refusal to testify. The court also found that Richardson's assertion of his Fifth Amendment rights did not "give rise to any inference which could have affected the case in any way" and did not add "critical weight to the prosecution's case." *U.S. v. Victor*, 973 F.2d at 980.

In the present case, it is clear that the prosecutor was aware that Thomas would refuse to testify even if immunized, and we cannot discern from the record what the prosecutor's motive may have been for having Thomas invoke his Fifth Amendment rights in the presence of the jury. The prosecutor's explanation to the trial judge that he would then be able to treat Thomas as a

"hostile witness" does not enlighten us, since treatment as a hostile witness merely allows use of leading questions in examining a witness one has called to testify. See Neb. Evid. R. 611(3), Neb. Rev. Stat. § 27-611(3) (Reissue 1989). However, such treatment presupposes that the witness will answer—which was clearly not going to be the circumstance here with Thomas.

Under the facts and circumstances of this case, we decide this assignment against Morris on two grounds: (1) the lack of prejudice and (2) Morris' failure to request a mistrial. By this stage of the trial, the jury already knew that Thomas and Morris were brothers and that Thomas had pawned the Kenwood cassette player that had been removed from Kowal's vehicle. Against this backdrop we examine the question put to Thomas before the jury: "Did you have a conversation with your brother, Alvin Morris, regarding the homicide of Gregory Kowal?" This question did not present any specific information to the jury, except that Thomas voluntarily answered "yeah" before claiming the privilege. As stated previously, there was no attempt by the prosecution to build its case from inferences from this one question and Thomas' exercise of the Fifth Amendment privilege. Moreover, in the context of the detailed evidentiary presentation by the prosecution, we cannot conclude that "critical weight" had been added to the State's case by Thomas' presence on the witness stand, his invocation of the Fifth Amendment, and the trial court's holding him in contempt. See *Namet v. United States, supra*. We also look to whether this was the only evidence on the subject or whether it was cumulative of other evidence. See *U.S. v. Victor*, 973 F.2d 975 (1st Cir. 1992). The answer to these questions is clearly that there was other evidence on the issue and that Thomas' testimony would have been cumulative.

The record also shows that Morris' defense counsel expressed concern at trial that the prosecution was acting in bad faith and was trying to put itself in a position to be able to impeach Thomas' testimony with prior inconsistent statements. However, the record shows that the State made no attempt to introduce prior inconsistent statements of Thomas after he

refused to testify.

Moreover, the potential inferences from the trial events involving Thomas' invocation of his Fifth Amendment privilege in front of the jury are (1) that Thomas was involved in Kowal's death and was protecting himself or (2) that he was protecting his brother. Thus, we believe that Morris must move for a mistrial to preserve any claim of error rather than hope that the jury would draw the inference that Thomas rather than Morris was responsible for Kowal's death. If Morris decided to take that gamble and did not move for a mistrial, he cannot be heard to complain on appeal when the jury appears to have chosen the other inference or has not accorded any weight whatsoever to Thomas' appearance.

[5] When a party has knowledge during a trial of irregularity or misconduct, he must timely assert his right to a mistrial. *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (objection was made and sustained as to volunteered testimony, but motion for mistrial after witness left stand found not timely). We find no prejudice to Morris and no reversible error in the trial court's allowance of Thomas' brief appearance before the jury. Moreover, in these particular circumstances, a motion for a mistrial was necessary to preserve the matter for appellate review. Thus, for several reasons, this argument lacks merit.

*Videotape of Victim's Body.*

Morris assigns error with regard to the trial court's showing of a videotape of Kowal's body to the jury over Morris' objection. The videotape, shot by the Omaha Police Division as part of their investigation of the homicide, shows the body of the victim and the location of the body when it was found. The trial court allowed the videotape to be shown to the jury, over objection, during the testimony of Officer Wilson, to illustrate his description of the scene and the body. Morris argues that the prejudicial effect of the videotape far outweighed its probative value.

[6] While we were unable to find any Nebraska cases that deal directly with the issue of the admissibility of a videotape depicting the condition of a victim's body at a crime scene, we

find that the law with regard to the admissibility of gruesome photographs is obviously analogous. Under Nebraska law, the admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

In *State v. Hankins*, 232 Neb. 608, 625, 441 N.W.2d 854, 869 (1989), we find further guidance on this subject:

> We have held that in a homicide case photographs of the victim are admissible, even if gruesome, provided a proper foundation is laid and they are received for purposes of identification, to show the condition of the body or the nature and extent of the wounds, or to establish malice or intent, particularly in conjunction with the examining pathologist's testimony. *State v. Parsons*, 226 Neb. 543, 412 N.W.2d 480 (1987); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). In other words, the gruesome nature of photographs alone will not keep them from the trier of fact, so long as the probative value is not outweighed by the prejudicial effect. *State v. Parsons, supra.*

After viewing the videotape, we conclude that the probative value is not substantially outweighed by its prejudicial effect. The tape corroborates Bray's testimony that Kowal was struck in the face while in the vehicle with Morris and also corroborates other aspects of the State's proof, such as the pathologist's testimony about the cause of death, the type of weapon used, and how long Kowal had been dead. The trial court correctly admitted the videotape into evidence.

*Out-of-Court Statements of Thomas.*

Morris also argues that the trial court erred in allowing the State to present an out-of-court statement of Thomas. Officer Wilson, when testifying about Morris' response when interrogated about the crime, was allowed to testify that Thomas had made statements to the police implicating Morris in the death of Kowal. Morris asserts that such testimony was inadmissible hearsay and that the trial court erred by overruling Morris' objection to this testimony.

At trial, Wilson was questioned with regard to his postarrest interview with Morris. Specifically, in response to a question from the prosecutor, Wilson answered:

> A. Raymond or, I'm sorry, Alvin didn't believe when I told him — or when he made his denials to me of having anything to do with the actual homicide of Mr. Kowal, I again reiterated the fact to him that we had physical evidence to show that we could connect him with the car and also statements from his brother implicating him.
>
> [Defense counsel]: Objection at this time, Your Honor, with regard to any statements by any other parties.
>
> THE COURT: Overruled.

[7-9] Thus, although Morris' objection was timely, the objection was not on any specific ground and clearly was not a specific hearsay objection as is now argued on appeal. Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989), states that an appellant claiming reversible error as the result of admission of evidence must have made "a timely objection . . . stating the specific ground of objection, if a specific ground was not apparent from the context." See *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). Generally, a party is barred from asserting a different ground for an objection to the admission of evidence on appeal than was offered before the trier of fact. *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991). It is also true that an issue not properly presented to and passed upon by the trial court may not be raised on appeal. *State v. Foley*, 234 Neb. 304, 450 N.W.2d 694 (1990). Although Morris' counsel voiced a general opposition to Wilson's testimony, he did not state a specific objection based on any of the Nebraska Evidence Rules.

In *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989), the court considered the timeliness and specificity of defense counsel's objection, which was nearly identical to the objection at issue here. In *Cox*, the objection was made well in advance of the prosecutor's question to the witness, " 'What did he [the victim] tell you?' " *Id.* at 503, 437 N.W.2d at 140. In addition to finding that the objection was not timely as being made too early, the court implied that the objection failed to preserve the matter for appellate review because it was not specific enough:

> Furthermore, counsel phrased the objection in the broadest possible terms, "any testimony of statements by any witness . . . not present in court." Given the all-inclusive nature and universality of counsel's objection, the district court had no choice but to overrule the objection. Under the Nebraska Evidence Rules, the hearsay rule does not require exclusion of all out-of-court or extrajudicial statements. See Neb. Evid. R. 803, Neb. Rev. Stat. § 27-803 (Reissue 1985). An extrajudicial statement must be examined to determine whether (1) it is hearsay defined by Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801 (Reissue 1985), and (2) if hearsay, whether any exception to the hearsay rule authorizes admission of the statement into evidence. See, Neb. Evid. R. 803; Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1985). To afford a trial court a fair opportunity to examine an out-of-court or extrajudicial statement in the light of the Nebraska Evidence Rules, counsel must direct a hearsay objection to the statement to be excluded pursuant to the objection. Failure to direct a hearsay objection to a particular extrajudicial statement, offered as evidence, may result in a waiver of the right on appeal to assert prejudicial error. See, *State v. Roggenkamp*[, 224 Neb. 914, 402 N.W.2d 682 (1987)]; *State v. Archbold*[, 217 Neb. 345, 350 N.W.2d 500 (1984)].

*State v. Cox*, 231 Neb. at 503-04, 437 N.W.2d at 140.

Despite its criticism of the objection in *Cox* on both timeliness and specificity grounds, the Supreme Court nonetheless proceeded to perform a "harmless error" analysis of the testimony, citing the rule that erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted or admitted without objection, supports the finding by the trier of fact. In *Cox*, a child abuse case, the police officer's testimony at issue was that the victim had stated, " '[D]addy poured hot water on [my] feet.' " *Id.* at 502, 437 N.W.2d at 139. The court recited that other witnesses had testified in detail regarding the defendant's disciplinary practice of placing the child in the bathtub and running hot

water on the child's feet. The court concluded its analysis by reasoning that even if the officer's testimony regarding the extrajudicial statement of the victim was excluded by the hearsay rule, testimony from other witnesses rendered the admission of this testimony about the cause of the child's burns an error which was harmless beyond a reasonable doubt.

In the instant case, we reach the same conclusion. The challenged testimony, in summary, was that Morris' brother had given a statement implicating Morris in Kowal's death. Other than the word "implicate," no other specifics were adduced as to what Thomas allegedly had said which implicated Morris. Additionally, there was abundant testimony from Bray which implicated Morris in the death of Kowal. Bray's testimony not only recited numerous admissions by Morris to Bray of involvement in the killing of Kowal, but also precise and detailed testimony of the events by which the paths of Bray and Morris came to meet with that of Kowal. Additionally, Bray provides evidence of the robbery, Bray's assault upon Kowal in the car, Morris' threats to Kowal, and Bray's observation of Morris with a knife which the pathologist testified was of the sort needed to inflict Kowal's fatal wound. Thus, even if the objection could be considered specific enough and the testimony inadmissible hearsay, neither of which we need decide, it would have been harmless error to allow Wilson's testimony, just as in *Cox*. Accordingly, the assignment lacks merit.

*Manslaughter Instruction.*

Finally, in our review of the record we noted that the jury instruction on manslaughter was as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:
>
> 1. That the defendant killed Gregory A. Kowal;
>
> 2. That he did so, either:
>
> a. *intentionally* without malice upon a sudden quarrel, or
>
> b. unintentionally while in the commission of an unlawful act which consisted of intentionally, knowingly,

or recklessly causing bodily injury to Gregory A. Kowal. (Emphasis supplied.)

Under *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) (overruling *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989)), this instruction was erroneous, since there is now no requirement of an intention to kill in committing the crime of manslaughter in the State of Nebraska. However, since the erroneous intent element increased the burden on the State for proving manslaughter upon a sudden quarrel, we find no prejudice to Morris in the erroneous instruction, nor do we find any plain error.

## CONCLUSION

There being no merit to the assigned errors and no plain error on the record, Morris' conviction and sentence are affirmed in all respects.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ANTHONY C. STARKS, APPELLANT.

533 N.W.2d 134

Filed June 13, 1995. No. A-94-896.

1. **Juries: Discrimination: Appeal and Error.** A trial court's determination of the adequacy of the State's neutral explanation of its peremptory challenges will not be reversed upon appeal unless clearly erroneous.
2. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
3. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

5. **Juries: Discrimination: Appeal and Error.** The trial court's determination as to whether a defendant has established purposeful discrimination in jury selection is a finding of fact entitled to appropriate deference from an appellate court.
6. **Equal Protection: Juries.** The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man.
7. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race or gender. To make a prima facie showing, the defendant must show that the prosecutor has exercised peremptory challenges to remove members of the panel that are of the same gender or a cognizable racial group and that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race or gender. If the requisite showing has been made, the burden shifts to the prosecutor to articulate a neutral explanation for striking the jurors in question. The explanation must be based on a juror characteristic other than gender or race and may not be pretextual. The final step is that the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.
8. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** The trial court need not determine if a prosecutor's explanation for striking a potential juror is reasonable, but only that it is nondiscriminatory and is constitutionally permissible.
9. **Juries: Discrimination.** A litigant may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged.
10. **Juries: Discrimination: Proof.** A party may establish that an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken.
11. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
12. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
13. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition.
14. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

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

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

## INTRODUCTION

Anthony C. Starks appeals his conviction for robbery. Starks assigns as error the district court's overruling his objection to the State's use of two peremptory challenges to exclude two female potential jurors and the district court's refusal to give two jury instructions he requested. He also contends that the evidence was insufficient to submit the case to the jury. Finally, Starks claims that the district court erred in denying his motion for new trial. For the reasons stated below, we affirm.

## FACTS

We review the facts in the light most favorable to the State, as we are required to do. See *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992). On December 17, 1993, the First Federal Lincoln Savings and Loan Association (First Federal) located in Lincoln, Nebraska, was robbed. A man ran into First Federal at approximately 1:35 p.m., threw a blue nylon gym bag at Denise Hoffman, one of the employees, and said, "Give me your money, bitch." Hoffman began putting bills into the bag. When a bank drive-through buzzer sounded, the robber grabbed the bag and ran from the building. Hoffman's cash drawer was $3,642 short after the robbery. Hoffman described the robber as a black male, with a medium build, about 5 feet 6 inches tall, and probably in his midtwenties. She said that he had on a ski mask and a scarf tied around the bottom part of his face and that the only skin she could see around the eyes was black.

About 1:30 p.m., Leslie Dale Vlcek, who was at the small engine repair shop next to First Federal, noticed a brown vehicle with a lighter brown or tan top, which he thought was an Aries K car, that was without license plates drive by once and then drive by again and stop. Vlcek saw a man who was wearing a

bandanna get out of the car and start running in the direction of the bank. Vlcek described this man as black with a muscular build and between 5 feet 9 inches and 5 feet 11 inches tall. Vlcek stated that a blonde woman remained in the driver's seat of the brown and tan car, that seconds later the same man ran back to the car, and that the car "took off."

Approximately 5 p.m. that same day at about 13th and F Streets in Lincoln, Officer Michael Pratt and Investigator Mark D. Domangue of the Lincoln Police Department met a car matching the description of the car seen by Vlcek. They began to follow this vehicle, but then they observed another vehicle which matched the description more closely, and they began to follow it. A white woman was driving the second car with a male passenger who appeared to be black. When this car pulled into the parking lot of a convenience store, the police pulled in behind it. The woman was identified as Rebecca Lowmack and arrested on an outstanding warrant. The male passenger, Roy Starks, who is Anthony Starks' brother or cousin, agreed to go to the police station to be questioned. In a search of the car, police found Lowmack's purse, which contained brochures from First Federal and receipts for jewelry purchased at Wal-Mart that day.

When questioned, Lowmack initially denied any knowledge of or involvement in the robbery. Eventually, she admitted that she had driven the car seen leaving First Federal after the robbery and that Anthony Starks had entered the bank. During questioning, she also admitted that she knew Starks was going to rob the bank.

At approximately 7:30 p.m., the police went to 916 S. 14th Street in Lincoln after receiving information from Lowmack and Roy Starks that Anthony Starks was at that location. When they approached the residence, the police saw a person they believed to be Anthony Starks standing in the doorway. It appeared that Starks had observed the police cruisers, and the police saw him move east inside the house. The police went to the back porch of the house. Through the kitchen door window, Det. Sgt. Gregory Sorenson saw Starks fumbling with pots and pans on the kitchen counter. The police knocked and announced themselves. A man named Curtis VanNote

answered the door, and the police asked that Starks step outside. Starks was then arrested. Starks was wearing two gold necklaces and two rings when arrested. With the consent of the owner of the residence, the police searched the kitchen. Officer Pratt found a bundle of currency totaling $2,708 under a cooking pan on the counter.

A jury trial commenced July 14, 1994. During voir dire, Starks objected that the State had used five of its six peremptory challenges to excuse females. Starks' counsel indicated that based upon the U.S. Supreme Court's holding in *J.E.B. v. Alabama ex rel. T.B.*, ____ U.S. ____, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), the State could not use its peremptory challenges in a gender-biased manner. The jury panel of 24 people included 12 females. The State struck five of the females and Starks struck three. At the time of Starks' objection, he had one peremptory challenge remaining and four females remained.

Because Starks continues to challenge two of these peremptory challenges on this appeal, we restrict our review to them. One potential juror (venireperson No. 1) stated during voir dire that she had been a paralegal student and had been living in Denver, Colorado, in 1989; she acknowledged socializing with people of other races; and she stated that her best friend, whom she lived with for years, was Hispanic and that over the years she had a number of friends of different nationalities. In response to a question from defense counsel regarding whether each venireperson considered herself or himself to be a leader or a follower, venireperson No. 1 indicated that although her personality "doesn't require the spotlight" she saw herself "more as a leader" because she was not "afraid to state [her] opinion" and "go against people that are more assertive and will."

The other potential juror (venireperson No. 2) stated during voir dire that she was a consulting forester and "usually look[s] at diseased, sick trees and do[es] planting designs." It appears that venireperson No. 2 stated in her jury questionnaire form that her husband was employed by a natural resources district. Venireperson No. 2 also indicated that she was a follower "because [she] do[es]n't like the spotlight."

The trial court determined that Starks had made a prima facie case for gender-based discrimination in the State's use of its peremptory challenges and requested that the State provide gender-neutral explanations for its peremptory challenges. The prosecutor stated that he struck venireperson No. 1 because "based upon questioning and observations" she was a "quiet, but strong-willed person. And I wasn't able to figure out just exactly what her opinions on much of anything were." He further stated:

> In my memory, and went into my decision with it, she said she was a follower.
>
> She struck me as potentially a classic holdout, hung juror, in that she struck me as the type of person who neither side knew much about, who might very well go back into the court — back into the jury room, hang on to a position . . . to the extent of causing a mistrial.

The prosecutor stated that he challenged venireperson No. 2 because in answer to defense counsel's question, "Are you a follower or a leader?" she stated she was a follower because she did not like to be in the spotlight. He stated that this type of person is often

> willing to go either way with the majority. Ah, I'm not sure that that's always best for a juror to do that. She was a forester and her husband, in my memory, is full time with the NRD in Wahoo, the North Platte NRD. . . .
>
> . . . I don't have any — I don't know anybody in either one of those businesses. And for that reason or to indicate — or in those areas of study, and for that reason I wasn't able to determine what, if any, ah, commonalities there are or what sort of people those are. I've never met any. And, so, for the reason that there was an unknown and for the reason that there was a follower, I guess, I struck—made that my final strike.

Starks argued that the State's explanations were pretextual because it had not exercised its peremptory challenges to excuse male jurors who described themselves as followers and who had similar characteristics as these two female jurors.

The court accepted the explanations of the State as gender neutral and found no showing of pretext. The trial court found

that the State had not exercised its peremptory challenges in a discriminatory, gender-based manner.

At trial, Lowmack testified that in December 1993, she owned a brown, four-door 1981 Plymouth Reliant; that it did not have license plates; and that she often gave Anthony Starks rides in her car. She testified that on December 17, 1993, at approximately 10 a.m., she and Starks drove to the Havelock neighborhood in Lincoln. Starks told her to go into First Federal, pick up some brochures, ask about checking accounts, and see who was in the bank. She did as he asked, placed the brochures in her purse, and returned to the car. Lowmack told Starks that she had gotten the brochures and that two females were working.

Lowmack testified that she and Starks drove around for awhile and then headed back toward First Federal. He then told her to stop and said he was going to go in. Starks came back to the car in what "seemed like about 30 seconds later." She testified that "[h]e came runnin' up to the car. . . . And he jumped in." She said that she saw his blue tote bag "kind of sticking out from under his arm." She testified that he yelled at her to drive fast and gave her directions. At the corner of 84th and Adams Streets, Starks jumped out of the car and told her to go home. Lowmack testified that Starks returned to her trailer house about 3:30 p.m. and that he was wearing different clothes. She and Starks went to Wal-Mart, where he bought two gold necklaces and two rings. That evening, Lowmack and Roy Starks were stopped by police, and she was arrested.

The inconsistences in Lowmack's statements to the police, her sworn statements to defense counsel, and her present testimony regarding the times that the events of December 17 had occurred and what had occurred were brought out on cross-examination. During cross-examination, Lowmack admitted that during police questioning she first told police that she left her home at 9 a.m. and had gone to First Federal alone. Lowmack admitted that she did not mention Starks' involvement in the robbery to the police until Detective Sorenson asked, "It's Anthony, isn't it?" Lowmack admitted that she was charged with robbery and that the State made a written offer that allowed her to plead to the charge of being an

accessory to a felony but that at the time of trial, she had not decided whether to accept or reject that offer. She testified that as part of the offer, she could not enter a plea until after testifying in Starks' trial. Lowmack also admitted that on December 17, she furnished the police with information she knew to be false. Detective Sorensen testified that when he questioned Lowmack on December 17, she told him that she knew Starks was going to rob the bank.

During the instruction conference, defense counsel offered two proposed jury instructions. One stated the elements of the offense of being an accessory to a felony and the other stated the elements of the offense of false reporting. Defense counsel stated that he was requesting the first instruction in order to help the jurors understand the meaning of the State's offer to Lowmack and the second instruction in order to show the jurors that Lowmack's lying to the police, as brought out on cross-examination, was illegal conduct. Defense counsel stated that both instructions addressed Lowmack's credibility as a witness. The trial court declined to give either of Starks' proposed instructions.

On July 19, 1994, the jury found Starks guilty of robbery. On July 21, Starks filed a motion for new trial alleging that there were irregularities in his trial because the State exercised peremptory challenges in a gender-biased manner; the verdict was not sustained by sufficient evidence; and the trial court's refusal to instruct the jury after a proper request by the defense was error. The trial court overruled this motion August 18. On August 18, an enhancement hearing was held and the court found that Starks should be sentenced as a habitual criminal. On September 13, Starks was sentenced to serve a term of imprisonment of not less than 12 nor more than 18 years, with credit for 268 days served. This appeal timely followed.

## ASSIGNMENTS OF ERROR

Starks' assignments of error may be summarized as follows: (1) The district court erred in failing to find that the State exercised two of its peremptory challenges on the basis of gender and that the State's explanations were pretextual, (2) the district court erred in failing to instruct the jury on the elements

of being an accessory to a felony and the elements of false reporting, (3) the district court erred in finding the evidence sufficient to submit the case to the jury, and (4) the district court erred in denying Starks' motion for new trial.

## STANDARD OF REVIEW

[1] A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed upon appeal unless clearly erroneous. *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991); *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993).

[2] All the jury instructions must be read together, and if taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

[3] On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992).

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Rosales*, 3 Neb. App. 26, 521 N.W.2d 385 (1994).

## ANALYSIS

*Peremptory Challenges.*

[5] We first consider whether the district court's finding that the State had not exercised its peremptory challenges in a gender-biased manner is clearly erroneous. See, *Morrow, supra*; *Edwards, supra*. The trial court's determination as to whether a defendant has established purposeful discrimination in jury selection is a finding of fact entitled to appropriate

deference from an appellate court. *Edwards, supra.* The U.S. Supreme Court has stated:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." [Citation omitted.] In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral [or gender-neutral] explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

*Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Starks also alleges that the district court erred in denying his motion for new trial, which identified the State's improper use of its peremptory challenges as one ground for new trial. The district court's determination in this regard will not be disturbed in the absence of an abuse of discretion. See *Rosales, supra.*

Starks contends that the State's explanations for excusing venireperson No. 1 and venireperson No. 2 were pretextual and, therefore, gender-biased because the State did not challenge male jurors with the same characteristics. According to Starks, the State wanted to excuse female jurors because male jurors would be more apt to accept Lowmack's testimony that she was just doing as she was told to do by Starks on the day of the robbery.

As to venireperson No. 1, Starks argues that the record shows that she identified herself as a leader, not a follower as stated in the State's explanation. Starks contends that a review of the record shows that other self-identified leaders who were male potential jurors were not challenged by the State and were indistinguishable from venireperson No. 1 except on the basis of gender. As to venireperson No. 2, Starks argues that there is no principled explanation to distinguish her, a self-identified follower, from unchallenged male potential jurors who

identified themselves as followers.

A review of the relevant case law is appropriate at this point. In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that a prosecutor's use of peremptory challenges to exclude blacks from a jury trying a black defendant violates the Equal Protection Clause of the U.S. Constitution. In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the U.S. Supreme Court held that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race. The Court reasoned that a defendant may raise the equal protection rights of a juror excluded from service because racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt. *Powers, supra.*

[6] The U.S. Supreme Court further extended its holding in *Batson* in *J.E.B. v. Alabama ex rel. T.B.*, ____ U.S. ____, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). In *J.E.B.*, the Court held that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. We are aware that the Nebraska Supreme Court held in *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), that a prosecutor's exercise of peremptory challenges on the basis of gender did not violate the Equal Protection Clause. Accord *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993). However, *Culver* was decided prior to the U.S. Supreme Court's decision of *J.E.B.*

[7] The three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause is as follows: First, the defendant must make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race or gender. See *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). To make a prima facie showing, the defendant must show that the prosecutor has exercised peremptory challenges to remove members of the panel that are of the same gender or a cognizable racial group and that facts

and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race or gender. See *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993). Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a neutral explanation for striking the jurors in question. *Hernandez, supra*. The explanation must be based on a juror characteristic other than gender or race and may not be pretextual. *J.E.B., supra*; *Hernandez, supra*. The final step is that the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. *Hernandez, supra*.

[8] In applying the *Batson* test, the Nebraska Supreme Court has stated that the prosecutor's explanations need not rise to the level of a challenge for cause. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). The prosecutor's basis for his strikes need not even rise to the level of rationality. *Id.* The trial court need not determine if the explanation is reasonable, but only that it is nondiscriminatory and is constitutionally permissible. *Id.*; *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991).

[9,10] As discussed above, Starks claims the State's explanations of its peremptory challenges were pretextual because the State did not challenge male potential jurors who had similar characteristics as the two excused female jurors. This particular question has not been addressed by the Nebraska Supreme Court. However, the Eighth Circuit Court of Appeals has consistently held that a litigant may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged. *Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 737, 130 L. Ed. 2d 639 (1995); *U.S. v. Scott*, 26 F.3d 1458 (8th Cir. 1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 584, 130 L. Ed. 2d 498; *Reynolds v. Benefield*, 931 F.2d 506 (8th Cir. 1991), *cert. denied* 501 U.S. 1204, 111 S. Ct. 2795, 115 L. Ed. 2d 969. A party may establish that an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken. *Davidson, supra*; *Walton v. Caspari*, 916

F.2d 1352 (8th Cir. 1990), *cert. denied* 499 U.S. 931, 111 S. Ct. 1337, 113 L. Ed. 2d 268 (1991); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987), *cert. denied* 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 191. This reasoning may also be applied to cases such as the one before us involving claims that peremptory challenges were used in a gender-biased manner.

In the case before us, some of the unchallenged male potential jurors identified themselves as leaders and some identified themselves as followers, and therefore, they shared that "characteristic" with venireperson No. 1 or venireperson No. 2. However, a review of the record shows that the male jurors passed by the prosecutor did not share other characteristics of the two female jurors. Venireperson No. 1 and venireperson No. 2 both possessed at least one additional characteristic that was not possessed by unchallenged male potential jurors and that the prosecutor identified as a basis for his decision to excuse them.

Whether considered a leader or a follower, venireperson No. 1 was also challenged by the prosecutor because she was a "quiet, but strong-willed person" who appeared to the prosecutor to be a "classic holdout, hung juror." The prosecutor's explanation is supported by venireperson No. 1's explanation as to why she considered herself a leader. She stated she was not "afraid to state [her] opinion" and "go against people that are more assertive and will." Similar explanations were not given by unchallenged male potential jurors.

In addition to being a self-identified follower, venireperson No. 2 was challenged by the prosecutor because she was a forester and her husband worked with a natural resources district and the prosecutor did not know anyone in these businesses. For this reason, the prosecutor explained that she was an "unknown." The record does not show that any unchallenged male jurors had a similar background.

Because the above characteristics of two female jurors were not possessed by unchallenged male potential jurors, the two groups are not comparable in that there are characteristics distinguishing them other than gender. Therefore, we conclude that the trial court's determination that the prosecutor's explanations were gender neutral was not clearly erroneous and

that the trial court did not abuse its discretion in denying Starks' motion for new trial on this basis.

*Starks' Proposed Jury Instructions.*

Starks also contends that the district court erred in refusing to include his two proposed instructions regarding the elements of the offenses of being an accessory to a felony and false reporting. Starks' theory for the inclusion of these instructions apparently was to affect the jurors' perception of the credibility of witness Lowmack.

All the jury instructions must be read together, and if taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

[11] In the case before us, the inclusion of Starks' proposed instructions regarding the elements of the two crimes allegedly committed by Lowmack would not have been proper. The Nebraska Supreme Court has held that a jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 306 N.W.2d 580 (1981). " 'It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.' " *Long*, 246 Neb. at 552, 520 N.W.2d at 199 (quoting *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986)).

Jury instructions regarding the elements of crimes of which a defendant is not accused misstate the issues, and such instructions would have tended to confuse and distract the jury in this case. The jury instructions given were an accurate statement of the law. The jury instruction regarding the evaluation of the credibility of witnesses that was given to the jury provided an appropriate means to determine the weight of Lowmack's testimony. In addition, Starks had cross-examined Lowmack at length regarding these alleged offenses, and Lowmack had admitted to them. Therefore, we find that the

district court did not commit prejudicial error in refusing to give Starks' proposed instructions or abuse its discretion in denying his motion for new trial on this basis.

*Sufficiency of Evidence.*

Starks assigns as error that the evidence was insufficient to submit the case to the jury. Starks also assigns as error the district court's denial of his motion for new trial. One of the grounds for his motion for new trial was that the evidence was insufficient to support the guilty verdict. Although Starks' assignment of error regarding his motion for new trial is generalized and vague, specific contentions are set forth in his brief, and the State in its brief argued in response to these contentions. See *State v. Harper*, 2 Neb. App. 220, 508 N.W.2d 584 (1993). In the interest of providing a full and complete appellate review, we will address both alleged errors.

[12] In a criminal case, a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992). On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *Schumacher, supra*; *State v. Fleck*, 238 Neb. 446, 471 N.W.2d 132 (1991). Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

[13,14] In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. *Schumacher, supra*. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *Id.*

Upon an examination of the evidence, which is construed

most favorably to the State in light of Starks' conviction, we conclude that the conviction is based on sufficient evidence. The testimony of Lowmack places her and Starks at First Federal at the time of the robbery. Lowmack's testimony, along with that of Hoffman and Vlcek, describing the events surrounding the robbery supports the conclusion that Starks committed the robbery. The testimony of the witnesses and the police and the physical evidence corroborated Lowmack's testimony. The testimony of the police that $2,708 was found where Starks, an unemployed man, was seen fumbling on the counter and that Starks had spent approximately $460 at Wal-Mart earlier that afternoon also supports the conclusion that Starks committed the robbery.

The evidence against Starks and the evidentiary inferences for the State warranted submission of the case to the jury. Therefore, the district court correctly overruled Starks' request for a directed verdict. We conclude that the State presented evidence sufficient to sustain Starks' conviction.

Finding no merit to any of Starks' assigned errors, we affirm.

AFFIRMED.

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## IN RE INTEREST OF WILLIAM H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. WILLIAM H., APPELLEE.

533 N.W.2d 670

Filed June 20, 1995. No. A-94-706.

1. **Juvenile Courts: Appeal and Error.** An expedited review of a juvenile disposition under Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 1993) to the juvenile review panel is permitted only when the juvenile court orders the implementation of a plan different than the plan proposed by the Department of Social Services for the care, placement, and services to be provided to the juvenile, and the department or any other party believes such court-ordered plan is not in the best interests of the juvenile.
2. _____: _____. An appeal from a final order or judgment entered by the juvenile review panel shall be reviewed by the Court of Appeals or the Supreme Court de novo on the record submitted to the panel.

3. _____: _____. Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. _____: _____. The statutory requirements for expedited review by a review panel of a juvenile case are these: First, the order must implement a different plan than that proposed by the Department of Social Services. Second, there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile.
5. **Jurisdiction: Appeal and Error.** Where the forum from which an appeal was taken lacks jurisdiction, an appellate court acquires no jurisdiction.

Appeal from the Juvenile Review Panel, DANIEL BRYAN, JR., THOMAS H. DORWART, and GARY G. WASHBURN, Judges, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, Judge. Appeal dismissed.

Don Stenberg, Attorney General, Royce N. Harper, Lisa Swinton, and Beth Tallon for appellant.

No appearance for appellee.

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

MILLER-LERMAN, Judge.

The Nebraska Department of Social Services (DSS) appeals the June 16, 1994, decision of the juvenile review panel which denied DSS' request for review under Neb. Rev. Stat. § 43-287.01 et seq. (Reissue 1993). For the reasons recited below, we dismiss the appeal.

## FACTS

This case involves the disposition and placement of William "Andy" H., who was adjudicated to be under the jurisdiction of the juvenile court on September 28, 1992. The events leading up to Andy's 1992 adjudication are summarized as follows:

Andy was born on July 1, 1976. The record contains very little information about Andy's natural parents. However, it appears that due to severe neglect by Andy's natural mother, Andy and Andy's sister, Susie, began living in Kearney with Russell Peters when Andy was 4 years old. At that time, Russell was married to Andy's half-sister, Carol Peters. Russell and

Carol had two children of their own, Tanya and Kourtney Peters.

The record indicates that Andy's first contact with the juvenile court system occurred when he was adjudicated to be an abandoned child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on March 26, 1987. The details of the 1987 adjudication are unclear. It appears, however, that after the 1987 adjudication Andy continued to reside with Russell in Kearney.

In September 1987, Russell and Carol divorced, and Russell was granted legal guardianship of Andy and Susie. In 1988, Russell married Brenda Hunnell. Brenda had two children from a prior marriage, Crystal and Chad Hunnell. The record suggests that Andy did not get along with Brenda and that Russell and Brenda may have abused Andy during certain periods when he resided with them.

The record indicates that Andy had a history of minor contacts with the law and was adjudicated a second time on April 25, 1991, for an October 4, 1990, shoplifting incident and for furnishing false information to a police officer in regard to the shoplifting incident. In relation to the 1991 adjudication, Andy was sentenced to 6 months' probation, which he successfully completed on December 5, 1991. The record reflects that Andy began seeing a counselor in 1990, which date may be related to the 1990 shoplifting incident.

On July 22, 1992, Brenda reported to the Kearney Police Department that Andy had run away after an argument at the Peters residence. Andy advised that he ran away because he had been accused of sexually assaulting another child the previous night. Apparently, Andy had gone to see his counselor, who turned him over to the Kearney Police Department.

The record indicates that after the sexual assault, to which Andy later confessed, Russell would not allow Andy in his home and placed him at Richard Young Hospital in Kearney. DSS again instituted adjudication proceedings against Andy as a result of the sexual assault. On September 28, 1992, Andy was adjudicated to be a juvenile within the meaning of § 43-247(1) and (3)(b) because of the July 21, 1992, sexual assault and because he had threatened Crystal with a knife. After the

adjudication, Andy was placed at the Youth Development Center-Kearney and later transferred to the Youth Development Center-Geneva on October 2, 1992.

In November 1992, Andy entered West Pines Psychiatric Hospital in Wheat Ridge, Colorado. West Pines is a full-time psychiatric institution where Andy was enrolled in an all-male treatment program and was primarily under the care of a clinical social worker, Linda Plaut, and supervising psychiatrist Dr. Robert Kleinman.

Andy had been at West Pines for over a year when he became obsessed with finding his natural father, who he believed was living in the Colorado Springs area. Apparently, this obsession caused Andy to run away from West Pines on February 26, 1994. When Andy was found on March 1, he was returned to West Pines. However, at this time, the Nebraska medicaid peer review organization denied Andy funding for further treatment at West Pines. During March and April 1994, when Andy's placement was uncertain, Andy remained at West Pines, without being readmitted to a treatment program. The record suggests that when Andy learned of the pending discharge from West Pines, he felt angry and rejected, and he regressed considerably in his treatment.

After the denial of funding and the proposed discharge from West Pines, DSS reevaluated Andy's status. Darlene Meiners, the primary DSS caseworker on this case since May 13, 1993, prepared a new case plan and court report dated April 11, 1994. In the written recommendations to the court, Meiners suggested that "Andy be placed at a facility that can address his oppositional, sexual and passive/aggressive behaviors, as well as his conduct disorder, solitary, aggressive Paraphilia." We note that Meiners also stated in her summary that "[i]n this worker's professional opinion, it would not be in Andy's best interests to be placed in a foster home at the current time."

The county court for Buffalo County, sitting as a juvenile court, held a dispositional review hearing of this matter on April 15, 1994. There were two witnesses present at the hearing, Dr. John Riedler and Meiners. Plaut testified by telephone from Colorado. Dr. Riedler and Plaut testified on behalf of DSS, and Meiners testified for the State. The court received

into evidence as exhibit 4 the April 11 DSS written case plan and court report.

Plaut testified generally that she thought Andy had progressed at West Pines and that it would be in Andy's best interests to remain at West Pines and receive full-time institutional treatment. Plaut further opined that Andy was not ready to live in a foster home, where he would receive only outpatient psychiatric treatment. Dr. Riedler, a certified adolescent psychiatrist employed by DSS, testified that he believed Andy was becoming institutionally dependent and should be removed from the institutional setting to foster care. According to the record, Dr. Riedler's opinion was based exclusively on his review of Andy's written records, because he had never met or spoken with Andy. Dr. Riedler further stated that if the proposed foster care situation did not "work," Andy could be re-placed at West Pines or a similar facility for more intensive treatment. Meiners testified briefly regarding her understanding of why Andy ran away from West Pines and of why Andy was to be discharged from West Pines.

After hearing the witnesses' testimony, the court stated:

> This is a difficult situation in the sense that this court is charged with looking after the best interest of Andy [H.] But in looking at that, I also cannot ignore society's interest. Unfortunately, I think that's been done too often in the past. I have no doubt if this were a case of dealing with an adult offender, given the conflicts in the testimony I heard today, I would err on keeping Andy in an institutional setting. Because I think everybody, even Doctor Riedler, acknowledges that there is a risk and problems existent and it probably comes down to one of philosophy. Doctor Riedler sounds like he's more willing to accept the consequences of that risk than, perhaps, I am. But this isn't an adult. This is a juvenile, who this court is going to lose jurisdiction over in approximately a year and three months. In July of 1995. And so, the question is, how best to try to make sure that that risk isn't going to exist after that time while acknowledging that it's always going to be there and we can't ever guarantee anything.

The court took the matter under advisement, and on April 20, 1994, issued an order rejecting the foster care proposal and directing DSS to maintain Andy at West Pines for a minimum of 6 months. In reaching this decision, the court stated:

> [T]his court can find little credence with [Dr. Riedler's] extreme and absolute rejection of the West Pines Treatment Plan both as recommended and as previously administered. While the DSS psychiatrist points to the lack of extreme abnormal behavior on the part of the juvenile as evidence that he has been misdiagnosed, this court feels, to the contrary, that it is evidence that he is improving during his treatment at the West Pines Facility. As stated, the DSS psychiatrist himself states that the juvenile would be replaced at West Pines in the event he reoffends or engages in some other extreme antisocial behavior. The court feels that it is not in either the juvenile's best interest or the community's to take <u>that</u> risk at this time.

DSS interpreted the court's order as adopting a plan different than it had recommended and filed a request for expedited review under § 43-287.01 et seq., which statutes provide for expedited review of a juvenile court decision if the court adopts a plan different than that proposed by DSS and if one of the parties believes the court-adopted plan is not in the best interests of the subject juvenile.

The review panel denied review of the case, finding that the court did not adopt a plan different than the one DSS proposed. The review panel determined that

> the Department of Social Services did file a prepared plan [exhibit 4] which is in the best interest of the minor; that the only evidence presented was by the two witnesses called by the Department; that the Department, in its plan, made specific recommendations as to the kind or type of treatment that was to be furnished to the minor, but that the two witnesses held differing opinions as to the preferred situs and as to the implementation of the treatment; that both opinions, although different, were consistent with the language of the submitted plan; that the trier of fact, by choosing one opinion rather than the

other, did make an order which directed the implementation of the plan prepared by the Department and that therefore a plan different from the plan prepared by the Department was not ordered to be implemented.

DSS appeals to this court the review panel's denial of review, generally assigning the following errors: (1) The review panel erred in ruling that the county court did not implement a plan different than the plan DSS had prepared, and (2) the review panel erred by failing to rule that the court-ordered plan was not in the best interests of Andy.

## SCOPE OF REVIEW

[1,2] An expedited review of a juvenile disposition under §§ 43-287.01 to 43-287.06 to the juvenile review panel is permitted only when the juvenile court orders the implementation of a plan different than the plan proposed by the Department of Social Services for the care, placement, and services to be provided to the juvenile, and the department or any other party believes such court-ordered plan is not in the best interests of the juvenile. *In re Interest of A.K.*, 2 Neb. App. 662, 513 N.W.2d 42 (1994). An appeal from a final order or judgment entered by the juvenile review panel shall be reviewed by the Court of Appeals or the Supreme Court de novo on the record submitted to the panel. § 43-287.06.

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

## ANALYSIS

[4] The central issue in the instant case is whether the review panel properly denied review of DSS' appeal from the order of the county court. To qualify for expedited review by a juvenile review panel, the subject case must meet the requirements of § 43-287.01 et seq. The controlling language of § 43-287.01 provides:

> The purpose of sections 43-287.01 to 43-287.06 is to provide for an expedited review of juvenile dispositions by the courts. It is the intent to allow such review only when a court orders the implementation of a plan different than the plan prepared by the Department of Social Services for the care, placement, and services to be provided to such juvenile and the department or any other party believes such court-ordered plan not to be in the best interests of the juvenile.

The Supreme Court recently interpreted the statutory requirements for expedited review in this manner:

> We must next look to Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 1992), which declares, in pertinent part: "The department or any other party may request a review of the court's order concerning the plan by a juvenile review panel as provided in section 43-287.04." Section 43-287.04 sets forth the procedure to seek such review. While standing alone the quoted language of § 43-285(2) would entitle the department to obtain an expedited review in any case, its reach is limited by the requirements set forth in §§ 43-287.01 and 43-287.03. The second sentence of § 43-287.01 and the provisions of § 43-287.03 require the application of a disjunctive test: 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, 673-74, 496 N.W.2d 495, 498 (1993). Although the foregoing quotation uses the expression "disjunctive test," *In re Interest of M.J.B.* applied the test in a conjunctive manner, thereby requiring both adoption of a different plan and one said to be inconsistent with the best interests of the juvenile as precursors to expedited review panel consideration.

In the instant case, the predispositional case plan and court report contains DSS' only written "plan" for Andy's disposition. This plan generally states DSS' proposal that "Andy be placed at a facility that can address his oppositional, sexual and passive/aggressive behaviors, as well as his conduct

disorder, solitary, aggressive Paraphilia." The predispositional report further states the caseworker's opinion that "it would not be in Andy's best interests to be placed in a foster home at the current time."

To aid the court in making a determination regarding Andy's placement, DSS presented the testimony of Plaut and Dr. Riedler. The testimony of both Plaut and Dr. Riedler was consistent with the general nature of DSS' assessment of Andy's condition contained in DSS' written proposal, quoted above. However, the two witnesses had differing, conflicting opinions as to the best situs for Andy and the extent of treatment he required. Specifically, Plaut believed Andy should remain at West Pines, and Dr. Riedler believed Andy should be removed to a foster care arrangement in Nebraska subject to subsequent institutional placement if the need arose. Consequently, although DSS may have intended for the testimony of these two witnesses to clarify the specific parameters of its proposed plan, the witnesses' conflicting opinions as to the best placement for Andy served to confuse, rather than to clarify, the nature of the plan that DSS proposed. The trial court was, therefore, left to evaluate the opinions of the two witnesses and choose the one it believed to be in the best interests of the juvenile. Accordingly, the court ordered Andy to remain at West Pines pursuant to the testimony of Plaut and the written plan.

DSS sought expedited review by a review panel of the court's decision ordering Andy to remain at West Pines. The review panel denied review, finding that the case did not meet the statutory requirements for expedited review. Specifically, the review panel concluded that the court did not adopt a plan different from that proposed by DSS. Accordingly, the review panel did not address the "best interests" prong of the expedited review requirements set forth in *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). We note that as a practical matter, the juvenile court will lose jurisdiction over Andy as of July 1, 1995, and the review panel's denial of review effectively affirmed the dispositional decision of the county court.

On appeal to this court, DSS contends that the actual "plan" it proposed for approval by the county court was the foster care

arrangement espoused by Dr. Riedler and that because the county court adopted a disposition consistent with Plaut's testimony, rather than that of Dr. Riedler, the court-ordered plan was different from the one DSS proposed. DSS argues that for these reasons, the review panel improperly decided that the case was ineligible for expedited review. We disagree.

We have conducted a de novo review of the record and find that the court-ordered plan does not differ from the written one DSS submitted for court approval and the recommendations of DSS' witness Plaut. The court-ordered plan is consistent with the general directives of the only written plan in the record, which is contained in the predispositional case plan and court report. Further, the court-ordered plan follows the suggestions of one of DSS' conflicting witnesses, Plaut, who had been Andy's primary counselor for the last year and a half. Apparently, DSS asks us to interpret the contents of its plan, for purposes of determining its eligibility for expedited review, by ignoring the evidence it offered through Plaut's testimony and the written plan in favor of the opinion of Dr. Riedler, who has never met or spoken with Andy. We decline to do so. Based on our de novo review of the record, we conclude that this case did not meet the "different plan" prong of the two-pronged test for expedited review set forth in *In re Interest of M.J.B., supra*.

[5] The county court's order did not implement a different plan than that proposed by DSS. Consequently, the review panel properly refused to consider the application for expedited review. Where the forum from which an appeal was taken lacks jurisdiction, an appellate court acquires no jurisdiction. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992).

APPEAL DISMISSED.

# GLENN R. WAITE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HARRIET I. WAITE, DECEASED, APPELLANT, V. W. SCOTT CARPENTER, M.D., ET AL., APPELLEES.

533 N.W.2d 917

Filed July 3, 1995. Nos. A-94-444, A-94-445, A-94-498.

1. **Jurisdiction: Words and Phrases.** Jurisdiction is a court's power or authority to hear a case.
2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **Courts.** It is the duty of the courts to prevent abuse of process and frivolous proceedings in the administration of justice.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Glenn R. Waite, pro se.

James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Regional West Medical Center.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellees Carpenter et al.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

SIEVERS, Chief Judge.

These three cases from the district court for Scotts Bluff County involve three "medical malpractice" cases alleging the wrongful death of Glenn R. Waite's mother. These cases were originally before this court approximately 3 years ago. In *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992), this court affirmed the district court's dismissal of the lawsuits. We affirmed because we agreed with the district court that the pro se personal representative was engaged in the unauthorized practice of law and that dismissal was the appropriate remedy and sanction. Waite's petition for further review of our decision was rejected by the Supreme Court.

The present appeals involve the attempt of Waite, the appellant in the earlier cases, to "revive" these suits by claiming

that he is the sole heir of the decedent, Harriet I. Waite. In our previous opinion, we expressly concluded that he was not the sole heir. Our mandate affirming the dismissal of the original cases was filed in the district court for Scotts Bluff County on February 11, 1993. In each of the three district court cases, Waite filed pleadings as follows: a "Motion to Vacate Judgment of Dismissal" on November 17, 1993; an "Amended Motion to Vacate Judgment of Dismissal" on December 7, 1993; and a second "Amended Motion to Vacate Judgment of Dismissal" on January 19, 1994. In these motions, Waite alleged, inter alia, that the district court and the Court of Appeals lacked jurisdiction to determine the question of his alleged unauthorized practice of law and that the district court was biased at the time of the dismissal of the original cases. After a hearing was held on these motions on February 1, 1994, the district court took these motions under advisement. On March 1, 1994, the district court recorded a journal entry which overruled all of Waite's motions in all of the cases finding that "all matters raised by the various motions of the plaintiff herein could have or should have been raised in the appeal taken to the NEBRASKA COURT OF APPEALS and in which final judgment was entered."

Thereafter, Waite filed a motion for new trial, which was subsequently overruled by the district court. Waite now appeals once again to this court. Little purpose would be served by detailing Waite's allegations which purport to show that he is the sole heir of his deceased mother and, thus, can now bring the lawsuits. Waite apparently believes he can "fix" the defects previously found by this court and thereby make our judgment something other than final.

[1] As a matter of procedure, the issue is whether the district court had any power, i.e., jurisdiction, to consider Waite's motions to vacate the judgments of dismissal and reopen these proceedings after this court has affirmed the judgment of dismissal and issued its mandate to the district court. See *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994) (jurisdiction is a court's power or authority to hear a case).

[2] Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing

proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994). Our previous decision conclusively settled the matter of whether these lawsuits were to be dismissed—we plainly held that they were dismissed. When the Supreme Court denied further review, our decision became final and binding on the district court. The district court therefore lacks the power to allow the reopening, revival, or relitigation of these cases. The district court correctly characterized our decision as *final* and had no choice but to deny the motions. Any other conclusion would mean chaos in our judicial system. If the parties and the district court were not bound by our decision, then finality of judgment would become an empty doctrine, and litigation would have no end. Although Waite believes otherwise, these cases were finally dismissed long ago.

[3] Perhaps this is an appropriate time to remind Waite that it is the duty of the courts to prevent abuse of process and frivolous proceedings in the administration of justice. See *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984).

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. MICHAEL HANUS, APPELLANT.

534 N.W.2d 332

Filed July 3, 1995. No. A-94-468.

1. **Criminal Law: Motions for New Trial: Sentences: Time: Appeal and Error.** A motion for new trial in a criminal proceeding does not toll the 30-day appeal time as to the order of sentence.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

4. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.
5. **Appeal and Error.** Denial of a request to proceed in forma pauperis is an appealable order.
6. **Affidavits: Appeal and Error.** Generally, one is entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and not objected to.
7. _____: _____. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis.
8. _____: _____. Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion. However, an appellate court cannot determine whether the trial court acted within its discretion or abused its discretion without a statement as to why the court deemed the appeal to be frivolous or otherwise not in good faith.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

Michael Hanus, pro se.

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

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

Michael Hanus appears pro se appealing an order entered by the Dodge County District Court which dismissed an appeal to that court from the Dodge County Court in a criminal proceeding. The exact grounds relied upon by the district court in dismissing the appeal are not disclosed by the record. However, there was a failure to transmit a bill of exceptions or transcript of the county court proceedings to district court.

It appears that the failure to transmit the transcript or bill of exceptions to the district court resulted, at least in part, from the county court's rejection of Hanus' request to proceed on appeal in forma pauperis and Hanus' subsequent failure to pay advance fees for their preparation. Why the county court

denied Hanus' request to proceed in forma pauperis is not disclosed. Neither is it apparent whether that issue was ever appealed to the district court. We reverse the order of dismissal and remand this cause to the district court for further proceedings.

## PRESENT APPEAL

The district court dismissed Hanus' appeal on April 8, 1994. On May 6, Hanus filed his notice of appeal to this court along with a poverty affidavit. On that same date, the district judge denied his application to appeal in forma pauperis with a one-word handwritten note stating "Denied" followed by the date and the district judge's signature, which order was filed on May 10.

On June 27, Hanus filed a "Motion for Relief" with this court, essentially seeking review of the district court's denial of his motion to proceed with this appeal in forma pauperis. We had no transcript or bill of exceptions from the district court, although Hanus had previously filed praecipes in district court asking for preparation of the same. Accordingly, our review of the denial of the motion to proceed in forma pauperis by the district court was limited to Hanus' motion for relief and brief in support thereof.

On July 21, we granted Hanus' request to proceed with this appeal in forma pauperis and ordered the district court for Dodge County to order Dodge County to pay costs for preparation of a certified transcript and bill of exceptions to include "those pleadings, filings and proceedings related to the appeal from Dodge County Court case number 93-893, docketed as district [court] case number 32-478." We specifically ordered that the transcript should include:

> any portions of the county court transcript contained in the records of the district court including, but not limited to, the notice of appeal to district court, certification of payment of docket fee, or poverty affidavit in lieu thereof, order of judgment and sentence, and the criminal complaint, and shall also contain the final order or orders of the district court relating to the appeal from county court.

We specifically directed that the bill of exceptions should include "a transcription of any hearings before the district court related to the appeal in case number 32-478 and any exhibits admitted into evidence therein."

## RECORD BEFORE US

The record now before us consists of a transcript received from the clerk of the district court pursuant to our July 21 order, as well as an affidavit of a court reporter reflecting "there was no record made" of any hearings held in district court and that, therefore, a bill of exceptions would not be filed.

The transcript consists of 40 pages. Pages 2 through 34 are described in the index as being the "Transcript from County Court." Pages 2 and 3 are the notice of appeal pertaining to the appeal from county court to district court. It carries a filing stamp of the county court dated August 16, 1993, and a filing stamp of the district court dated November 24, 1993. The balance of this portion of the transcript consists mainly of documents captioned in the county court for Dodge County in a case styled "State of Nebraska, Plaintiff, vs. Michael Hanus, Defendant," case No. 93-893. Many of these papers do not contain the filing stamp of the Dodge County Court. A fair number of them carry numbered and dated exhibit labels, but we have no record of which court each exhibit was offered in, if and when it was offered, or if it was received.

Most notably, none of the papers identified as the "Transcript from County Court" are certified by the clerk of the county court, as required by Neb. Rev. Stat. § 25-2731 (Reissue 1989). Other than the notice of appeal, which carries the district court filing stamp, the balance of this "Transcript from County Court" is not verifiable as such and will not be considered as part of the record on this appeal. The circumstances of how these papers came to be part of the file of the district court clerk is a mystery from the record before us. They are certainly not *certified* county court papers.

Other than the afore-described "Transcript from County Court," the transcript received from the district court consists of a notice directed to the clerk of the district court and signed

by a clerk magistrate, presumably of the Dodge County Court, with an attached letter; three orders of the district court; and the affidavit of the court reporter mentioned above.

As is apparent, the transcript before us does not provide what we requested in our July 21 order, particularly with regard to the county court transcript. Of course, the district court clerk can certify only those proceedings "contained" in that court. Neb. Rev. Stat. § 25-1912(5) (Cum. Supp. 1994). It is obvious that no official county court transcript was ever transmitted to the clerk of the district court. Therefore, none was "contained" in the district court's records. In any event, and because there is no bill of exceptions of any proceedings in district court, the record before us is marginal, at best.

The sparse record shows that Hanus filed a notice of appeal on August 16, 1993, in the Dodge County Court regarding a matter styled "State of Nebraska, Plaintiff, vs. Michael Hanus, Defendant," case No. 93-893. The notice of appeal was accompanied with a $31 deposit for docket fees. The notice of appeal references a motion for new trial filed by Hanus in county court which had been overruled by the county court on July 19, 1993. The notice of appeal provides that Hanus "intends to prosecute an appeal of rulings and orders made final in this captioned case to the District Court of Dodge County, Nebraska." We have no such "rulings and orders" of the county court before us.

The notice signed by the clerk magistrate reflects that Hanus did not file a praecipe for transcript or for bill of exceptions with the county court until September 27, 1993, and that on September 28 he filed therein an affidavit of poverty. Neither document is in the *official* record before us. The notice further recites that Hanus' motion to proceed in forma pauperis was *set* for hearing on October 15 and that it was denied. The *actual* date of hearing, if any, and the date of denial are not clear from the record. The order denying the motion is also not before us.

On November 24, Hanus' notice of appeal, originally filed in county court on August 16, was filed in the district court for Dodge County. As of November 24, Hanus had not made a deposit in county court for the cost of the bill of exceptions and transcript. Therefore, on November 24, an order was issued to

the court stenographer to cease preparation of the transcript and bill of exceptions because of the failure to make such deposit.

## DISTRICT COURT ACTION

After the notice of appeal and notice from the clerk magistrate were filed in the district court, the district court issued an order on January 3, 1994, requiring Hanus to show cause within 10 days "why this matter should not be dismissed for failure to perfect the appeal."

On April 8, the district court entered another order, reciting that Hanus had sought an extension of the 10-day show cause order of January 3 and had been granted until March 1 to show cause in writing why the matter should not be dismissed for failure to perfect his appeal. The April 8 order further recites that on March 1, Hanus filed another motion for an extension of time to show cause. The district court's April 8 order denied Hanus' second motion for extension and dismissed the appeal. The order notes that as of April 8 no statement of errors, no bill of exceptions, and no transcript had been filed with that court.

Hanus filed a motion for new trial in the district court on April 18. It is not in the record. On April 19, the district court determined that the motion for new trial was not properly presented to it, as it was then sitting as an appellate court reviewing the judgment of a county court. It struck the motion.

Hanus filed his notice of appeal on May 6, 1994, within 30 days of April 8, 1994, the date his appeal was dismissed by the district court.

The record before us does not contain even the county court order which Hanus appealed to district court. From the record on appeal, we do not know the charge against him or the sentence imposed. Although reluctant to do so, we take judicial notice of a related proceeding, that being Hanus' application for writ of mandamus filed November 29, 1993, in the Nebraska Supreme Court, case No. S-33-930032. See *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990). This record consists solely of Hanus' allegations. However, it is the only official record presently available to us which offers even fundamental information as to the nature of

Hanus' county court proceedings appealed to district court. We thus consult it only to illuminate the background of this appeal.

In his application directly to the Supreme Court, Hanus sought an order compelling the district and county judges to enable the filing of a record from county court to district court to allow his criminal appeal to go forward. The application was denied without a written opinion. In that application, Hanus alleges, inter alia, that on February 24, 1993, he was charged in Dodge County Court with "no proof of ownership" and "no proof of insurance" in case No. 93-893 and that after a trial on July 9, a judgment of conviction and a sentence which consisted of a fine only were entered on July 12.

[1] Accepting Hanus' allegations as true, Hanus' notice of appeal filed in county court on August 16 was beyond the 30-day appeal time required by Neb. Rev. Stat. § 25-2729 (Reissue 1989) as to the sentencing order. However, Hanus' notice of appeal filed in county court references a motion for new trial which he filed in county court and which was overruled on July 19. A motion for new trial in a criminal proceeding does not toll the 30-day appeal time as to the order of sentence. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). However, the August 16 notice of appeal would have been timely as to the county court's order of July 19 overruling the motion for new trial. Therefore, Hanus' appeal on those issues properly preserved by his motion for new trial was timely. See *id.*

## ASSIGNMENTS OF ERROR

Hanus assigns multiple errors. He contends that the district court erred in dismissing his appeal from county court

> without a hearing, without allowing [Hanus] to make a record, as he requested . . . and without allowing [Hanus] to make a record from county court, as he requested, given [Hanus'] timely payment of the docket fee to county court, his inability to afford the fees for the record, as the county court demanded, his notice to the court of his inability to pay, and his request to pay for the record by making payments over time if the court did not allow [Hanus] to make the record in pauperis [sic].

## STANDARD OF REVIEW

[2] Under Neb. Rev. Stat. § 25-2733 (Reissue 1989), in an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992); *State v. Dean*, 2 Neb. App. 396, 510 N.W.2d 87 (1993).

[3] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994).

Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966).

## LACK OF COUNSEL

As a preliminary matter, we note that the record does not disclose whether Hanus had the assistance of counsel at the county court trial or on his direct appeal to the district court. As stated above, Hanus' application for writ of mandamus alleges that he was charged with "no proof of ownership" and "no proof of insurance," presumably related to the ownership or operation of a motor vehicle. Conviction on even one of those charges, i.e., no proof of insurance, carries with it the potential for imprisonment. See, Neb. Rev. Stat. § 60-570 (Reissue 1993) (declaring it a Class II misdemeanor to fail to carry in a motor vehicle proof of financial responsibility); Neb. Rev. Stat. § 28-106 (Cum. Supp. 1994) (authorizing a maximum penalty of 6 months' imprisonment for a Class II misdemeanor). However, Hanus' application for writ of mandamus also discloses that he received only a fine from the county court as his sentence. Since Hanus was penalized only by fine, he was not entitled to court-appointed counsel. See *Dean, supra*. See, also, Neb. Rev. Stat. §§ 29-3902 and 29-3906 (Cum. Supp. 1994).

## DISCUSSION

[4] Before discussing the errors assigned by Hanus, we note in passing that the "Facts" portion of his brief makes reference to numerous matters outside the record on appeal. In part, this may be due to confusion as to what is and what is not properly before us. Perhaps it is also encouraged by the very nature of Hanus' grievances, i.e., there being virtually no record before us from either of the lower courts. Nevertheless, such reference is improper, and we are compelled to disregard matters which are not in the record presented to us. Moreover, in many instances, Hanus' brief, undoubtedly due to his pro se status, obfuscates more than clarifies the questions before us. Yet, a pro se party is held to the same standards as one who is represented by counsel, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994), and we proceed with that principle in mind.

Although Hanus assigns what might be viewed as several errors, his focus on appeal is that the district court erred in dismissing his appeal without "allowing" him to make a record (presumably in district court) and without "allowing" him to "make a record from county court."

The record in district court on an appeal from county court generally consists of the county court transcript and the bill of exceptions from the county court proceedings appealed from. § 25-2731(1); Neb. Rev. Stat. § 25-2732 (Reissue 1989); § 25-2733(1). The bill of exceptions from county court, if filed at or before the time the appeal is heard in district court, is considered admitted into evidence on appeal, absent objection. § 25-2733(2). Here, there was no transcript or bill of exceptions from county court filed in district court. Therefore, it was not the failure of the district court to grant Hanus a hearing or to allow him to make a record of his appeal that is the crux of the problem. Rather, the problem is that there was no county court record before the district court for the district court to review, which is the essence of its duty under § 25-2733(1).

*Appeal Perfected/District Court Jurisdiction.*

We observe that the district court's April 8, 1994, order of dismissal was entered contemporaneously with its denial of Hanus' second request for an extension of time to show cause.

The initial order to show cause was entered January 3 and was based upon Hanus' "failure to perfect the appeal." If the order of dismissal was based on the failure of Hanus to perfect his appeal, it was erroneous.

Hanus, by timely filing his notice of appeal and depositing a docket fee with the clerk of the county court, had perfected his appeal as of August 16, 1993. See § 25-2729. Appellate jurisdiction was then vested in the district court. See, *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990); *Rorick Partnership v. Haug*, 228 Neb. 364, 422 N.W.2d 365 (1988). The transmittal of the county court transcript and bill of exceptions to the clerk of the district court was not a prerequisite to perfecting the appeal to the district court or to its jurisdiction over Hanus' appeal.

*Delay in Docketing Appeal.*

Section 25-2731(1) requires the clerk of the county court to transmit the docket fee and a certified copy of the county court transcript to the clerk of the district court within 10 days of the perfection of the appeal, whereupon the clerk of the district court shall docket the appeal. Section 25-2731(2) authorizes the Supreme Court to specify, by rule and regulation, the method of ordering the transcript, along with its form and content.

Neb. Ct. R. of Cty. Cts. 52(I) (rev. 1993) provides, inter alia, that the transcript must be requested by the appellant at the time of filing the notice of appeal and that the requesting party must pay the cost of the transcript *before* the same "may be delivered to the district court." That rule also authorizes the dismissal of an appeal for failure to make payment for the transcript, except where a poverty affidavit has been filed. However, if payment for the transcript has not been received within the time allowed by § 25-2731 (10 days from the date the appeal is perfected) and no poverty affidavit has been filed (presumably also within that 10-day period), the clerk of the county court must still send a "certified copy of the notice of appeal to the clerk of the district court, together with a statement that the fee has not been paid." Rule 52(I)(D)(2).

Hanus did not request a transcript when he filed his notice of appeal. Within the 10-day period following the perfection of his

appeal, he neither paid the cost of the transcript nor filed a poverty affidavit. The county court clerk failed to file a transcript and docket fee with the district court within 10 days, and a certified copy of the notice of appeal was not filed in district court, absent the transcript, within 10 days of the perfection of Hanus' appeal with a "statement that the fee has not been paid."

It was not until November 24, 1993, nearly 40 days after Hanus' motion for in forma pauperis status on appeal was set for hearing by the county court, that the county court clerk filed the notice in district court. That notice was approximately 90 days late in advising the district court of the status of nonpayment for the transcript under rule 52(I)(D)(2) and in advising the district court of the status of nonpayment of the estimated cost for preparing the bill of exceptions as required by rule 52(II)(G) (estimated cost to be paid within 14 days of request, which is to be made at time appeal filed; if not timely paid, clerk to order stenographer to cease work and notify district court in writing of failure to pay).

Section § 25-2731(1) is mandatory. The county court clerk is to transmit the transcript within 10 days. No request or prepayment of costs is required by the plain language of the statute as a condition to perform that duty. Yet, rule 52(I) also seems mandatory. The appellant is to make a request and advance payment as conditions to transmitting a transcript from county court to district court.

That the acts and omissions of both the county court clerk and Hanus combined and contributed to the *frustration* of the appellate process in this case is without question. Whether those acts and omissions were grounds for the *dismissal* of that process, however, is less clear. From the record, the most apparent reason for the dismissal was the lack of a record on appeal. That omission was due to Hanus' failure to pay for it in advance.

*Denial of In Forma Pauperis Status.*

What we *do* know from the record is that (1) Hanus perfected his appeal; (2) Hanus sought in forma pauperis status for purposes of paying for preparation of the transcript and bill of

exceptions; (3) the county court denied that request; (4) the appeal languished in county court from August 16 to November 23, 1993, before the district court even knew of it; and (5) as of April 8, 1994, no transcript or bill of exceptions was yet filed in district court, and the appeal was dismissed. The possibility that Hanus' right to appeal was denied solely because he could not afford it causes alarm.

[5] Denial of a request to proceed in forma pauperis is an appealable order. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966). Whether Hanus specifically appealed the denial or otherwise presented it to the district court is not clear from the record before us. However, the district court was given notice that Hanus had filed an affidavit of poverty and a request to proceed in forma pauperis, which had been denied, and that preparation of the record had stalled for nonpayment. Without such record, the substantial right to appeal was frustrated.

[6] Generally, one is entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and not objected to. *Flora, supra*. Whether the State objected to Hanus' in forma pauperis status is not disclosed.

[7] If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis. *Flora, supra*; *Eberhardt, supra*. The record before us shows that a hearing in county court on Hanus' right to proceed in forma pauperis was set for October 15, 1993, and that the request was denied. We do not have a transcription of any such hearing. We do not know what evidence, if any, was presented or if a hearing was in fact held.

[8] Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion. However, an appellate court cannot determine whether the trial court acted within its discretion or abused its discretion without a statement as to why the court deemed the appeal to be frivolous or otherwise not in good faith. See, e.g., *Flora, supra*.

The district court presumably had no more of an official record of the county court's denial of Hanus' request to proceed in forma pauperis than we do. It had no findings, reasons, or conclusions of the county court supporting denial. Therefore, it was unable to apply any standard at all to the denial.

The district court essentially was in the same predicament as the Supreme Court had been in *Flora*—the denial by the trial court of the benefits of an in forma pauperis appeal on direct appeal with no record to review because the appellant could not pay for it and little idea of why it had been denied. In *Flora*, the Supreme Court had granted in forma pauperis status on direct appeal and ordered the county to pay for the preparation of a record on appeal. We found ourselves in a similar position when granting Hanus' present appeal from the district court's denial of in forma pauperis status on the appeal to this court—no record, no findings, no conclusions, and no stated reason for the denial.

We are certain of very little with regard to what happened in the courts below. Yet, we are certain that the district court's duty to safeguard the appellate process for an in forma pauperis applicant is no less than that assumed by this court on Hanus' appeal to us and no less than that exercised by the Supreme Court in *Flora*.

We therefore remand this cause to the district court to determine whether the county court complied with *Flora* and *Eberhardt* in the denial of Hanus' motion for leave to proceed in forma pauperis. If the county court did not do so, Hanus shall be granted the benefits of an in forma pauperis appeal for his direct appeal to the district court, as was the appellant in the direct appeal in *Flora*. If the county court did comply with *Flora* and *Eberhardt* regarding hearing requirements and reasons, findings, and conclusions supporting the denial, the district court must then determine whether the denial was an abuse of the county court's discretion. If in forma pauperis status was properly denied, Hanus' appeal was clearly subject to dismissal for failure to advance the costs of the appeal. See, rule 52(I)(D)(2) and (II)(G); Neb. Rev. Stat. § 25-2308 (Reissue 1989).

It will undoubtedly be necessary for the district court to

order portions of the county court transcript and a bill of exceptions of some or all of the county court proceedings in order to comply with this opinion. Those initial costs, under the rationale of *Flora*, must be borne by Dodge County. In some instances, the process of reviewing the denial of a request for in forma pauperis status on appeal inexorably accomplishes, at least in part, the very thing sought by the request, e.g., creation of a record for appeal. Nevertheless, under some circumstances there is no practical alternative. This case presents such circumstances.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## GLADYS M. JOHNSON, APPELLANT, V. HOLDREGE MEDICAL CLINIC AND CONTINENTAL INSURANCE CO., APPELLEES.

534 N.W.2d 340

Filed July 18, 1995. No. A-94-1034.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that an appellate court also does not substitute its view of the facts for that of the trial judge.
2. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
3. **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.
4. _____: _____. The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong.
5. **Workers' Compensation: Words and Phrases: Proof.** The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's

job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive, and the claimant must establish by a preponderance of the evidence that both conditions exist.

6. **Workers' Compensation.** The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his or her employment.
7. _____. Walking on the employer's premises to and from the street and a building where one is employed is a necessary incident of employment, and an injury sustained in so doing is compensable under the Workers' Compensation Act.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Dale A. Romatzke, of Ross, Schroeder, Brauer & Romatzke, for appellant.

Jay C. Elliott, of Kay & Kay, for appellees.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

SIEVERS, Chief Judge.

Gladys M. Johnson appeals the Workers' Compensation Court review panel's decision which affirmed the trial judge's denial of her claim for workers' compensation benefits. The trial judge found that Johnson failed to show that the injury and accident she sustained arose out of and in the course of her employment with Holdrege Medical Clinic. For the reasons cited below, we affirm.

## FACTS

The record reflects that at the time of trial, Gladys M. Johnson was a 62-year-old woman who had been employed as a therapist technician at Holdrege Medical Clinic for approximately 25 years. Johnson normally worked 36 hours per week at a rate of $6.90 per hour. Johnson's usual work hours were from 8 a.m. to 5 p.m.; however, she often went into work at 7 a.m. to "get things straightened out and get ready to go for the day." On November 5, 1991, Johnson left her home at approximately 6:45 a.m. and drove 10 blocks from her home to a city parking lot located near the clinic. The parking lot was approximately 75 to 100 feet from the back entrance of the clinic. Johnson testified that her "normal route" was to park

her vehicle in the city lot, cross Fifth Avenue, and then cut across the Home Federal Savings and Loan parking lot to an alley that led to the back entrance of the clinic. Johnson was not required to use the back door, although she usually did so. On the morning of November 5, Johnson stated that after she parked her vehicle in the city lot, she crossed Fifth Avenue and began to walk across the driveway leading to the drive-through window for the Home Federal building. Just as she was going up into the driveway of the Home Federal property, Johnson slipped on some ice and fell, injuring her left elbow. At the point that she fell, Johnson was approximately 50 feet from the edge of the clinic building. Due to her injury, Johnson was unable to work for approximately 3 months. However, she had returned to work at the time of trial.

The clinic maintains a parking lot located immediately behind the clinic. The administrator of the clinic, Thomas Canaday, testified that although employees were allowed to park in this lot at one time, a new parking policy was implemented whereby employees were asked to park elsewhere, since the lot was of limited space and parking was needed for patients and doctors. Although Canaday could not remember the exact date the clinic implemented its parking policy for employees, he testified that it was probably suggested some time in the early 1980's. At the time the parking policy was implemented Canaday posted a memorandum advising the clinic's employees that they were no longer going to be allowed to park in the clinic's parking lot. A city map that indicated the available areas of public parking was also posted at that time. Canaday testified that the map showed four city parking lots available for employee parking along with various areas for street parking. There was no policy or rule that required the clinic's employees to park in any particular place other than to prohibit them from parking in the clinic's lot. Johnson testified that the lot where she parked was the city lot closest to the clinic.

Johnson testified that although she had at one time parked in the clinic's parking lot, she had parked in the same city lot as she did the day of her accident since the time that the clinic's employees had been asked to park elsewhere, approximately 10

to 12 years previous. Johnson testified that at the time of her accident, she was aware that she was not required to use the city parking lot she parked in that morning and that there were other places available for her parking use, including other city lots and street parking. Johnson chose that particular city lot, since it was one of the suggested parking places and it was the closest and most convenient for her to park in. Although she primarily used this particular lot for parking, Johnson had also parked in other places when that lot was full.

Johnson's application for benefits was denied by a judge of the Workers' Compensation Court. The trial judge held that Johnson was not entitled to compensation because her accident and injury did not arise out of and in the course of her employment with the clinic. On appeal, a review panel affirmed the order of the trial judge.

## ASSIGNMENTS OF ERROR

In her appeal to this court, Johnson's two assignments of error can be summarized into the following: The trial court erred in denying her benefits, since her accident and injury arose out of and in the course of her employment with the clinic.

## STANDARD OF REVIEW

[1-3] This court has recently summarized the principles of the standard of review applicable to appellate review of the trial judge's decision in workers' compensation cases in *Logan v. Rocky Mountain Rental*, 3 Neb. App. 173, 174, 524 N.W.2d 816, 818 (1994):

> Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that an appellate court also does not substitute its view of the facts for that of the trial judge. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). When testing the sufficiency of the evidence to support findings of fact by

the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

## ANALYSIS

[4,5] Johnson argues that the Workers' Compensation Court erred by denying her benefits, since her accident and injury arose out of and in the course of her employment with the clinic. The Workers' Compensation Act provides that "[w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer . . . ." Neb. Rev. Stat. § 48-101 (Reissue 1993). The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong. *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990); *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986); *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980). The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job. *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982). The term "in the course of" refers to the time, place, and circumstances surrounding the accident. *Id.* The two phrases are conjunctive, and the claimant must establish by a preponderance of the evidence that both conditions exist. *Id.*

[6] The record shows that Johnson's accident and injury did not occur at Johnson's place of employment but happened while Johnson was on her way to work. In Nebraska, the general rule is that an injury sustained by an employee while

going to and from his work does not arise out of and in the course of his or her employment. *Kramer v. DeNoyer*, 240 Neb. 805, 484 N.W.2d 447 (1992); *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961).

In *Reynolds v. School Dist. of Omaha*, 236 Neb. at 511-12, 461 N.W.2d at 761, the Nebraska Supreme Court held:

> Generally, under what is known as the "going and coming rule," if an employee is injured while going to or from the employee's workplace, the injury does not arise out of or in the course of the employment. See 1 A. Larson, The Law of Workmen's Compensation § 15.11 (1990). For nearly 60 years, Nebraska has adhered to this rule. See, *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N.W. 466 (1931); *Richtarik v. Bors*, 142 Neb. 226, 5 N.W.2d 199 (1943); *Monroe v. St. Marks Lutheran Church*, 184 Neb. 741, 171 N.W.2d 644 (1969); *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979).

We find a Nebraska Supreme Court case to be factually similar and dispositive of the case at bar. In *Acton v. Wymore School Dist. No. 114, supra*, the plaintiff was employed by the local school as a cook. One morning, while on her way to work, Acton slipped on an icy sidewalk that bordered the school's property and broke her ankle. Although the sidewalk was maintained by the school, it was owned and controlled by the city of Wymore. The sidewalk, which was 1.78 feet north of the school's property line, had to be passed over to enter the school building.

[7] Acton argued that her injury arose out of and in the course of her employment, since walking to and from the street and the building where one is employed is a necessary incident of employment. The Nebraska Supreme Court recognized that " ' "the hazards of entering or leaving the place of employment while on the property of the employer are hazards of the employment which must be assumed by the employer. . . ." ' " *Acton v. Wymore School Dist. No. 114*, 172 Neb. at 612, 111 N.W.2d at 370. The court also stated that "walking on *the employer's premises* to and from the street and a building where one is employed is a necessary incident of employment and an injury sustained in so doing is compensable." (Emphasis

supplied.) *Id.* at 615, 111 N.W.2d at 371. However, the *Acton* court emphasized that

> [t]o hold that a sidewalk, which is a part of the street and which is beyond the defendant's property line, is a part of the defendant's premises as that term is used in the Workmen's Compensation Act, would not be interpretation but legislation. It is not the function of the court to create a liability where the law creates none.

172 Neb. at 616, 111 N.W.2d at 371. The Supreme Court upheld the denial of workers' compensation benefits to Acton since, when injured, she had not yet reached her employer's premises, and therefore, "[t]he injury sustained by the plaintiff did not arise out of and in the course of her employment." *Id.* at 616, 111 N.W.2d at 372.

In the present case, at the time of Johnson's accident she had not yet started her workday at the clinic and had not yet reached the clinic's property. Johnson parked her vehicle in a lot owned and maintained by the city, and she walked across property that was owned by Home Federal, where the accident and injury occurred. The clinic did not own or maintain the area where the accident occurred. Other than prohibiting its employees from parking in the clinic's lot, the clinic did not have any policy or requirement that its employees park in any particular place or take any particular route to the clinic. Johnson's "normal route" from the city parking lot to the back entrance of the clinic was simply a shortcut of her own choosing. Accordingly, we find the reasoning in *Acton* to be applicable, and we hold that Johnson's accident and injury were not in the course and scope of her employment, since although she was on her way to work, she had not yet reached her employer's premises. Johnson's injury was therefore not compensable as arising out of and in the course of her employment under the Nebraska Workers' Compensation Act.

Johnson also argues that the Workers' Compensation Court erred by failing to find that her accident and injury constituted an exception to the "going and coming" rule. Johnson argues that an exception applies in her case, since her parking off the clinic's lot constituted a substantial benefit to her employer, and that the clinic either expressly or impliedly required her to park

elsewhere, which extended the scope of her employment with the clinic. However, we find no merit to these arguments. The Nebraska Supreme Court has not departed from the reasoning set forth in *Acton*, and the facts of this case do not require us to depart from the holding of *Acton*. Johnson sets forth case law from other jurisdictions in her brief in support of her argument that this court should create an exception to the Nebraska "going and coming" rule. However, as we have observed, there are no facts present in this case requiring us to depart from *Acton* or to adopt rules from other jurisdictions.

In the present case, although the clinic did have a policy prohibiting its staff from parking in the clinic's parking lot, the clinic's employees were not required to park in any particular place and were not required to follow any particular route to arrive at the business. Accordingly, Johnson's accident and injury, which occurred off of her employer's premises before she arrived at work, did not arise out of or in the course of her employment at the clinic. The Workers' Compensation Court correctly denied compensation.

AFFIRMED.

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## IN RE INTEREST OF NOELLE F. AND SARAH F., CHILDREN UNDER 18 YEARS OF AGE.
## STATE OF NEBRASKA, APPELLEE, V. DONALD F., APPELLANT.

534 N.W.2d 581

Filed July 25, 1995. Nos. A-94-842, A-94-843.

1. **Appeal and Error.** An appellate court has an obligation to reach a conclusion independent from a trial court's conclusion as to questions of law.
2. **Affidavits: Fees: Time.** Pursuant to Neb. Rev. Stat. § 25-2308 (Reissue 1989), when the trial court denies the motion to proceed in forma pauperis, the court may permit the affiant to proceed upon payment of costs, fees, or security, thus effectively extending the time to pay docket fees.
3. **Affidavits: Appeal and Error.** The denial of a motion to proceed in forma pauperis is an appealable order.

4. **Jurisdiction: Affidavits: Appeal and Error.** In an in forma pauperis appeal, although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court.
5. **Affidavits: Appeal and Error.** Neb. Rev. Stat. §§ 25-2301 and 25-2308 (Reissue 1989) require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith.
6. **Affidavits.** A trial court may inquire into the truthfulness or good faith of a litigant's poverty affidavit.
7. **Affidavits: Appeal and Error.** Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion.
8. _____: _____. When it appears that a trial court may deny an appellant leave to proceed in forma pauperis, a hearing shall be held. As required by Neb. Rev. Stat. § 25-2301 (Reissue 1989), the trial court must certify in writing if, in its judgment, an appeal lacks good faith. However, a written statement of the trial court's reasons, findings, and conclusions for denial of the appellant's leave to proceed in forma pauperis must accompany its certification that an appeal is frivolous.

Appeal from the County Court for Boone County: GARY F. HATFIELD, Judge. Appeals dismissed.

Clark J. Grant and James M. Dake, of Grant, Rogers, Maul & Grant, for appellant.

Kathryn L. Mesner, guardian ad litem.

MILLER-LERMAN and INBODY, Judges, and HOWARD, District Judge, Retired.

MILLER-LERMAN, Judge.

In these consolidated cases, Donald F. appeals the August 25, 1994, order of the county court for Boone County, sitting as a juvenile court, adjudicating his daughters, Noelle F. and Sarah F., to be juveniles as described in Neb. Rev. Stat. § 43-247(3)(a) and (b) (Reissue 1993). Appellant was alleged in the juvenile petitions to have engaged in sexual contact with each child. For the reasons recited below, we dismiss these appeals.

## STANDARD OF REVIEW

[1] An appellate court has an obligation to reach a conclusion independent from a trial court's conclusion as to questions of law. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

## FACTS

The petitions in these cases, filed May 9, 1994, alleged that each child was a juvenile as described in § 43-247(3)(a) and (b) for the reason that their father had engaged in sexual contact with the juveniles. Criminal charges against appellant, alleging that he had sexually molested his daughters, ages 3 and 5, had been previously filed. Appellant was a 27-year-old high school graduate with 2 years of vocational training. Statements that appellant gave to a deputy sheriff in connection with the criminal action were found to be involuntary and were suppressed by the trial court. The order of suppression was affirmed by this court. See *State v.* [*Donald F.*], 94 NCA No. 16, case No. A-94-068 (not designated for permanent publication).

An adjudication hearing was conducted on June 30, 1994. Testimony by nine witnesses covers approximately 150 typed pages. Six exhibits were received in evidence, including documents from the criminal case against appellant and from the separation proceeding between appellant and his wife, Deborah F., who is the mother of the two juveniles. After receiving briefs and taking the matter under advisement, the trial court found the evidence sufficient to adjudicate both daughters to be children as described by § 43-247(3)(a) and (b) and noted in its order of August 25 that the State had met its burden of proof without consideration of appellant's statements which had been suppressed in the criminal case.

Appellant filed his notices of appeal accompanied by combined motions to proceed in forma pauperis and affidavits of poverty on September 13, 1994. Appellant did not pay docket fees. The State filed its "Objection to Motion to Proceed Informa [sic] Pauperis" on September 20, objecting to appellant's proceeding in forma pauperis, inter alia, because the poverty affidavits did not contain accurate statements of appellant's assets, income, and expenditures.

On September 29, 1994, the trial court conducted a hearing on appellant's motions to proceed in forma pauperis and the State's objections thereto. At that hearing, appellant's counsel argued that due to the filing of appellant's notices of appeal and the passage of 30 days after the adjudication order appealed

from, the trial court lacked jurisdiction to rule on the motions to proceed in forma pauperis. Appellant did not argue or present evidence regarding his financial condition. The State argued that the motions were properly before the trial court. As to the merits, the State asked the court to take judicial notice of the district court file concerning the legal separation of appellant and Deborah and stated that appellant's child support calculation and statement of financial condition in the separation proceeding showed that appellant had a total monthly income of $1,664 from all sources, plus other assets, and that appellant had been ordered to pay child support of $379 per month. The court took judicial notice of the district court file in the separation proceeding without exception by appellant.

At the conclusion of the hearing, the trial court found as a factual matter that "the motion to proceed in forma pauperis is not well taken under the statute and they're not entitled to proceed with an appeal in forma pauperis . . . ." The trial court also concluded that "I do not have jurisdiction to enter an order pursuant to that finding." On October 13, 1994, the trial court entered an order to the same effect, stating: "The Court finds that the Motion to Proceed Informa [sic] Pauperis is not well taken but that the County Court does not have jurisdiction to dismiss the appeal." Donald appeals to this court the trial court's findings relating to the adjudications of his daughters, but he does not seek review of the trial court's decision denying his motions to proceed in forma pauperis. Notwithstanding the denial of his motions to proceed in forma pauperis, appellant did not file docket fees.

## ASSIGNMENTS OF ERROR

On appeal to this court, appellant assigns as error (1) the receipt of certain testimonial evidence containing hearsay statements by the juveniles, (2) the receipt into evidence of appellant's statements obtained and suppressed in the criminal proceeding, and (3) the trial court's conclusion that the daughters are children as defined by § 43-247(3)(a) and (b). The State did not file an appellate brief. The guardian ad litem responds to the substance of appellant's assigned errors and

argues preliminarily that because appellant has failed to pay docket fees, his appeals should be dismissed.

## ANALYSIS

[2] The Nebraska statutes contain several provisions relating to the procedure for proceeding in forma pauperis. Neb. Rev. Stat. § 25-2301 (Reissue 1989) provides:

> Any court of the State of Nebraska, except the Nebraska Workers' Compensation Court, or of any county shall authorize the commencement, prosecution, or defense of any suit, action, or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay such costs or give security. Such affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he or she is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Neb. Rev. Stat. § 25-2308 (Reissue 1989) provides: "The court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious." The two quoted statutes, §§ 25-2301 and 25-2308, are somewhat inconsistent in their language in that § 25-2301 refers in the context of perfecting an appeal to "fees and costs or security" and to "such costs," evidently referring collectively to "fees and costs or security," whereas § 25-2308 refers only to "costs." Because both statutes relate to the perfection of an appeal when the appellant moves to proceed in forma pauperis, whether or not successful, and because § 25-2301 appears to use the term "such costs" to relate back to and to incorporate the expression "fees and costs or security," we interpret the reference to "costs" in § 25-2308 to mean "fees and costs or security" such as is used in § 25-2301. Thus, pursuant to § 25-2308, when the trial court denies the motion to proceed in forma pauperis, "[t]he court may . . . permit the affiant to proceed upon payment of costs[, fees, or security]," thus effectively extending the time to pay docket fees.

[3] The denial of a motion to proceed in forma pauperis is an appealable order. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). In the instant case, appellant did not appeal the order denying his motion to proceed in forma pauperis.

[4,5] In *Flora*, the Nebraska Supreme Court clarified the procedure an appellant and the trial courts shall follow in connection with an application to proceed in forma pauperis on appeal. The cases hold, pursuant to Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994), that an appeal is perfected upon filing a notice of appeal and paying a docket fee or upon filing a valid poverty affidavit in lieu of such docket fee. In *Flora*, the Nebraska Supreme Court noted that in an in forma pauperis appeal, "[a]lthough jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court." 247 Neb. at 264, 526 N.W.2d at 647. See, also, *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990). Specifically, *Flora* states that "[s]ections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith." 247 Neb. at 265, 526 N.W.2d at 647.

[6-8] In *Flora*, the Nebraska Supreme Court noted that under *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966), a trial court may inquire into the truthfulness or good faith of a litigant's poverty affidavit. In *Flora*, the Nebraska Supreme Court stated that "[o]rdinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion." 247 Neb. at 265, 526 N.W.2d at 647. In connection with future decisions, the Nebraska Supreme Court concluded in *Flora* that

> [i]n the future, when it appears that a trial court may deny an appellant leave to proceed in forma pauperis, a hearing shall be held. As required by § 25-2301, the trial court must certify in writing if, in its judgment, an appeal lacks good faith. However, a written statement of the trial court's reasons, findings, and conclusions for denial of the appellant's leave to proceed in forma pauperis must accompany its certification that an appeal is frivolous.

247 Neb. at 265-66, 526 N.W.2d at 647.

In the instant case, the substance of the State's objection to appellant's motions to proceed in forma pauperis was that appellant's financial condition did not warrant granting him leave to proceed in forma pauperis. At oral argument on the motions, reference was made to the files of the district court regarding the separation proceeding between appellant and Deborah, of which files the trial court took judicial notice. Following the hearing, the trial court found that appellant's motions to proceed in forma pauperis were not well taken, which we understand to mean that appellant was not indigent. This reading is consistent with the State's objection challenging appellant's claim of indigence and the argument in connection with appellant's motions to proceed in forma pauperis.

Although the entire district court file of the separation proceeding is not part of the record on appeal, a certified copy of the district court's docket sheet and judge's notes from the separation proceeding was received as exhibit 6 at the adjudication hearing. The entry from November 2, 1993, decreeing a legal separation reads in part as follows:

> The court finds it would be in the best interests of the parties' two minor children that their custody be awarded to the petitioner [Deborah], and that the respondent [appellant] shall at this time have no visitation rights with said minor children[.] Pursuant to the child support guidelines, the respondent [appellant] is ordered to pay to the petitioner [Deborah] child support at the rate of $379 [per] month first commencing on November 2, 1993, and continuing on the first day of each month thereafter until further order of the court, with said child support to decrease to the sum of $244 [per] month when only one minor child remains[.]

According to the copy of the docket sheet, this child support order had not been modified at the time the docket sheet was copied and certified by the clerk of the district court for Boone County on June 30, 1994. Appellant filed his poverty affidavits September 13. At the hearing conducted on September 29, appellant did not dispute the information regarding his financial condition presented by the State, nor did he offer

proof or argument regarding his financial condition. The district court's order in the separation proceeding of $379 per month child support pursuant to the Nebraska Child Support Guidelines, on which the trial court in this juvenile proceeding relied in assessing appellant's financial condition, presupposes appellant's financial ability to pay said support and defeats a claim of indigence. Compare, Nebraska Child Support Guidelines, paragraph I (recommending that "even in very low income cases, a minimum support of $50 per month be set" for purposes of maintaining information on the obligor).

As noted in *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995), and *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966), a trial court's decision regarding the truthfulness of a litigant's poverty affidavit will ordinarily not be disturbed on appeal unless it amounts to an abuse of discretion. Our review of the record shows that the trial court did not abuse its discretion in finding that because of his financial condition, appellant should not be permitted to proceed in forma pauperis. The procedures followed by the trial court in connection with this pre-*Flora* hearing and its certification are in accordance with the dictates of *Flora*. However, we disagree with the trial court's legal conclusion that it lacked authority to act pursuant to its finding. See *Flora, supra*.

We recognize the Nebraska Supreme Court's recent decision in *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), decided under Neb. Rev. Stat. § 29-2306 (Cum. Supp. 1994). We do not find this case, decided under Neb. Rev. Stat. § 25-2301 et seq. (Reissue 1989), inconsistent with *Schmailzl*.

Given the trial court's proper finding that appellant's requests to proceed in forma pauperis were not well taken and the fact that appellant has failed to pay docket fees in connection with these appeals, we dismiss the appeals. See § 25-1912(1) and (3).

APPEALS DISMISSED.

# STATE OF NEBRASKA, APPELLEE, V. DAVID L. MOORE, APPELLANT.

535 N.W.2d 417

Filed August 1, 1995. No. A-94-986.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment requires that officers knock and announce their purpose, and be denied admittance, prior to breaking into a dwelling, absent certain circumstances.
4. **Search and Seizure: Police Officers and Sheriffs.** A refusal to reply to an officer's order to "open up" can be implied from silence.
5. _____: _____. Exigent circumstances may excuse failure to wait for the occupant to refuse entry, but absent exigency, there must be explicit refusal or lapse of a significant amount of time before officers may forcibly enter the premises.
6. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed.

Frederick D. Franklin, of Lefler & Franklin, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

HANNON, MILLER-LERMAN, and INBODY, Judges.

INBODY, Judge.

David L. Moore appeals his conviction of possession of marijuana with the intent to deliver. As a result of information from a cooperating witness, Omaha police officers learned that Moore was acting as a middleman for the sale of marijuana in his home. Omaha police officers found 20 pounds of marijuana after entering Moore's home pursuant to a search warrant. Moore filed a motion to suppress the marijuana and any statements he gave to police upon his arrest for possession with the intent to deliver, on the basis that the search was illegal

because Omaha police officers failed to comply with the "knock and announce" requirements of the search warrant. Moore's motion was denied, and a bench trial was had. Moore was convicted of possession of marijuana with intent to deliver and sentenced to 7 to 10 years' imprisonment.

## STATEMENT OF FACTS

On January 26, 1994, Omaha police officers arrested Ralph Christensen for possession of marijuana with the intent to deliver after conducting a search of his home pursuant to a search warrant. Christensen told the officers that he had received the marijuana from a man named "Dave" who lived near 40th and Hamilton Streets. Christensen stated that "Dave" in turn obtained the marijuana from a man who lived in south Omaha. Christensen agreed to act as a cooperating witness to arrange a purchase of marijuana from "Dave."

On January 27, Omaha police officers followed Christensen, who was wearing a body transmitter, to 3840 Seward Street. The officers recorded a conversation between Christensen and David Moore, in which Christensen told Moore that he was interested in purchasing around 30 pounds of marijuana. Moore agreed to arrange to have his supplier obtain the marijuana and that the price would be $1,150 per pound, which included a commission for Moore of $50 per pound.

On January 29, Christensen called Moore at home, and Moore told him that his supplier had 20 pounds of marijuana available for a total price of $23,000. Christensen was told to come to Moore's house at 12:30 p.m. on January 30 to purchase the marijuana. Omaha police officers obtained a "knock and announce" search warrant the morning of January 30. The affidavit to obtain the search warrant appears to be a standard form. On page four of the affidavit, the form states, "A Warrant authorizing a night-time search is requested because . . ." and, "That a no-knock search warrant is requested because . . . ." Both statements are followed by the entry "not requested" on the affidavit. The warrant authorized police to search Moore's two-story home and seize "[m]arijuana . . . . All records and monies used to conduct an illegal marijuana selling operation. Venue identifying the residents of 3840 Seward

Street, Omaha, Douglas County, Nebraska."

Later that morning, Christensen was equipped with a body transmitter and given $23,000 to purchase the marijuana. Sgt. Mark Langan and Omaha police officer Mark Lang followed Christensen to Moore's house, while other officers monitored and recorded Christensen's conversations. Christensen entered Moore's home and held a conversation with him for about 14 minutes until Moore's supplier arrived at the home. After inspecting the marijuana, Christensen then used the code word "junior" to indicate to the police monitoring the conversation that the marijuana was currently in Moore's home.

After hearing the code word, approximately eight Omaha police officers, including Sergeant Langan, went to the porch of the Moore house. In his supplementary report, Sergeant Langan stated that at 12:35 p.m., he

> knocked on the front door very loudly and yelled in an authoritative tone, "Police officers, search warrant, we demand entry immediately". After a wait of several seconds, there was still no answer at the door. Sergeant Langan again knocked very loudly and stated in a loud, authoritative voice, "Police officer, search warrant, we demand entry immediately". After several seconds there was still no answer at the door. Judging by the size of the house, it was evident that during the time that Sergeant Langan had first knocked until the last statement uttered by Sergeant Langan that there was sufficient time for a reasonable person inside of the address to answer the door.

As a result, Sergeant Langan authorized Officer Lang to use a battering ram on the front door to gain entry into Moore's house.

At the hearing on the motion to suppress, Officer Lang testified that Sergeant Langan twice knocked on the door loudly and also verbally commanded the persons inside Moore's house to open the door. Officer Lang stated that the verbal commands were "probably louder" than the knocks on the door. Officer Lang stated at the hearing that because the police were attempting to seize 20 pounds of marijuana, they did not request a no-knock warrant because "[w]e didn't believe that the individuals inside were going to be able to destroy that

evidence . . . . We didn't believe the individuals were going to be able to eat that or flush it down the toilet or down the sink, so we used the knock clause."

At the hearing on Moore's motion to suppress, Moore offered the tape recording made by Omaha police from the body transmitter on Christensen. While the police officers who were on the porch did not continue to listen to the transmission from Christensen, the transmission continued to be taped. On the tape, one can hear the voices of Christensen, Moore, and Moore's supplier in addition to a television or radio broadcast in the background. The tape recording reveals two loud knocks approximately 7 seconds apart. The tape recording does not reveal an audible announcement accompanying the knocks. After the second knock, approximately 7 seconds passed before the police officers used the battering ram to gain entry. A total of 15 seconds elapsed between the first knock and the use of the battering ram.

Upon entering Moore's home, Officer Lang found against a wall in the dining room a cardboard box which contained 20 Ziploc bags, each containing approximately 1 pound of marijuana. Moore was arrested and gave a statement to the police officers.

Moore filed a motion to suppress the marijuana and any statements he gave to police, alleging that the police officers' method of serving the warrant did not comply with the "knock and announce" requirements under Neb. Rev. Stat. § 29-814.01 (Reissue 1989). The district court denied Moore's motion to suppress, finding:

> Defendant's argument that the "knock" required warrant was not sufficient and adequately complied with, fails as a matter of fact and a matter of law. The Court finds that the police officers knocked twice before entry was made. Speculation as to how long police officers must wait before making entry after knocking should be subject to a reasonableness rule under all circumstances.

A bench trial was held, and stipulated evidence was offered at the trial, subject to Moore's renewed motion to suppress. The motion to suppress was again denied, and Moore was found guilty of possession of marijuana with intent to deliver. Moore appeals.

## ASSIGNMENTS OF ERROR

Moore alleges the district court erred when it denied his motion to suppress because (1) the marijuana was seized as a result of a search after police failed to knock and announce their identity and purpose and wait a reasonable amount of time and (2) there was no evidence of exigent circumstances to support immediate, unannounced entry.

## STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

## ANALYSIS

Moore argues that because police officers failed to knock and announce their identity and purpose before making a forcible entry and because there were no exigent circumstances which would exempt the officer from complying with the requirements of knocking and announcing when serving a search warrant, the evidence against him should have been suppressed.

Under Neb. Rev. Stat. § 29-411 (Reissue 1989), a police officer may break into a house when serving a search warrant if "after notice of his office and purpose, he is refused admittance." Such a search warrant has been labeled a "knock and announce" warrant. So-called "no-knock" warrants are also authorized under the statute "if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice." The statute allows a judge or magistrate to issue such a warrant only upon proof under oath that "the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given." The statute codifies the common-law requirement of

knocking and announcing when serving a search warrant prior to breaking into a person's dwelling. See, *Wilson v. Arkansas*, ____ U.S. ____, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995); *Miller v. United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958).

[3] The U.S. Supreme Court has recently ruled that the Fourth Amendment requires that officers knock and announce their purpose, and be denied admittance, prior to breaking into a dwelling, absent certain circumstances. *Wilson v. Arkansas, supra*. In *Wilson*, the Court found:

> Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. . . . [W]e hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

115 S. Ct. at 1918.

*Wilson* effectively overrules *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), in which the Nebraska Supreme Court held that there was no Fourth Amendment requirement to knock and announce prior to entry when serving a search warrant.

The *Wilson* Court recognized, however, that not every entry into a dwelling must be preceded by an announcement. Instead, the Court recognized that there are certain circumstances which excuse announcement. The Court noted that lower courts have allowed no announcement when there may be a threat of physical violence to the officers if they announced their presence, or when a prisoner has escaped from an arresting officer to retreat to his or her dwelling. See, e.g., *In re Lavoyne M.*, 221 Cal. App. 3d 154, 270 Cal. Rptr. 394 (1990). Finally, the Court found that "courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." 115 S. Ct. at 1919 (citing *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)). See, e.g., *Commonwealth v. Morgan*, 517 Pa. 93, 534 A.2d 1054 (1987).

The Court further stated that it declined to create a "comprehensive catalog" of the relevant countervailing factors which would override the requirement for an announcement, leaving to the lower courts the determination of when unannounced entry is reasonable.

Absent exigent circumstances, the U.S. Supreme Court has held that a mere pro forma compliance with knock and announce requirements under 18 U.S.C. § 3109, which is the federal codification of the common-law knock and announce requirement, is not enough, unless the police officers' actions were sufficient to give actual notice. *Miller v. United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958). In *Miller*, the evidence showed that police knocked on the defendant's front door and, when asked who was there, said in a low voice "police." The police, however, did not expressly demand admission or state their purpose. The *Miller* Court found that the defendant did not receive the required notice of authority and purpose and that therefore the evidence against him should have been suppressed.

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

357 U.S. at 313. See, also, *Rivera v. U.S.*, 928 F.2d 592 (2d Cir. 1991) (the Fourth Amendment requires that police officers make a reasonable effort to provide actual notice, not mere pro forma notice of their identity and purpose).

[4,5] In the case at hand, the question before us is whether the district court was clearly erroneous when it found that the officers' actions of knocking twice and entering within 15 seconds constituted a reasonable search, where the court made no finding as to whether or not an announcement had been made, and if so, whether it was adequate, coupled with the fact that the tape does not reveal an announcement following the knocks, and where there was no showing of exigent

circumstances. In *U.S. v. Mendonsa*, 989 F.2d 366, 368 (9th Cir. 1993), police officers executing a search warrant knocked; announced loudly, " 'Police! Open up, we have a search warrant' "; and waited approximately 3 to 5 seconds before "smashing" through the defendant's front door. The search warrant was issued pursuant to 18 U.S.C. § 3109 (1988), which provides that a police officer may break into someone's dwelling when executing a warrant if "after notice of his authority and purpose, he is refused admittance." The *Mendonsa* court found:

> A refusal to reply to an officer's order to "open up" can be implied from silence. [Citation omitted.] Exigent circumstances may excuse failure to wait for the occupant to refuse entry, but absent exigency, there must be explicit refusal or lapse of a significant amount of time before officers may forcibly enter the premises. [Citation omitted.]
>
> What constitutes a "significant amount of time" between announcement and entry depends upon the circumstances of each case. [Citation omitted.] If officers have knocked and announced properly, mild exigency justifies simultaneous entry if it occurs without destruction of property. [Citation omitted.]
>
> When physical destruction of property is necessary to gain entry, more specific inferences of exigency are required. [Citation omitted.] Forced entry within three to five seconds is permissible when specific inferences are present. [Citations omitted.] An unjustified, yet sincere, belief in exigent circumstances does not justify non-compliance with section 3109.

989 F.2d at 370.

The *Mendonsa* court found that the evidence did not establish specific inferences of exigency in the case, as the evidence showed that at the time of service of the warrant, all the occupants of the house were sitting in the living room, playing soft music. The court noted that "[t]he Government has pointed to no particular type of noise, which would indicate that the occupants were rushing to arm themselves or to destroy evidence." 989 F.2d at 371.

Like the court in *Mendonsa*, the court in *People v. Jennings*, 204 Ill. App. 3d 1075, 562 N.E.2d 1239 (1990), found that the measure of what was a reasonable time to wait, given that police had properly knocked and announced, was made by examining the exigent circumstances. "The presence of exigent circumstances is as important and relevant to the question of the amount of time an officer ought to wait prior to entering forcibly as it is to the question of whether he needs to even announce his authority and purpose prior to entry." *Id.* at 1078, 562 N.E.2d at 1240.

An example of a case in which there was a lack of exigent circumstances is *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994), in which the court overturned the district court's order denying the motion to suppress made by one of the defendants. The evidence showed that members of the Omaha Police Division's emergency response unit (ERU) knocked on the defendant's door and yelled "police officers." After hearing no noise or movement and after 3 to 5 seconds, the police entered the defendant's house using a battering ram. The district court found exigent circumstances justifying the quick entry on the basis that the defendant's house was small; it did not have curtains covering the windows; the view from the house to the street was unencumbered; there was probable cause to believe drugs, cash, and weapons were present; and all the inhabitants of the house were awake. The *Lucht* court stated:

> The proper inquiry is whether, given the facts and circumstances known to [the police officer leading the search], he reasonably decided there was an urgent need to force entry. . . .
>
> . . . Here, ERU was not in a dangerous tactical situation. They did not hear or see anything to indicate they were in danger or that evidence was being destroyed. [The police officer] knew there was a likelihood that there were weapons in the house, but he had no information indicating that [the defendant] Kress was considered dangerous or violent or might be inclined to use the weapons against them. . . . [The police officer] also knew that the search was for a large amount of methamphetamine, but he testified that this did not alter how he entered

> the house. There was no evidence that Kress could have easily disposed of a large quantity of drugs or that, like [his fellow defendant], he had a special hiding place for them.

*Id.* at 551.

In contrast, two of Kress' fellow defendants were subjected to forced entry within 5 to 10 seconds and 6 to 8 seconds, but in each case, exigent circumstances existed to excuse noncompliance with the statute. See, also, *U.S. v. Marts*, 986 F.2d 1216 (8th Cir. 1993) (the lapse of 5 seconds without a showing of exigent circumstances is not a refusal of admittance); *People v Asher*, 203 Mich. App. 621, 513 N.W.2d 144 (1994) (lapse of 5 seconds between knock and announce and entry did not comply with knock and announce requirements because there was no evidence that drugs were being destroyed or that defendants possessed weapons).

We find the *Mendonsa* and *Jennings* courts' reasoning to be persuasive, given the recent U.S. Supreme Court ruling in *Wilson v. Arkansas*, ____ U.S. ____, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), that the knock and announce requirement under the Fourth Amendment be subjected to a reasonableness test. The determination of whether police officers made more than a pro forma attempt to comply with the knock and announce requirements, which absent exigent circumstances entails allowing the defendant to respond to the knock and announcement, should be made by determining whether there were exigent circumstances.

In the case at hand, we find no evidence in the record of any exigent circumstances which would excuse following the knock and announce requirements. Officer Lang testified at the hearing on the motion to suppress that the police made a conscious decision *not* to ask for a no-knock warrant, as they believed it was unnecessary. Officer Lang stated that given the amount of marijuana to be seized, police believed it would be difficult to destroy it quickly. There is no evidence that Moore was armed or suspected to be dangerous, which would cause police to be in fear of their lives or of Christensen's life. There is no evidence that police heard movement within the house, suggesting an attempt to escape or not answer the door.

Therefore, we find that in the absence of exigent circumstances, there is no evidence in the record to support a finding that there was an implied or constructive refusal to admit the police officers within 15 seconds of the first knock.

[6] Unreasonable searches and seizures are proscribed by the 4th Amendment to the U.S. Constitution, and this prohibition is enforceable against the states through the 14th Amendment. *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992). We find that the district court was clearly erroneous when it denied Moore's motion to suppress.

## CONCLUSION

We find that there is no evidence in the record to support a finding that there were exigent circumstances which would excuse compliance with the knock and announce requirements under the Fourth Amendment. We therefore reverse.

REVERSED.

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## STATE OF NEBRASKA, APPELLEE, V. TYRONE V. HAYES, APPELLANT.

535 N.W.2d 715

Filed August 8, 1995. No. A-94-1087.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures.

4. _____: _____. The 4th and 14th Amendments to the U.S. Constitution and the Nebraska Constitution do not protect citizens from all governmental intrusions, but only from unreasonable intrusions.
5. **Search and Seizure: Investigative Stops.** A pat-down search which goes beyond a "plain feel" is improper in the context of a *Terry* stop.
6. **Constitutional Law: Arrests: Search and Seizure.** In the case of a lawful custodial arrest, a full search of a person is not only an exception to the Fourth Amendment's warrant requirement, but is also a reasonable search under that amendment. A search incident to a lawful arrest is a reasonable search under article I, § 7, of the Nebraska Constitution.
7. **Police Officers and Sheriffs: Arrests: Search and Seizure: Probable Cause.** The validity of a warrantless arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists.
8. **Police Officers and Sheriffs: Arrests: Probable Cause.** Where a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
9. **Arrests: Search and Seizure: Probable Cause.** A search incident to an arrest can be made prior to an arrest as long as probable cause for the arrest exists prior to the search.
10. **Arrests: Search and Seizure.** A search before an arrest, and claimed to be an incident of the arrest, cannot serve as a basis for the validity of the arrest.
11. **Arrests: Search and Seizure: Probable Cause.** It does not matter that a defendant is not formally placed under arrest until after a search, so long as the fruits of the search are not necessary to support probable cause to arrest.
12. **Constitutional Law: Arrests: Search and Seizure: Words and Phrases.** A person is arrested or seized for Fourth Amendment purposes when there is a restraint on his or her freedom of movement in any significant way.
13. **Police Officers and Sheriffs: Arrests: Search and Seizure.** For purposes of an arrest, police have seized an individual only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.
14. **Police Officers and Sheriffs: Search and Seizure.** A suspect's submission to an officer's show of authority may constitute a seizure.
15. **Police Officers and Sheriffs: Arrests: Probable Cause.** Where a law enforcement officer has probable cause to believe he or she was witnessing the commission of a felony, an officer may arrest a person without a warrant.
16. **Constitutional Law: Arrests: Search and Seizure: Probable Cause.** The Fourth Amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure.
17. **Arrests: Search and Seizure: Probable Cause.** The principles enunciated in connection with probable cause in cases involving search warrants generally apply to an assessment of probable cause in connection with a warrantless arrest.

18. **Arrests: Probable Cause.** Probable cause for a warrantless arrest exists by reference to the totality of the circumstances.
19. **Search and Seizure: Probable Cause.** Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.
20. **Police Officers and Sheriffs: Probable Cause.** Although flight from officers is insufficient alone to establish probable cause, in the context of assessing the totality of the circumstances, flight is a relevant factor.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

MILLER-LERMAN and INBODY, Judges, and HOWARD, District Judge, Retired.

MILLER-LERMAN, Judge.

Tyrone V. Hayes appeals the order of the district court for Douglas County which denied his motion to suppress evidence gained as a result of a search of his person and statements made subsequent thereto. For the reasons recited below, we affirm the decision of the district court.

## FACTS

This case involves the admissibility of certain evidence seized from Hayes on January 6, 1994. A preliminary hearing was held in the county court for Douglas County on August 10. Thereafter, in an information filed in the district court for Douglas County on August 11, Hayes was charged with unlawfully and knowingly or intentionally possessing with the intent to deliver 28 grams or more of crack cocaine. See Neb. Rev. Stat. § 28-416(8)(a) (Cum. Supp. 1994). Hayes filed a motion to suppress on September 27. In his motion, Hayes contended that the evidence was seized unconstitutionally.

The district court held a hearing on the motion to suppress on October 20, 1994. At the hearing, the State offered the testimony of Omaha police officer James Quaites. Hayes and Officer John Neaman of the Omaha Police Division testified

for the defense. From the evidence adduced at the preliminary hearing and the suppression hearing, we summarize the following facts:

On the afternoon of January 6, 1994, Quaites was participating in a consensual search for narcotics at a residence located at 3706 Ernst Street in Omaha. Quaites was accompanied by Omaha police sergeant Mark Langan, Neaman, and special agent Bill Nellis of the Federal Bureau of Investigation. The individuals executing the search were wearing civilian clothes under their "raid jackets." The jackets identified in bold letters on the front and back the respective law enforcement agency the individuals represented.

At 2:55 p.m., approximately 1 1/2 hours after the search unit arrived at the residence, Quaites heard a vehicle pull up in the driveway. Quaites peered out the window and saw Hayes get out of the car, approach the house, enter the porch area, and knock on the front door. Quaites opened the door and identified himself to Hayes as a police officer. Hayes stepped back, turned, and attempted to run away. According to Quaites, he and Nellis ran after Hayes, apprehended Hayes, and brought him into the house. When asked why he grabbed Hayes as he tried to leave the porch, Quaites stated that it was common procedure to detain an individual who arrives at a residence where a search is being conducted, that he recognized Hayes from previous investigations as a known drug dealer with gang ties, and that he had information that Hayes was currently involved in drug distribution. Notwithstanding his knowledge of the foregoing, Quaites testified on cross-examination that he asked Hayes his name before bringing him into the house.

After bringing Hayes into the house, Quaites asked Hayes if he was carrying any weapons, to which Hayes responded "no." Quaites then told Hayes he was going to conduct a pat-down search. We note that Quaites' testimony at the preliminary hearing is somewhat in conflict with that from the suppression hearing, summarized above, in that at the preliminary hearing he stated that he initially asked Hayes if he had any weapons or contraband on him and then told Hayes that he was "going to conduct a pat-down search on him to make sure that he did not have any on him."

Hayes was wearing a soft, leather-type jacket with pockets. The jacket was large on him and reached his midthigh area. At the suppression hearing, Quaites explained on direct examination that when he executed the pat-down search he felt an object he believed to be a controlled substance in Hayes' left pocket. On cross-examination, Quaites described the "pat-down" search as follows:

> Q. . . . And you patted him down. Where did you start when you patted him down?
>
> A. I may have started, I believe, while facing him just up around his chest and arm areas, having him move his hands out, and then I believe I went from one side of his body down and then went to the other side of his body down.
>
> Q. How many times did you pat him down?
>
> A. Maybe — I believe twice.
>
> Q. Did you detect a weapon the first time?
>
> A. No.
>
> Q. And then you still continued to — you patted him down a second time; didn't you?
>
> A. On the area that I felt was controlled substances, I went back up and — to try to confirm, I believe — try to confirm what I thought was controlled substance.
>
> Q. At the time that you went back to confirm that, you knew there wasn't a weapon in that area; is that correct?
>
> A. Yes.
>
> Q. So the purpose that you were doing the pat-down in this area was to get more information about possible drugs?
>
> A. I believe that's correct.
>
> Q. Okay. And you palpated that area with your fingertips? You palpated it?
>
> A. If that's what you call it. I basically rubbed up against it as I was patting him down, if that's what you consider it.

Based on the foregoing, the record is clear that the search of Hayes which occurred at 3706 Ernst Street (the initial search) was composed of two excursions: a pat-down search followed by a search which exceeded a pat-down search.

In contrast to Quaites' description of the initial search, Hayes' testimony at the suppression hearing indicated that the initial search exceeded a pat-down search. Specifically, Hayes testified that Quaites "grabbed" and "yank[ed]" at his coat pockets and pants pockets in order to determine their contents. Quaites did not search the interior of Hayes' pockets during the initial search.

According to Quaites, he handcuffed Hayes after he completed the initial search. In contrast to Quaites' testimony, Hayes testified that Quaites handcuffed him on the porch, before bringing him into the house, and that Quaites conducted the initial search while Hayes was handcuffed. Quaites testified that Hayes was not free to leave after the initial search. Quaites testified that Hayes asked if he could leave, and his request to leave was denied.

After he completed the initial search, Quaites told the other officers that he believed Hayes was in possession of controlled substances, specifically crack cocaine. Neaman then asked Hayes if he could conduct a search of his person, to which Hayes replied "no." Langan then dispatched Neaman to obtain a search warrant for Hayes' person. At that time, Hayes remained handcuffed in the house while the other officers continued the original investigation. Approximately 30 minutes later, after the officers completed their investigation of the residence, they took Hayes to police headquarters, where he remained handcuffed. Neaman arrived with the search warrant in approximately an additional 30 minutes.

Neaman obtained the search warrant by swearing to an affidavit which generally set forth that Neaman had been contacted by a reliable confidential informant (CI) on January 6, 1994, who informed Neaman that within the 24 hours prior to such contact Hayes had large amounts of crack cocaine on his person, that Hayes would be actively selling the crack cocaine in North Omaha, and that the CI had observed Hayes actively selling crack cocaine on numerous occasions in the past several months and also generally set forth that Quaites had conducted a search of Hayes on January 6 and had felt objects which he believed to be crack cocaine in his pockets. Neaman further swore that the CI had previously provided reliable

information to the members of the Omaha Police Division and the Federal Bureau of Investigation regarding the distribution of crack cocaine, and such information had "perfectly matched" information verified by such law enforcement agencies. The affidavit for the search warrant was received into evidence at the suppression hearing.

In regard to the information contained in the affidavit, Neaman testified unequivocally at the suppression hearing that before Hayes arrived at the residence at 3706 Ernst Street, Neaman had informed Quaites of what he had learned about Hayes from the CI. Although the record reflects that no narcotics were actually found in the house, Neaman apparently was not aware of this information at the time he obtained the warrant.

When Neaman arrived at police headquarters with the signed search warrant, the officers completely searched Hayes. The officers found Hayes to be in possession of what proved to be approximately 97.5 grams, or 3 1/2 ounces, of crack cocaine, a pager, and a gram scale. At that time, Hayes was read his *Miranda* warnings and agreed to answer questions. The questioning of Hayes revealed that he was intending to sell the crack cocaine, that he had been buying 2-ounce quantities of crack cocaine for resale, and that "he would make approximately $2,000.00 off of each ounce that he would sell in pieces."

After hearing and considering the evidence, the district court overruled the motion in an order dated November 4, 1994. In its order, the district court stated:

> [T]he Court has determined that the initial detention and pat-down for weapons of the Defendant were justified by the information within the knowledge of the police involved concerning Defendant's past drug involvement, gang ties, the information received from a previously reliable confidential informant that, within the preceding 24 hours, the Defendant told the C.I. that he would have large amounts of crack cocaine on his person for sale on that very day, January 6, 1994, and the fact that the Defendant turned and started to run after the officer had ascertained his identity while they were on the front porch

of 3706 Ernst Street.

. . . .

The pat-down for weapons was, under the circumstances in this case, proper under *Terry v. Ohio*, 392 U.S. 1 (1968). When the officer felt what he believed to be, based upon his training and experience, crack cocaine on Defendant's person during the pat-down, he had probable cause to arrest and, accordingly, a search incident to arrest at that time would have been proper. The fact that the police waited to search until they had obtained a warrant is of no consequence to the decision in this case. They were merely exercising an overabundance of caution.

After Hayes waived his right to jury trial, his case was tried to the court on stipulated facts. The challenged evidence was admitted over objection. The trial court found Hayes guilty of the charge and sentenced him to incarceration for a period of not less than 5 nor more than 8 years. Hayes appeals to this court the district court's order denying his motion to suppress and the admission of the challenged evidence.

## ASSIGNMENTS OF ERROR

Hayes generally asserts that the district court erred in overruling his motion to suppress and in admitting the challenged evidence because (1) the initial "stop and frisk" was unlawful, and therefore, the fruits of the search could not be used to establish probable cause for an arrest; (2) the State lacked probable cause to arrest; and (3) the affidavit for the search warrant contained deliberate falsehoods and was drafted with a reckless disregard for the truth.

## STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but,

rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *Ranson, supra*. See *Flores, supra*.

## ANALYSIS

Hayes argues on appeal that the trial court erred by denying his motion to suppress and by receiving evidence of the crack cocaine and his statement at the stipulated trial. Hayes claims that the police violated the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Hayes' argument proceeds that the police improperly stopped him at 3706 Ernst Street in violation of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); that the search of his person during this stop exceeds that permitted by *Minnesota v. Dickerson*, ____ U.S. ____, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); that his arrest was unsupported by probable cause, see *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986); and that the warrant to search his person was improperly obtained, see *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The State responds primarily that when police seized Hayes at 3706 Ernst Street, there was probable cause to arrest him at that time and that the search of his person which led to the discovery of the crack cocaine was proper as an incident to a lawful custodial, warrantless arrest. See *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992). We agree with the State.

[3,4] It is fundamental that the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). The 4th and 14th Amendments and the Nebraska Constitution do not protect citizens from all governmental intrusions, but only from unreasonable intrusions. *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

[5,6] In the instant case, it is clear from the record that Quaites did not merely pat down Hayes for weapons, but took a second pass at Hayes, palpating his clothes and thus locating the crack cocaine. Such an excursion, beyond a "plain feel," is

improper in the context of a *Terry* stop. *Dickerson, supra*; *State v. Jackson*, 276 N.J. Super. 626, 648 A.2d 738 (1994). However, in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the U.S. Supreme Court held that in the case of a lawful custodial arrest, a full search of a person is not only an exception to the Fourth Amendment's warrant requirement, but is also a reasonable search under that amendment. The Nebraska Supreme Court has also held that a search incident to a lawful arrest is a reasonable search under article I, § 7, of the Nebraska Constitution. See, *State v. Sässen*, 240 Neb. 773, 484 N.W.2d 469 (1992); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990).

[7-11] The validity of a warrantless arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists. *Roach, supra*. Where a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 113, 126 L. Ed. 2d 78. It has also been held that a search incident to an arrest can be made prior to an arrest as long as probable cause for the arrest exists prior to the search. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *Roach, supra*. It is fundamental that "a search before an arrest, and claimed to be an incident of the arrest, cannot serve as a basis for the validity of the arrest." *Twohig*, 238 Neb. at 107, 469 N.W.2d at 354. Thus, it has been observed that it does not matter that a defendant is not formally placed under arrest until after a search, so long as the fruits of the search are not necessary to support probable cause to arrest. *Roach, supra*.

[12-14] A person is arrested or seized for Fourth Amendment purposes when there is a restraint on his or her freedom of movement in any significant way. See, *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), *cert. denied* 498 U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1195 (1991); *State v. LaChappell*, 222 Neb.

112, 382 N.W.2d 343 (1986). See, also, *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995) (regarding custodial statements and arrest for *Miranda* purposes). The test derived from *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), namely, that police have seized an individual " ' "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," ' " is commonly cited as the description of an arrest. *Twohig*, 238 Neb. at 102, 469 N.W.2d at 351, quoting *Mendenhall, supra*. See, also, *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). Under Nebraska jurisprudence, it appears that a suspect's submission to an officer's show of authority may also constitute a seizure. See, *Van Ackeren, supra*; *Twohig, supra*. See, also, *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

[15-17] Pursuant to Neb. Rev. Stat. § 29-404.02 et seq. (Reissue 1989) and the case law, where a law enforcement officer has probable cause to believe he or she was witnessing the commission of a felony, an officer may arrest a person without a warrant. See *Roach, supra*. The crime of possession with intent to deliver 28 grams or more of crack cocaine is a Class IC felony. § 28-416(8)(a). In assessing probable cause, it has been observed that "[t]he fourth amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure." *State v. Haynie*, 239 Neb. 478, 483, 476 N.W.2d 905, 910 (1991). Thus, the principles enunciated in connection with probable cause in cases involving search warrants generally apply to an assessment of probable cause in connection with a warrantless arrest.

[18,19] In the instant case, the State asserts that there was probable cause to arrest Hayes prior to the time he was restrained by the officers at 3706 Ernst Street. Probable cause for a warrantless arrest exists by reference to the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). It has been held that "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to

that person." *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979). See, also, *Roach, supra*.

As recited above, the trial court made the following factual findings in denying the motion to suppress:

> Based upon consideration of the foregoing, the Court has determined that the initial detention and pat-down for weapons of the Defendant were justified by the information within the knowledge of the police involved concerning Defendant's past drug involvement, gang ties, the information received from a previously reliable confidential informant that, within the preceding 24 hours, the Defendant told the C.I. that he would have large amounts of crack cocaine on his person for sale on that very day, January 6, 1994, and the fact that the Defendant turned and started to run after the officer had ascertained his identity while they were on the front porch of 3706 Ernst Street.

We recognize the inconsistencies in the testimony of Quaites between the preliminary hearing and the hearing on the motion to suppress, as noted by Hayes on appeal. Apparently, the trial judge found the testimony of Quaites and Neaman at the hearing on the motion to suppress credible, and we cannot say that assessment or the court's findings are clearly erroneous. See *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994). The trial court's findings support the legal conclusion that there was probable cause to arrest Hayes when he was seized at 3706 Ernst Street prior to the search.

Although the moment when Hayes was handcuffed is controverted, it is clear that the officers exercised authority over Hayes and that he submitted to such authority prior to the handcuffing. It is uncontroverted that Hayes was handcuffed and held at 3706 Ernst Street for a half hour and thereafter at the police station for an additional period. His request to leave 3706 Ernst Street was denied. Based on the foregoing, Hayes was arrested when the police restrained him at 3706 Ernst Street prior to the initial search.

[20] On appeal, we review the record as a whole, *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967), *cert. denied* 386 U.S. 1024, 87 S. Ct. 1384, 18 L. Ed. 2d 466, and we

conclude that the facts support a finding of probable cause to arrest Hayes at 3706 Ernst Street prior to Quaites' locating the bulge in Hayes' clothing which later proved to be contraband. The record shows that within the 24 hours prior to Hayes' arrest, an informant, with a proven reliable track record, advised police that Hayes would be in possession of crack cocaine for sale on January 6, 1994. See *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Prior to Hayes' arrest, the officers independently verified Hayes' history of a drug conviction in 1989. See *id.* Neaman testified that he was aware of this information and imparted it to Quaites prior to Hayes' arrival at 3706 Ernst Street. Hayes appeared at 3706 Ernst Street during the officers' search for drugs at that location and started to flee when an officer identified himself. See, generally, *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) (regarding a detention of persons on the premises where a search warrant is being executed). Although flight from officers is insufficient alone to establish probable cause, in the context of assessing the totality of the circumstances, flight is a relevant factor. See *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993).

Based on the foregoing, we conclude that there was probable cause to arrest Hayes at the time he was seized at 3706 Ernst Street prior to the initial search, that the arrest was proper, and that the subsequent recovery of the crack cocaine and statements were proper. Thus, the trial court did not err in its denial of the motion to suppress and the subsequent admission of the challenged evidence at trial.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. NICHELLE K. GLOVER, APPELLANT.

535 N.W.2d 724

Filed August 8, 1995. No. A-94-1151.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Statutes.** Statutory interpretation is a question of law.
3. _____. In the absence of anything indicating 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. **Sentences: Probation and Parole.** Pursuant to Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1994), if any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility, the statement of the minimum limit shall control the calculation of the offender's term.
5. **Trial: Courts: Proof: Appeal and Error.** To establish reversible error, a defendant must demonstrate that the trial court's action prejudiced or otherwise adversely affected a substantial right of the defendant.

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

Frank E. Robak, Sr., of Robak & Springer, for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

Nichelle K. Glover appeals the sentence imposed following her plea of guilty to the charge of unlawful possession of cocaine with intent to deliver, arguing that her sentence must either be reduced or the cause must be remanded for resentencing because the district court's advisement at sentencing pursuant to Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1994) incorrectly informed her of the minimum term she must actually serve before becoming eligible for parole.

## FACTS

On March 3, 1993, Glover accepted a package delivered by United Parcel Service (UPS), knowing it contained cocaine. The police department was alerted to the contents of the

package when a UPS employee opened the package as part of a standard procedure to substantiate an incorrect address and observed a plastic baggie containing a quantity of suspected narcotics. After Glover signed for and accepted the package, police executed a no-knock search warrant and arrested Glover. Tests performed on the substance verified that it was, in fact, 173.1 grams of crack cocaine.

Glover entered a plea of guilty on September 23, 1994, to the amended charge of unlawful possession with intent to deliver, a Class II felony, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1992). This offense carries an authorized penalty of 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1989). At the sentencing hearing on November 3, 1994, the trial judge sentenced Glover as follows: "[Y]ou are to be confined in the Women's Correctional Facility for a term of one and three-quarters to two and a half years. On the low end, you will serve about nine months. And the upper end, you will serve one and one-fourth." Glover subsequently perfected this appeal.

## SCOPE OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

[2] Statutory interpretation is a question of law. *Wragge, supra.*

## ANALYSIS

On appeal, Glover argues that her sentence must be reduced or that the case must be remanded for resentencing due to the district court's failure to correctly inform her of the minimum term she will actually serve under Nebraska's "truth in sentencing" laws, pursuant to § 29-2204, before becoming eligible for parole. Section 29-2204 provides in relevant part:

> (1) . . . [I]n imposing an indeterminate sentence upon an offender, the court shall:
>
> (a) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law . . . ;

(b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and

(c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.

*If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and the maximum limit shall control the calculation of the offender's term.*

(Emphasis supplied.) A committed offender can receive 1 day of "good time" credit for each day served to reduce his or her sentence. Neb. Rev. Stat. § 83-1,107(1) (Reissue 1994).

The district court sentenced Glover to 1 3/4 to 2 1/2 years' imprisonment, or 21 to 30 months. This sentence is clearly within the statutory limits. In instructing Glover that "[o]n the low end, [she would] serve about nine months" and on "the upper end, [she would] serve one and one-fourth" years, the trial court was obviously attempting to comply with the requirements of § 29-2204. The court substituted the phrase "on the low end" as an abbreviation for "the time [Glover] will serve on . . . her minimum term before attaining parole eligibility assuming that no good time for which [she] will be eligible is lost" and the phrase "the upper end" instead of reciting "the time [Glover] will serve on . . . her maximum term before attaining mandatory release assuming that no good time for which [she] will be eligible is lost." Glover does not challenge the brevity of the court's language.

The court correctly informed Glover regarding the time she would serve on the maximum term before eligibility for release. However, it erroneously informed her that she would serve 9 months on her minimum term of sentence before becoming eligible for parole, when, in fact, she will not be eligible for parole under the minimum sentence of 21 months until she has actually served 10 1/2 months, assuming no loss of good time.

See § 83-1,107(1). Glover argues that "[t]his error misled [her] as to the actual time she would spend in the correctional facility," violating "the very reason 'Truth in Sentencing' was promulgated." Brief for appellant at 4. Glover contends that the remedy for this misstatement is that the 21-month term of her minimum sentence must be reduced to 18 months to conform with the pronouncement of the court which was required by § 29-2204(1) or, in the alternative, that she should be resentenced.

[3,4] There is an obvious inconsistency between the court's statement of minimum time before parole eligibility, 9 months, and the minimum limit of the sentence imposed, 21 months, which requires her to serve 10½ months before becoming eligible for parole. However, as is evident from the emphasized portion of § 29-2204 quoted earlier in this opinion, the statute plainly provides that in the event of such discrepancy, the court's statement of the minimum limit of the sentence controls. In the absence of anything indicating 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. *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). Pursuant to § 29-2204, if any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility, the statement of the minimum limit shall control the calculation of the offender's term. Therefore, the court's statement of Glover's minimum sentence of 21 months controls the calculation of Glover's term, which then determines her parole eligibility. A misstatement of parole eligibility cannot be used to "bootstrap" a reduced term of sentence.

Glover was sentenced to an indeterminate sentence, and the minimum and maximum limits were clearly fixed at 21 and 30 months, respectively. That sentence was not unclear and was not misleading. The meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself. *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992). The trial judge's incorrect statement regarding time for parole eligibility

was not part of the sentence and does not evidence ambiguity in the sentence imposed.

[5] Finally, although Glover contends she was "misled" by the trial court's erroneous statement regarding the minimum time she would serve before parole eligibility, she has failed to demonstrate any prejudice resulting from this error. To establish reversible error, a defendant must demonstrate that the trial court's action prejudiced or otherwise adversely affected a substantial right of the defendant. See *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993). There can be no suggestion that the misstatement in any way led to Glover's plea which, by necessity, preceded the misstatement. Moreover, nothing in the record indicates the trial judge would have sentenced her differently had he not miscalculated the good time and parole eligibility date. Upon our review of the record, we find that Glover has suffered no prejudice.

Glover's assignments of error are without merit.

AFFIRMED.

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IN RE INTEREST OF ROBIN C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROBIN C., APPELLEE, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

535 N.W.2d 831

Filed August 15, 1995. No. A-95-011.

1. **Juvenile Courts: Appeal and Error.** An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record.
2. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.

Appeal from the County Court for Morrill County: JAMES L. MACKEN, Judge. Reversed and remanded for further proceedings.

Don Stenberg, Attorney General, Royce N. Harper, and James L. Hatheway, Special Assistant Attorney General, for appellant.

Jean Rhodes, Morrill County Attorney, for appellee State.

HANNON, MILLER-LERMAN, and INBODY, Judges.

HANNON, Judge.

The Nebraska Department of Social Services (DSS) appeals from the order of the county court for Morrill County, acting as a juvenile court, which placed Robin C. on probation subject to the supervision of DSS. On appeal, DSS asserts that the trial court erred by placing Robin on probation subject to its supervision because Nebraska law does not permit such a disposition. Because we conclude that the juvenile court lacked the statutory authority to order DSS to supervise Robin's probation, we reverse the dispositional order of the juvenile court and remand the cause for further proceedings.

## FACTUAL SUMMARY

On August 30, 1994, a petition was filed in the county court for Morrill County, alleging that Robin was a child as defined by Neb. Rev. Stat. § 43-247(1) and (3)(b) (Reissue 1993). The petition alleged that Robin was a juvenile under the age of 21 years, was in possession of alcohol, had disobeyed her curfew, was uncontrollable, and was verbally abusive to her parents.

At a hearing held on September 21, Robin admitted the allegations contained in the petition, and the court found that the allegations were true. Robin was adjudicated a juvenile as defined by § 43-247(1) and (3)(b). The court ordered DSS to conduct a predispositional investigation.

A dispositional hearing was held on November 30. After receiving evidence, the court placed Robin on probation subject to the supervision of DSS. DSS has appealed.

## ASSIGNMENT OF ERROR

DSS alleges that the juvenile court erred when it ordered DSS to supervise Robin's probation.

## STANDARD OF REVIEW

[1] An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

[2] Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

## DISCUSSION

DSS alleges that the juvenile court was without jurisdiction to order DSS to supervise Robin's probation because Nebraska statutory law does not provide the authority for such a disposition.

Neb. Rev. Stat. § 43-286 (Cum. Supp. 1994) provides in relevant part:

> When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247:
>
> (1) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the juvenile's reformation or rehabilitation, and, subject to the further order of the court, may:
>
> (a) Place the juvenile on probation subject to the supervision of a probation officer;
>
> (b) Permit the juvenile to remain in his or her own home, subject to the supervision of the probation officer; or
>
> (c) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of the Department of Social Services, the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents.
>
> . . . .
>
> (2) Except as provided in section 43-287, the court may commit such juvenile to the care and custody of the Office

> of Juvenile Services or the Department of Correctional Services, but a juvenile under the age of twelve years shall not be committed to the Youth Rehabilitation and Treatment Center-Geneva or to the Youth Rehabilitation and Treatment Center-Kearney unless he or she has violated the terms of probation or has committed an additional offense and the court finds that the interests of the juvenile and the welfare of the community demand his or her commitment. This minimum age provision shall not apply if the act in question is murder or manslaughter.

Neb. Rev. Stat. § 43-287 (Cum. Supp. 1994) provides:

> Notwithstanding the provisions of subdivision (2) of section 43-286, when any juvenile is found by the court to be a juvenile defined by subdivision (3)(b) of section 43-247, the court may (1) enter such order as it is empowered to enter in the case of a juvenile described in subdivision (1) or (2) of section 43-247, except that no such juvenile shall be committed to the Youth Rehabilitation and Treatment Center at Kearney or Geneva, or (2) enter an order committing or placing the juvenile to the care and custody of the Department of Social Services.

The above statutes present the choices for disposition of juveniles adjudicated to be juveniles as defined by § 43-247. Clearly, the juvenile court was authorized under §§ 43-286 and 43-287 to place Robin on probation; whether the court was authorized to order DSS to supervise the probation is another matter. Section 43-286 specifically provides that a juvenile may be placed on probation subject to the supervision of a probation officer. There is no provision in either § 43-286 or § 43-287 that grants the juvenile court the authority to place a juvenile on probation subject to the supervision of DSS. We are unable to find any statutory or case law under which a juvenile court can order DSS to supervise a juvenile's probation.

We conclude that the juvenile court lacked the statutory authority to order DSS to supervise Robin's probation, and therefore, the dispositional order must be reversed and the cause remanded for further proceedings. On the basis of the record before us, we agree with the purpose and intention of the trial court in entering the order. We simply conclude the statutes

do not give the court the authority to make DSS a probation supervisor. We do not presume to fashion a remedy by modifying the trial court's order, but, rather, return the cause to the court, leaving it free to fashion some other procedure that is within its powers.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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JOHN JESSEN, AND ALL TAXPAYERS OF THE CITY OF BLOOMFIELD, STATE OF NEBRASKA, SIMILARLY SITUATED, APPELLANT, V. LYLE A. DEFORD ET AL., APPELLEES.

536 N.W.2d 68

Filed August 22, 1995. No. A-93-900.

1. **Motions to Dismiss: Proof.** 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 favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
2. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to himself or herself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
3. **Actions: Equity: Taxation: Municipal Corporations.** A taxpayer, for the benefit of a municipal or public corporation, may commence and prosecute to judgment an equitable action to enforce a right of action which the governing body has refused to enforce.
4. **Actions: Pleadings: Taxation: Municipal Corporations.** To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless.
5. **Public Officers and Employees: Presumptions: Proof: Municipal Corporations: Appeal and Error.** Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated. In order for the plaintiff to rebut this presumption, he must first allege and prove that the municipal or public corporation had done something wrong, that it was pointed out to the municipal or public corporation,

and that it would have rejected his demand.

6. **Motions to Dismiss.** If a motion to dismiss is sustained, the case ends, and any amendment thereafter is a judicial grace and not a right.
7. **Trial: Evidence: Appeal and Error.** The reopening of a case to receive additional evidence is a matter within the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion.
8. _____: _____: _____. Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.
9. **Demurrer: Motions to Dismiss.** A demurrer and a motion to dismiss are two distinct procedures.
10. **Appeal and Error.** A party cannot complain of error which the party has invited the court to commit.
11. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
12. **Trial: Evidence.** If a trial court feels that there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced.
13. **Motions for New Trial: Appeal and Error.** If an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial.
14. _____: _____. A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously prejudicial nor an abuse of discretion.

Appeal from the District Court for Knox County: RICHARD P. GARDEN, Judge. Affirmed.

Vince Kirby for appellant.

Daniel D. Jewell and, on brief, J. Mark Barnett of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellees.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

This is an appeal from the decision of the Knox County District Court sustaining defendants' individual motions to dismiss plaintiff's petition with prejudice at the close of

plaintiff's case. Plaintiff-appellant is John Jessen, a resident taxpayer and property owner in the city of Bloomfield, Knox County, Nebraska. Defendants-appellees are the mayor of Bloomfield, Lyle A. DeFord; the individual members of the city council, Don Eggen, Harry Sage, Jr., Kenneth Carlow, and Douglas Hefner; the city treasurer, Ryan Bloomquist; and the city clerk, Gerald L. Clausen. For the following reasons, we affirm.

## I. BACKGROUND

On August 7, 1991, Jessen filed a petition on behalf of all taxpayers of the city of Bloomfield to recover approximately $300,000, alleging that defendants illegally diverted public funds to pay for a sidewalk improvement project in downtown Bloomfield and neglected to follow statutory procedure. Each defendant demurred to the petition on the grounds that the petition failed to state a cause of action and that there was a defect of parties' defendant and amended the demurrer to include the allegation that Jessen did not have legal capacity to sue. The district court overruled the amended demurrers, specifically finding that the action was derivative in nature, that the petition stated facts sufficient to state a cause of action, that there was no defect of parties' defendant, and that plaintiff had legal capacity to sue. Each defendant then filed answers, which were amended prior to trial. The original and amended answers each contained, inter alia, a general allegation that the petition failed to state a cause of action against the answering defendant.

A pretrial conference was scheduled for December 7, 1992. It was canceled upon the appearance of Jessen's and defendants' counsel who advised the court that such conference would be unnecessary in that each had agreed to timely exchange lists of witnesses and evidence. No subsequent request for a pretrial conference was made by either Jessen or defendants. The record contains no pretrial order.

On August 17, 1993, the case was tried to the court, a jury having been waived. At the commencement of the trial, defendants objected to Jessen's introduction of evidence of an illegal and unauthorized transfer of money, basing the

objection on the grounds that the petition failed to state a cause of action. The court overruled the objection but granted defendants' continuing objection on the basis of relevancy to the admission of all evidence offered by Jessen. Jessen then put on his case and rested.

At the close of Jessen's evidence, each defendant moved for a dismissal of Jessen's petition with prejudice on the grounds that Jessen failed to allege and prove a demand upon the city of Bloomfield to commence the action and to allege and prove a refusal by the city to bring the action, or show facts that such a demand was useless; that the proceeding constituted a collateral attack and the proper remedy was a petition in error; and that the evidence was insufficient to support the cause of action. One defendant, Bloomquist, moved to dismiss with prejudice on the additional ground that the evidence was generally insufficient that Bloomquist conspired or acted in any illegal or improper manner.

The court sustained the motions to dismiss with prejudice, finding that Jessen failed to allege or prove any special injury and that the action was derivative in nature, being brought on behalf of all taxpayers. The court recognized that as a derivative action, it was necessary for Jessen to prove a demand made upon the city to bring the action itself and a refusal by the city to do so, or to offer proof that such a demand was useless. In sustaining the motion and dismissing Jessen's petition with prejudice, the court noted that there had "been no allegation in the petition that demand was made upon the city to bring the action, nor ha[d] there been any allegation in the petition that such demand would be useless." The court further found that there had "been no proof offered by the plaintiff that demand was made upon the city nor that demand would be useless."

On August 19, 1993, Jessen filed a "Motion to Amend or, in the Alternative, a Motion for New Trial." The "Motion to Amend" seeks an order granting Jessen leave to withdraw his rest for purposes of amending his petition to allege that demand would have been useless because defendants would have had to take action against themselves and to allege that he suffered special damages. The "Motion for New Trial" alleged several grounds, all of which are repeated, verbatim, as his assignments

of error to this court. The motion was overruled. In overruling the motion, the court found that in addition to the failure of proof on the "demand" issue, it had reviewed all the evidence and concluded that Jessen had failed to prove a prima facie case, specifically noting that there was "no evidence of improper conduct" by defendants. This appeal followed.

## II. ASSIGNMENTS OF ERROR

Jessen alleges the district court erred in (1) dismissing his petition at the close of his evidence " 'with prejudice' on the basis of the lack of an essential jurisdictional allegation"; (2) dismissing his petition at the close of his evidence with prejudice, denying him the opportunity to withdraw his rest to amend his petition and offer additional proof; (3) failing to sustain defendants' demurrer initially and at the beginning of his case in chief; (4) failing to hold a pretrial conference; (5) "allowing counsel to sit by idly and then, for the first time, to move for dismissal at the close of plaintiff's case"; and (6) reversing the court's position on defendants' demurrer at the end of Jessen's case without granting him leave to amend.

## III. STANDARD OF REVIEW

[1] 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 favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994).

## IV. ANALYSIS

### 1. Dismissal With Prejudice

Jessen brings this action as a resident taxpayer on behalf of himself and other taxpayers in the city of Bloomfield. Jessen pled no special injury peculiar to himself. The district judge, in overruling defendants' demurrers, determined that Jessen's action was a suit on behalf of all taxpayers. Jessen did not thereafter seek to amend his petition to otherwise challenge that order. Although Jessen seeks money, not injunctive relief,

neither party challenges the order defining the nature of this suit. Therefore, we express no opinion in that regard. Moreover, defendants do not challenge Jessen's status as a resident taxpayer.

[2-4] A resident taxpayer, without showing any interest or injury peculiar to himself or herself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). A taxpayer, for the benefit of a municipal or public corporation, may commence and prosecute to judgment an equitable action to enforce a right of action which the governing body has refused to enforce. *Taxpayers' League v. Wightman*, 139 Neb. 212, 296 N.W. 886 (1941). "To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless." *Nebraska Sch. Dist. No. 148*, 220 Neb. at 508, 371 N.W.2d at 261-62 (citing *Sesemann v. Howell*, 195 Neb. 798, 241 N.W.2d 119 (1976)).

Jessen's first assignment of error alleges that the district court erroneously dismissed his petition because it lacked "an essential jurisdictional allegation." That is not the basis upon which the district court dismissed Jessen's petition. While it is true that Jessen did not allege in his petition that a demand had been made on the city or that a demand would have been useless, the district court dismissed the petition, having found that Jessen failed to *prove* either of those necessary elements, not that he failed to *plead* them. Our review of the record confirms that omission of proof.

Jessen argues that because he has alleged that defendants were, at all times material, the entire governing body of the city and that each defendant is accused of making specific illegal expenditures, that "it is reasonably inferred that demand from the alleged wrongdoers would be obviously useless inasmuch as it would be untenable that the defendants would sue themselves." Brief for appellant at 8. Jessen points to no

evidence other than the status of the named defendants and their resistance to the suit to support his contention that proof of demand was unnecessary. It is true that the authorities cited above provide that if the making of a demand would have been useless, the failure to prove such a demand is unnecessary. In *Wightman, supra*, the city of Wayne was joined as a party defendant. The city answered and resisted the plaintiffs' taxpayer suit. The Supreme Court, although finding no specific proof of a refusal of the city to join in the suit, observed that its answer and its resistance were sufficient to show such refusal and that a "demand would have been an idle ceremony." *Id.* at 219, 296 N.W. at 887. But see *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982) (public corporation's demurrer to prior lawsuit held insufficient to waive necessity to prove prior demand).

[5] The facts of *Wightman, supra*, are not the facts here. Jessen has not sued the city of Bloomfield. It is not a party to these proceedings. The essence of Jessen's cause of action is that it is for the benefit of the city and a precondition to that cause of action in that the city has refused to enforce its own rights. The named individual defendants were the governing body of the city of Bloomfield at some point in time, but there is no evidence that they still enjoyed that status at the time the suit was filed in August 1991 or at the time one or more demurred, answered, or testified at trial. In fact, the evidence shows that as of August 19, 1991, only two of the seven named defendants, Carlow and Clausen, were still members of the governing body of the city of Bloomfield. The fact that the individual defendants resisted Jessen's suit, therefore, was not the resistance of the city and does not lead to the conclusion that a demand on the city would have been useless. The resistance does not, as was the case in *Wightman*, relieve Jessen of proving that the appropriate governing body of the city of Bloomfield had refused to enforce the rights which Jessen had then asserted on the city's behalf in this suit.

> " 'Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under

> circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated.' ". . .
>
> . . . In order for the plaintiff to rebut this presumption, he must first allege and prove that [the municipal or public corporation] had done something wrong, that it was pointed out to [the municipal or public corporation], and that it would have rejected his demand.

*Piper, Jaffray & Hopwood Inc.*, 212 Neb. at 576, 324 N.W.2d at 663.

It was Jessen's burden to adduce evidence to rebut the presumption that the appropriate governing body of the city of Bloomfield was ready and willing to perform its duty with regard to the rights of the city as alleged in his petition. There is evidence in the record that the governing body of the city was aware that the suit was filed and in fact authorized the hiring of counsel for the individual defendants at the city's cost. That body did not seek intervention by the city in the suit to either join with, or resist, Jessen's suit. However, we cannot conclusively infer from such inaction that the city chose to ignore its rights and those of its taxpayers. Indeed, the fallacy of such an inference becomes at once apparent when one reads the allegations of the amended answer, filed by the individual defendants, that the city, after suit was filed by Jessen, took action to address the alleged misdoings of the individual defendants. Whether true or not, those allegations evidence that more than one reasonable explanation can be made of the city's failure to join this proceeding. Jessen's petition was properly dismissed at the close of his case in chief because he failed to prove that the city refused to enforce its right of action or that a demand on the city to enforce such right would have been an "idle ceremony."

### 2. Leave to Withdraw Rest

[6] Jessen's remaining assignments of error combine in support of one contention—the district court abused its discretion in not allowing Jessen to withdraw his rest, amend his petition, and offer new evidence on the "demand" element of his case. Upon the sustaining of a *demurrer*, the court must

grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect. See *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). However, "[i]f a *motion to dismiss* is sustained, the case ends," (emphasis supplied) *Anderson v. Matthis*, 246 Neb. 215, 219, 518 N.W.2d 94, 97 (1994), and "[a]ny amendment thereafter is a judicial grace and not a right," *Reller v. Ankeny*, 160 Neb. 47, 50, 68 N.W.2d 686, 688 (1955).

Jessen relies exclusively upon *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981), in support of all his arguments on appeal. In *Deaver*, the plaintiff brought suit on a promissory note, and in the answer, the defendants alleged duress as an affirmative defense. The plaintiff first challenged the sufficiency of that defense after he rested, demurring ore tenus on the grounds that the answer failed to state facts which constituted duress. A pretrial order entered in the case required that all motions be filed 10 days before the trial. In overruling the sustainment of the demurrer, the Supreme Court found that "[t]he defect in the answer did not affect the substantial rights of the plaintiff and the objection, coming when it did, should have been disregarded." *Id.* at 183, 302 N.W.2d at 701. The court found that the plaintiff should have addressed the claim of duress by motion or a demurrer timely filed. *Deaver* is clearly distinguishable from the action before us in that the present action involves a motion to dismiss, rather than demurrer; here no pretrial order restricting motions had been entered; and defendants repeatedly challenged the sufficiency of the petition starting with a demurrer, continuing the objection by answer, and objecting at the commencement of Jessen's evidence. Jessen's reliance on *Deaver* is misplaced.

[7,8] The reopening of a case to receive additional evidence is a matter within the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion. See *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989). Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the

admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent. 75 Am. Jur. 2d *Trial* § 382 (1991).

(a) Reason for Failure to Introduce Evidence

A common theme throughout Jessen's arguments is the notion that he was deceived or tricked by the pretrial proceedings into not offering proof of demand or its uselessness and that he was surprised by being faced at trial with motions to dismiss on the grounds that he failed to allege and prove that element of his case. Although it is difficult to reconcile this position with Jessen's argument at trial and before us that he *had* sufficiently proved this element, we will address it in the interest of fully answering the issues raised.

First, Jessen asserts that the district court erred in failing to sustain defendants' demurrers and in reversing its position on defendants' demurrers. We understand this as contending that Jessen relied upon the district court's action in this regard and that he was somehow lulled into a false sense of security in his belief that his petition contained all allegations necessary to a cause of action. This argument distorts the office of a demurrer.

Upon demurrer, the petition is to be construed liberally in determining whether it states a cause of action and the demurrer should be overruled if as so construed the petition states a cause of action. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). A motion to dismiss is properly sustained if the nonmoving party has failed to prove his or her prima facie case even when every controverted fact is resolved in his or her favor and when given the benefit of every reasonable inference. See *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994).

[9] In denying defendants' demurrer, the trial court obviously construed the petition liberally and gave Jessen the benefit of the doubt. This did not relieve Jessen of offering evidence at trial to support a prima facie case. Faced with a

motion to dismiss and lack of proof on an essential element of Jessen's prima facie case after he had rested his case in chief, the court had no option but to sustain the motion to dismiss. Jessen's argument, logically extended, is that having liberally construed his petition and saved it from amendment on defendants' initial demurrers, the court was compelled to overrule a motion to dismiss even though proof on a necessary element was lacking. That argument has no merit. A demurrer and a motion to dismiss are two distinct procedures. See *Anderson v. Matthis*, 246 Neb. 215, 518 N.W.2d 94 (1994).

[10] Second, Jessen contends that the district court erred in failing to hold a pretrial conference. We understand this to simply argue that because there was no pretrial, there was no disclosure of issues and he was surprised by the issue of demand at trial. The record indicates that the pretrial conference was scheduled by the court, but waived upon the mutual agreement of counsel for both parties. No subsequent request for a pretrial conference is contained in the record. A party cannot complain of error which the party has invited the court to commit. *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994); *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994).

Third, Jessen argues that defendants sat "by idly, and then, for the first time, [moved] for dismissal at the close of plaintiff's case." This contention hardly justifies comment. Defendants' pleadings consistently maintained that Jessen's petition failed to state a cause of action. Moreover, by demurring ore tenus at the beginning of Jessen's case in chief, they continued to voice that objection. It is true that the answers did not specify in exactly what way the petition was defective in stating a cause of action. Yet there is no indication that Jessen sought such specificity in the pleading, discovery, or pretrial stages of this proceeding. Moreover, at trial, when defendants attempted to explain the basis for their continuing objection, Jessen's counsel objected to such explanation and Jessen's objection was sustained.

Underlying Jessen's arguments is the notion that the trial judge or defense counsel had some duty to ensure that Jessen was aware of the essential elements required to establish his prima facie case. Jessen directs us to no authority to support

such a view. The adversarial nature of our system of justice defies that proposition.

(b) Admissibility and Materiality of New Evidence

In Jessen's motion following the district court's order of dismissal, Jessen submitted no proposed amended petition and offered no proof of what evidence he would expect to adduce if allowed the opportunity to withdraw his rest, amend his petition, and present additional evidence. He points to no such evidence on appeal. Therefore, we have no basis for determining the admissibility or materiality of the new evidence he sought to adduce, nor did the district court. Jessen has abandoned on appeal any suggestion that he suffered special damages such that the nature of his suit was personal rather than derivative. He has never argued that there is evidence that a demand was made to the city itself to prove the suit. Presumably, Jessen would attempt to prove that demand was useless, but the new evidence he proposes in that regard is not before us, nor was it ever before the district court.

(c) Diligence Exercised and Timing of Motion

[11] Jessen did not seek leave to withdraw his rest and to move for leave to amend, upon learning the basis for defendants' motions to dismiss. Instead, Jessen submitted the case to the court on the facts before it, arguing that the facts proved a demand would be useless. It was not until 2 days after the court's adverse judgment that Jessen filed his motion seeking leave to withdraw his rest to amend his petition and present additional evidence. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). Jessen's current position is inconsistent with that which he maintained at trial. Jessen submitted the issue on the facts and pleadings before the court, and only upon an adverse ruling did he seek the opportunity to withdraw his rest, amend his petition, and try again.

[12] "If a trial court feels that there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a

miscarriage of justice, it may properly permit that evidence to be introduced . . . ." 75 Am. Jur. 2d *Trial* § 386 (1991). In overruling Jessen's "Motion to Amend or, in the Alternative, a Motion for New Trial," upon a review of all the evidence, the district court concluded that Jessen failed to prove a prima facie case, not only because of the failure of proof on the "demand" issue, but the court also specifically noted that there was "no evidence of improper conduct" by defendants. Thus, the court obviously concluded that even had Jessen proved the "demand" element of his case, the evidence was insufficient to support a verdict in Jessen's favor. There was no "serious danger of a miscarriage of justice" requiring the reopening of the case to allow admission of additional evidence on the demand issue.

(d) Unfair Surprise and Prejudice to Opponent

We presume that defendants were prepared to meet the demand issue in their case in chief. However, having nothing before us to indicate precisely the type of evidence Jessen would have introduced had he been allowed to reopen his case, we are unable to determine whether that evidence would have unfairly surprised or prejudiced defendants. Jessen sought the reopening of his case. It was his burden to advise the court of what he wanted to offer.

Considering all the factors enunciated and examined above, the district court did not abuse its discretion in denying Jessen's request to withdraw his rest after judgment had been rendered. See *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989).

3. MOTION FOR NEW TRIAL

[13,14] Although Jessen has not assigned the denial of his motion for new trial as an error on this appeal, we observe that if an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously prejudicial nor an abuse of discretion. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594

(1994); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). Based upon our above discussion of the issues raised by Jessen's motion for new trial, we conclude that the district court did not abuse its discretion in denying Jessen's motion for a new trial.

## V. CONCLUSION

Because Jessen failed to offer proof on an essential element of his cause of action, the district court properly sustained defendants' motion to dismiss. We find no abuse of discretion in the district court's denial of Jessen's request to withdraw his rest to amend his petition and adduce further evidence or in the denial of his motion for a new trial. The judgment of the district court is affirmed in all respects.

AFFIRMED.

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## PATRICIA MARIE ROBBINS, APPELLEE, V. CRAIG MITCHELL ROBBINS, APPELLANT.

536 N.W.2d 77

Filed August 22, 1995. No. A-94-194.

1. **Modification of Decree: Appeal and Error.** Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning the modification.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Appeal and Error.** Where the evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Support: Rules of the Supreme Court.** Paragraph D of the Nebraska Child Support Guidelines defines "total monthly income" as income of both parties derived from all sources.
5. **Child Support.** Findings regarding an employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control.

6. **Modification of Decree.** A change of circumstances not within the *reasonable* contemplation of the parties at the time of the decree may be the basis for modification of a decree.
7. **Modification of Decree: Child Support.** A child support order may be modified prospectively from the time of the modification order itself.
8. **Divorce: Child Support.** When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments.
9. **Modification of Decree: Child Support.** In certain circumstances, depending upon the equities involved, a child support order may be modified retroactive to the filing date of the application for modification.
10. **Modification of Decree: Property Division.** Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.
11. **Property Division.** The trial court has an affirmative duty to scrutinize the transaction and see to it that no unconscionable advantage is taken through fraud or intimidation, or even by reason of ignorance, passion, or improvidence.
12. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** In the absence of a final judgment or final order in the court from which an appeal is taken, an appellate court acquires no jurisdiction.
13. **Judgments: Final Orders: Words and Phrases.** A final judgment or order determines a substantial right of a party to an action.
14. **Contempt.** A civil contempt order is intended to compel a party to do some act for the benefit of another party to the action.
15. _____. When a coercive sanction is imposed, the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance.
16. **Contempt: Final Orders.** An order imposing a coercive sanction in a civil contempt proceeding is not a final order because the coercive order is always subject to modification by the contemner's conduct.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Jeffrey L. Hansen, of Simmons, Olsen, Ediger & Selzer, P.C., for appellant.

James L. Zimmerman, of Sorensen & Zimmerman, and, on brief, G. Kirk Meade, of Nichols, Douglas, Kelly and Meade, P.C., for appellee.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

Craig Mitchell Robbins appeals from an order of the district court for Scotts Bluff County which modified the decree dissolving his marriage to Patricia Marie Robbins by reducing his child-support obligation and by requiring him to pay a portion of child-care expenses. The district court declined to modify a property settlement agreement and to retroactively apply the reduced amount of child support. The district court also found Craig in willful contempt for failing to maintain health insurance for his children. For the following reasons, we affirm.

## FACTUAL BACKGROUND

The marriage of Craig and Patricia was dissolved on June 8, 1992. Prior to the hearing, the parties entered into a "Property Settlement and Custody Agreement" (Agreement) on May 27, 1992, regarding various matters, including child custody, child support, division of property, and debt allocation. Craig was not represented by legal counsel in the divorce action. The court approved the Agreement and, pursuant to it, awarded custody of the parties' two minor children, Melissa Brooke, born August 9, 1984, and Christopher Anthony, born October 4, 1987, to Patricia and ordered Craig to pay $850 per month total child support. Craig was also ordered to maintain health insurance for the children and to pay all uncovered medical, dental, and vision care expenses, including deductibles. In accordance with their Agreement, the court awarded Craig sole interest in the parties' Domino's Pizza business, subject to any and all encumbrances. In lieu of an interest in the business, Patricia was awarded a money judgment in the amount of $20,000. Additional personal property and marital debts were allocated between the parties pursuant to their Agreement and are not at issue on this appeal.

Craig filed an application for modification of decree on April 8, 1993, and amended the application on September 14. Craig sought, in relevant part, a reduction in child support, due to a substantial reduction in his income, and a modification of the decree's award to Patricia of a $20,000 money judgment because tax liability incurred on the sale of the pizza business

had reduced the net property awarded to him.

In response to the original application for modification, Patricia alleged that Craig's reduction in income was the result of "voluntary impoverishment" and that Craig had failed to pay the children's medical expenses. In addition, Patricia sought to modify the decree to award her child-care expenses. Patricia's demurrer to that portion of the amended application regarding modification of the property agreement was overruled by the court.

The record reflects that an "Amended Motion for Citation of Contempt" was filed on December 17, 1993, alleging that Craig failed to pay federal and/or state income taxes for 1991 and 1992, resulting in the seizure of Patricia's $588 income tax refund in June 1993, and that Craig failed to pay certain medical expenses for the children.

At the hearing held January 20, 1994, Patricia conceded that there had been a material change in circumstances with regard to Craig's income, requiring a reduction in his child support obligation. The parties' testimony indicates that Patricia's gross income is $1,800 per month and Craig's is $350 per week. Craig testified that he also receives free food and beverages from his current place of employment at any time, such that his "food bill [is] almost nonexistent."

In his order, the trial judge attributed monthly income to Craig of $150, representing the value of the food and beverage items he receives from his place of employment. Based on net monthly income figures of $1,462 and $997 for Patricia and Craig, respectively, the trial court determined that Patricia's child support contribution is 59 percent, or $418 per month, and Craig's is 41 percent, or $288 per month. Accordingly, the trial court reduced Craig's child support obligation to $288, but denied his request for retroactive relief. The calculations themselves are not contested on appeal. The court also ordered Craig to contribute 41 percent of the child-care expenses, currently $144 per month. The court declined to modify the $20,000 money judgment awarded to Patricia in the property settlement agreement.

At the hearing, Craig testified that he had paid all but one of the children's medical bills in full a few days before trial.

However, evidence adduced at the hearing reflected that health insurance coverage for the children had lapsed on September 13, 1993. Craig admitted that he had not paid the premium for several months, but was unaware that the policy had actually lapsed. The district court found Craig in willful contempt for failing to maintain health insurance coverage for the children, but allowed him to purge himself by immediate reinstatement of the coverage.

## ASSIGNMENTS OF ERROR

Craig alleges the district court erred in (1) attributing additional monthly income to him of $150, representing food and beverage items he receives from his place of employment; (2) modifying the dissolution decree to require him to pay 41 percent of the child-care expenses; (3) failing to apply the reduced child support obligation retroactively to the date of filing; (4) failing to modify the property settlement; and (5) finding him in willful contempt for failing to provide health insurance for the minor children.

## STANDARD OF REVIEW

[1,2] Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning the modification. *Schmale v. Schmale*, 240 Neb. 499, 482 N.W.2d 268 (1992). 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. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

[3] Where the evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Sabatka, supra*; *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

## ANALYSIS

*Attribution of Additional Income.*

Craig argues that the trial court erred in attributing to him monthly income of $150 representing the food and beverage items he receives from his place of employment. In response to a question from his attorney regarding bonuses he receives from his employment, Craig testified that he does not receive cash, but he does receive food and beverages. On cross-examination, Craig testified that he receives free food while at his place of employment and also is able to bring food home, but does not keep track of the amount. Although he was unable to state the amount of food he receives from his place of employment, he did testify that he takes food home "[a]ll the time," that he feeds both himself and his girl friend with food from his place of employment, that he was "actually getting [his] girlfriend sick of Italian food," and that his "food bill [is] almost nonexistent."

[4,5] The Nebraska Child Support Guidelines clearly define "total monthly income" as "income of both parties derived from all sources." Paragraph D. However, Nebraska law is equally clear that findings regarding an employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control. *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991).

Craig argues that the meal benefit he receives is comparable to such employee benefits as health insurance or a company car. He contends that these benefits are "not assigned a value and included as income to the child support obligor for purposes of calculating child support." Brief for appellant at 13. However, he provides no authority for this assertion. We observe that the guidelines allow a specific deduction for insurance in determining net income, and therefore, it is reasonable to conclude that the value of employer-provided insurance would not be attributed as income. However, we find no authority to suggest that the value of an automobile, or as in this case, food and beverage items, provided by an employer would not be an appropriate consideration in determining net income or in otherwise deviating from the guidelines in calculating child

support.

Although we find it troublesome that there was no testimony as to the precise value of the food and beverage items Craig received from his place of employment each month, the amount attributed to his monthly income is minuscule in light of his testimony that his monthly food budget is all but supplanted by the meals he receives from his place of employment. We find no abuse of discretion in the trial court's attribution of $150 in monthly income to Craig for purposes of calculating child support.

*Child-Care Expenses.*

Craig next argues that the trial court erred in requiring him to pay 41 percent of the child-care expenses, as the Agreement the parties entered into was silent on that issue, despite the fact that such expenses were contemplated at the time of the decree.

[6] Patricia testified that at the time of the divorce she was a full-time student, was intending to continue her education, and did not require child-care services. While she was in school, her mother lived with them and cared for the children. However, on cross-examination, Patricia testified that at the time of the divorce, she had a feeling that she would incur some child-care costs "down the road." Some months after the divorce, Patricia obtained full-time employment and now incurs $350 per month in child-care expenses for the two children. While we recognize that Patricia may have contemplated that she would incur child-care expenses at some point in the future, many items within the realm of contemplation at the time of dissolution remain uncertain or speculative. Such changes are not *reasonably* contemplated and are not appropriately considered until actual occurrence. A change of circumstances not within the *reasonable* contemplation of the parties at the time of the decree may be the basis for modification of a decree. See *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983). That Patricia anticipated child-care costs at some time in the future when the decree was entered does not prohibit the award of such expenses under these circumstances. Under the guidelines, child-care expenses, while often considered along with child support in calculating the overall support obligation, see *Hamm v.*

*Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988), "are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines," Nebraska Child Support Guidelines, paragraph N. The district court found that Craig's income represented 41 percent of the parties' total income and based upon that figure ordered Craig to contribute 41 percent of the child-care expenses, currently $144 per month. We find no abuse of discretion in the district court's award.

*Retroactivity of Child Support Obligation.*

Craig also contends the district court erred in failing to apply the decrease in the amount of child support retroactively to the date of filing his application for modification. In the initial decree, Craig was ordered to pay $850 per month for the support of his children. After the modification hearing, the court reduced Craig's child support obligation to $288 per month. This amount is not in dispute on this appeal.

[7-9] The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments. *Id.* The *Maddux* court, although rejecting retroactive modification under the circumstances of that case where the father entered court with "unclean hands," recognized that in certain circumstances, depending upon the equities involved, the Nebraska Supreme Court has approved modification of a child support order retroactive to the filing date of the application for modification. See *Maddux, supra* (citing *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962) (accrued child support payments after date of filing canceled where mother deliberately removed children from state for purpose of keeping them away from father); *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Williams v. Williams*, 206 Neb. 630,

294 N.W.2d 357 (1980) (doctrine of equitable estoppel held applicable to defeat claims for accrued child support payments where natural father reasonably believes that adoption of child has been completed); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991) (credit allowed for amounts due for support of a child for a period of time in which the child resided with the noncustodial parent); and *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990) (respondent credited for monthly payments made directly to the custodial parent by respondent's parents)). See, also, *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993) (Supreme Court held no abuse of discretion by district court in ordering father to pay child support retroactive to date of filing). However, we observe that in none of the above-cited cases did the Supreme Court reverse the district court's decision to deny retroactive modification. Nor have we found any cases factually similar in that a noncustodial parent is seeking to recover a "refund" on support amounts already paid.

Craig has remained current on his child support obligation, despite the substantial reduction in his income. He has not kept current on the children's medical bills and has allowed their health insurance coverage to lapse, but it would seem those transgressions, although serious, are slight given the dramatic decrease in his income. At the same time, Patricia has done nothing to prevent Craig's visitation with the children, has demonstrated no bad faith in the parties' interactions, and has not unnecessarily delayed the modification proceedings.

No specific explanation was provided by the district court in denying Craig's request to reduce his child support obligation retroactively. Perhaps the court found that Craig's "hands" were not entirely "clean" due to his failure to remain current on the medical bills and maintain health insurance for the children. Perhaps the court placed significance on the fact that Patricia has not acted in bad faith and that a credit against future support would be unduly burdensome. Perhaps the court questioned the involuntariness of Craig's significant reduction in income. While the district court may have had the authority to reduce Craig's child support obligation retroactively and while this court might have fashioned a different result on the

issue if presented with it initially, that is not the standard of our review. As we have previously stated, our review concerning modification of a decree is to determine whether the trial court abused its discretion concerning the modifications, i.e., whether the district court's decision is untenable and unfairly deprives a litigant of a substantial right or a just result. See, *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff, supra*. Given the Supreme Court's teachings on the latitude to be afforded a district court's discretion, see *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994), and *Eberspacher v. Hulme*, 248 Neb. 202, 533 N.W.2d 103 (1995), we cannot say that the district court abused its discretion under the circumstances of this case, and therefore, we decline to reverse on this issue.

*Property Settlement.*

Craig seeks to modify the $20,000 money judgment awarded to Patricia. This amount, pursuant to the terms of the Agreement, was to be paid in lieu of her interest in the Domino's Pizza business. Craig argues that the amount of the money judgment should be reduced because he claims a $37,000 tax liability relating to the sale of the business was not contemplated at the time of the decree and substantially affects the amount of proceeds from the sale. Craig contends that considering this tax liability, Patricia's 50-percent share of the proceeds should have been only $4,000. The district court declined to modify the property settlement.

The parties purchased the Domino's Pizza business in January 1990 for $28,000. Craig operated the business as a sole proprietorship. Patricia did not work for the business and had essentially no knowledge regarding its operations. The specific terms of the sale and the assets and debits of the business were never discussed with Patricia's attorney, and Craig failed to respond to interrogatories containing such questions. The only recommendation made by Patricia's attorney on this issue was to split the proceeds from the sale equally. Craig testified that he and Patricia determined her share of the proceeds to be $20,000 after discussing the sale price of the business and estimating the debt owed by the business. Patricia testified that Craig simply

told her that $20,000 "would be half." The $20,000 amount of the money judgment was presented to Patricia's attorney as the amount the parties believed to be a fair division of the proceeds, and it was thereafter incorporated into their Agreement.

The decree was entered on June 8, 1992. The business was sold on July 1 for $115,000. Craig paid Patricia the $20,000 judgment from the proceeds. Craig testified that the debts of the business totaled $50,000. Therefore, the record suggests that Craig received a pretax net of $45,000 from the sale of the business, despite his testimony that he only received $27,000.

Craig claims that at the time the amount of the money judgment was determined, he was not aware of the substantial tax consequences related to the sale of the business, and maintains that he first learned of the tax liability in late 1992 or early 1993. However, the testimony reflects that during the relevant period of time in which the settlement negotiations and divorce proceedings were held, Craig regularly saw his accountant, according to his own testimony, two to three times a week. The accountant, Dana Weber, prepared Craig's tax returns and also performed monthly bookkeeping and payroll duties for the business. Weber admitted that he knew Craig was selling the business, and Weber was certain that at some point he discussed with Craig the capital gains consequences relating to the sale, but could not recall if that discussion was before or after the sale of the business. Craig testified that he did not "recall" discussing the sale of the business and its tax consequences during the time in which the divorce was pending.

Weber testified that the total tax liability specifically relating to the sale of the business was $34,010, $27,572 of which consisted of federal taxes and $6,438 of which was state taxes. Weber further testified that the precise dollar amount of Craig's tax liability was not discussed until approximately April 1993 and that discussions prior to that time were general in nature.

[10,11] Craig contends that the money judgment should be modified because Patricia obtained an unconscionable advantage due to his ignorance concerning the tax consequences of the sale of the business. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court

and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988); *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975). Here, Craig was not formally represented by counsel at the time of the execution of the property settlement agreement or its approval by the district court. Particularly under those circumstances, the trial court has an affirmative duty to scrutinize the transaction and see to it that " 'no unconscionable advantage is taken through fraud or intimidation, or even by reason of ignorance, passion or improvidence.' " *Pittman v. Pittman*, 148 Neb. 864, 872, 29 N.W.2d 790, 795 (1947).

Craig asserts that the Agreement does not address the issue of tax liability related to the sale of the business because it was not contemplated by either party at the time the Agreement was entered. In *Pascale, supra*, the Supreme Court reversed the district court's modification of a property settlement agreement. In that case, the husband and wife entered into a property settlement agreement and divided certain shares of stock. Pursuant to the terms of the agreement, the parties would file joint income tax returns, and the husband would be solely entitled to any tax refund and obligated for any tax liability. The dispute arose when the wife immediately sold her shares of stock, thereby increasing the parties' tax liabilities in the sum of $26,672, all of which the husband was obligated to pay under the terms of the agreement. The husband filed an application to modify the decree outside the 6-month waiting period, and the district court ordered the wife to pay the husband $7,974.50 toward the additional tax resulting from the sale of the stock. In reversing the district court's order, the Supreme Court recognized that modification of the original decree required a change in circumstances that was "not within the reasonable contemplation of the parties." *Id.* at 50, 424 N.W.2d at 891 (citing *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983)). The Supreme Court found there had been no such change in circumstances because the husband knew the tax consequences generally relating to the financial dealings of

the parties, the agreement allowed a certain amount of money to be used for tax liability, and the husband regularly prepared the parties' income tax returns. The court observed that the husband "could have insisted in the agreement that the shares not be sold during the year in which he voluntarily assumed the tax obligations of the parties." *Pascale*, 229 Neb. at 51, 424 N.W.2d at 891. Finding that the sale of the stock was within the reasonable contemplation of the parties, that there was no fraud on the part of the wife, and that the ultimate result was not grossly inequitable, the Supreme Court reversed the district court's judgment and ordered that the husband was solely responsible for the tax consequences. See, also, *Klabunde, supra* (Supreme Court found no abuse of discretion in district court's refusal to vacate decree within 6-month waiting period where property division was approximately equal).

Similarly, in the present action, while the Agreement does not specifically mention tax liability, it does provide that Craig received the business "subject to any and all encumbrances." Moreover, Craig is the party with intimate knowledge of the business operations, and he is the one who was in regular contact with the accountant. The sale had been discussed and contemplated by Craig for about a year before it actually occurred. The Agreement did not require Craig to sell the business. While the trial court made no specific findings in this regard, we cannot say it was an abuse of discretion to conclude that the tax aspects of the sale of the business were reasonably contemplated at the time of the agreement.

Craig relies on *Pittman, supra*, to argue that the money judgment should be modified because the tax consequences were not considered due to his ignorance and his failure to seek the advice of counsel or an accountant. In *Pittman*, the Supreme Court found that the district court abused its discretion in failing to vacate the property settlement agreement where the wife had obtained an unconscionable advantage due to the husband's ignorance. In that case, as here, the husband was not represented by counsel. However, in *Pittman*, the motion to vacate was filed within the 6-month waiting period, and the record was clear that the wife had received substantially all the property plus $50 per month in alimony from the

husband's $200-per-month salary, some parts of which settlement were induced by the urging of the wife's attorney, contrary to the husband's desires.

While, under *Pittman*, we must consider the fact that Craig was not formally represented by counsel during the divorce proceedings, that does not mean that the Agreement is automatically invalid. We simply must carefully scrutinize the transaction to see that " 'no unconscionable advantage [wa]s taken through fraud or intimidation, or even by reason of ignorance, passion or improvidence.' " *Pittman*, 148 Neb. at 872, 29 N.W.2d at 795. Craig has completed his high school education and approximately 1½ years of college. He owned his own business for approximately 2½ years. Although Craig testified that he has never been required to pay a capital gains tax before, the district court was not required to accept that a person of Craig's education and business acumen was entirely ignorant of the fact that tax implications might accrue upon selling an asset for $87,000 more than he paid for it. Neither are we.

There is absolutely no evidence of fraud on the part of Patricia or her attorney, and Craig does not contend otherwise. Moreover, upon our review of the record, we find no evidence that Patricia or her attorney took any unconscionable advantage of Craig. To the contrary, if we accept Craig's testimony of total ignorance of tax consequences, he is the one who *attempted* an unfair advantage over Patricia. The evidence is sufficient to conclude that without consideration of taxes, the sale netted proceeds of $65,000 ($115,000 less $50,000). Patricia agreed, at Craig's behest, to accept only $20,000, leaving Craig with $45,000, certainly not the equal "split" that Patricia's attorney recommended. The bottom line is that had the tax liability been taken into account, half of the posttax proceeds would have been $15,500 (($65,000 less $34,000) divided by 2), not the $4,000 asserted by Craig.

We cannot say that the ultimate result in this case was grossly inequitable. The district court did not abuse its discretion in refusing to modify the money judgment portion of the property settlement.

*Willful Contempt.*

Patricia filed an "Amended Motion for Citation of Contempt" on December 17, 1993, based upon Craig's failure to reimburse her for an income tax refund withheld by the IRS and his failure to pay certain medical expenses for the children. With regard to Craig's failure to pay medical expenses, Patricia's motion specifically alleges that

> pursuant to the Decree, [Craig] was obligated to pay all medical expenses for the minor children and to maintain health coverage for the children. That [Patricia] has sustained significant medical expenses for the minor children, that the billings for all such expenses have been presented to Respondent but that [Craig] has either failed to submit such changes to his insurance company, or in the event that he no longer maintains such insurance or such charges are not covered by insurance, [Craig] has failed and refused to pay such charges.

In its order filed January 25, 1994, the district court found Craig "guilty of willful contempt for failure to maintain health insurance coverage on the minor children. [Craig] may purge himself by immediate reinstatement of health insurance coverage on the minor children."

Craig argues the district court erred in finding him in contempt of court because the "amended" motion was filed without an original motion, no affidavit was filed with the motion, and he never received a copy of the pleadings or the affidavit. He also contends that the bases specifically asserted in the motion did not concern his failure to maintain insurance on the children, and thus, it was an improper basis for the contempt order.

As to the procedural grounds for Craig's contentions, we observe, first, that no objections were made at or before the hearing to the filing of the "amended" motion, the lack of an affidavit, or his failure to receive a copy of the pleadings. Rather, Craig appeared generally, and not specially, at the court hearing with counsel, and no objections to any of these "problems" were made. The motion contains a certificate of service indicating that Craig's counsel received a copy of the motion. That certificate is not challenged. As to Craig's

contention that the language of the motion was inadequate to forewarn him that failure to maintain health insurance on the children would be part and parcel of the issues in the contempt proceeding, we simply refer the reader back to the quoted portion above and conclude that such argument strains credibility.

[12-16] More importantly, in the absence of a final judgment or final order in the court from which an appeal is taken, an appellate court acquires no jurisdiction. *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992). A final judgment or order determines a substantial right of a party to an action. *Dunning, supra*. A civil contempt order is intended to compel a party to do some act for the benefit of another party to the action. *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). "When a coercive sanction is imposed, 'the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance.' " *Maddux v. Maddux*, 239 Neb. 239, 241, 475 N.W.2d 524, 528 (1991) (quoting *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984)). An order imposing a coercive sanction in a civil contempt proceeding is not a final order because the coercive order is "always subject to modification by the contemner's conduct." *In re Contempt of Liles*, 216 Neb. at 534, 344 N.W.2d at 628.

The district court's order places Craig in a position to mitigate any penalty by reinstating health insurance for his children. As such, Craig "holds the keys to his jail cell." See *Maddux, supra*. This court, therefore, lacks jurisdiction to review the civil contempt order.

## CONCLUSION

We have reviewed the record de novo and find no abuse of discretion in the decision of the district court. We therefore affirm its order in all respects.

AFFIRMED.

# GLENN G. PAYNE, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

536 N.W.2d 656

Filed August 29, 1995. No. A-93-819.

1. **Jurisdiction: Appeal and Error.** An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
2. _____: _____. It is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
3. _____: _____. When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to hear the merits of the claim.
4. **Administrative Law: Pleadings: Service of Process: Time: Appeal and Error.** There are three requirements under Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994) when a petitioner appeals from a nonparty agency action: (1) filing of a petition in the district court of the county where the action is taken within 30 days after service of the final decision of the agency, (2) service of summons on all parties of record within 30 days after the filing of the petition, and (3) service of a copy of the petition and a request for preparation of the official record upon a nonparty agency which performed as a neutral factfinding body within 30 days of filing the petition.

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

Thom K. Cope, of Bailey, Polsky, Cope, Knapp & Nelson, for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol for appellee.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

Glenn G. Payne appeals from the district court's dismissal of his petition for review, in which he sought a reversal of the Nebraska Equal Opportunity Commission's order denying his claim of discrimination in violation of the Nebraska Fair Employment Practice Act. Payne claimed that the Nebraska Department of Correctional Services discriminated against him on the basis of his race and disability while he was employed by the department. Because the district court did not have

jurisdiction over Payne's appeal, we dismiss Payne's appeal before this court.

## STATEMENT OF FACTS

Glenn G. Payne, a black male, applied for a job as a corrections officer with the Nebraska Department of Correctional Services (DCS) in 1981. At the time of his application, he informed DCS that he had a 20-percent knee disability from his service in the military, which limited his ability to kneel for an extended period of time. Payne was hired by DCS and was promoted to corporal in 1983. During his employment, Payne held numerous positions, including officer in a housing unit, which required him to have prisoner contact when going to and returning from work. In addition, Payne was employed as a relief officer in the master control center, a position which required no inmate contact; as a relief officer at the front entrance, which required limited contact with prisoners accompanied by other corrections officers; and in the towers, which required the guard to climb two sets of stairs and serve an 8-hour shift before coming down.

During his employment, Payne had injured his knee several times and was allowed to work on crutches. During Payne's recovery from the knee injuries, DCS placed him in positions in which his disability was accommodated. In 1988, Payne was hit in the back while breaking up a fight in the prison's gymnasium. As a result of the incident, Payne was off work for a period of time and received a 17-percent permanent partial disability rating from his doctor. Payne filed a claim for workers' compensation benefits and received from the State a lump-sum settlement of $20,000. Payne was released back to work by his doctor in January 1990, with restrictions. On approximately January 29, 1990, DCS sent Payne a letter of termination, informing him that there was not a corrections officer position available to an individual with his limitations. Payne filed a discrimination complaint against DCS with the Nebraska Equal Opportunity Commission (NEOC), claiming that other DCS employees with disabilities who were not black were accommodated by DCS, and therefore, Payne had been discriminated against on the basis of his race and his disability.

After the parties submitted evidence and testimony to an NEOC hearing officer, the officer recommended to the NEOC that Payne's claim be denied. At a meeting in Omaha on October 16, 1992, the NEOC issued an order denying Payne's claim. The final order was served by mail upon Payne's counsel on October 21. Payne filed a petition for review in the district court for Douglas County on November 23. In addition, Payne served a copy of the summons and the petition on the NEOC, the Attorney General's office, and DCS on November 24. Payne served a request to prepare the official record of his case upon the NEOC on January 25, 1993.

Upon holding a hearing on Payne's petition for review, the district court ordered Payne's petition dismissed with prejudice. Payne appeals the district court's order.

## ASSIGNMENTS OF ERROR

Payne alleges the district court erred when it found (1) that Payne was not qualified to hold the position of corrections officer and therefore could not show he was discriminated against and (2) that the Workers' Compensation Act precluded recovery under the Nebraska Fair Employment Practice Act.

## STANDARD OF REVIEW

[1-3] An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). It is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994). When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to hear the merits of the claim. *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993).

## ANALYSIS

Appeals from the NEOC are had under the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992). Persons aggrieved by a final decision of an agency in a contested case are entitled to judicial review in the

district court under § 84-917. Subsection (2)(a) of that statute provides in part that

> [p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action. If the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of the petition.

DCS argues that because Payne failed to file a request for preparation of the official record upon the NEOC within 30 days of filing the petition, the district court did not gain jurisdiction over the case, and therefore, this court has no jurisdiction.

The provision in § 84-917(2)(a) that requires a petitioner to serve a summons upon the parties of record within 30 days of filing the petition has been held by this court to be mandatory to confer jurisdiction on the district court. *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993). We believe that a timely filing of a request for the preparation of the official record is similarly a jurisdictional requirement.

We are aware that the Nebraska Supreme Court in *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), held that the preparation and *filing* of the transcript by the agency within the statutory timeframe were not jurisdictional requirements. In *Maurer*, the court addressed the requirements of § 84-917 (Reissue 1981). Subsection (2) of § 84-917 at that time provided that to obtain a review of the agency's final decision, an aggrieved party had to file a petition in the district court of the county where the action is taken within 30 days after service of the final decision and that "[a]ll parties of record shall be made

parties to the proceedings for review. . . . [A] copy of the petition shall be served upon any such agency together with the summons." Unlike the form of § 84-917 currently in force, the statute addressed in *Maurer* did not require a party to serve a request upon an agency to prepare a transcript under any circumstances. Therefore, that requirement was not in issue.

The provision regarding the *filing* of the prepared transcript or record by the agency found in both the 1981 version of § 84-917 discussed in *Maurer* and the current version is in subsection (4), a separate subsection from subsection (2), which instructs a petitioner how to perfect his or her appeal. Currently, subsection (4) requires an agency to prepare and transmit to the court a certified copy of the official record of the proceedings had before the agency within 30 days after service of the petition or within such further time as the court for good cause shown may allow.

The *Maurer* court noted that in contrast to the petition in error statute which imposes the burden upon the plaintiff in error to file the transcript, § 84-917(4) required the agency to file the transcript. Furthermore, as the court noted in *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987), because the statute allows the filing deadline to be extended for good cause, "[t]he idea of a possible extension of a filing time militates against such a time's being jurisdictional." *Id.* at 762, 415 N.W.2d at 123. The language from the current version of § 84-917(2)(a) regarding appeals from party agencies and nonparty agencies is mandatory and requires the petitioner to take certain steps within fixed time periods. There is no provision, like that in subsection (4), which allows for an extension of time for good cause.

We conclude that because the requirement that a copy of the petition and a request for preparation of the official record must be served upon a nonparty agency within 30 days of filing the petition is found among the other requirements in § 84-917(2)(a) which a petitioner must meet for the district court to obtain jurisdiction, the serving of the request for preparation of the record becomes akin to the requirements of the current petition-in-error statute, Neb. Rev. Stat. § 25-1905 (Cum. Supp. 1994), which states in part: "The plaintiff in error

shall file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings."

The Nebraska Supreme Court has repeatedly held that the provisions in § 25-1905 must be followed to confer jurisdiction on the district court. *Transcon Lines, Inc. v. O'Neal*, 230 Neb. 31, 429 N.W.2d 718 (1988); *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960). Prior to 1991, § 25-1905 required the petitioner to file the transcript of the lower tribunal's proceedings with the petition in district court. The Legislature amended § 25-1905 in 1991 to allow a petitioner the alternative of filing a praecipe with the petition, requesting that a transcript be prepared. However, the Legislature did not change the statutory requirement that a petitioner must file either a praecipe or a transcript along with his petition, nor did it otherwise change the statute to indicate dissatisfaction with the Supreme Court's interpretation that the filings were jurisdictional.

[4] The holding in *James v. Harvey*, 246 Neb. 329, 332, 518 N.W.2d 150, 152 (1994), which states that "[t]he filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act," is not dispositive of the issue before us. In *James*, the court addressed an appeal from a *party agency*. In such a case, § 84-917(2)(a) does not require a petitioner to serve a request for preparation of the official record of the agency. However, in the case at hand, the appeal is from an action taken by a *nonparty agency*. There are three requirements under § 84-917(2)(a) when a petitioner appeals from a nonparty agency action: (1) filing of a petition in the district court of the county where the action is taken within 30 days after service of the final decision of the agency, (2) service of summons on all parties of record within 30 days after the

filing of the petition, and (3) service of a copy of the petition and a request for preparation of the official record upon a nonparty agency which performed as a neutral factfinding body within 30 days of filing the petition.

While Payne filed a petition in district court within 30 days after service of the final order of the NEOC and served the parties of record and the NEOC with a summons within 30 days of filing the petition, Payne did not serve a request for preparation of the official record from the proceedings before the NEOC within 30 days of filing the petition. Instead, the request was served more than 60 days after filing the petition. Because we find that the serving of a copy of the petition and a request for preparation of the official record upon the nonparty agency whose action the petitioner is appealing is jurisdictional, the district court did not gain jurisdiction over Payne's appeal from the NEOC's final order, and therefore, this court cannot have jurisdiction over Payne's appeal. See *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993). Payne's appeal is therefore dismissed.

APPEAL DISMISSED.

SIEVERS, Chief Judge, dissenting.

I must respectfully disagree with the conclusion of my colleagues that there is a third jurisdictional requirement under the Administrative Procedure Act when a case is appealed to the district court. In addition to the two requirements for perfection of jurisdiction set forth in Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994), i.e., the filing of the petition in the district court within 30 days and service of summons within 30 days of the filing of the petition, my colleagues have found that the service of "a request for preparation of the official record upon the agency within thirty days of the filing of the petition" is also a jurisdictional requirement.

In the case at hand, Payne filed his request for preparation of the record before the NEOC more than 60 days after the timely filing of his petition. The majority distinguishes *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), on the ground that the form of § 84-917(2) then in effect did not require a party to serve a request upon the agency to prepare a transcript. That may be true; however, the version of § 84-917(2)(a) and (4)

which my colleagues construe was in effect on July 8, 1994, when the Supreme Court decided *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994). The Supreme Court there said: "The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992)." 246 Neb. at 332, 518 N.W.2d at 152. Referencing *Maurer v. Weaver, supra*, the court in *James* also said: "Our holding that the filing of the transcript is not jurisdictional still applies . . . ." 246 Neb. at 332, 518 N.W.2d at 153. I would hold that consequently, the filing of the request for preparation of the record is also not jurisdictional.

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ZICKIE Z. MALOLEY, APPELLANT, V. THE CITY OF LEXINGTON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

536 N.W.2d 916

Filed August 29, 1995. No. A-94-611.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. _____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Actions: Governmental Subdivisions: Property.** An inverse condemnation action is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
5. **Constitutional Law: Easements.** The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street and the owner cannot be deprived of such right without due process of law and compensation for loss.

6. **Constitutional Law: Property: Streets and Sidewalks.** The measure of the right of the owner of property abutting a street to access to and from the property by way of the street is reasonable ingress and egress under all the circumstances.
7. **Constitutional Law: Easements: Streets and Sidewalks.** Not only does the owner of property abutting a street possess the right to the use of the street along with other members of the general public, the owner also possesses a private right or easement for the purpose of ingress and egress to and from his property which is a special right not shared with the general public.
8. **Eminent Domain.** The trier of fact determines whether the access to the abutting owner's property remaining after the taking is reasonable under all the circumstances.
9. **Eminent Domain: Damages: Valuation.** If the trier of fact finds that the means of ingress and egress has been substantially impaired and that access to the property was not reasonable under all the circumstances, the loss of access would be used, along with other consequential damages, to determine the value of the remaining land after the taking.
10. _____: _____: _____. Damages as a result of a destruction or interference with ingress and egress to and from a street via abutting property are measured by consideration of diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded.

Earl D. Ahlschwede, of Mayer, Burns & Ahlschwede, for appellant.

Willard C. Weinhold, Lexington City Attorney, for appellee.

SIEVERS, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

Zickie Z. Maloley appeals the district court's order granting summary judgment to the City of Lexington, Nebraska (City). Maloley brought an inverse condemnation action against the City for damages he allegedly suffered as a result of the closing of 8th Street, which abutted his building, during the construction of a new jail facility located on 8th Street across from his building. Maloley filed a motion for partial summary judgment on the issue of liability alone. In response, the City filed a motion for summary judgment. The district court granted the City's motion upon finding that ingress and egress to and from Maloley's property could be had from other routes,

that he had suffered no more than an inconvenience common to the general public, and that he was not entitled to compensation. For the reasons stated below, we reverse and remand.

## STATEMENT OF FACTS

Zickie Z. Maloley is the owner of a commercial building and parking lot on land described as Lots 7, 8, 9, and 10, Block 16, the City of Lexington. The building and its parking lot are located at 8th and Washington Streets on the southwest corner of Block 16. The southeast portion of Block 16 is occupied by an ophthalmologist's business. Washington Street runs north and south; 8th Street runs east and west. The parking lot is accessed from the south through two driveways from 8th Street and from the north via an alley running east and west through Block 16, from Grant Street west to Washington Street. The alley is to the north of both the building and the parking lot. The building faces 8th Street, where prior to August 1991, parallel parking was available along a cut-in curb space. The west side of the building, which has no doors, faces Washington Street, where additional street parking is available. The east side of the building, which has a door, faces the offstreet parking lot.

In August 1991, the City authorized the closing of 8th Street to traffic between Grant and Washington Streets during the construction of a new jail facility adjacent to the Dawson County Courthouse and across the street from Maloley's property. Bill Podraza, the city manager for the City, attested in his affidavit that the street closing was deemed reasonably necessary to protect the public from the hazards of construction activity which would take place within the right-of-way area on the block of 8th Street.

Podraza attested that between August 1991 and August 1993, during working hours for the construction crew, the north half of 8th Street was open for passage of construction vehicles and that except when actually occupied by construction vehicles, there was direct vehicle access from 8th Street to the south side of Maloley's building and to the parking lot east of the building. Podraza also attested that during nonworking

hours, access to the north half of 8th Street was restricted by only a movable barricade and that the public sidewalk between Maloley's building and 8th Street remained unobstructed, providing pedestrian access to the building.

Photographs taken by Maloley over the 2-year period, however, appear to depict obstruction at various times of both the north half of 8th Street and the public sidewalk between Maloley's building and 8th Street. Some photographs show that the entire west end of 8th Street, which, if open, would intersect Washington Street, was blocked by construction barriers. Further, photographs taken on October 9 and November 11, 1991; on February 5 and 19, March 7, September 13, and December 17, 1992; and on February 9 and March 15 and 29, 1993, appear to depict a blockade of a parking lot entrance either by construction barriers or by various construction materials piled in front of the driveway entrance. Maloley stated in his deposition that his access to the east side of the building via the alley was occasionally blocked by cement trucks and that construction vehicles parked in his parking lot, without his permission, during the construction of the jail.

In his deposition, Maloley also stated that he erected the building in 1970 and ran a grocery store business in the building until 1979. In 1979, he sold the business, but not the building. The purchasers remained in the building, leasing the facility from Maloley for $3,500 per month. In 1981, the purchasers declared bankruptcy, and Maloley took possession of the building and the business equipment. Maloley then resold the business, the next purchaser remaining in the building and also paying $3,500 per month in rent until 1989, when he, too, declared bankruptcy. Maloley then repossessed the grocery store fixtures and building a second time. The building has been vacant since 1989.

Maloley testified that from 1989 until 1993 he has attempted to rent or sell the building to about six different parties. Maloley stated that each party balked after examining the property and asked him when 8th Street would be opened. One of the potential lessees talked to Maloley about turning the building into a steakhouse. Maloley stated that his prospective tenants pursued the venture, including the drawing of

architectural plans, but, Maloley testified (without objection), the prospective lessee was told by someone associated with the county jail construction crew that 8th Street would never be reopened. As a result, Maloley stated, the prospective lessee ended negotiations with Maloley because of concerns regarding the closing of 8th Street.

On August 4, 1993, Maloley filed a suit for money damages against the City, alleging that barricades set up during the construction unreasonably hampered ingress and egress to and from the building and that building materials stored on the sidewalk hampered ingress and egress to and from the building. Maloley alleged that as a result of the City's actions, he was hindered and prevented from acquiring a new tenant in the premises and as a result he suffered loss of rental income of $64,538 and that his property had suffered a reduction in market value of $70,000—all as a result of the City's actions which constituted a taking without due process and without payment of just compensation contrary to the Nebraska Constitution.

Maloley filed a motion for partial summary judgment on the issue of liability only, and the City responded with a motion for summary judgment seeking dismissal of Maloley's petition. The City's motion was granted. The district court found that while access to Maloley's building on the 8th Street side was blocked during construction, total access to his property was not impeded as access could be had through the alley, on the Washington Street side, and via the sidewalk immediately in front of the building. The court stated, "The only result of the closing of Eighth Street on the property, was the inconvenience of taking away some parking stalls on Eighth Street in front of the building owned by the Plaintiff. Such inconvenience was one borne by the general public, as well as borne by the Plaintiff." Maloley appeals.

## ASSIGNMENTS OF ERROR

Maloley alleges the district court erred when it (1) determined that the only result of closing 8th Street was the inconvenience of taking away the parking spaces in front of Maloley's building on that street, (2) found that the inconvenience suffered by

Maloley was the same borne by the general public, and (3) found that the City's actions did not result in any compensable damages under Neb. Const. art. I, § 21.

## STANDARD OF REVIEW

[1,2] 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. *LaBenz Trucking v. Snyder*, 246 Neb. 468, 519 N.W.2d 259 (1994). 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. *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

[3] 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. *LaBenz Trucking, supra*.

## ANALYSIS

Upon appeal of the district court's grant of summary judgment to the City, we must view the evidence in a light most favorable to Maloley, and give him the benefit of all reasonable inferences deducible from the evidence. See *LaBenz Trucking, supra*.

The evidence before this court reveals a factual dispute regarding whether entry to Maloley's parking lot was blocked during construction, whether the 8th Street sidewalks which ran past the front of the building were blocked at various times, and to what extent 8th Street was open on the north side during the period of construction. Viewing the evidence in a light most favorable to Maloley, there is evidence that ingress and egress to and from Maloley's parking lot and the building, via the 8th Street sidewalk, were blocked for significant periods of time during construction. Thus, we do not agree with the district court that the evidence shows that the only result of the closing of 8th Street, as it pertained to Maloley's property, was the loss of some parking stalls on 8th Street in front of the building or

with the court's conclusion that Maloley suffered only an inconvenience in common with the general public. 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. *Healy, supra.*

There appears to be no question that ingress and egress to and from Maloley's property were affected when 8th Street was closed. The real question presented to the district court was a legal one of whether the temporary obstructing and closing of 8th Street amounted to a compensable injury under Neb. Const. art. I, § 21.

*"Takings" Clause Under Nebraska Constitution.*

[4] Under Neb. Const. art. I, § 21, no person's property shall be taken or damaged for public use without just compensation. As stated in *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 684, 515 N.W.2d 401, 405 (1994), an inverse condemnation action such as Maloley's is "a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings." The language of Nebraska's constitutional provision prohibits both the *taking* and the *damaging* of property without just compensation. Thus, the language is broader than that of the federal constitutional provision, U.S. Const. amend. V, and recovery under the state provision has been allowed for damages caused by *temporary takings*, as well as permanent takings. *Whitehead Oil Co., supra.*

*Abutting Owner—Ingress and Egress.*

[5-7] The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street and the owner cannot be deprived of such right without due process of law and compensation for loss. *Balog v. State*, 177 Neb. 826, 131 N.W.2d 402 (1964). The measure of the right of the owner of property abutting a street to access to and from the property by way of the street is reasonable ingress and egress under all the circumstances. *Id.* Not only does the owner of property abutting a street possess

the right to the use of the street along with other members of the general public, the owner also possesses a private right or easement for the purpose of ingress and egress to and from his property which is a special right not shared with the general public. *Id.* When an

> "owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor. The damages may be merely nominal or they may be severe. Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount which would be just [compensation] under the circumstances. . . . Other means of access may mitigate damages . . . but does not constitute a defense to the action however. . . ."

(Citations omitted.) *Id.* at 837, 131 N.W.2d at 410.

*Impairment of Access/Question of Fact.*

[8,9] *Balog* confirmed that whether the right of access has been destroyed or substantially impaired is a question of fact which must be determined by the particular facts in each case. The trier of fact determines whether the access to the abutting owner's property remaining after the taking is reasonable under all the circumstances. *W.E.W. Truck Lines, Inc. v. State*, 178 Neb. 218, 132 N.W.2d 782 (1965). If the trier of fact finds that the means of ingress and egress has been substantially impaired and that access to the property was not reasonable under all the circumstances, the loss of access would be used, along with other consequential damages, to determine the value of the remaining land after the taking. *Id.*

In *Balog, supra*, the court found that the construction of a frontage road as a means of access to an arterial roadway, Cornhusker Highway, after the plaintiffs' direct means of ingress and egress to and from the highway had been impaired, may be used to show that the damages the plaintiffs suffered as a result of the loss of the easement to the highway which abutted their property were mitigated. However, the construction of the frontage road did not, as a matter of law, deprive the landowners of their right to damages.

[10] Similarly, in *International Mov. & Stor. v. City of*

*Lincoln*, 226 Neb. 213, 410 N.W.2d 483 (1987), the court recognized the plaintiff's right to recover damages as a result of being deprived of ingress and egress to and from 27th Street as a result of the construction of a viaduct which elevated the street in front of the plaintiff's business and deprived him of direct access to the street. The city of Lincoln constructed a new street to serve as a service road to the plaintiff's business, but the road ran to the back of the building. The front of the building faced a solid concrete wall created by the viaduct. The *International Mov. & Stor.* court found that the plaintiff was not entitled to introduce evidence of reduced traffic flow, because landowners have no vested right to the continued flow of traffic by their property. Instead, the court noted that damages as a result of a destruction or interference with ingress and egress to and from a street via abutting property are measured by consideration of " 'diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement.' " (Emphasis omitted.) *Id.* at 218, 410 N.W.2d at 486 (quoting *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N.W. 582 (1907)).

While the City cites *Rossitto v. City of Omaha*, 199 Neb. 260, 258 N.W.2d 126 (1977); *Kraft & Sons, Inc. v. City of Lincoln*, 182 Neb. 187, 153 N.W.2d 725 (1967); and *Fougeron v. County of Seward*, 174 Neb. 753, 119 N.W.2d 298 (1963), in support of its argument that Maloley is not entitled to recovery, each of the cases is distinguishable, for in each case the property owner seeking compensation did not own land directly abutting the closed street in question and thus did not have the private right or easement of ingress and egress onto the street as recognized in *Balog*. In each case, the street closing caused the landowners and their clients to take more circuitous routes to reach the landowners' property, but the Nebraska Supreme Court found in each case that the landowners suffered no greater inconvenience than that suffered by the general public. See, *Rossitto, supra* (closing of street which ran to and ended at street abutting plaintiff's property only created inconvenience because owner and others entering or leaving property must

take more roundabout way, which was injury suffered by public at large); *Kraft & Sons, Inc., supra* (owner of business which did not abut closed street suffered from restricted travel as result of closing, but inconvenience suffered not different in kind from that sustained by general public); *Fougeron, supra* (owner of land which did not abut intersection of county road and Interstate was not damaged in manner different from public at large by barricading of county road exit onto Interstate). In contrast, in the case at hand, Maloley's land abuts the closed street in question.

The trial court cited *Kraft* for the proposition that even an abutting landowner has no vested interest in the flow of traffic past his premises. That is an accurate statement of Nebraska law. However, Maloley does not complain solely because traffic could not *flow* on 8th Street *past* his building. Rather, his suit seeks damages for an unreasonable impairment of access to his property. See, e.g., *International Mov. & Stor. v. City of Lincoln*, 226 Neb. 213, 410 N.W.2d 483 (1987) (recognizing distinction and allowing recovery for impairment of access and not obstructed flow of traffic).

The City would have us determine, as a matter of law, that Maloley's access was not "unreasonably" impaired because, inter alia, he had access to the building through the alley on the north and the sidewalks on the west and east of the building. However, the evidence conflicts as to what Maloley was deprived of and how the blockage impacted his access. We cannot say that depriving a retail establishment of access to a street is per se reasonable when said establishment's front entrance, parking stalls, and parking lot driveways border that street. If the only remaining access to Maloley's building, or the parking lot which services it, is from an alley behind the building, or from a street located on a side of the building which has no entrance, with the sidewalk between 8th Street and the main entrance piled high with debris and construction materials, it might be inferred by some fact finder that the property suffered more than an "inconvenience" and an injury different in kind from that suffered by the general public.

As further support for the conclusion that access was not unreasonably impaired, the City points to the fact that

Maloley's building was vacant during the street closing and 2 years before the closing and that the City had agreed, shortly after the closing, to reopen the street if the building became occupied. We believe those facts are relevant to the issue of damages and mitigation, but are not determinative of whether access was or was not unreasonably impaired. Although the City's offer to reopen is not in dispute, Maloley testified that he had asked the City to reopen the street on various occasions, presumably without success. As to the vacancy of the building, it is of obvious import to this case. It would be silly to suggest otherwise. As an illustration, we believe it is safe to assume that an owner of a thriving fast food hamburger chain establishment that had its access impaired, as did Maloley, would be able to prove greater damage than could one whose access to an empty lot was similarly impaired. Yet, damages for interference with ingress and egress to and from a street from abutting property are generally measured by considerations of market value loss. See *International Mov. & Stor., supra*. Diminution of business is one factor in determining that measure, not an independent item of damage. Similarly, the lack of business taking place on Maloley's property before or during the alleged impairment of access is a factor in determining damages, but not conclusive on the issue. However, see *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), holding that in the case of temporary *regulatory* takings, the loss takes the form of an injury to the property's *potential* for providing income or an expected profit.

While we express no opinion as to the appropriate measure of damages in this case, should it be determined by the fact finder that Maloley's rights of access have been unreasonably impaired, we do note that Maloley offered evidence that the market value of his land was $350,000 before the temporary street closing as well as after it was reopened and $131,250 during the approximately 2-year period of the closing. These were his opinions, as owner of the land. He is certainly qualified to express such opinions. See, e.g., *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982). These values were based in part on appraisals from experts identified both in his deposition and in his answers to

interrogatories.

If or how Maloley translates the evidence of temporary reduction in value or the prior rental income from the building into a legal measure of damages is not our concern at this juncture. The City does not assert that the evidence is incapable of rising to such level, only that access to the property was not unreasonably impaired. Viewing the evidence most favorably to Maloley, as we must, we determine only that there are genuine issues of material fact regarding whether Maloley's access was unreasonably impaired which were necessarily decided by the court's granting of summary judgment.

## CONCLUSION

Whether Maloley's right of access was temporarily "unreasonably impaired" is a fact question which should not have been decided by summary judgment. While other means of accessing his building and the parking lot were available throughout the street closing, such evidence does not bar Maloley's right to compensation as a matter of law. See *Balog v. State*, 177 Neb. 826, 131 N.W.2d 402 (1964). There were genuine issues of material fact in this case, and the district court's granting of summary judgment to the City was erroneous.

REVERSED AND REMANDED.

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