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STATE OF NEBRASKA, APPELLEE, V. ARVEN MALCOM, JR., APPELLANT.

675 N.W.2d 728

Filed March 9, 2004. No. A-02-621.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
2. **Effectiveness of Counsel: Records: Postconviction: Appeal and Error.** If the record on direct appeal is not adequate for the appellate court to review a claim of ineffectiveness of counsel, then such claim must wait for a postconviction proceeding for the development of an adequate record.
3. **Postconviction: Records: Appeal and Error.** Before a direct appeal presents a procedural bar to raising an issue in a postconviction proceeding, the issue must be one which could have been raised on direct appeal and the direct appeal record must have been adequate for the appellate court to review and decide the issue.
4. **Postconviction: Appeal and Error.** The burden of establishing the basis for postconviction relief is on the party seeking relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
5. **Effectiveness of Counsel: Appeal and Error.** When an appellate court reviews a claim of ineffective assistance of counsel, it is a mixed question of law and fact and the appellate court reviews the factual findings for clear error.
6. ____: ____. The issues pertaining to counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), are questions of law, reviewed independently of the lower court's decision.
7. **Postconviction: Effectiveness of Counsel: Proof.** A defendant seeking postconviction relief on the ground of ineffective assistance of counsel has the burden of proof to show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.
8. **Effectiveness of Counsel: Proof.** In order to prove deficient performance of counsel, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
9. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
10. **Effectiveness of Counsel: Proof.** A showing of prejudice for the purpose of proving counsel's deficient performance requires a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.
11. **Effectiveness of Counsel: Plea Bargains.** The right to effective assistance of counsel extends to the plea bargaining process.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

Arven Malcom, Jr., pro se.

Don Stenberg, Attorney General, Marilyn B. Hutchinson, and Corey M. O'Brien for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Arven Malcom, Jr., was convicted in November 1993 in the district court for Dawson County of first degree sexual assault under Neb. Rev. Stat. § 28-319 (Reissue 1989) and was sentenced to 10 to 30 years' imprisonment. Before us in this appeal is the 104-page pro se "Verified Motion to Vacate and Set Aside Conviction and Sentence" filed in March 1999 by Malcom under the Nebraska Postconviction Act. After granting a limited evidentiary hearing, the district court for Dawson County denied Malcom postconviction relief, and he has now appealed to this court.

FACTUAL BACKGROUND

Malcom was convicted of first degree sexual assault for engaging in sexual intercourse and cunnilingus with a 15-year-old girl when he was 49 years old. The pertinent facts of the case are found in our opinion in Malcom's direct appeal, *State v. Malcom*, 7 Neb. App. 286, 583 N.W.2d 45 (1998), and we will not repeat them in this opinion except as necessary. We are fully aware that Malcom testified and admitted all facts necessary to prove the State's case except for the victim's age, but he claims that he did so only because of the ineffective assistance of his trial counsel. In any event, this appeal does not deal with Malcom's factual innocence. Instead, our focus is on the crucial constitutional principles upon which our criminal justice system rests and which, on occasion, take precedence over the question of a particular defendant's factual guilt or innocence.

PROCEDURAL BACKGROUND/DISTRICT COURT DECISION

On August 5, 1993, Malcom was charged by information with having committed first degree sexual assault when he was over 19 and the victim was under 16, a crime sometimes referenced as statutory rape. The Dawson County public defender, Stephen

Potter, initially represented Malcom. The county court record shows that Potter filed a motion in the Dawson County Court to withdraw as counsel due to a conflict of interest. The county court record reflects that the court determined that there was no conflict of interest, although the facts and reasoning behind this conclusion were not put on the record. The court did find on the record that it was proper for Brenda Brogan, Potter's deputy, to act as Malcom's attorney. Malcom's motion and briefing make much of alleged conflicts of interest, including that Brogan was a friend of the victim and her family.

Brogan acted as Malcom's attorney for the trial in the district court for Dawson County, at which he was found guilty of first degree sexual assault. Brogan failed to perfect an appeal, and in Malcom's first postconviction action, he was able to obtain vacation of his sentence on such ground. He was resentenced to the same term of imprisonment, and he then perfected a direct appeal to this court.

His direct appeal proceeded with new counsel. In the direct appeal, the following errors were assigned: ineffective assistance of counsel, erroneous jury instructions, an excessive sentence, and abuse of discretion in resentencing. In our opinion on direct appeal, *State v. Malcom*, 7 Neb. App. 286, 583 N.W.2d 45 (1998), we found that trial counsel's performance had been deficient because counsel had advanced the "defenses" of consent and mistake of age, which are not defenses in a statutory rape case, as well as relying on nonexistent lesser-included offenses. However, in analyzing whether Malcom had suffered prejudice from such ineffective assistance of counsel, we said that Malcom had not been prejudiced by such deficiencies, citing the fact that the evidence supported the conviction. *Id.* Among other things, we referenced Malcom's admissions to two witnesses that he had had sex with the victim. This court found no reversible errors and affirmed the conviction and the sentence. It is of particular significance that Malcom sought review of our decision by the Nebraska Supreme Court. In his briefing to that court, he vigorously argued that our analysis of whether he had been prejudiced by the ineffective assistance of counsel was flawed because we should have found prejudice per se or structural error, dispensing with any need on his part to show prejudice. See *United States v.*

Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (complete denial of counsel or deprivation of effective representation at critical stage of accused's trial justifies presumption of prejudice). Nonetheless, the Nebraska Supreme Court denied Malcom's petition for further review, letting our published decision stand.

[1] In 1999, Malcom filed a second postconviction motion, which is now before us. The district court treated it as a first motion for postconviction relief and entered a preliminary order in which it made a number of findings, beginning with the finding that its review would be limited to Malcom's claims concerning ineffectiveness of appellate counsel. The district court developed this position from the rule that a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, quoting *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Thus, the district court said, it may not review issues in regard to "ineffective assistance of counsel at the trial stage since those issues were or could have been raised on the direct appeal."

[2,3] The district court correctly quotes the holding of *State v. Jones, supra.* However, the district court's conclusion from that holding is not entirely correct, or at least, it is incompletely expressed. Rather, the rule is that if the record on direct appeal is not adequate for the appellate court to review a claim of ineffectiveness of counsel, then such claim must wait for a postconviction proceeding for the development of an adequate record. See, *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994) (as trial record did not reveal whether trial counsel had conducted investigation into informant's background, issue of ineffectiveness on ground of failure to investigate was held not to be before court); *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986) (court refused to consider ineffectiveness of counsel claim on direct appeal because there was no record of counsel's performance to review), *disapproved on other grounds, State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987). In summary, before a direct appeal presents a procedural bar to raising an issue in a postconviction proceeding, the issue must be one which could have been raised on

direct appeal *and* the direct appeal record must have been adequate for the appellate court to review and decide the issue. See *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). In fairness, we note that elsewhere in the district court's order of April 12, 1999, its awareness of these rules is apparent, irrespective of its initially stated incorrect premise or its ultimate incorrect application thereof—which we discuss more fully later. However, completeness requires that we discuss the district court's other findings in some detail.

The district court found that Malcom's motion raised, "in essence, three claims of denial of the right to effective assistance of counsel on appeal." The district court said that these three claims were (1) that appellate counsel did not raise issues in the Court of Appeals in regard to a claimed conflict of interest between Malcom and the public defender's office; (2) that appellate counsel did not raise issues in the Court of Appeals concerning pretrial proceedings, for example, trial counsel's failure to pursue a plea bargain or file a motion to quash; and (3) that appellate counsel did not "raise all of the issues that should have been raised in order to seek a proper review in the Court of Appeals of the issue of ineffective assistance of counsel." The district court dispensed with this third claim by reasoning that even if we had found that "trial counsel was more ineffective, the result would not have been different," because although we found that Malcom's trial counsel had been ineffective, we found that Malcom's defense had not been prejudiced by such ineffectiveness.

Central to our resolution of this appeal is the district court's discussion of Malcom's motion, which it said

> can be read to argue that the appellate counsel did not raise issues in the District Court by way of a motion for new trial so that there could have been a record submitted to the Court of Appeals in regard to certain issues. Specifically the issue of the conflict involving trial counsel because of her friendship of the victim's family and issues regarding counsel's failure to investigate. The Court finds that a hearing should be held on the Defendant's Motion for Post-conviction Relief in regard to those issues only.

After this finding, the district court significantly restricted the evidentiary hearing, saying that the "scope of the inquiry in regard to the depositions shall be limited to the conversations held between [Malcom] and appellate counsel in regard to the two issues [of conflict of interest and failure to investigate] noted above and the actions of appellate counsel in that regard."

The district court's incorrect finding that this postconviction proceeding was strictly limited to the effectiveness of appellate counsel foreclosed the trial court from considering Malcom's other allegations about trial counsel, which allegations had not been procedurally barred by the direct appeal because the trial record was inadequate for us to have reviewed them on direct appeal—even if appellate counsel had raised such allegations. For example, Malcom's postconviction motion claimed that he rejected a favorable plea agreement, under which he would have pled guilty or no contest to attempted first degree sexual assault, because of trial counsel's ineffective advice about available defenses. As we shall discuss in detail later, the district court's limitation of the evidentiary hearing to the actions of appellate counsel was wrong because it ignored the reality that an appellate counsel cannot bring to us any issue about a trial counsel's performance where the trial record is inadequate.

Pursuant to the district court's limitation, only the depositions of Malcom's appellate counsel and of Malcom himself were taken and entered in evidence at the evidentiary hearing. The district court entered its final order on May 14, 2002, deciding that appellate counsel had not been ineffective. As we understand the district court's order, that court approached the matter from the analytical standpoint of whether appellate counsel should have filed a motion for new trial so as to bring Malcom's issues concerning trial counsel to us on direct appeal. Malcom's motion for postconviction relief was overruled, and this appeal followed.

ASSIGNMENTS OF ERROR

Malcom's numerous assigned errors in his pro se brief cover four pages. Therefore, we do not try to summarize or detail all of them. Instead, after a thorough review of Malcom's lengthy motion, the district court's action, and Malcom's briefing, we have limited our opinion to discussion of the matters necessary

to reach our ultimate conclusion, as well as those which need to be discussed to make our opinion more understandable. Those numerous assignments of error which we do not discuss are ones which we find have no merit.

STANDARD OF REVIEW

[4] The burden of establishing the basis for postconviction relief is on the party seeking relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. See, *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985).

[5,6] When an appellate court reviews a claim of ineffective assistance of counsel, it is a mixed question of law and fact and the appellate court reviews the factual findings for clear error. See *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). The issues pertaining to counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), are questions of law, reviewed independently of the lower court's decision. See *State v. Davlin, supra.*

ANALYSIS

PRESUMED PREJUDICE

[7,8] The two prongs of *Strickland v. Washington, supra*, have been stated so frequently in Nebraska cases that there can be no dispute about the general guidelines which apply in postconviction cases. Malcom's burden of proof is to show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his case. See, *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). In order to prove deficient performance, Malcom must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

The ineffectiveness of trial counsel during Malcom's trial virtually leaps from the pages of the bill of exceptions. It is apparent from the record of this trial that trial counsel did not appreciate the fundamental and well-established law applicable to a statutory

rape case. See *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991) (holding that consent, mistake of fact about victim's age, and possible active misrepresentation of victim's age are not defenses to first degree sexual assault on child). See, also, *State v. Navarrete*, 221 Neb. 171, 175, 376 N.W.2d 8, 11 (1985) (Nebraska has rejected " 'California rule' " allowing defense of reasonable mistake). Trial counsel was also proceeding under the misapprehension that there were lesser-included offenses to first degree sexual assault on a child. We already made these findings on direct appeal; however, we concluded that the prejudice prong of *Strickland* had not been satisfied.

Malcom argued on direct appeal, and now argues again on postconviction, that we should use the *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), standard of prejudice per se or presumed prejudice. Our opinion on direct appeal did not do so even though review of Malcom's brief on direct appeal shows that he clearly made this argument. Thus, while we could have rejected application of *Cronic* explicitly, we did so implicitly by analyzing the record for prejudice. Moreover, as said earlier, Malcom argued in his briefing to gain review of our decision by the Nebraska Supreme Court that we erred in not finding prejudice per se under *Cronic*. Because the Nebraska Supreme Court denied Malcom's petition for further review, we can only conclude that the high court did not disagree with our analysis—or with our affirmance of the conviction—given that a finding of prejudice per se could only result in a reversal of the conviction and an order for a new trial. Accordingly, while trial counsel's performance was startlingly deficient, the question of whether there was prejudice from the way counsel tried the case has already been finally resolved against Malcom.

Self-Incrimination/Evidentiary Hearing

Trial counsel solicited from Malcom on direct examination his admission to having had oral sex and penile-vaginal sex (in three positions) with the victim, thereby exposing him to cross-examination wherein he admitted his age. It is beyond our imagination as to how such questioning could be part of a trial strategy which would advance Malcom's not guilty plea. The law is

clear that there is no defense to this charge, save "It didn't happen" or "The State has not proven its charges beyond a reasonable doubt." But, trial counsel's examination of Malcom obviously foreclosed even these arguments, because through her questioning, Malcom admitted each and every element that the State needed to prove, less the victim's age, which the victim had already testified to.

[9] Malcom claims that the trial court erred in failing to grant him an evidentiary hearing on whether such self-incrimination was knowingly, voluntarily, and intelligently done or whether it was the product of his trial counsel's ineffectiveness. The law is clear that an evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[10] Malcom's postconviction motion, at paragraphs 157 through 162, contains his allegations about his obviously unhelpful trial testimony, and while a number of allegations are made, we focus on what we see as the key allegation: If his trial counsel had known that consent and mistake of age were not defenses to statutory rape, he would not have taken the stand and incriminated himself. This court having already found trial counsel to have been ineffective for advancing such "defenses," such allegations clearly merit an evidentiary hearing unless they could not be the basis for any relief—in other words, while there was deficient performance, no prejudice to Malcom resulted. In *State v. Robinson*, 218 Neb. 156, 352 N.W.2d 879 (1984), the prejudice prong was defined as requiring a showing of 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.*

Using this test, if we remove Malcom's self-incriminating testimony from the record, we find that there was still uniform testimony from a variety of sources which established the time, place, and circumstances when the victim was a guest at a party hosted by Malcom. Accordingly, opportunity for the sexual encounter was proved. Further, two witnesses testified that

Malcom admitted to them that he had had sex with the victim, and of course, the victim testified to the illegal acts. Therefore, given the strength of the evidence, we cannot say that there was a reasonable probability that Malcom would have been acquitted by the jury but for the fact that he took the stand and admitted the acts which conclusively established his guilt. Accordingly, this claim must fail on the prejudice prong.

Rejection of Favorable Plea Bargain

In Malcom's postconviction motion, he alleges that he rejected a favorable plea bargain. He claims that he was offered an opportunity to plead guilty or no contest to attempted first degree sexual assault, whereby he would be required to serve a 1-year prison sentence. He also alleges that he was advised by his trial counsel when discussing such plea that he had a good chance of winning an acquittal using the defenses of consent and misrepresentation of age. Finally, he contends that he would have accepted a plea bargain had he been properly advised about those "defenses." We note that attempted sexual assault is a Class III felony, whereas the crime of which he was convicted is a Class II felony—having respective maximum terms of imprisonment of 20 and 50 years. These allegations clearly satisfy the requirements for the grant of an evidentiary hearing on such claims, because if they are true, there would be a basis for postconviction relief. In other words, if a criminal defendant rejects a favorable plea bargain because his counsel advises him that nonexistent defenses will get him acquitted, there is an obvious problem with counsel's performance and obvious prejudice.

[11] The district court gave these claims short shrift, reasoning, "[T]here is no Constitutional right to plea negotiations. Absent such a Constitutional right, it [presumably the allegations our opinion outlines above] cannot form the basis of a granting of post-conviction relief." This reasoning is incorrect because the allegation put at issue is the federal constitutional right, under the Sixth Amendment, to effective assistance of counsel in the context of plea bargaining—which is obviously a key component of our present-day criminal justice system. The law is contrary to the district court's reasoning, as there is no question that the right to effective assistance of counsel extends to the plea bargaining

process. See *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The Eighth Circuit Court of Appeals has succinctly summarized the matter:

> The Supreme Court has long held that *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),] applies to ineffective assistance claims arising out of the plea bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The prejudice inquiry in such cases "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*." *Id.* at 59, 106 S.Ct. 366 (emphasis added). Moreover, a large body of federal case law holds that a defendant who rejects a plea offer due to improper advice from counsel may show prejudice under *Strickland* even though he ultimately received a fair trial. *See Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (collecting cases). To establish prejudice under such circumstances, the petitioner must show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence. *Id.*

Wanatee v. Ault, 259 F.3d 700, 703-04 (8th Cir. 2001).

Therefore, remembering counsel's deficient performance at trial in the context of Malcom's allegation that a plea bargain to a lesser charge was "on the table" but rejected because of counsel's faulty advice based on her lack of understanding of the applicable law, it is clear that the district court erred in failing to grant an evidentiary hearing on such allegation. The potential for prejudice is self-evident by virtue of the fact that an attempt charge carries a maximum term of imprisonment of 20 years and Malcom was sentenced to as much as 30 years' imprisonment.

Additionally, Malcom alleges in his motion and argues to this court that trial counsel had a conflict of interest because of acquaintanceship with the victim and her family. The typical conflict of interest claim in postconviction litigation arises when the same lawyer represents multiple defendants. See *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). However, we do not think multiple representation is the only way that a conflict of interest could result in ineffective assistance of counsel. We note that under Canon 1, DR 5-101(A), of the Code of Professional

Responsibility, without the client's sanction, a lawyer shall not accept employment if his or her independent judgment and ability to zealously represent the client may be impaired:

> Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

Unquestionably, a lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. See Canons 5 and 7 of the Code of Professional Responsibility. A criminal defense lawyer's duty under these canons could be affected or compromised by friendship with the victim and her family in a situation such as this case to the point that counsel does not provide effective assistance. And, a way that such ineffective assistance from such conflict could be manifested is in the plea bargaining process by way of faulty advice to the client. This is the essence of what Malcom has alleged. The trial record is not sufficient for this court to have reviewed such a claim on direct appeal. However, we are convinced from the allegations of the motion, coupled with the established fact of ineffective representation during trial, that the district court erred in foreclosing exploration via an evidentiary hearing of whether there was a relationship between trial counsel, the victim, and the victim's family and, if so, how such relationship affected the plea bargaining process. What Malcom and his appellate counsel discussed about plea bargaining and conflicts with his trial counsel, after Malcom was already convicted, begs the question of trial counsel's performance during the plea bargain discussions—the focus of Malcom's allegations. Thus, upon remand, the evidentiary hearing shall encompass the alleged relationship between Malcom's trial counsel and the victim and how any such relationship affected the plea bargaining process.

Malcom also alleges a conflict of interest between himself and the public defender's office arising out of a prior, unrelated misdemeanor prosecution, as we understand the allegation. The district court rejected any evidentiary hearing on such claim, and we agree with the district court to the extent that Malcom advances

this as an independent ground for postconviction relief. The focus for potential relief is properly on what plea bargaining occurred in this prosecution, not in an unrelated misdemeanor case. However, when distilled down, this second allegation by Malcom is that his approach to plea bargaining in the instant case was impacted by his previous experience with the public defender's office and plea bargaining. Thus, while not a ground for relief by itself, the prior plea bargain experience cannot be conclusively foreclosed in advance as irrelevant evidence. It may be relevant to Malcom's other plea bargaining-based claim—a matter to be determined in the new evidentiary hearing we order. Thus, to the extent that the district court's order conclusively precluded the production of evidence about the prior plea bargaining process, we reverse that decision.

CONCLUSION

We reverse the decision of the district court as outlined above and remand the matter to the district court for a new evidentiary hearing. That hearing shall focus on whether there was a favorable plea bargain offered, that being pleading guilty or no contest to attempted sexual assault, which bargain Malcom alleges that he rejected as a result of deficient performance of his counsel in the plea bargaining process. The evidence adduced for the trial court's consideration may include the alleged friendship between trial counsel, the victim, and the victim's family. Evidence may be introduced, if relevancy is shown, about Malcom's prior plea bargaining experience with the public defender's office, which also represented him in this prosecution, to the extent that such experience had an effect on the plea bargaining process in the instant prosecution. Because Malcom has made allegations about the plea bargaining process which, if proved, would entitle him to relief, and given the previous finding of ineffectiveness of his trial counsel, the trial court shall appoint counsel to represent Malcom in the new evidentiary proceedings. Finally, we reverse the finding that Malcom was not entitled to postconviction relief, and we remand that ultimate question to the district court for its decision, after the new evidentiary hearing we have ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN P. PETERSEN, APPELLANT.

676 N.W.2d 65

Filed March 16, 2004. No. A-03-268.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge.
3. **Motions to Suppress: Judgments: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress evidence, 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.
4. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation.
5. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
6. **Criminal Law: Controlled Substances.** Possession of drug paraphernalia is an infraction under Neb. Rev. Stat. § 28-441 (Reissue 1995).
7. **Criminal Law: Arrests.** Pursuant to Neb. Rev. Stat. § 29-435 (Reissue 1995), except as provided in Neb. Rev. Stat. § 29-427 (Reissue 1995), for any offense classified as an infraction, a citation shall be issued in lieu of arrest or continued custody.
8. **Arrests: Police Officers and Sheriffs.** Pursuant to Neb. Rev. Stat. § 29-427 (Reissue 1995), any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain him further when the accused fails to identify himself satisfactorily or refuses to sign the citation or when the officer has reasonable grounds to believe that such action is necessary in order to carry out legitimate investigative functions.
9. **Arrests.** An arrest for an infraction normally handled by a citation is warranted when the surrounding circumstances give rise to reasonable suspicion of criminal behavior beyond the infraction.
10. **Warrantless Searches: Search and Seizure.** In the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, meaning that the facts available to the officer at the moment of the search or seizure should warrant a person of reasonable caution to believe the action taken was appropriate.

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

W. Randall Paragas and Sarah M. Mooney, of Paragas Law Offices, for appellant.

Jon Bruning, Attorney General, and David Arterburn for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

John P. Petersen appeals his conviction in the Lancaster County District Court for manufacture of a controlled substance (methamphetamine), a Class III felony. The evidence supporting the conviction was found in a vehicle after a traffic stop. At issue is the legality of a pat-down search of the driver, Petersen, which produced a baggie of marijuana, which discovery led to a search of the vehicle, wherein materials for the manufacture of methamphetamine were found.

FACTUAL BACKGROUND

On April 2, 2001, at approximately 1:47 a.m., Lincoln police officer Justin Darling was patrolling the area of 48th Street between Old Cheney Road and Nebraska Highway 2 in response to a recent string of larcenies in the area. He observed a white pickup with the name "Adams Concrete" on its side headed south on 48th Street, coming from Highway 2. That pickup had been identified by a confidential informant as possibly related to the larcenies. When Officer Darling saw the pickup, he turned around and headed in the same direction as the pickup.

The driver of the pickup immediately made a right turn onto Briarpark Drive, but failed to signal the turn. Officer Darling sped up so that he could stop the pickup for the traffic infraction of failure to signal, and the pickup appeared to speed up while Officer Darling was behind it. The pickup pulled into the Amberwood Apartments parking lot. Officer Darling then turned on his cruiser's overhead lights and pulled into the lot. As Officer Darling approached the stopped pickup, only Petersen was in the pickup, and the pickup's passenger door was wide open. The passenger shortly returned and sat down in the passenger seat. Upon

making contact with Petersen, Officer Darling noticed that Petersen's eyes were bloodshot and watery and that his speech was slurred. When asked by Officer Darling whether he had been drinking, Petersen responded that he had had one beer. Petersen voluntarily took a preliminary breath test which produced a result of 0.002 grams of alcohol per 210 liters of breath. Officer Darling found the low result surprising in light of Petersen's bloodshot, watery eyes and slurred speech.

A second officer, Eric Runge, arrived on the scene pursuant to Officer Darling's earlier call for backup. Officer Runge arrived about the time Officer Darling was finishing the breath test and still speaking with Petersen. While Officer Darling was still with Petersen, Officer Runge spoke with John Eads, the passenger in the pickup. While speaking with Eads, Officer Runge suspected that Eads was not telling the truth about where he and Petersen had been that night and what they had been doing. Officer Runge consequently placed Eads in the back seat of his cruiser. Officer Runge returned to the passenger side of the pickup, and from the outside of the pickup, he saw a marijuana pipe in plain view in the center-console ashtray of the pickup.

Officer Darling testified that Petersen was free to go after the breath test, but that upon the discovery of the pipe, Petersen was detained again while Officer Runge sought to determine to whom the pipe belonged. Initially, neither Petersen nor Eads claimed ownership of the pipe, but Petersen did shortly thereafter admit that it was his. Petersen told the officers that there was no more marijuana in the pickup or on him, as Eads and he had smoked it all. Officer Darling asked Petersen for permission to search the pickup, which Petersen refused.

After permission to search the pickup was declined, Officer Darling patted Petersen down. Officer Darling testified that this was done because "there's narcotics that he's claimed to be his. There's no marijuana located with the pipe, he possibly has narcotics on him." Officer Darling testified that he did the pat down incident to his arrest of Petersen, finding in Petersen's left front jeans pocket a baggie of what, due to his experience and training, he concluded was marijuana. On cross-examination, Officer Darling first testified that he placed Petersen under arrest after Petersen had admitted the pipe was his and then did a pat-down

search incident to such arrest. But, after reviewing his report on the witness stand during cross-examination, he testified that his police report, made the night of the incident, indicated that he patted Petersen down for weapons, found the baggie of marijuana, placed him under arrest, and then searched the pickup incident to the arrest.

A third officer arrived on the scene, and the three officers searched the pickup. During the search of the pickup, several items associated with the manufacture of methamphetamine were found. The items included empty pill sheets from pills containing pseudoephedrine; a plastic bag containing pseudoephedrine boxes, some full of pills and others containing more empty pill sheets; a box of Mason jars; and a bottle of propane and a propane camp stove—all materials used to cook methamphetamine.

Suspecting that the pickup was a "meth lab," the officers exited the pickup and called for a sergeant and then a clandestine laboratory team that specializes in dismantling methamphetamine laboratories. A clandestine laboratory team arrived and began its investigation. Other facts in the record are omitted as unnecessary to our determination of the issue presented by this appeal.

PROCEDURAL BACKGROUND

Petersen was charged by information in the district court for Lancaster County with one count of manufacturing a controlled substance, methamphetamine. On May 13, 2002, Petersen filed a motion to suppress evidence. On September 26, a hearing on the motion to suppress was held. The motion to suppress was overruled on October 10. On December 11, a stipulated bench trial was held in the district court. On January 15, 2003, Petersen was adjudged guilty of manufacturing a controlled substance, methamphetamine. On February 26, Petersen was sentenced to 3 years' probation, plus a special condition of probation that he serve a 6-month term of imprisonment in the Lancaster County jail. Petersen now appeals the denial of his motion to suppress evidence.

ASSIGNMENTS OF ERROR

Petersen alleges that the district court erred in (1) ruling that the pipe which the officers saw in plain view constituted probable cause to search the pickup he was driving, pursuant to the automobile exception to the warrant requirement; (2) finding that

the search of his person was constitutional as a search incident to a lawful arrest; and (3) ruling that the search of the pickup was constitutional.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

[2] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

[3] When reviewing a trial court's ruling on a motion to suppress evidence, 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. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *State v. Manning*, *supra*.

ANALYSIS

[4,5] This is a warrantless search and seizure case. Thus, we begin our analysis by quoting at some length from *State v. Roberts*, 261 Neb. 403, 409-10, 623 N.W.2d 298, 304-05 (2001), wherein the Nebraska Supreme Court set forth the basic law applicable to a warrantless search and seizure case:

> Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few "'"'specifically established and well-delineated exceptions,'"'" *State v. Craven*, 253 Neb. 601, 606, 571 N.W.2d 612, 617 (1997), which "must be strictly confined by the exigencies which justify [their] initiation," *State v. Ortiz*, 257 Neb. [784,] 815, 600 N.W.2d [805,] 828 [(1999)]. "In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability

> of one or more of the exceptions to the warrant requirement." *State v. Craven*, 253 Neb. [601,] 606, 571 N.W.2d [612,] 617 [(1997)].

Petersen contends that the pipe in plain view does not legally justify the search of the pickup, nor can the pickup's search be justified by the pat down during which the marijuana was discovered, as such was not a legal search. Petersen relies heavily on this court's decision in *State v. Scovill*, 9 Neb. App. 118, 608 N.W.2d 623 (2000), wherein we found that possession of drug paraphernalia—a bong discovered by police at the scene of a vehicle accident—did not justify a pat-down search of the driver, which search produced methamphetamine, after officers found him at a truckstop several miles from the accident scene. The State argues that the "surrounding circumstances," in addition to the discovery of the marijuana pipe, brief for appellee at 8, justify the officers' further investigation under Neb. Rev. Stat. § 29-427 (Reissue 1995), claiming that such investigation is clearly authorized in *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992). We conclude that *Sassen* does sustain the pat down of Petersen and the search of the pickup because even though possession of a marijuana pipe is only an infraction, see Neb. Rev. Stat. § 28-441 (Reissue 1995), for which citations are to be issued in lieu of arrest, see Neb. Rev. Stat. § 29-435 (Reissue 1995), *Sassen* creates the controlling exception.

In *Sassen*, police officers stopped a car and spoke with the driver when they noticed that the car did not have a front license plate and was being driven with its rear window completely covered in snow. The driver admitted that she was driving without a driver's license, and during the course of the contact, the officers observed that the driver had what they thought was drug paraphernalia, a syringe. The officers then arrested the driver; searched the car, her purse, and her person; and found methamphetamine.

[6-9] The Nebraska Supreme Court affirmed the *Sassen* driver's conviction for possession of a controlled substance, rejecting her argument that the officers had not had probable cause to arrest her. The driver argued that § 29-435 requires officers to issue a citation in lieu of an arrest when faced with an infraction such as possession of drug paraphernalia and that as a

result, she could not be searched incident to an arrest. The court in *Sassen* noted that the driver's argument was faulty because at the time of the arrest, the officers had been aware of three separate misdemeanors supporting the driver's arrest—the missing license plate, her driving without a license, and her driving with snow covering the rear window. Thus, the searches were upheld as incident to a valid custodial arrest. The *Sassen* court then, although perhaps in dicta, made it entirely clear that the possession of paraphernalia alone would have justified an arrest and searches, and we quote:

> In addition, the officers could validly arrest [the driver] for possession of drug paraphernalia under these circumstances. Possession of drug paraphernalia is an infraction under Neb. Rev. Stat. § 28-441 (Reissue 1989). Again, § 29-435 states: "Except as provided in section 29-427, for any offense classified as an infraction, a citation shall be issued in lieu of arrest or continued custody pursuant to sections 29-422 to 29-429."
>
> [Section] 29-427 . . . states: "Any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain him further when the accused fails to identify himself satisfactorily, or refuses to sign the citation, or when the officer has reasonable grounds to believe that . . . such action is necessary in order to carry out legitimate investigative functions . . . ."
>
> The officers arrested [the driver] for possession of drug paraphernalia, and the following investigation was directly related to that charge. The officers observed [the driver] with the syringe, as well as her visible nervousness and her "furtive gesture" of throwing the syringe on the floor when she was asked to step out of the car. They observed that she had a dealer plate over the regular license plate on the back and that she had a bank bag on the seat beside her. Additionally, they noticed that she was holding something against the back of the bank bag that she did not want them to see. The situation required more investigation, and the officers arrested [the driver] in order to carry out the investigation. In this situation, an arrest for an infraction is permissible.

> We hold that the officers had the authority to arrest [the driver] for the infraction of possession of drug paraphernalia. Although the offense is only an infraction, for which officers are instructed to give only citations, this situation came within one of the exceptions listed in § 29-427.

State v. Sassen, 240 Neb. 773, 778-79, 484 N.W.2d 469, 472-73 (1992). Thus, under *Sassen*, we hold that an arrest for an infraction normally handled by a citation is warranted when the surrounding circumstances give rise to reasonable suspicion of criminal behavior beyond the infraction.

From *Sassen*, we conclude that what is most significant to our analysis is that paraphernalia was found, admitted by Petersen to be his, and the surrounding circumstances. As in *Sassen*, there was a "furtive" gesture, in that once the police cruiser turned around in pursuit of the pickup, about which the police department had received a tip linking it to thefts in the area, the pickup turned off of its path onto a side street and appeared to speed up. When Officer Darling got to where the pickup eventually stopped, Eads, the passenger, had fled and disappeared, only to return shortly thereafter—raising the natural question of "What had he gotten rid of?" Additionally, Petersen, the driver, appeared intoxicated but strangely passed an alcohol breath test, which facts were plausibly explained by the subsequent discovery of a marijuana pipe and the story that the two men had smoked all of their marijuana. As in *Sassen*, these surrounding circumstances—suggesting criminal behavior beyond riding around with a marijuana pipe—cry out for further investigation as to exactly what these two men were up to in the early morning hours of April 2, 2001. Thus, under the exception from *Sassen*, the officers were authorized under § 29-427 to detain and investigate further, including to search Petersen's person via the pat down and to inspect the interior of the pickup, even though both the failure to signal the turn and the possession of the pipe were only infractions.

[10] Because we find that the *Sassen* exception to the need for a predicate arrestable offense is so directly applicable here, given the presence of surrounding circumstances suggesting a need for further investigation beyond dealing with the infractions, we do not attempt to distinguish our opinion in *State v. Scovill*, 9 Neb. App. 118, 608 N.W.2d 623 (2000), from the case at hand. We do,

however, acknowledge that *Scovill* may not sufficiently emphasize the creation by *Sassen* of an exception to the need for a predicate arrest before an investigatory detention when officers have found a citizen involved in merely an infraction. But, we emphasize the need for surrounding circumstances giving rise to a reasonable suspicion of criminal behavior beyond such an infraction before the *Sassen* exception comes into play. Finally, while the record reveals inconsistency in Officer Darling's evidence about whether he did the pat down for weapons or for drugs, which pat down produced the marijuana and led to the search of the pickup, the rule is that our review is de novo on an objective basis when we evaluate the grounds for a search. See *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973) (in evaluation of reasonableness of search and seizure without warrant, it is imperative that facts be judged against objective standard, meaning that facts available to officer at moment of search or seizure should warrant person of reasonable caution to believe that action taken by officer was appropriate).

CONCLUSION

Using an objective standard in our de novo review, we find that the district court did not err in denying Petersen's motion to suppress. We therefore affirm the conviction and sentence pronounced by the district court.

AFFIRMED.

KENNETH BARNES, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

676 N.W.2d 385

Filed March 23, 2004. No. A-02-797.

1. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Due Process: Statutes: Administrative Law.** Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations.
4. **Administrative Law: Evidence: Prisoners.** When the disciplinary committee considers a charged inmate's request to produce relevant documentary evidence in the inmate's defense, the request should generally be permitted, unless allowing the inmate to do so will be unduly hazardous to institutional safety or correctional goals.
5. ____: ____: ____. When the disciplinary committee declines a charged inmate's request to produce relevant documentary evidence in the inmate's defense, the committee should make a finding regarding the reasons for denial of the request.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed.

Don Stenberg, Attorney General, and Amber Fae Herrick for appellant.

Kenneth Barnes, pro se.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

The Nebraska Department of Correctional Services (DCS) appeals the order of the Johnson County District Court reversing the decision of the DCS Appeals Board (Appeals Board) which affirmed a decision of the Institutional Disciplinary Committee (Committee) finding Kenneth Barnes guilty of violating a DCS rule prohibiting swearing, cursing, or use of abusive language or gestures and sanctioning Barnes to 7 days of disciplinary segregation.

STATEMENT OF FACTS

On March 1, 2002, a Sergeant Beenblossom, a DCS employee at the Tecumseh State Correctional Institution, filed a misconduct report against inmate Barnes. Sergeant Beenblossom stated in her report that at approximately 6:20 p.m., she heard several inmates talking in the hall between housing units and she directed the inmates to "lock down." Several of the inmates started toward her, and Sergeant Beenblossom informed them to back up and not touch her. Barnes asked her, " 'And what are you gonna do if I do?' " She again informed them not to touch her or

she would use force on them. At that point, Barnes "brought his left arm up and back in a very fast and threatening manner to take a swing at [her]." In response, Sergeant Beenblossom put her right arm up in a defensive position. Barnes then started to laugh and went into his housing unit. At the investigatory hearing, Barnes denied the contents of the misconduct report and stated that he wanted "the video from Central."

On March 12, 2002, a hearing was held by the Committee. Barnes waived his right to have the reporting employee and witnesses present, so Sergeant Beenblossom's report was read into the record. Although Barnes had filled out a request for the videotape of the alleged incident to be used in his defense, when he requested the videotape at the hearing, he was told by the Committee that the videotape was not going to be used as evidence. Barnes then told his version of the events and admitted that he "acted like [he] was going to grab [Sergeant Beenblossom's] hat." Barnes again stated that without the videotape, he felt that he was "being denied my right to have my evidence." The Committee found Barnes guilty of violating 68 Neb. Admin. Code, ch. 5, § 005III[D] (2000), which prohibits "[s]wearing, cursing, or using abusive gestures or language directed at another person; words, actions, or other behavior intended to harass, demean, or cause alarm in an employee," and imposed 7 days of disciplinary segregation.

Barnes appealed the decision of the Committee to the Appeals Board. On April 11, 2002, the Appeals Board affirmed the decision of the Committee, finding that the denial of the videotape was not a violation of Barnes' right to due process and that based on the misconduct report and Barnes' admission, there was sufficient evidence to support the Committee's ruling that he had acted like he was going to grab Sergeant Beenblossom's hat.

Pursuant to the Administrative Procedure Act, Barnes then appealed the Appeals Board's decision to the Johnson County District Court. A hearing before the district court was held on June 24, 2002. Two exhibits, the transcript of the pleading and the bill of exceptions from the March 12 hearing before the Committee, were received into evidence. On June 26, the district court entered an order reversing the decision of the Appeals Board, finding that DCS had violated Barnes' right to due process

when the Committee denied Barnes' request for documentary evidence consisting of a videotape and that the denial rendered the proceedings invalid. The district court did not reach the issue of whether there was sufficient evidence to find Barnes guilty of the rule violation. DCS has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, DCS contends that the district court erred when it reversed the decision of the Appeals Board based upon the court's finding that Barnes' proceedings were invalid because the denial of documentary evidence resulted in a violation of Barnes' due process rights. DCS further contends that there is competent evidence in the record to support the findings of both the Appeals Board and the Committee.

STANDARD OF REVIEW

A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Baxter v. Nebraska Dept. of Corr. Servs.*, 11 Neb. App. 842, 663 N.W.2d 136 (2003). See Neb. Rev. Stat. § 84-918(3) (Reissue 1999).

[1,2] On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997). 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. *Id.*

ANALYSIS

First, we consider DCS' claim that the district court erred in reversing the decision of the Appeals Board based upon the court's finding that the denial of use of the requested videotape was a violation of Barnes' due process rights rendering the disciplinary proceedings invalid.

[3] Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations. *Baxter v. Nebraska Dept. of Corr. Servs., supra*; *Dailey v. Nebraska Dept. of Corr. Servs.*, 6 Neb. App. 919, 578 N.W.2d 869 (1998). An administrative regulation, 68 Neb. Admin. Code, ch. 6, § 006.07 (2000), provides in part: "The inmate charged shall be allowed to call witnesses with relevant knowledge and present relevant documentary evidence in the inmate's defense when permitting the inmate to do so will not be unduly hazardous to institutional safety or correctional goals." Accord Neb. Rev. Stat. § 83-4,122(4) (Reissue 1999).

In *Baxter v. Nebraska Dept. of Corr. Servs., supra*, the disciplinary committee denied an inmate's request to call a witness with relevant knowledge without finding that having the witness appear would be unduly hazardous to institutional safety or correctional goals. Failure to so determine violated both § 83-4,122(4) and 68 Neb. Admin. Code, ch. 6, § 006.07, which require that the disciplinary committee state in writing its reasons for refusing to call a witness. We held in *Baxter* that in prison disciplinary proceedings, when the disciplinary committee considers a charged inmate's request to call witnesses with relevant knowledge in the inmate's defense, the request should generally be permitted, unless allowing the inmate to do so will be unduly hazardous to institutional safety or correctional goals. We found that such a requirement does not interfere with prison officials' great discretion to refuse to call witnesses whose testimony is irrelevant or unnecessary, or who may undermine prison authority, and that such a requirement protects the rights of charged inmates. See *Baxter v. Nebraska Dept. of Corr. Servs., supra.*

[4] In addition to allowing an inmate to call witnesses with relevant knowledge, § 83-4,122(4) and 68 Neb. Admin. Code, ch. 6, § 006.07 also require that an inmate be allowed to present relevant documentary evidence in the inmate's defense when permitting the inmate to do so will not be unduly hazardous to institutional safety or correctional goals. Thus, like a request to call a witness with relevant knowledge, a charged inmate's request to produce relevant documentary evidence should also generally be

permitted, unless allowing the inmate to do so will be unduly hazardous to institutional safety or correctional goals.

[5] Further, when the disciplinary committee declines a charged inmate's request to produce relevant documentary evidence, the committee should make a finding regarding the reasons for denial of the request. Such a requirement protects the rights of charged inmates and does not interfere with prison officials' great discretion to refuse to allow production of documentary evidence which is irrelevant or unnecessary, or which may undermine prison authority.

In the instant case, the Committee denied Barnes' request to produce as evidence the videotape of the alleged incident without finding that the videotape was irrelevant or that producing the videotape would be unduly hazardous to institutional safety or correctional goals. The Committee's failure to do so violates both § 83-4,122(4) and 68 Neb. Admin. Code, ch. 6, § 006.07. Therefore, we affirm the order of the district court reversing the decision of the Appeals Board.

We need not reach the issue of whether there is competent evidence in the record to support the findings of both the Appeals Board and the Committee. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

AFFIRMED.

IN RE INTEREST OF CRYSTAL C., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V.
TAMMY S., APPELLANT, AND GREG C., APPELLEE
AND CROSS-APPELLANT.
676 N.W.2d 378

Filed March 23, 2004. No. A-03-651.

1. **Juvenile Courts: Evidence: Witnesses: 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 juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

2. **Parental Rights: Evidence: Proof.** A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1998) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (10) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (10) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.
3. **Parental Rights: Time: Abandonment.** Neb. Rev. Stat. § 43-292(1) (Reissue 1998) provides that a court may terminate parental rights if the parent has abandoned the juvenile for 6 months or more immediately prior to the filing of the petition.
4. **Parental Rights: Time: Abandonment: Words and Phrases.** As used in Neb. Rev. Stat. § 43-292(1) (Reissue 1998), the term "immediately prior" regarding abandonment means the time period determined by counting back 6 months from the filing date of the petition.
5. **Parental Rights: Abandonment: Intent: Words and Phrases.** Abandonment, for purposes of determining whether termination of parental rights is warranted under Neb. Rev. Stat. § 43-292(1) (Reissue 1998), has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.
6. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
7. **Parental Rights.** Parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.

Appeal from the County Court for Red Willow County: CLOYD CLARK, Judge. Affirmed in part, and in part reversed.

Frank Shoemaker for appellant.

Robert E. Wheeler, Special Assistant Attorney General, for appellee State of Nebraska.

Nathan A. Schneider for appellee Greg C.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

Tammy S. appeals and Greg C. cross-appeals the decision of the county court for Red Willow County, sitting as a juvenile court, which decision terminated their parental rights to their daughter Crystal C.

FACTUAL AND PROCEDURAL BACKGROUND

Tammy's appeal was decided this same day by a separate memorandum opinion in our cases Nos. A-03-650 through A-03-653, where we affirmed the juvenile court's decision to terminate her parental rights to Crystal as well as to her three other children. The remainder of this opinion relates only to the termination of Greg's parental rights to Crystal, born April 25, 1994. Crystal was living with Tammy and George Dean S., Sr. (Dean). Tammy is the biological mother of Crystal, Dean is the stepfather of Crystal, and Greg is the biological father of Crystal.

In early May 2000, after watching a videotape at school on "Stranger Danger" which helped children understand what is good and bad touch, Tesia S., Crystal's half sister, reported inappropriate touching to Tesia's first grade teacher, Rose Sitzman. Tesia stated to Sitzman, " 'My daddy tickles me there.' " When Sitzman asked Tesia where her father touches her, Tesia pointed to her genital area and said, "[H]ere." It is undisputed that when talking about her " 'daddy' " in this context, Tesia was referring to her stepfather, Dean. The school contacted the Nebraska Department of Health and Human Services (DHHS) and the McCook Police Department. A child protection worker from DHHS and a police investigator interviewed Tesia and Crystal on May 12.

On May 26, 2000, the State filed an application for temporary custody, which was granted, and Crystal and her three siblings—Tesia; George S., Jr. (George Jr.); and Sonya S.—were removed from Tammy and Dean's home and placed in foster care. They were initially placed with foster parents in Cambridge and lived there until August 2001. Then the children were placed with foster parents in Overton until August 2002. Then George Jr. and Sonya were placed with foster parents in McCook until November 2002, at which time they were placed with Tracie H. Tesia and Crystal were placed with a different foster parent from August until October 1, 2002, at which time they were placed with Tracie. So, all four children were again placed together.

An adjudication hearing was held on June 30, 2000. In its July 3 order, the court found by a preponderance of the evidence that Dean neglected and abused Tesia and Crystal, sexually abused

them, and used inappropriate corporal punishment. All four children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). The children were placed in the care of DHHS for foster home placement.

The original goal was reunification of Greg and Crystal. A case plan was approved and adopted by the court on August 10, 2000. The plan set forth several requirements for Greg, including working with a family support worker to learn appropriate discipline, boundaries, and child-parent roles. Subsequent reports on progress in meeting the goals of the plan were received by the court.

Greg began exercising visitations with Crystal in July 2000. The evidence reveals that in the beginning he was not very consistent in his visitations with Crystal. On April 6, 2001, Greg married his current wife, LeeAnn C. LeeAnn brought to the marriage her two sons, and Greg and LeeAnn have a son who was born on June 14, 2001. Since his marriage, Greg has been much more consistent in his visitations with Crystal. During their visits, Greg and Crystal have engaged in such activities as bowling, playing on the computer, playing at the park or the playground, and eating out. LeeAnn was an active participant in Greg's visitations with Crystal, and the boys participated in some of the visits as well. Crystal seemed to enjoy spending time with Greg, LeeAnn, and the boys. All visits ended with hugs and kisses.

Notably, there were two occasions when Greg left Nebraska without notifying either Crystal or DHHS. The first time that Greg left Nebraska was in November 2000 when he moved to North Carolina. He returned in March 2001 and began to exercise regular visits with Crystal beginning on April 6. Greg left again in March 2002 when he went to Wyoming to find work. Greg subsequently returned to Nebraska and resumed visitations with Crystal in September 2002. Since that time, Greg has exercised regular visits with Crystal.

Between July 2000 and November 2002, several permanency review hearings were held, as well as hearings on numerous motions. We do not believe it is necessary to detail those proceedings, although we have reviewed them. On November 20, 2002, the county attorney filed a petition to terminate Greg's parental rights. Then on December 10, the county attorney withdrew his petition to terminate parental rights. On December 16,

DHHS filed a petition to terminate the parental rights of Greg. The petition alleged in part that Greg had abandoned Crystal for 6 months or more immediately prior to the filing of the petition, that Crystal had been in out-of-home placement for 15 of the most recent 22 months, and that Greg had neglected and refused to protect Crystal. On May 27 and 28, 2003, the termination of parental rights hearing was held. On May 28, the court announced its decision to terminate the parental rights of Greg on the first two grounds alleged. The order was signed and filed on June 2. Greg cross-appeals.

ASSIGNMENT OF ERROR

Greg alleges that the juvenile court erred in finding the evidence sufficient to support an order terminating his parental rights.

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 juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003).

ANALYSIS

[2] Greg argues that the juvenile court erred in terminating his parental rights to Crystal.

> "A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 19[9]8) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to ([10]) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to ([10]) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required."

In re Interest of A.C., 239 Neb. 734, 739, 478 N.W.2d 1, 4-5 (1991). The juvenile court terminated Greg's parental rights, finding that Crystal had been in an out-of-home placement for more than 15 months and that Greg willfully abandoned Crystal on two occasions—both circumstances justifying termination of parental rights under Neb. Rev. Stat. § 43-292 (Reissue 1998).

Out-of-Home Placement.

At the outset, we observe that this case is somewhat unique in that at the time of Crystal's removal from her home, she was residing with Tammy, her mother, and Dean, Tammy's husband, and in that Greg was the noncustodial parent of Crystal. Accordingly, Greg's actions were not the basis for Crystal's removal from the home. Crystal came into the juvenile system because of sexual abuse by Dean, her stepfather—circumstances clearly beyond Greg's control.

Crystal has been in an out-of-home placement for 15 or more months of the most recent 22 months. She was removed from the parental home on May 26, 2000, and has remained in foster care since that time. This means that Crystal has been in foster care for over 3½ years or approximately 45 months. The State proved this statutory basis for termination of parental rights. When a basis for termination has been proved, the next inquiry is whether termination is in the child's best interests. See *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002).

Abandonment.

[3] The court based its decision in part on the fact that Greg twice left McCook for other employment without notifying either Crystal or DHHS, actions which were contrary to the court-ordered plan. The State argues that this was abandonment, thereby justifying termination of Greg's parental rights to Crystal. Section 43-292(1) provides that a court may terminate parental rights if the parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition." The petition to terminate Greg's parental rights was filed on December 16, 2002.

[4] The Nebraska appellate courts have not discussed the term "immediately prior," as used in § 43-292(1), regarding abandonment. However, the Nebraska Supreme Court has, in an adoption

setting where termination of parental rights was based on abandonment, dealt with similar statutory language from Neb. Rev. Stat. § 43-104 (Cum. Supp. 2002) that consent to adopt was not required of a parent who had "abandoned the child for at least six months next preceding the filing of the adoption petition." The Supreme Court said that the crucial time period was determined by counting back 6 months from the date the petition was filed. See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). Other states have similarly ruled. See, *In re Adoption of K.A.S.*, 933 S.W.2d 942 (Mo. App. 1996) (applicable period of consideration is calculated backward from filing date of petition); *Matter of Adoption of Maria S.*, 145 Misc. 2d 99, 545 N.Y.S.2d 676 (1989) (reason for current in praesenti 6-month period of abandonment being required is commonsense realization that "bright line" is necessary in calculating when such 6-month period occurs so that any 6-month period cannot be arbitrarily utilized as basis for terminating parental rights regardless of current or present state of that relationship). But see *Abercrombie v. LaBoon*, 290 S.C. 35, 348 S.E.2d 170 (1986) (court not persuaded that only 6-month period prior to commencement of action may be considered by court because conduct which may have warranted finding of abandonment may be cured by parent's subsequent repentant conduct). Based on the foregoing authority and the plain language of the statute, we hold that as used in § 43-292(1), the term "immediately prior" regarding abandonment means the time period determined by counting back 6 months from the filing date of the petition.

[5] Abandonment, for purposes of determining whether termination of parental rights is warranted under § 43-292(1), has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Joseph L.*, 8 Neb. App. 539, 598 N.W.2d 464 (1999). While we question whether the evidence even comes close to satisfying this standard, the issue is resolved on another very straightforward basis.

Greg's absence from Nebraska from March to August 2002 does not constitute abandonment under § 43-292(1) because Greg was absent for approximately 5 months, which is less than

the 6-month statutory requirement. Cumulatively, Greg has been gone from Nebraska for a total of approximately 9 months, if we count his time in North Carolina beginning in November 2000. However, a close reading of § 43-292(1) does not allow us to count the North Carolina absence because it did not occur "immediately prior to the filing of the petition." It was nearly 2 years later, in December 2002, when DHHS filed its petition, and 2 years is not "immediately prior." Therefore, Greg has not abandoned Crystal, and the juvenile court erred in finding that abandonment had occurred.

Best Interests of Crystal.

[6,7] A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). Therefore, with such severe and final consequences, parental rights should be terminated only in "the absence of any reasonable alternative and as the last resort." See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). The record shows that Crystal enjoys her visits with Greg, LeeAnn, and the other children. Greg has, for the most part, had regular visits with Crystal and has improved by making his visits consistently. He missed visits for 5 months while he was out of the state seeking work. Although he should have told Crystal and DHHS of his plans, the law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. These things are present here.

We cannot say that it is in Crystal's best interests that Greg's parental rights be terminated when all of the evidence is to the contrary. Greg and Crystal have a loving relationship. They enjoy spending time together, and Greg's parenting skills have improved greatly. Crystal has become an integral part of Greg's new family, having formed relationships with LeeAnn and the other children. In fact, Greg and LeeAnn have expressed an interest in obtaining custody of Crystal. While custody is not an issue before us in this appeal, this is significant because it demonstrates Greg's commitment to Crystal. Clearly, this is a

relationship worth salvaging, and it would not be in Crystal's best interests to terminate Greg's parental rights. Because the "best interests" prong of § 43-292 has not been met, we find that the evidence is not sufficient to support an order terminating Greg's parental rights.

CONCLUSION

For the reasons stated above, we find that the juvenile court erred in terminating Greg's parental rights to Crystal, and therefore, we reverse that decision. As stated above, in a separate memorandum opinion for cases Nos. A-03-650 through A-03-653, we affirm the juvenile court's decision to terminate Tammy's parental rights to Crystal.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE INTEREST OF ANTONE C. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARY M. MORAN, INTERVENOR-APPELLANT, AND DOUGLAS COUNTY, INTERVENOR-APPELLEE.

677 N.W.2d 190

Filed March 30, 2004. No. A-03-615.

1. **Juvenile Courts: Guardians Ad Litem: Fees: Appeal and Error.** On appeal, a juvenile court's decision on guardian ad litem fees is reviewed de novo on the record for an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Judgments.** A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended.
4. ____. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative.
5. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained

from the entire language of the statute considered in its plain, ordinary, and popular sense.

6. **Legislature: Supreme Court.** The Legislature is deemed to be aware of existing Supreme Court precedent when it enacts legislation.
7. **Statutes.** Effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
8. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute.
9. **Juvenile Courts: Jurisdiction: Judgments.** Because a juvenile court is not a court of general jurisdiction, it lacks authority to modify or vacate its own judgments during the term in which they are rendered.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Nunc pro tunc order vacated in part, and cause remanded with directions.

Sheri E. Cotton for intervenor-appellant.

Stuart J. Dornan, Douglas County Attorney, and Bernard J. Monbouquette for intervenor-appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Mary M. Moran, an attorney appointed as guardian ad litem for the minor children in these proceedings, appeals from the juvenile court's order entitled "Nunc Pro Tunc and Notice" which modified its initial order approving Moran's fees. We conclude that the order did not constitute an order nunc pro tunc and that the juvenile court did not have authority to modify its prior order within term. We therefore vacate the "nunc pro tunc" portion of the order and remand the cause with directions to reinstate the initial order approving Moran's fees.

BACKGROUND

On March 17 and May 16, 2000, the juvenile court appointed Moran as guardian ad litem for the minor children in this matter. Moran thereafter undertook those duties and subsequently requested fees for her services. Although it is not directly relevant to this appeal, we note that Moran previously appealed the

juvenile court's partial disallowance of fees concerning services for March 2002. See *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003).

On April 17, 2003, the court conducted a hearing on Moran's application for fees. The court received exhibit 47, which included Moran's fee statements for September 2002 through March 2003. Exhibit 47 showed fees and costs of $2,084.05 for February and $2,846.97 for March. The court also received exhibits 48 and 49, which were Moran's fee statements for July and August 2002. Two deputy county attorneys appeared and indicated their full agreement with and approval of the fees and costs in these three exhibits as amended by the parties and the court. The court inquired whether the parties and counsel had so agreed just for the December and January fees in exhibit 47, and counsel responded, "They've reviewed all of [the exhibit 47 fees]" and "[The exhibit 47 fees] are for the months of September through March of [2003]." On April 18, 2003, the court entered an order approving payment of Moran's fees as amended and set forth in exhibits 47 through 49.

On April 28, 2003, the court entered the order entitled "Nunc Pro Tunc and Notice." The court stated:

> This Court, having fully reviewed Exhibit No. 47 subsequent to its admission into evidence at the April 17, 2003 hearing, became aware for the first time that new monthly billings for the months of February and March, 2003 were submitted as part of Exhibit No. 47, and that these billings have not been cleared through the Office of the Juvenile Court Administrator prior to being approved for payment in the Court's Order of April 17, 2003. The Court has serious concerns that these billings are excessive and contain unnecessary work on the part of the Guardian ad Litem. The Court now therefore amends its Order of April 17, 2003, Nunc Pro Tunc in the following particulars:
>
> That the Court approves payment of attorney fees under Exhibit Nos. 48 and 49 only, AND IT IS SO ORDERED.
>
> IT IS FURTHER ORDERED that this matter shall be set for a continued hearing on the request for payment of fees of the Guardian ad Litem for the children contained in Exhibit No. 47 . . . .

The court also restricted Moran from performing additional work on the case absent express approval from the juvenile court and appointed a "Co-Guardian ad Litem."

On May 8, 2003, the court conducted the further hearing contemplated by the April 28 order. Moran moved for a continuance, for the judge to recuse himself, and for the court to vacate the "nunc pro tunc" order. The court denied Moran's motions and ordered that Moran be paid $500 for her services in February and $500 for her services in March.

ASSIGNMENTS OF ERROR

Moran assigns that the juvenile court erred (1) in modifying its April 18, 2003, order by entering a "nunc pro tunc" order on April 28 and (2) in denying Moran due process in several respects.

STANDARD OF REVIEW

[1] On appeal, the juvenile court's decision on guardian ad litem fees is reviewed de novo on the record for an abuse of discretion. See, *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002) (juvenile cases are reviewed de novo on record); *Halouska v. Halouska*, 7 Neb. App. 730, 585 N.W.2d 490 (1998) (allowance and amount of guardian ad litem fees will be set aside only where there appears to be abuse of discretion by trial court).

[2] 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. *Halouska v. Halouska, supra.*

ANALYSIS

Moran asserts that the juvenile court lacked authority to enter the April 28, 2003, order reducing the fees previously approved in the April 18 order. She argues that the April 28 order was not a valid nunc pro tunc order.

[3] According to case law, a nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually

rendered, even if such order was not the order intended. See *Walsh v. City of Omaha*, 11 Neb. App. 747, 660 N.W.2d 187 (2003).

The record shows that at the April 17, 2003, hearing, the juvenile court stated approval of the fees and expenses represented in exhibits 47 through 49, and that the April 18 order accurately memorialized that approval. The April 28 order shows that the juvenile court judge subsequently decided to change or revise the April 18 order. The case law rejects use of a nunc pro tunc order for that purpose.

[4] We next consider whether legislation adopted in 2000 modifies the case law regarding the function of nunc pro tunc orders. Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2002) provides, "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative . . . ."

[5] Subsections (1), (2), and (4) of § 25-2001 expressly address a district court's authority to modify within term, under its equity jurisdiction, and after close of term. Unlike the other subsections of § 25-2001, subsection (3) does not specifically refer to the district court. We therefore assume, without deciding, that the authority to enter nunc pro tunc orders under subsection (3) extends to the juvenile court. See *In re Interest of Steven K.*, 11 Neb. App. 828, 661 N.W.2d 320 (2003) (in discerning meaning of statute, court must determine and give effect to purpose and intent of Legislature as ascertained from entire language of statute considered in its plain, ordinary, and popular sense).

We must consider whether the April 28, 2003, order corrected an error on the record "arising from oversight or omission" as contemplated by § 25-2001(3). The subsection's language encompasses both the correction of "[c]lerical mistakes" and the correction of "errors [in an order which have arisen] from oversight or omission" as being within the function of an order nunc pro tunc. Considered alone, the phrase "errors . . . arising from oversight or omission" might be construed to extend the function of an order nunc pro tunc. We reject that interpretation.

[6] The Legislature is deemed to be aware of existing Supreme Court precedent when it enacts legislation. *In re Estate*

of Kopecky, 6 Neb. App. 500, 574 N.W.2d 549 (1998). We therefore consider that the Legislature understood the existing case law regarding nunc pro tunc orders when adopting § 25-2001(3). In enacting subsection (3), the Legislature expressly characterized an order correcting errors arising "from oversight or omission" as an "order nunc pro tunc."

[7] Section 25-2001(3) authorizes a nunc pro tunc order "at any time," whether during or after term. Unless limited to the preexisting function of nunc pro tunc orders, the "oversight or omission" language would greatly expand the function of such orders, rendering subsections (1), (2), and (4) superfluous. An interpretation inferring such expansion violates the rule requiring effect to be given, if possible, to all the several parts of a statute and precluding rejection of any sentence, clause, or word as superfluous if it can be avoided. See *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). We conclude that the plain meaning of the language, as properly understood, limits the operation of subsection (3) to nunc pro tunc orders as they existed under prior case law.

Although we do not deem it necessary to resort to legislative history, we note that the legislative history supports our conclusion that the Legislature intended only to codify the court's authority to enter nunc pro tunc orders as that authority has been set forth in case law:

> [T]here is no statute which provides for an order nunc pro tunc to correct a clerical error in order to change a clerical mistake arising from an oversight or admission [sic]. . . . [T]he post-trial motion procedure is clarified, and the statutory authority for nunc pro tunc orders is created.

Floor Debate, L.B. 921, Judiciary Committee, 96th Leg., 2d Sess. 9720 (Mar. 1, 2000).

Regardless of its title, the juvenile court's April 28, 2003, order was not a nunc pro tunc order as defined by Nebraska law.

[8,9] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). Because the juvenile court is not a court of general jurisdiction, it lacks authority to modify or vacate its own judgments during the term in which they

are rendered. See *In re Interest of Lisa V.*, 3 Neb. App. 559, 529 N.W.2d 805 (1995).

We conclude that the portion of the April 28, 2003, order purporting to modify the prior approval of Moran's fees and costs must be vacated and that the April 18 order approving those fees and costs must be reinstated. Moran assigns no error regarding the remaining portions of the April 28 order directing Moran to perform no additional work without express approval and appointing a coguardian ad litem, and our decision does not affect those portions of the April 28 order.

Because our consideration of the "nunc pro tunc" order is dispositive of this appeal, we need not consider Moran's remaining assignment of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

For the foregoing reasons, we conclude that the juvenile court lacked authority to modify the April 18, 2003, order approving Moran's fees and costs. We therefore vacate that portion of the April 28 order modifying fees and costs and remand the cause with directions to reinstate the order entered on April 18.

NUNC PRO TUNC ORDER VACATED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
HECTOR H. ROMO, APPELLANT.
676 N.W.2d 737

Filed March 30, 2004. No. A-03-925.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Assault: Words and Phrases.** A dangerous instrument is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury.

4. **Assault: Intent.** One commits an attempted first degree assault if one intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause serious bodily injury to another person.
5. **Criminal Law: Trial.** A trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases.
6. **Criminal Law: Juries: Jury Instructions.** When a jury is the fact finder in a case involving accessory to a felony charges, the jury should be instructed so as to ensure that the underlying offense of the principal is specifically determined.
7. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

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

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

Hector H. Romo appeals the decision of the district court for Adams County, which convicted him of accessory to a felony under Neb. Rev. Stat. § 28-204 (Cum. Supp. 2002) and sentenced him to a term of 20 months' to 3 years' imprisonment. Romo appeals both the judgment and the sentence.

FACTUAL BACKGROUND

On June 25, 2001, Rene Hernandez (Rene) was standing outside his vehicle parked at a residence on North Lexington in Hastings, Nebraska, when a white Honda Civic owned and operated by Romo drove past the residence. As the car passed, a passenger, Robert Dante Starr (Dante), fired 10 to 12 shots in the direction of Rene's vehicle. Also standing outside Rene's vehicle and in the line of fire were Emilio Llanes (Emilio) and Brandon Barrientez. Rene's wife and two children were sitting inside the vehicle. After Dante quit shooting, Romo continued driving for several blocks to where Dante instructed him to stop. Dante then

got out of the car and ran to his grandmother's house, where he waited about an hour, and then he went to a pond and threw the gun in the water. After Dante got out of the car, Romo then drove to Beatrice, Nebraska, where he was later apprehended.

This incident between Romo, Emilio, and Rene was not the first to occur on June 25, 2001. Earlier in the day, Rene had "flipped [Romo] off," and about 30 minutes to an hour prior to the shooting, Rene shattered the back window of Romo's car with a baseball bat in the parking lot of a fast-food restaurant. After the incident at the restaurant, Romo told Bouston Roman (Bouston) that he was "fed up with how Emilio was acting" and that he "planned on getting Emilio." Romo and Bouston then went to pick up Dante, who brought his gun along. Romo, Bouston, and Dante then went to find Emilio, and the shooting took place soon thereafter.

PROCEDURAL BACKGROUND

Romo was charged by information on September 10, 2001, with "Accessory to Felony," "Class IV Felony." Romo waived his right to a jury trial. Following the bench trial, Romo was found guilty of accessory to a felony, a Class IV felony. Romo then filed a motion for new trial, which motion the trial court overruled, sentencing him to a term of 20 months' to 3 years' incarceration. Romo timely appeals.

ASSIGNMENTS OF ERROR

Romo asserts, restated, that the trial court erred in (1) finding sufficient evidence to support the conviction; (2) failing to find what felony Romo "believed" Dante had committed, which failure affected Romo's penalty; and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003); *State v. Taylor, ante* p. 58, 666 N.W.2d 753 (2003).

[2] With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

ANALYSIS

Sufficiency of Evidence.

Romo contends that the trial court erred in finding that there was sufficient evidence to convict him of accessory to a felony under § 28-204. Where a jury has been waived and the judge is the trier of the facts in a criminal case, the factual findings will not be disturbed on appeal unless they are clearly wrong. *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988). On a claim of insufficiency of the 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 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. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

Section 28-204 provides in relevant part:

> (1) A person is guilty of being an accessory to felony if with intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, he or she:
>
> . . . .
>
> (b) Provides or aids in providing . . . transportation . . . or other means of effecting escape or avoiding discovery or apprehension;
>
> . . . .
>
> (2) . . . .
>
> . . . .
>
> (c) Accessory to felony is a Class IV felony if the actor violates subdivision . . . (1)(b) . . . of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class III or Class IIIA felony.

[3] Therefore, under the statute, in order for Romo to be convicted of a Class IV felony, Dante's conduct must constitute a Class III or Class IIIA felony. Dante testified during trial that he was convicted of terroristic threats and two counts of "attempted aggravated assault." While Nebraska does not have a crime statutorily labeled "aggravated assault," such term could encompass, as is pertinent here, second degree assault, intentionally causing bodily injury with a dangerous instrument, a Class IIIA felony, see Neb. Rev. Stat. § 28-309 (Cum. Supp. 2002); or first degree assault, knowingly and intentionally causing serious bodily injury, a Class III felony, see Neb. Rev. Stat. § 28-308 (Reissue 1995). Either of such crimes committed by Dante would suffice for the predicate offense of a Class III or Class IIIA felony for Romo's Class IV felony accessory conviction. A dangerous instrument is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991). Obviously, a handgun is a dangerous instrument which can cause serious bodily injury. Consequently, Dante's admission that he was convicted of two counts of "attempted aggravated assault" cannot by itself carry the State's burden to show the predicate offense by Dante to convict Romo for Class IV felony accessory. However, such admission can be considered along with the other evidence of Dante's actions to determine whether a predicate felony was proved. Therefore, in order to determine whether the evidence was sufficient to convict Romo as an accessory to a felony committed by Dante, we look to whether the evidence was sufficient for the trial court to find that Dante committed either attempted first degree assault or attempted second degree assault, whether Romo knew of such conduct, and whether Romo had the requisite intent.

[4] "One commits an attempted first degree assault if one intentionally engages in conduct which is a substantial step in a course of conduct 'intended or known to cause' 'serious bodily injury to another person.' " *State v. McBride*, 252 Neb. 866, 878, 567 N.W.2d 136, 145 (1997). Attempted second degree assault would be analogous, substituting the elements of second degree assault, e.g., attempt to cause bodily injury with a dangerous instrument.

Dante testified that he and Romo were planning to "ride around" on the evening of June 25, 2001. Dante testified that he did not like Rene and that when he saw Rene as they drove by in Romo's car, Dante "went ahead and let some shots off." He admitted that he fired at least 10 to 12 shots "in the vicinity" of Rene. Romo then drove several blocks, and Dante got out and ran. Dante's version of the events, as well as Dante's description of his and Romo's intentions, varies somewhat from Romo's version. Romo did not testify at trial. However, he waived his *Miranda* rights and spoke to Det. Adam Story of the Hastings Police Department on the ride back to Hastings from Beatrice. Detective Story testified that Romo said he "was fed up with how Emilio was acting" and that Romo "planned on getting Emilio." Romo told Detective Story that on the night of the shooting, he knew Dante had a gun when Romo picked Dante up and they intended to go find Emilio. Romo said he drove the car while Dante fired the gun about 10 times. Romo then drove a few more blocks, and Dante got out and fled.

In viewing the evidence most favorably to the State, the evidence shows that Dante intentionally took a gun with him in Romo's car and planned to "get" someone, either Emilio or Rene, depending on whose version is accepted. Further, Dante fired the gun 10 to 12 times in the direction of six people, including two children. Dante's conduct was sufficient to constitute a substantial step in a course of conduct intended or known to cause serious bodily injury to another person. See *State v. McBride, supra* (evidence was sufficient for first degree attempted assault charge where witness saw defendant pull out gun and fire at occupied automobile). Anytime one fires a gun in the direction of a group of people, there is a substantial risk that serious bodily injury could result from the conduct. Therefore, we find there is sufficient evidence to determine that Dante committed attempted first degree assault, a Class III felony. The same evidence would obviously also sustain a finding that Dante's conduct constituted attempted second degree assault.

We now turn to whether Romo knew of Dante's felonious conduct and whether Romo had the intent to "interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment" of Dante by driving the car in

the commission of the felony and fleeing the scene of the crime. See § 28-204. As to Romo's knowledge, the Nebraska Supreme Court has found that the knowledge element is satisfied if one knows of the conduct. See *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). According to Romo's own admission to Detective Story, Romo knew that Dante had the gun with him when he got into Romo's car on June 25, 2001. Further, Romo admitted they intended to find Emilio and "get" him, and Romo obviously knew of the shots being fired from the car he was driving. There is sufficient evidence to satisfy Romo's knowledge of Dante's felonious conduct.

Finally, we must determine whether Romo had the requisite intent. There is no doubt that Romo drove the car as Dante fired the shots and that once Dante quit firing, Romo drove away from the scene and then let Dante out of the car so he could flee. Romo did not report the incident to law enforcement, but instead fled to Beatrice. Based on these circumstances, any fact finder could infer that Romo had the requisite intent to transport Dante during the crime and while Dante fled the scene. The evidence was sufficient to prove the elements of accessory to a felony, including Dante's predicate felony, and the trial court did not err in finding Romo guilty.

Finding of Felony.

As to Romo's second assignment of error, Romo's entire argument is as follows:

> [Romo] was the driver of a car from which Dante . . . fired several shots. Since there was no discussion ahead of the time of the incident about what Da[n]te . . . was going to do . . . and, since [Romo] was driving during the incident, and continued driving away from the scene, [Romo] would have no way of knowing what crime Dante . . . may have committed, other than discharging a firearm within the city limits.
>
> The Court found [Romo] guilty of a Class IV felony. In order to be guilty of a Class IV felony, [Romo] must have believed Dante . . . committed a Class III A or Class II A felony.
>
> The District Court failed to find what crime that [Romo] believed that Dante . . . had committed. Such finding is

> necessary to determine the punishment that [Romo] is subject to.

Brief for appellant at 8.

[5] This argument is not supported by citation to the record or case law. Romo did not request that the trial judge make a specific finding regarding the predicate felony on which Romo's conviction of accessory to a felony was based, but by convicting him of a Class IV felony, the predicate crime had to be a Class III or Class IIIA felony. However, even if he had made such a request, the assignment would be without merit, because a trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. See *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992). See, also, *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995); *State v. Lozano*, 209 Neb. 772, 311 N.W.2d 529 (1981).

Additionally, it is clearly not the duty of the trial court to determine what crime Romo "believed" Dante had committed; the court must determine whether a predicate felony to sustain the charge of accessory has been committed. We have already found there was sufficient evidence to find Dante guilty of attempted first degree assault or attempted second degree assault. Thus, we find that the trial judge did not err in finding Romo guilty of a Class IV felony based on Dante's commission of either attempted first degree assault or attempted second degree assault. This assignment of error is without merit.

[6] That said, we encourage trial judges, when sitting as finders of fact, to make a specific finding of the offense that the principal committed when a defendant is charged with being an accessory to a felony in violation of § 28-204. Although not yet required by law, such a finding would aid appellate review, because the penalty may depend on the class of felony committed by the principal. Clearly, when a jury is the fact finder, the jury should be instructed so as to ensure that the underlying offense of the principal is specifically determined.

Excessive Sentence.

[7] Romo contends that the trial court erred in sentencing him to 20 months' to 3 years' incarceration, rather than placing him on probation. Whether the sentence imposed is probation or

incarceration is a matter within the discretion of the trial court. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion, which abuse exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

The trial court declined to give Romo probation because placing Romo on probation "would promote disrespect for the law." Further, Romo failed to cooperate with probation in regard to the presentence investigation report, and he had a previous conviction for a concealed weapon where his probation was revoked. Thus, the trial court found there was a likelihood that Romo would engage in additional criminal conduct. Thus, the trial court did not abuse its discretion in determining that Romo was not a suitable candidate for probation.

We also note the seriousness of the offense—driving by and shooting at three people standing outside a vehicle when a mother and her two children are inside the vehicle. This drive-by shooting put in danger not only those six people, but the community at large. The fact that no one was hurt does not diminish the seriousness of the offense. The trial court did not abuse its discretion when it sentenced Romo.

AFFIRMED.

JERE D. DETTER, APPELLANT, V. MIRACLE HILLS ANIMAL HOSPITAL, P.C., A NEBRASKA CORPORATION, APPELLEE.

677 N.W.2d 512

Filed April 6, 2004. No. A-02-688.

1. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
2. **Valuation: Goodwill.** Any value which attaches to a commercial entity solely as a result of personal goodwill represents nothing more than probable future earning capacity.
3. **Partnerships: Goodwill.** Professional partnerships do not have a goodwill asset.

4. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
5. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Duane M. Katz for appellant.

Robert E. O'Connor, Jr., for appellee.

HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired.

INBODY, Judge.

INTRODUCTION

Jere D. Detter appeals a decision of the Douglas County District Court, which found Miracle Hills Animal Hospital, a professional corporation owned by veterinarians Detter and Jeffrey Schreiber, to be worth $35,912 and valued Detter's portion of the corporation at $17,956. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

Prior to 1988, Detter ran a mobile veterinary practice in the Omaha, Nebraska, area out of a modified van. In approximately 1988, Detter met Schreiber, another Omaha veterinarian, who was running a practice out of the Omaha College of Health Careers. Detter initially rented space from Schreiber while continuing to run his mobile practice. Eventually, Detter and Schreiber decided that they should combine their talents and create one animal hospital. In January 1991, Detter and Schreiber agreed to form the Miracle Hills Animal Hospital (hereafter MHAH). Part of their agreement included Schreiber's signing promissory notes, totaling $19,000, over to Detter. This was to account for Detter's more valuable practice and equipment, which he was bringing to MHAH.

Detter and Schreiber began to do business as MHAH in Omaha. Soon thereafter, Schreiber's wife, Linda Schreiber (Linda), began

working at MHAH as a groomer. When Linda first began at MHAH, there was an oral agreement that she would get 60 percent of her fees and that MHAH would get the other 40 percent. While Linda used mostly her own equipment, MHAH provided her with space, supplies, scheduling, and other staff assistance. In 1993, Schreiber told Detter that he felt Linda deserved to be paid better. As a result, they made two additional agreements: MHAH would buy Detter's modified van from him, and Linda would be allowed by MHAH to keep all of her grooming profits and would pay rent for the space and services provided her by MHAH.

Detter and Schreiber operated this way until October 1997. When Schreiber made his payment to Detter on the promissory notes for that month, he informed Detter that it would be the last payment he would make until Detter agreed to compensate him for past and future management services. Detter told Schreiber that Schreiber would have to abide by their 1991 agreement and pay off the promissory notes before Detter would pay management fees to Schreiber. They continued to have conversations about management fees, Linda's grooming services, and the valuation of each other's veterinary time. While they had discussed eventually phasing out Detter's mobile practice, it was still a main income source for MHAH. Detter also had reservations about Linda's grooming practice, believing that MHAH was providing too much for Linda's practice.

Soon, Detter and Schreiber began discussing reorganizing their business so that each of their incomes would be based on revenue production. In an attempt to resolve their differences, mediation was suggested, but it was not undertaken. Discussions were still going on until March 1998, when Detter offered to settle, for $14,000, the promissory notes and Schreiber's management fee requests. Schreiber turned down Detter's offer and counteroffered to settle for $11,000. Detter did not accept Schreiber's counteroffer, notifying Schreiber that they did not have any agreements on how to handle management fees. On April 27, Detter sent a demand letter on the promissory notes to Schreiber; Schreiber responded to the letter by notifying Detter that he should feel free to institute litigation.

On May 1, 1998, Detter withdrew his settlement offer. Schreiber again offered to settle the promissory notes and management fees

for $11,000, but again, Detter turned down the offer. Soon thereafter, Schreiber delivered an $11,000 check to Detter, claiming that that amount represented full payment. Detter told Schreiber that no agreement had been made and notified Schreiber that he would be suing Schreiber on the promissory notes, and a suit was filed on May 12. On June 3, Schreiber's attorney contacted Detter, confirming that there were no restrictions on the $11,000 check Schreiber had written to Detter and that if Detter cashed the check, he could still pursue legal action for the remainder he felt was due on the promissory notes. At that point, Schreiber owed Detter approximately $21,302.28, according to Detter's calculations. Detter did cash the $11,000 check after receiving the assurances from Schreiber's attorney that cashing the check would not affect his ability to sue for what he felt was the remaining balance.

In June 1998, Detter called a board meeting in an attempt to resolve the differences between himself and Schreiber. The meeting was held June 30, at which time the parties discussed reorganizing MHAH. An attorney was hired to bring the corporate records up to date, but Schreiber later indicated that no agreement had been made to hire the attorney and stopped payment on the check written for the attorney's services. Detter called another board meeting, which took place on August 5. Detter had called this meeting to discuss problems he had with Linda's grooming business and the way she was selling the inventory of MHAH without paying anything to MHAH. However, before the meeting began, Schreiber's attorney told Detter, "[Y]ou're going to vote yes to remove her, we're going to vote no, we're at an impasse, so what can we do to move on?"

Subsequently, the office environment became unpleasant. Schreiber began to keep MHAH's business checkbook at home, making it difficult for Detter to know the financial status of the business. Detter claims that the office staff would not work for him, would waste time, and would switch appointments to have customers see Schreiber instead of Detter and that on one occasion, Linda took a note Detter had left for Schreiber, ripped it up, and threw it away.

On September 19, 1998, Detter made an offer to Schreiber to settle their differences, offering to buy Schreiber's interest in MHAH for $60,000 minus what Schreiber still owed Detter on

the promissory notes, a little over $10,000 by Detter's calculations. The offer would have been good either way, meaning that if Schreiber wanted to stay at MHAH, Detter would take $60,000 plus the balance of the promissory notes for his half of the business, and if Detter wanted to stay at MHAH, he would pay Schreiber $60,000 less the balance of the promissory notes. Schreiber did not respond to the offer. Detter then filed suit on November 18 to dissolve MHAH. Schreiber did respond after suit was filed, rejecting Detter's offer and making a counteroffer to pay Detter $10,000 for Detter's half of MHAH. Schreiber later increased his offer to $15,000, but both of those offers were rejected by Detter. Detter left MHAH on September 4, 1999, and resigned as a director and an officer.

The two lawsuits, on the promissory notes and on the dissolution and valuation of MHAH, were consolidated. During the trial, the court found against Schreiber in the suit on the promissory notes in the amount of $17,321.84, and that judgment has not been appealed by Schreiber. During trial on the dissolution and valuation case, the court refused to allow some of Detter's witnesses to testify. Detter wished to call Theresa Brinks and Amy Payton, both of whom are former MHAH employees. Detter claims that Brinks and Payton would have testified that the work environment had become very unpleasant; that some of the employees did not work well for Detter; that Linda went through Detter's briefcase, looking for personal information and items; that employees would hang up when Detter would call MHAH; and that employees would do things just to antagonize Detter, among other things. Detter also wanted to introduce the deposition of another former employee, Monica Lasher, into evidence. Detter alleged that Lasher's deposition would have included allegations of similar occurrences. Detter wanted to enter these witnesses' testimony into evidence as proof of how MHAH was being run, but the court denied Detter's requests to call Brinks and Payton and to introduce Lasher's deposition, noting that all of this evidence would be irrelevant and immaterial.

Detter called an expert witness, Cynthia Wutchiett, who provided an opinion as to the valuation of MHAH. Wutchiett, a certified public accountant, testified that she had a great deal of experience with valuing veterinary practices because that was her

specialty. She testified that the value of MHAH was $182,082 on November 17, 1998. Wutchiett also claimed that it was very difficult for a doctor leaving a veterinary practice to retain many of the clients he or she had served at the practice, citing a Kansas practice's relocation wherein only 30 to 40 percent of the clients were ultimately retained after aggressive advertising.

Schreiber called only two witnesses in his case in chief. The first witness was Ronald Nebbia, another certified public accountant. Nebbia testified that he disagreed with Wutchiett's valuation, specifically because she included goodwill in her valuation. Nebbia testified that "in a professional practice of this nature, goodwill primarily rests with the provider and not the practice." Schreiber entered into evidence Nebbia's detailed valuation of the practice at $35,912. The second witness was Schreiber himself. Schreiber took the stand and testified that among other things, he felt his management duties were undervalued, he felt he had settled the promissory notes with Detter for $11,000, and many of the former clients of MHAH had left to go elsewhere after Detter left.

At the end of evidence, the trial court found for Detter on the promissory notes, as noted above. The trial court then found that Wutchiett used an incorrect valuation method when valuing MHAH and that under *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), goodwill was not to be added to the valuation of a professional corporation like MHAH. The court found that Nebbia used the correct valuation method and found the value of MHAH to be $35,912. After making its award to Detter for the promissory notes, it awarded Detter an additional $21,006, which amounted to half the $35,912 value of the practice ($17,956) plus half the $6,100 value of the van ($3,050). This $21,006 amount was to be paid to Detter by MHAH, which had elected under Neb. Rev. Stat. § 21-20,166(1) (Reissue 1997) to purchase Detter's shares of the corporation. Further, the court stated that it did not find that Schreiber engaged in behavior that was "illegal, oppressive, or fraudulent," Neb. Rev. Stat. § 21-20,162(2)(b) (Reissue 1997), and did not find that he misapplied or wasted corporate assets in contravention of § 21-20,162(2)(d). Therefore, the court did not award Detter his requested attorney fees or costs. Detter has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Detter's assigned errors can be consolidated into the following issues: He contends that the district court erred (1) in its valuation of the corporation, (2) in failing to allow him to present all relevant evidence of Schreiber's conduct, and (3) in declining to award him attorney fees and expenses pursuant to § 21-20,166(5)(b).

STANDARD OF REVIEW

An action seeking corporate dissolution is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*; *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000); *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Kirchner v. Wilson, supra.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, 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. *Id.*

ANALYSIS

Valuation of Corporation.

[1] Detter's first assignment of error is that the district court erred in its valuation of MHAH. Specifically, Detter claims that the district court erred in finding that *Taylor v. Taylor*, 222 Neb.

721, 386 N.W.2d 851 (1986), controls the determination of the value of a corporation in a corporation dissolution action, in rejecting Wutchiett's expert testimony, and in allowing no value for the goodwill of MHAH. A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003); *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988).

Section 21-20,166(4) provides:

> If the parties are unable to reach an agreement as provided for in subsection (3) of this section, the court, upon application of any party, shall stay such proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the petition under subdivision (2) of section 21-20,162 was filed or as of such other date as the court deems appropriate under the circumstances.

Therefore, it was the trial court's responsibility to "determine the fair value," *id.*, of Detter's portion of MHAH.

[2] The trial court held that *Taylor* controlled the issue of valuation in this case, relying on the following language in *Taylor*:

> [W]here goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity . . . .

222 Neb. at 731, 386 N.W.2d at 858. The trial court then held that "good will for members of a professional corporation does not have a value when one or the other part[y] leave[s]" and that "any good will that might have been present with . . . Detter's participation in [MHAH] left with . . . Detter."

While the logic of *Taylor* and its progeny remains sound, *Taylor* deals with a partner of a professional corporation and his spouse involved in a marital dissolution. In contrast, in the instant

case, the two members of a professional corporation are dissolving the corporation. Despite his assertion that the trial court relied too heavily on *Taylor*, however, Detter is unable to point to any Nebraska law that controls the issue. Detter merely points out that the operative statute requires the court to come up with a " 'fair value of the petitioner's shares.' " (Emphasis omitted.) Brief for appellant at 25. As we have also been unable to discover Nebraska law on this issue, we determine that this is a case of first impression in Nebraska and that we must therefore look elsewhere for guidance in this case.

We find a case from the Texas Supreme Court instructive. In *Salinas v. Rafati*, 948 S.W.2d 286 (Tex. 1997), three radiologists had established a professional partnership. When one of the radiologists elected to leave the partnership due to internal strife, a dispute arose over the value of his share of the partnership. Much like Detter in the instant case, the departing radiologist wanted to compute the value of his share of the partnership using a formula including goodwill. The Texas Supreme Court noted that "the value [brought by the departing radiologist and] attributed to the partnership was largely based on [his] talents and abilities . . . and [his] ability to generate income in the future." *Id.* at 290. That court continued by holding that "[t]o the extent that the valuation of the dissolved partnership was based on the goodwill attributable to the personal skills and talents of the former partners, [the trial court] improperly took into account intangibles that were not partnership assets." *Id.*

[3] The Wyoming Supreme Court held similarly in *Smith, Keller & Assoc. v. Dorr & Assoc.*, 875 P.2d 1258 (Wyo. 1994). In *Smith, Keller & Assoc.*, four accountants had created a professional partnership. When the partnership dissolved, arguments arose over the value of the departing accountants' shares of the partnership. In dealing with the question of whether to include goodwill in the valuation of the partnership, the Wyoming Supreme Court noted in a footnote: "Goodwill represents an intangible asset that refers to the ability of a professional firm to attract clients as a result of the firm's name, reputation, location, managerial skill, and technological resources. . . . The accepted rule has recognized that professional partnerships do not have a goodwill asset." (Emphasis omitted.) *Id.* at 1265 n.5.

We find the reasoning of the Texas Supreme Court and the Wyoming Supreme Court persuasive. As the former of those two courts held in *Salinas v. Rafati*, 948 S.W.2d at 291:

> [I]t is evident that a valuation based on the earnings of the [radiologists] improperly takes into account goodwill that is attributable only to the professionals personally. . . . Each of the former partners now has the opportunity to compete for the partnership's former business. . . .
>
> . . . [A] rule of law that would allow a partner to recover a share of a former partner's ability to generate income under the guise of goodwill [would be incongruous].

It has long been held that the analysis for determining the value of a professional partnership and the analysis for determining the value of a professional corporation would be the same. Therefore, we decide that the trial court's determination that goodwill should not be included as an asset of a closely held corporation was not error.

Detter also claims that the court erred by rejecting Wutchiett's testimony. In his brief, Detter alleges that Wutchiett's credibility is "undeniable," brief for appellant at 27; that "[h]er experience with veterinarians is decisive," *id.*; and that "[t]he witness who provided an opinion of value and who was clearly the most qualified was Wu[tchie]tt," *id.* at 28. While the credentials of Wutchiett are certainly impressive, she determined the value of MHAH using a method giving the corporation credit for goodwill. As we mentioned previously, goodwill is not an asset with an assignable value in a professional corporation; it is not a marketable asset that stays with a corporation, but, rather, a nonmarketable one that leaves with a professional. Because Wutchiett's valuation of MHAH incorporated an asset that is not a marketable asset, we affirm the trial court's decision to reject her testimony. Based on our review of the record, we find that the trial court properly rejected Detter's method of valuation for MHAH. Accordingly, we affirm the trial court's valuation of MHAH.

Failure to Allow Detter to Present Relevant Evidence.

Detter claims that the district court erred in failing to allow him to present relevant testimony from Lasher, Brinks, and Payton which he claimed showed that Schreiber's and Linda's conduct

was illegal and oppressive and caused a misapplication and waste of MHAH's assets. The court found that the proffered testimony was irrelevant.

[4] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401; *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). Evidence which is not relevant is not admissible. Neb. Rev. Stat. § 27-402 (Reissue 1995).

[5] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

Detter made offers of proof regarding the oral testimony of Brinks and Payton and the deposition testimony of Lasher. The offers of proof essentially provided examples of conflicts between Linda and Detter and between another MHAH employee, Jenny Hollinger, and Detter, such as Hollinger's refusal to assist Detter, Linda's intrusion into Detter's briefcase searching for personal information and items, Linda's and Hollinger's hanging up on Detter or placing him on hold unnecessarily when he called in, Linda's and Hollinger's writing rude notes on a calendar or appointment book, and fights over a radio station. However, there was no evidence that Schreiber was responsible for, or encouraged, this behavior or otherwise fostered the conflicts.

Furthermore, § 21-20,162 provides that a court may dissolve a corporation "(2) [i]n a proceeding by a shareholder if it is established that . . . (b) [*t*]*he directors or those in control of the corporation* have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent . . . or (d) [t]he corporate assets are being misapplied or wasted." (Emphasis supplied.) Neither Linda nor Hollinger was a director or otherwise in control of MHAH, and therefore, this evidence was not relevant. Consequently, this assignment of error is without merit.

Failure to Award Attorney Fees and Expenses.

Finally, Detter contends that the district court erred in declining to award him attorney fees and expenses pursuant to § 21-20,166(5)(b). This decision was based upon the court's finding that Schreiber did not misapply or waste corporate assets.

Section 21-20,166(5)(b) provides, "If the court finds that the petitioning shareholder had probable grounds for relief under subdivision (2)(b) or (d) of section 21-20,162, it may award to the petitioning shareholder reasonable attorney's fees and expenses and fees and expenses of any experts employed by him or her." As noted above, § 21-20,162 provides that a court may dissolve a corporation "(2) [i]n a proceeding by a shareholder if it is established that . . . (b) [t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent . . . or (d) [t]he corporate assets are being misapplied or wasted."

As discussed earlier, the behavior of other employees, such as Linda or Hollinger, cannot be considered here because they were not "directors" or "in control of the corporation," see § 21-20,162(2)(b). Therefore, we must focus squarely on the behavior of Schreiber himself. The trial court stated that it "[did] not find that . . . Schreiber was at anytime misapplying or wasting the corporate assets[,] and [the court] therefore decline[d] to award attorney fees under . . . § 21-20[,]162(2)(b) or (d)."

Much of the conduct Schreiber engaged in may have been unkind, unfriendly, mistrusting, and greedy. The record indicates that Schreiber, on different occasions, kept the corporate checkbook at home and away from Detter, attempted to get Detter to accept less than what was owed on the promissory notes, wanted to pay Linda more than she ought to have been paid, and allowed employees to treat Detter, his business partner, disrespectfully. The district court specifically found:

> [I]t appears to the Court that Schreiber attempted to put the squeeze on [Detter] by attempting to negotiate something on the money [Schreiber] owed on the promissory notes and also to force Detter to pay him remuneration for past manager fees and future manager fees . . . .
>
> . . . .

> . . . [Schreiber's] conduct toward [Detter] while the corporate matters were wound up was much less than civil and certainly not fair.

While we agree with the district court that Schreiber's conduct was not kind and was perhaps unfair, the record does not indicate that Schreiber's behavior was "illegal, oppressive, or fraudulent," see § 20-21,162(2)(a)(ii). It also does not show that Schreiber was misapplying or wasting corporate assets. We find that the district court did not err in denying Detter's request for attorney fees and costs.

CONCLUSION

Detter's expert, Wutchiett, failed to use a method of valuation that has been approved in Nebraska. Therefore, we find that the trial court properly rejected her testimony. Based on our review of the record, our conclusion is that the trial court used an appropriate method of valuation, and we affirm the trial court's valuation of MHAH. The trial court properly refused to award Detter attorney fees and costs and appropriately refused to allow testimony by Brinks, Payton, and Lasher. Therefore, the trial court's decision is affirmed in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PATRICK R. HILL, APPELLANT.
677 N.W.2d 525

Filed April 13, 2004. No. A-03-516.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
3. **Criminal Law: Statutes: Jurisdiction.** Neb. Rev. Stat. § 29-205 (Reissue 1995) gives authority to detain a person who has been charged with the commission of a punishable offense and who has left the jurisdiction in which the offense occurred.
4. **Statutes: Controlled Substances.** Unless a statute specifically provides otherwise, it matters not how much of a controlled substance one possesses; under such a circumstance, the quantity possessed is not an essential element of the crime.

5. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

David L. Kimble, Seward County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Patrick R. Hill appeals his conviction and sentence on a charge of possession of methamphetamine. On appeal, Hill challenges the district court's order overruling his motion to suppress, the sufficiency of the evidence to support the conviction, and the sentence imposed by the district court. We find no merit to Hill's assertions, and we affirm.

II. BACKGROUND

The events which gave rise to this case occurred on November 5, 2001. On that date, Gregory Sims, a narcotics investigator for the Lincoln Police Department, observed Hill driving a vehicle within the city limits of Lincoln. Sims had prior information concerning Hill and alleged manufacture of methamphetamine, so Sims began to follow Hill. As Sims continued to follow Hill, Hill left the city limits of Lincoln and moved toward Milford, in Seward County.

While following Hill, Sims was in contact with the dispatcher in Lincoln and was made aware that there was an outstanding arrest warrant for Hill on a charge of failure to appear in Lancaster County Court. Approximately 1 mile outside the city limits of Milford, Hill pulled the vehicle he was driving over to the side of the road. Sims believed that Hill stopped to find out why Sims had been following him. Sims testified that he did nothing to cause Hill to stop his vehicle.

While Sims had been following Hill and had been in contact with the dispatcher in Lincoln, information concerning Sims' actions in following Hill had been communicated to the Seward County Sheriff's Department. Sims testified that when Hill stopped the vehicle he was driving and Sims contacted Hill, Sims was aware that "the sheriff's department was fairly close" to the scene, so Sims handcuffed Hill and detained him until local law enforcement officers arrived. Sims testified that he handcuffed Hill for officer safety, because Sims had information about Hill concerning methamphetamine and because Sims was aware of the effects of methamphetamine.

The Milford chief of police arrived "within one minute" of Sims' detention of Hill. The Seward County Sheriff's Department had requested the Milford chief of police's assistance, and "shortly after" his arrival, a deputy from the sheriff's department arrived. The deputy testified that he was made aware of the outstanding warrant concerning Hill after arriving at the scene. Hill was arrested by a local law enforcement officer and was transported to a Seward County correctional facility. At the correctional facility, Hill was searched and a substance which later tested positive for methamphetamine was located on his person.

On December 13, 2001, Hill was charged with possession of methamphetamine. Hill pled not guilty on January 29, 2002. On February 21, Hill filed a motion to suppress, in which he challenged the detention by Sims and alleged that Sims was without authority to detain Hill because Sims was outside his jurisdiction at the time of the detention. On July 29, the district court denied Hill's motion to suppress. After a bench trial, the court, on December 19, entered a verdict of guilty. On April 8, 2003, the court sentenced Hill to a term of 20 months' to 2 years' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Hill has assigned three errors. First, Hill asserts that the district court erred in overruling his motion to suppress. Second, Hill asserts that there was insufficient evidence to support the district court's finding of guilt. Third, Hill asserts that the sentence imposed by the district court is excessive.

IV. ANALYSIS

1. Motion to Suppress

The issue raised on appeal concerning Hill's motion to suppress is whether Sims had authority to detain Hill when the detention occurred outside Sims' jurisdiction. Hill argues that Sims was without authority because the local law enforcement agencies had not requested Sims' assistance and because Sims had not personally witnessed any felony or misdemeanor offense. We conclude that Sims had authority to briefly detain Hill because Hill was a fugitive subject to an outstanding arrest warrant.

The district court based its determination that Sims had authority to detain Hill, in part, on a reading of Neb. Rev. Stat. § 29-215(2)(c)(ii) (Cum. Supp. 2002). Section 29-215(2) provides that a law enforcement officer who is beyond his primary jurisdiction "shall have . . . enforcement and arrest and detention authority when responding to a call in which a local, state, or federal law enforcement officer . . . needs assistance in making an arrest." We find that the record does not support basing Sims' authority on this provision.

The record in this case does not indicate that any local law enforcement agency, either the Seward County Sheriff's Department or the Milford Police Department, ever requested Sims' assistance in making an arrest. In fact, the record does not indicate that either of the local law enforcement departments, prior to arriving at the scene, intended to make an arrest. The deputy from the Seward County Sheriff's Department, in fact, testified that he was not made aware of the existence of the outstanding arrest warrant until after he arrived at the scene, which was after Sims had already detained Hill. As such, we find that § 29-215(2)(c)(ii) does not provide a basis for Sims' authority to detain Hill.

Nonetheless, we find that the district court was correct in concluding that Sims did have authority to briefly detain Hill. Neb. Rev. Stat. § 29-205 (Reissue 1995) provides:

> If any person or persons who may be charged with the commission of a crime or offense made punishable by the laws of this state shall abscond or remove from the county in which such crime or offense is charged to have been

> committed, it shall be lawful for any sheriff *or other person to apprehend the person or persons so charged* . . . .

(Emphasis supplied.)

[1,2] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Id.*

[3] We read § 29-205 to give authority to detain a person who has been charged with the commission of a punishable offense and who has left the jurisdiction in which the offense occurred. Section 29-205 specifically refers to "any person or persons who *may be charged* with the commission of a crime" and further provides that if such a person leaves "the county in which such crime or offense *is charged to have been committed* . . . the person or persons *so charged*" may be detained. (Emphasis supplied.) Read together, we find that the plain, direct, and unambiguous language of this statute gives authority to detain a person who is subject to an outstanding arrest warrant, since a person subject to an outstanding arrest warrant has been charged with the commission of a punishable crime. The record in this case clearly indicates that Hill was subject to an outstanding arrest warrant, so Hill fits within the class of people for whom detention is authorized by the statute.

We further find that the authority to detain was given to Sims under the statute. The language of § 29-205 gives the authority to detain to "any sheriff *or other person*." (Emphasis supplied.) The phrase "other person" is not otherwise defined or limited by the statute or by subsequent case law. We need not decide in this case how broad the phrase "other person" should be construed, except to conclude that the phrase should be extended to a law enforcement officer such as Sims, who was in the process of investigating a crime and was following a suspect when he became aware of an outstanding arrest warrant.

The record in this case indicates that Sims, aware of an outstanding arrest warrant, came into contact with Hill after Hill

voluntarily stopped his vehicle. Sims was investigating Hill for methamphetamine-related conduct, and Sims knew that local law enforcement officers, including the Seward County Sheriff's Department, were nearby and would be on the scene in a short amount of time. Sims further concluded that based on Hill's alleged involvement with methamphetamine, officer safety required the handcuffing of Hill. The record further indicates that Sims' detention of Hill lasted for only approximately 1 minute before local law enforcement officers, whose authority is not at issue on appeal, arrived on the scene and effected a lawful arrest. On these facts, we conclude that Sims had authority, pursuant to § 29-205, to briefly detain Hill. See, also, *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990) (validity of arrest and search not dependent on officer's knowledge that proper basis exists, but only on actual existence of proper basis). This assigned error is without merit.

2. Sufficiency of Evidence

Hill next asserts that there was insufficient evidence to support the district court's finding of guilt. Specifically, Hill argues that because the record indicates there was an insufficient amount of the "substance" which tested positive as methamphetamine to be weighed, the record was insufficient to support a finding that he exercised dominion over anything. As the Nebraska Supreme Court has previously done, we reject this assertion.

[4] In *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993), the Nebraska Supreme Court was faced with a significantly similar argument. In *Thompson*, the defendant argued that because the forensic chemist for the State was unable to ascribe either weight or size to the substance submitted for testing, the State failed to prove its case. The Supreme Court rejected this assertion, stating that pursuant to the statutes under which the defendant was convicted, there was no minimum amount of the drug required for conviction. Unless a statute specifically provides otherwise, it matters not how much of a controlled substance one possesses; under such a circumstance, the quantity possessed is not an essential element of the crime. *Id.* For the same reason, we reject Hill's assertion in this case and find this assignment of error to be without merit.

3. Excessive Sentence

Finally, Hill asserts that the sentence imposed by the district court was excessive. Hill does not argue that the sentence imposed was beyond the statutory limits, but, rather, that the court should have sentenced him to probation instead of incarceration. We reject Hill's assertion.

[5] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

As noted, there is no assertion in this case that the sentence imposed was outside the statutory limits. The district court sentenced Hill to a term of 20 months' to 2 years' imprisonment, but also ordered the sentence to be served concurrently with an unrelated sentence Hill was serving. The presentence investigation report in this case includes prior convictions for possession and attempted possession of controlled substances, prior convictions for theft, a prior violation of probation, and a prior failure to appear. Hill's sentence does not demonstrate an abuse of discretion, and this assignment of error is meritless.

V. CONCLUSION

We find Hill's assertions on appeal to be without merit. We find that Sims had authority to briefly detain Hill because Sims was aware of an outstanding arrest warrant for Hill from the county Sims had followed Hill from. We find that the evidence was sufficient to support the district court's finding of guilt. We also find that the sentence imposed was not an abuse of discretion. The judgment of the district court is affirmed.

Affirmed.

JAMES WIDTFELDT AND JAMES WIDTFELDT TRUST, APPELLANTS, V. HOLT COUNTY BOARD OF EQUALIZATION, APPELLEE.

677 N.W.2d 521

Filed April 13, 2004. No. A-04-068.

1. **Trusts: Actions.** Generally, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust.
2. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
3. **Taxes: Jurisdiction: Service of Process: Time: Appeal and Error.** Service of summons within 30 days of the filing of the petition for review of the Tax Equalization and Review Commission's decision is necessary to confer subject matter jurisdiction upon the Court of Appeals.

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

James Widtfeldt, pro se.

No appearance for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997), we provided an opinion explaining a summary dismissal because we had not previously had occasion to discuss how subject matter jurisdiction from the Nebraska Tax Equalization and Review Commission (Commission) to this court is perfected. As we explained in *McLaughlin*, our practice is to closely examine all cases in their initial stages to ensure that jurisdiction has been properly conferred and to quickly terminate appeals where we lack jurisdiction because of procedural defects. Because this case presents the jurisdictional defect arising in a different way from that explained in *McLaughlin*, we again believe that an opinion explaining our decision would be helpful.

PROCEDURAL BACKGROUND

James Widtfeldt has filed a petition with this court for review of two orders of the Commission.

The record shows property valuation protests filed by Widtfeldt regarding 26 separate tracts of land for tax year 2002. Widtfeldt

filed these protests either individually or individually and on behalf of "James Widtfeldt Trust." All 26 tracts were located in Holt County, Nebraska. The Holt County Board of Equalization (Board) denied each protest. Widtfeldt then filed separate appeals with the Commission, challenging the decisions of the Board. The Commission docketed those appeals as cases Nos. 02A-114 through 02A-139, inclusive. The Commission served notices in lieu of summonses to the Board on September 4, 2002, and the Board filed timely answers on September 25. On November 17, 2003, the Commission ordered the 26 appeals consolidated for hearing and set the hearing for December 17. On December 17, no one appeared on behalf of either Widtfeldt or "James Widtfeldt Trust" and the Commission filed its written decision dismissing each appeal with prejudice and determining the final valuations for each tract for tax year 2002 as previously determined by the Board. On December 22, Widtfeldt filed a motion for rehearing, which the Commission denied in its order dated December 23, 2003.

Similarly, Widtfeldt filed protests with the Board regarding tax year 2003 valuations on 29 tracts of land in Holt County. The Board denied each protest. Widtfeldt then filed appeals with the Commission to challenge the Board's denials. The Commission docketed those appeals before the Commission as cases Nos. 03A-43 through 03A-65, inclusive, and 03R-298 through 03R-303, inclusive. The "A" cases apparently concern agricultural real estate, while the "R" cases pertain to residential real estate. By orders entered on November 13, 2003, the Commission ordered consolidation of the agricultural cases and consolidation of the residential cases. The record further shows that the Commission scheduled a hearing on the residential cases for February 17, 2004, at 10 a.m. and scheduled a hearing on the agricultural cases for the same date at 2 p.m. After the Commission was notified of the present petition for review filed with this court, the Commission, by orders entered January 23, 2004, continued the hearings on the tax year 2003 appeals, pending determination of the petition for review.

Widtfeldt's petition filed with this court attacks the Commission's orders consolidating the tax year 2002 cases, consolidating the tax year 2003 agricultural cases, and consolidating the tax year 2003 residential cases. The petition for review further

criticizes the Commission's final order regarding tax year 2002 cases, asserting inadequate notice of hearing. The petition for review does not identify the parties in the body of the petition. The caption of the petition for review identifies the appellant as "James Widtfeldt" and identifies the "Nebraska Tax Equalization and Review Commission" as the sole appellee.

At the time of the filing of the petition for review on January 15, 2004, Widtfeldt requested the issuance of a summons to the Attorney General on behalf of the Commission. Our clerk issued a summons to the Attorney General on January 16. A copy of the summons with a certified mail return receipt showing service by the Attorney General's office on January 21 also appears in our file.

This court issued an order to show cause on February 3, 2004, directing Widtfeldt to show cause why the appeal should not be dismissed for lack of jurisdiction, because service was made on the Attorney General rather than upon the Commission. Widtfeldt submitted a timely response, asserting that he properly served the Commission by service upon the Attorney General. However, the Board was not identified as a party in Widtfeldt's petition for review, nor was any summons issued or served upon the Board in this review proceeding. Pursuant to the Tax Equalization and Review Commission Act, Neb. Rev. Stat. § 77-5001 et seq. (Reissue 2003), we consider the jurisdictional question presented by Widtfeldt's failure to identify the Board as a party and failure to cause summons to be served upon the Board.

ANALYSIS

As we observed in *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997), the Legislature modeled § 77-5019, which provides for judicial review in this court of final decisions of the Commission, upon the Administrative Procedure Act. Section 77-5019(2)(a) provides in part:

> All parties of record shall be made parties to the proceedings for review. The [C]ommission shall only be made a party of record if the action complained of is an order issued by the [C]ommission pursuant to [Neb. Rev. Stat. §] 77-1504.01 [(Reissue 2003)] or [§] 77-5023. Summons shall be served on all parties within thirty days after the

> filing of the petition in the manner provided for service of a summons in [Neb. Rev. Stat. §] 25-510.02 [(Reissue 1995)]. If the [C]ommission 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 [C]ommission within thirty days after the filing of the petition.

Section 77-5019(2)(b) sets forth the required content of a petition for review, including "the identification of the parties in the case that led to the final decision."

[1] We recall that generally, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust. *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989). We need not determine whether the proper petitioning party has been joined in this case regarding those proceedings in which the party appealing was identified as "James Widtfeldt Trust," because the jurisdictional defect regarding other parties renders such determination moot. We also observe that here, unlike the situation in *Back Acres Pure Trust*, Widtfeldt is an attorney admitted to the bar of this state such that he could properly represent the interests of others if properly named.

Although it was not clear at the time of the issuance of our order to show cause, we now observe two jurisdictional problems concerning Widtfeldt's petition for review. Regarding the tax year 2003 cases, Widtfeldt seeks review of orders which are not final. Section 77-5019(1) limits our review to the Commission's "final decision." Clearly, the Commission has not entered a final decision regarding disposition of the appeals concerning tax year 2003. The premature attempt to petition for review the tax year 2003 proceedings must be dismissed.

[2] Regarding the proceedings concerning tax year 2002, Widtfeldt's petition fails to name the Board as a party and Widtfeldt failed to have summons served upon the Board within 30 days after the filing of the petition. We recall that the character of a pleading is determined by its content, not by its caption. *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002). Thus, the mere fact that the caption of Widtfeldt's petition names the Commission as the sole appellee does not control. However, the body of Widtfeldt's petition similarly fails to name or otherwise identify any party, thus

violating the statutory mandate of § 77-5019(2)(b) regarding content of the petition.

In certain circumstances, § 77-5019(2)(a) authorizes the Commission to be made a party of record. This only applies where "the action complained of is an order issued by the [C]ommission pursuant to [§] 77-1504.01 or [§] 77-5023." Neb. Rev. Stat. § 77-1504.01 (Reissue 2003) concerns petitions to the Commission by a county board of equalization to consider an adjustment to a class or subclass of real property within the county. Similarly, § 77-5023 empowers the Commission to effect percentage increases or decreases to classes or subclasses of affected real estate in the identified county. See *Boone Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 9 Neb. App. 298, 611 N.W.2d 119 (2000) (discussing distinction between §§ 77-5023 and 77-1504.01). For our purposes, we need only determine that none of Widtfeldt's proceedings arise under either of these statutes. Thus, Widtfeldt's petition improperly names the Commission as the sole party.

We agree that if the Commission were properly named as a party in this court, the Commission would be properly served by the issuance of a summons to the Attorney General. See Neb. Rev. Stat. § 25-510.02(1) (Reissue 1995) (service of "State of Nebraska, any state agency as defined in [Neb. Rev. Stat. §] 81-8,210 [(Reissue 2003)], and any employee of the state as defined in [§] 81-8,210 sued in an official capacity" is made upon Attorney General). However, § 25-510.02(2) requires service of a county, city, or village upon the chief executive officer or clerk. Section 25-510.02(3) requires service of other political subdivisions, as defined by Neb. Rev. Stat. § 13-903 (Cum. Supp. 2002), upon the subdivision's chief executive officer, clerk, secretary, or other official whose duty it is to maintain the official records; upon any member of the governing board or body; or by certified mail to the principal office of the political subdivision. We need not determine whether a county board of equalization falls under § 25-510.02(2) or (3). Neither subsection authorizes service upon the Attorney General.

[3] Widtfeldt's petition for review fails to name the Board as a party, and Widtfeldt failed to accomplish service of summons upon the Board within 30 days after filing the petition for review.

Section 77-5019(2)(a) requires the filing of the petition for review within 30 days after the final, appealable order is entered by the Commission. That time has expired. It is no longer possible for Widtfeldt to file a complying petition for review naming the Board as the proper party. Further, § 77-5019(2)(a) requires service of summons within 30 days after the filing of the petition, and the petition in the instant case was filed on January 15, 2004. In *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997), we held that service of summons within 30 days of the filing of the petition for review is necessary to confer subject matter jurisdiction upon this court. It is no longer possible for Widtfeldt to accomplish timely service of a summons upon the Board. Consequently, this court lacks subject matter jurisdiction to consider Widtfeldt's issues regarding the tax year 2002 protests.

CONCLUSION

This court lacks subject matter jurisdiction over the tax year 2002 issues because Widtfeldt failed to have summons timely served upon the Board. We lack jurisdiction of the tax year 2003 issues because of the absence of a final order. We therefore dismiss Widtfeldt's petition for review.

APPEAL DISMISSED.

FRANCISCO MARTINEZ-NAJARRO, APPELLANT, V.
IBP, INC., APPELLEE.
678 N.W.2d 114

Filed April 20, 2004. No. A-03-552.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** A determination as to an injured worker's loss of earning capacity is a question of fact to be determined by the Workers' Compensation Court.
5. **Workers' Compensation: Evidence: Appeal and Error.** If the record in a workers' compensation case presents conflicting medical reports and testimony, an appellate court will not substitute its judgment for that of the compensation court regarding which medical evidence to rely upon.
6. **Workers' Compensation: Evidence: Expert Witnesses.** The compensation court is entitled to accept the opinion of one medical expert over that of another, and as the sole trier of fact, the compensation court is the sole judge of the credibility of the medical evidence and the weight to be given to it.
7. **Workers' Compensation.** An employee is entitled to an award for a work-related injury even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award.
8. ____. An employee is entitled to full compensation, notwithstanding the fact that his present disability is the result of an aggravated preexisting condition.
9. ____. Benefits to an employee are not decreased because he or she had a preexisting condition that had been compensated for by the same or a different employer.
10. ____. To be apportionable, an impairment must have been independently producing some degree of disability before an accident and must be continuing to operate as a source of disability after the accident.
11. **Workers' Compensation: Words and Phrases.** In terms of the test for determining when apportionment is appropriate, the term "disability" contemplates impairment of earning capacity, not functional disability.
12. **Workers' Compensation.** The problem of apportionment may be encountered between an employer and an employee when disability from a prior injury contributes to a claimant's total disability following a subsequent injury.
13. ____. Any loss of earning capacity sustained from a permanent partial disability is irrelevant for the purpose of compensating scheduled member injuries.
14. ____. A preexisting injury is not relevant to a compensable work-related injury; apportionment occurs on a current award when a prior loss of earning capacity already existed.
15. ____. Apportionment occurs after the loss of earning capacity for a current injury has been determined; the amount of loss of earning capacity for which the claimant has already been compensated is deducted from the subsequent loss of earning capacity.
16. ____. A determination of an employee's loss of earning capacity is clearly wrong when based upon an analysis which took into account that employee's preexisting condition. A preexisting condition cannot be considered in the determination of a claimant's loss of earning capacity.
17. **Workers' Compensation: Statutes.** Nebraska's workers' compensation statutes do not prohibit a claimant from concurrently receiving statutory benefits for separate injuries arising out of separate accidents, so long as the combined payments do not exceed the maximum weekly rate allowed by statute.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Todd Bennett, of Rehm & Bennett Law Firm, for appellant.

Bruce M. Smith for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Francisco Martinez-Najarro (Martinez) appeals from an order of the Workers' Compensation Court review panel which affirmed an order of a trial judge of the Workers' Compensation Court. The trial judge awarded Martinez compensation for a 5-percent loss of earning power due to an injury Martinez sustained in a work-related accident in 1999. Martinez was restricted to lifting no more than 30 pounds after the accident in 1999, but prior to that accident, he had been restricted to lifting no more than 34 pounds due to a prior work-related accident in 1997. The trial judge considered Martinez' prior lifting restriction in determining Martinez' loss of earning power, and a three-judge review panel affirmed. Martinez now appeals to this court, and for the reasons stated below, we reverse, and remand for further proceedings.

II. BACKGROUND

Martinez has been employed with IBP, inc., since 1996. In August 1999, Martinez developed a hernia while pushing boxes at IBP, which hernia resulted in Martinez' undergoing surgery. Martinez was also placed on a 30-pound lifting restriction as a result of his injury. This accident and the injuries suffered by Martinez are not disputed.

Prior to 1999, Martinez had been placed on a lifting restriction of no more than 34 pounds which was allegedly indefinite, though the record contains almost no information as to the injury which gave rise to this prior lifting restriction. Apparently, Martinez had injured his right shoulder in 1997. The record is also void of how or whether Martinez was compensated for this prior injury.

Martinez brought suit against IBP on February 22, 2000. At a hearing on October 29, 2001, the trial court heard testimony from Martinez and a representative of IBP. The court also received numerous exhibits. The court subsequently determined that

Martinez had sustained permanent partial disability, measured as a 5-percent loss of earning power, as a result of his accident and injury. In determining Martinez' loss of earning capacity, the court compared Martinez' prior 34-pound lifting restriction to his current 30-pound lifting restriction.

Martinez appealed the decision of the trial court, arguing that the court erred in, inter alia, apportioning Martinez' loss of earning power between his prior injury and his current injury. The three-judge review panel affirmed the decision of the trial court, and this appeal followed.

III. ASSIGNMENTS OF ERROR

Martinez assigns as error, renumbered and restated, that the trial court erred in (1) apportioning Martinez' loss of earning power because of a prior scheduled member injury, (2) finding that Martinez suffered from a prior permanent restriction, (3) failing to accord the court-appointed vocational rehabilitation counselor's loss of earning power opinion a presumption of correctness, and (4) failing to provide a reasoned decision for its determination that Martinez' loss of earning power should be apportioned.

IV. ANALYSIS

1. Standard of Review

[1] 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 did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003) (citing *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002)).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Morris, supra* (citing

Frauendorfer v. Lindsay Mfg. Co., 263 Neb. 237, 639 N.W.2d 125 (2002); *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001)). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Morris, supra* (citing *Frauendorfer, supra*).

[3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Morris, supra* (citing *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Vega, supra*).

2. Apportionment of Benefits

[4-6] A determination as to an injured worker's loss of earning capacity is a question of fact to be determined by the Workers' Compensation Court. *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 574 N.W.2d 533 (1998) (citing *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996)). If the record in a workers' compensation case presents conflicting medical reports and testimony, an appellate court will not substitute its judgment for that of the compensation court regarding which medical evidence to rely upon. *Cummings, supra* (citing *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996)). The compensation court is entitled to accept the opinion of one medical expert over that of another, and as the sole trier of fact, the compensation court is the sole judge of the credibility of the medical evidence and the weight to be given to it. *Cummings, supra* (citing *Kerkman, supra*).

In this case, the loss of earning capacity analysis submitted by Martinez states that his loss of earning capacity is anywhere between 31 and 52 percent, depending on whether he stays employed at IBP or goes elsewhere. This report acknowledges Martinez' prior injury and lifting restriction, but does not appear to take it into consideration in determining Martinez' loss of earning capacity.

The loss of earning capacity analysis submitted by IBP determines a much lower loss of earning capacity (a 1- to 5-percent loss). IBP's report took into account Martinez' prior injury and lifting restriction, which inclusion is the basis for the significant

difference between the two reports. IBP's report stated, "In order to accurately assess . . . Martinez' loss of earning capacity for his injury of April 21, 1999, one must first determine the effects of his pre-existing injury of 1997 on . . . Martinez' employment potential." The report also noted that after Martinez' injury in 1997, he returned to work and his wages were not affected by the injury, but "his access to the general labor market was diminished, and his opportunities to earn wages in the general labor market was also adversely [a]ffected." The report then calculated Martinez' loss of earning capacity on the basis of the 4-pound difference between the current lifting restriction and the pre-existing lifting restriction.

The trial judge awarded Martinez compensation based on a determination that Martinez sustained permanent partial disability measured as a 5-percent loss of earning power. The trial judge specifically stated, "Key to this determination is the recognition that before April 21, 1999, [Martinez] had a preexisting lifting restriction of 34 pounds as the result of a prior right shoulder injury." The judge further stated that "[a] significant portion of the 31 to 50 percent loss of earning capacity which [Martinez' report] identifies as being the result of the accident of April 21, 1999, was present because of the preexisting shoulder injury."

The court expressly adopted a doctor's report, stating in its order that "as a result of the neuropathic symptoms about the right groin, [Martinez] suffered a 2 percent impairment of the whole person." The court stated that the report is consistent with IBP's loss of earning capacity analysis that determined, after taking into account Martinez' preexisting lifting restriction, that Martinez had suffered a 1- to 5-percent loss of earning capacity.

On appeal, the review panel affirmed and issued an opinion stating that the essence of Martinez' argument was that the court should consider him "solely in the vacuum of the [1999] accident in contest" and that he "apparently wants history to be re-written so that he is presumed to have [had] no weight restrictions at the time of his [1999] accident." The review panel further stated that Martinez "wants to be assessed by some objective everyman standard unencumbered by the reality of his own make-up" and that "[t]o adopt [Martinez'] reasoning would be to wish away that which is fact."

The review panel then stated:

> Is the trial court to ignore other preexisting and limiting considerations; i.e. poor education; inability to speak English; etc.? Would the employer be free to take such a position if the court were to adopt [Martinez'] argument? Where does one draw the line? Are only those factors favorable to the plaintiff to be considered, and is the court to ignore those that lessen the plaintiff's loss? The better course, and the one universally accepted, is best personified in the old adage that "you take the plaintiff as you find him."

The review panel concluded that the court should "incorporate [into the determination of Martinez' loss of earning capacity] his physical capabilities existing at the time of his accident." (Emphasis in original.)

However, it is in fact the review panel that wants history to be rewritten and is wishing away that which is fact. Under Nebraska workers' compensation law, a plaintiff is not taken as he or she is found. Rather, an employer is liable to an employee for a work-related injury regardless of a preexisting condition so long as the employee proves by a preponderance of the evidence that the work-related injury was the proximate cause of his or her current injury. Furthermore, apportionment of an employee's benefits for a whole body injury is appropriate only when the employee has already been compensated for a prior whole body injury. In this case, no evidence existed that Martinez' prior 34-pound lifting restriction was from a previously compensated whole body injury, making appropriation inappropriate. In addition, it was error for the trial court to take into consideration Martinez' preexisting condition (being restricted from lifting more than 34 pounds) in determining his loss of earning capacity.

The review panel stated that Martinez did not cite any authority for his argument that his prior lifting restriction is not relevant to calculating his current loss of earning capacity. Notably, the review panel cites no authority to support its argument that Martinez' preexisting condition should be taken into consideration in determining Martinez' loss of earning capacity. Nebraska law is in fact contrary to the review panel's position.

In *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the Nebraska Supreme Court held that an

employee was entitled to compensation for a work-related injury, notwithstanding a preexisting condition. *Heiliger* involved an employee who suffered a back injury during the course of his employment. The employee had undergone back surgery a year before this accident for a prior injury. *Id.* The trial court recognized that the work injury " 'was probably an aggravation or reinjury of [the employee's prior injury].' " *Id.* at 465, 461 N.W.2d at 571. However, the court nonetheless determined that the employee was entitled to benefits. *Id.*

[7] The employer in *Heiliger* appealed the trial court's award of benefits to the employee on several bases, one of which was that a doctor's evaluation of the employee's permanent partial disability, on which the court had relied in awarding the employee benefits, had attributed one-half of the employee's permanent partial disability to the work-related injury and one-half to the preexisting injury. The Nebraska Supreme Court upheld the trial court's award of benefits, stating that an employee is entitled to an award for a work-related injury "even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award." *Id.* at 467, 461 N.W.2d at 572 (citing *Cole v. Cushman Motor Works*, 159 Neb. 97, 65 N.W.2d 330 (1954); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950)).

Heiliger did not address allocation to a prior injury with regard to calculating an injured employee's loss of earning capacity, but the court in *Heiliger* specifically held that because no claim was against the Second Injury Fund, allocation of disability attributable to a work-related injury and of disability attributable to an antecedent or preexisting disability or condition which may or may not have been work-related was irrelevant in that case. Furthermore, despite the doctor's evaluation attributing one-half of the employee's permanent partial disability to his prior injury, the court upheld the award of benefits for the full amount of the employee's permanent partial disability. *Id.*

Like the compensation court in *Heiliger* in stating the facts of that case, the compensation court in the case at bar stated in its order that "[a] significant portion of the 31 to 50 percent loss of earning capacity which [Martinez' report] identifies as being the

result of the accident of April 21, 1999, was present because of the preexisting shoulder injury." As noted above, the Nebraska Supreme Court specifically upheld the compensation court's award of benefits in *Heiliger* despite the fact that a portion of the employee's permanent partial disability was due to a prior injury. Under *Heiliger*, we find the compensation court's basis for determining Martinez' loss of earning capacity to have been in error.

In *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994), this court held that benefits received for a work-related injury are not decreased by taking a preexisting physical disability into account. In *Jacob*, 2 Neb. App. at 475, 511 N.W.2d at 213, an employee lost a portion of his left hand in a work-related accident; the remaining portion of his hand was "of questionable utility." Prior to this accident, the employee in *Jacob* had lost his index finger and lacerated his middle finger and thumb on that hand, for which injuries he had received a lump-sum settlement. The trial court reduced his award for the subsequent injury to his hand because of the prior settlement he had received for the prior injury, stating that the employee had failed to prove that the value of both injuries together was greater than that of the second injury alone. *Id.*

[8,9] In *Jacob*, 2 Neb. App. at 488, 511 N.W.2d at 219, this court reversed the trial court's apportionment, recognizing that "'"[a]n employee is entitled to full compensation, notwithstanding the fact that his present disability is the result of an aggravated preexisting condition."'" (Quoting *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984).) *Jacob* was not a Second Injury Fund case, but we stated therein that the treatment of an existing disability under the Second Injury Fund was instructive on the treatment of an existing disability when the Second Injury Fund is not involved. We concluded that "benefits to an employee are not decreased because he or she had a preexisting condition that had been compensated for by the same or a different employer." *Id.* at 488, 511 N.W.2d at 220.

As IBP emphasizes in its brief, this court in *Jacob* did specify that the employee in that case did not continue to be disabled from the prior accident at the time of the subsequent accident—that after his prior injury, he returned to work and did the same job. We

stated that the usual apportionment statute " 'allows compensation for the disability that would have existed if the prior injury had not occurred, since the final effect of loss of the hand itself is the same whether several fingers were previously missing or not' "; but we then stated, " 'To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.' " *Id.* at 491, 511 N.W.2d at 221 (quoting 2 Arthur Larson, The Law of Workmen's Compensation § 59.22(c) (1993)). We stated that the employee's prior injury did not produce disability before the loss of his hand and was not a source of disability after either of the accidents. *Id.* We then concluded that the employee was entitled to compensation for the loss of his hand without any deduction for the prior injury to the fingers and thumb of his hand. *Id.*

IBP argues that Martinez' award should be apportioned under *Jacob* because Martinez' prior disability continued to operate as a source of disability. This argument is not persuasive. Martinez' injuries were to different parts of his body. According to *Jacob*, the usual apportionment statute would entitle Martinez to compensation for a disability that would have existed if the prior injury had not occurred. Even if Martinez had not had a prior 34-pound lifting restriction from his shoulder injury, his hernia still would have resulted in a 30-pound lifting restriction. The two injuries were not related, so the second injury would not have been less had the first injury not occurred. Furthermore, there is no evidence that Martinez was compensated for the injury which gave rise to his prior 34-pound lifting restriction.

In *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 574 N.W.2d 533 (1998), this court held that apportionment was appropriate. In *Cummings*, an employee sustained a work-related injury that exacerbated a prior compensated work-related injury. The compensation court apportioned the employee's benefits between the prior and subsequent injuries, and a three-judge review panel affirmed. *Id.*

[10-12] In *Cummings*, this court held that *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), and *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994), did not prohibit apportioning a claimant's recovery

for disability between a prior compensated injury to the body as a whole and a subsequent compensable injury to the body as a whole. We recognized the rule stated in *Jacob* that "'"[t]o be apportionable . . . an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident."'" *Cummings*, 6 Neb. App. at 485-86, 574 N.W.2d at 539. However, we then stated, "In terms of this test for determining when apportionment is appropriate, the term 'disability' contemplates impairment of earning capacity, not functional disability," *id.* at 486, 574 N.W.2d at 539, and that "the problem of apportionment may be encountered between an employer and an employee when disability from a prior injury contributes to a claimant's total disability following a subsequent injury," *id.* at 486, 574 N.W.2d at 539-40.

We distinguished *Jacob* in *Cummings*, 6 Neb. App. at 486, 539 N.W.2d at 540, stating:

> Because both injuries [in *Jacob*] were injuries to members, rather than injuries to the body as a whole, the claimant [in *Jacob*] did not suffer any disability in terms of loss of earning capacity, as distinguished from functional disability, from the prior injury, and the award which he received for the prior injury did not need to be deducted from the disability benefits [to] which he was entitled as a result of the subsequent injury.

We also stated that "[t]he overriding factor in *Jacob* was that the prior injury did not result in any loss of earning capacity, and apportionment was therefore inappropriate." *Cummings*, 6 Neb. App. at 488, 574 N.W.2d at 541. In *Cummings*, 6 Neb. App. at 486, 574 N.W.2d at 540, we recognized that the employee's "prior back injury independently produced some degree of lost earning capacity, as indicated by his prior award of benefits for a 25-percent loss of earning capacity resulting from the prior accident," and that "the prior disability [continued] to act as a source of lost earning capacity even after the subsequent series of accidents." On this basis, we held that the employee in *Cummings* was "not entitled to be compensated again for the original 25-percent disability caused by the prior injury." 6 Neb. App. at 486, 574 N.W.2d at 540.

[13] In the case at bar, Martinez suffered the consequence of having already been compensated for a loss of earning capacity—which compensation could have been used as a basis for apportioning Martinez' benefits—without any evidence reflecting that Martinez had actually been previously compensated. The compensation court imposed this consequence by taking into account Martinez' prior lifting restriction to reduce his current loss of earning capacity despite the fact that no evidence supports a finding that Martinez' prior injury was in fact a previously compensated one that caused permanent partial disability and a loss of earning capacity. In fact, it is quite likely that Martinez was not compensated for a prior loss of earning capacity, because Martinez' prior injury, to his shoulder, would be a scheduled member injury under Nebraska's workers' compensation statutes. Any loss of earning capacity sustained from a permanent partial disability is irrelevant for the purpose of compensating scheduled member injuries. See *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001) (holding that because claimant's injuries were scheduled member injuries, and not injury to his body as a whole, any loss of earning capacity claimant may have sustained was irrelevant).

[14] The compensation court apportioned Martinez' loss of earning capacity based solely on his lifting restrictions. The compensation court's and the review panel's reasoning was that because of Martinez' preexisting lifting restriction, he is not entitled to be fully compensated for his current injury—that he should not be allowed to pretend that the prior injury did not occur. This is clearly against Nebraska case law. The law is that a preexisting injury is not relevant to a compensable work-related injury and that apportionment occurs on a current award when a prior loss of earning capacity already existed. The compensation court circumvented those rules by taking into account Martinez' preexisting injury in the calculation of his current loss of earning capacity (the court based its determination on the difference between his prior lifting restriction and the new, lower lifting restriction).

[15] Furthermore, apportionment is not properly done when determining an employee's loss of earning capacity. Apportionment occurs after the loss of earning capacity for the current injury has

been determined; the amount of loss of earning capacity for which the claimant has already been compensated is deducted from the subsequent loss of earning capacity.

[16] The compensation court's determination that Martinez suffered a 5-percent loss of earning capacity was clearly wrong because it was based upon an analysis which took into account Martinez' preexisting condition. A preexisting condition cannot be considered in the determination of a claimant's loss of earning capacity. In addition, there is absolutely no evidence on the record that Martinez was previously compensated for a prior loss of earning capacity.

[17] Finally, we note that Nebraska's workers' compensation statutes do not prohibit a claimant from concurrently receiving statutory benefits for separate injuries arising out of separate accidents, so long as the combined payments do not exceed the maximum weekly rate allowed by statute. See *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002) (holding that workers' compensation statutes do not prohibit claimant from receiving permanent partial disability benefits from prior accident concurrently with temporary total disability benefits from subsequent injury). This would entitle Martinez to be compensated for both his prior injury to the shoulder and his subsequent hernia and resulting surgery if the resulting benefits were concurrent. If Martinez could be compensated for both injuries at the same time had the benefits for both been concurrent, there is no justification for reducing his compensation on his current injury because of the resulting restrictions from the prior injury.

V. CONCLUSION

For all of the above-stated reasons, we find that because the compensation court's determination of Martinez' loss of earning capacity was expressly based upon a reduction for Martinez' prior lifting restriction, that determination was clearly wrong. An employee is entitled to compensation for a work-related injury regardless of a preexisting condition. Furthermore, apportionment would be appropriate only had Martinez' prior injury been a whole body injury and had it been compensated as such. IBP's sole basis for apportionment was that Martinez had a prior lifting restriction—not that Martinez' prior injury had resulted in a

permanent partial disability involving loss of earning capacity and that he had already been compensated for that loss of earning capacity. Accordingly, we hold that the trial court erred in its determination of Martinez' loss of earning capacity and that the review panel erred in affirming the trial court's determination.

We remand this case for further proceedings, on the record as it presently exists, in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GREGORY D. SEARCEY, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

679 N.W.2d 242

Filed April 27, 2004. No. A-03-019.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, under Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Time: Motions for Continuance.** A continuance of an administrative license revocation hearing to a date beyond the expiration of the offender's temporary motor vehicle operator's license shall stay the expiration of the temporary license when the request for continuance is made by the director of the Department of Motor Vehicles.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Parties: Words and Phrases.** Parties, in the context of administrative license revocation proceedings, are defined as "the Department of Motor Vehicles" and "the person who is alleged . . . to have refused to submit to a chemical test or to have submitted to a chemical test and failed."
6. **Administrative Law: Motor Vehicles: Motions for Continuance.** The director of the Department of Motor Vehicles may properly request a continuance.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Dismissal and Nonsuit.** In the context of administrative license revocation proceedings, the failure of the arresting officer to appear or be otherwise available for cross-examination shall be cause for dismissal.

8. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Motions for Continuance: Proof: Time.** Any party desiring a continuance of an administrative license revocation hearing shall request the same in writing, stating the reasons for such request, and, if required by the director of the Department of Motor Vehicles, submit proof of facts in support of such request in the time and manner specified.
9. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Motions for Continuance: Good Cause.** Continuances of administrative license revocation proceedings shall be granted only upon good cause shown.
10. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Motions for Continuance: Time.** A timely request to change an administrative license revocation hearing's date or time must state all of the following to be considered: (1) the reason for not being able to appear at the time or date scheduled, (2) why that reason is beyond the requesting party's control, (3) any fact which establishes that the need to reschedule arose after the scheduling of the hearing, and (4) the resulting specific undue hardship which would result if the request were to be denied.
11. ____: ____: ____: ____: ____: ____. Any motion for continuance in an administrative license revocation proceeding which is untimely filed or which fails to state facts sufficient to make a reasoned decision shall be denied unless substantial injustice would result.
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Judgments.** Once an officer's sworn report is provided in an administrative license revocation proceeding, the director of the Department of Motor Vehicles' order of revocation has prima facie validity.
13. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Judgments: Presumptions: Proof: Evidence.** Once an officer's sworn report is provided in an administrative license revocation proceeding, validating prima facie the order of revocation, it is presumed that the revocation will occur unless the offender establishes grounds for reversal by a preponderance of the evidence.
14. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Time.** Time limits in administrative license revocation proceedings are directory, not mandatory.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Stuart J. Dornan, on brief, and Michael Meckna, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, Charlotte Koranda, and, on brief, Hobert B. Rupe for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

The district court for Douglas County, Nebraska, affirmed the ruling of the director of the Nebraska Department of Motor

Vehicles (DMV) that a continuance should be granted in an administrative license revocation (ALR) proceeding concerning Gregory D. Searcey. At the continued hearing, Searcey's motor vehicle operator's license was revoked, and he appeals, complaining that the district court's affirmance of the continuance was error.

FACTUAL AND PROCEDURAL BACKGROUND

On March 7, 2002, at 2:25 a.m., Omaha police officer Scott Gerald Shymkewicz stopped Searcey on 72d Street just south of 72d and Grover Streets for a traffic violation—turning through a red light. Officer Shymkewicz noticed that Searcey had bloodshot and glassy eyes, slurred speech, and an odor of alcohol on his breath. When asked whether he had had anything to drink, Searcey responded that he had not. Officer Shymkewicz had Searcey perform several field sobriety tests, and Searcey showed signs of impairment. Officer Shymkewicz placed Searcey under arrest for suspicion of driving under the influence of alcohol after a result of 0.147 grams of alcohol per 210 liters of breath on a preliminary breath test. Searcey was transported to central police headquarters, where he refused to submit to an Intoxilyzer test. Officer Shymkewicz completed a sworn report and filed it with the DMV. He read Searcey a verbal notice of motor vehicle operator's license revocation and gave him a copy of the notice.

A petition for an ALR hearing concerning Searcey was received by the DMV on March 12, 2002, and a hearing was scheduled for March 21. Officer Shymkewicz sent a fax dated March 16, 2002, to the DMV, stating that he was unavailable for the ALR hearing and that he hoped that it could be rescheduled. The fax was file stamped as received on March 18. An order to continue was entered by the director of the DMV. Searcey filed a motion to dismiss which was denied. On April 4, an ALR hearing to determine whether Searcey had refused to submit to a chemical test, in violation of Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2002), was held before a hearing officer of the DMV. The hearing officer recommended that Searcey's license be suspended for 1 year, and the director of the DMV entered such an order. Searcey appealed to the district court for Douglas County, which affirmed the director's decision. Searcey now appeals the district court's decision.

ASSIGNMENT OF ERROR

Searcey alleges that the DMV's grant of a continuance was error because no good cause was shown in accordance with the regulations found in the Nebraska Administrative Code. We interpret this as a complaint that the district court should therefore not have affirmed the order of revocation.

STANDARD OF REVIEW

[1-3] Decisions of the director of the DMV, under Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act (APA). *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). A final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1999); *Trackwell v. Nebraska Dept. of Admin. Servs.*, 8 Neb. App. 233, 591 N.W.2d 95 (1999). When reviewing an order of a district court under the APA 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. *Id.*

Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002).

ANALYSIS

[4] When a person is arrested pursuant to § 60-6,197 for failure to submit to a chemical test, the arresting officer shall take possession of that person's motor vehicle operator's license and issue a temporary operator's license valid for 30 days. See Neb. Rev. Stat. § 60-6,205(4) (Cum. Supp. 2002). The arrested person has 10 days from the date of the arrest to file a petition for a hearing. § 60-6,205(2). "The director shall conduct the hearing within twenty days after a petition is filed," but "[t]he filing of the petition shall not prevent the automatic revocation of the petitioner's operator's license at the expiration of the thirty-day period." § 60-6,205(6)(b). Furthermore, "[a] continuance of the hearing to

a date beyond the expiration of the temporary operator's license shall stay the expiration of the temporary license when the request for continuance is made by the director." *Id.*

[5-7] The language of 247 Neb. Admin. Code, ch. 1, § 010.01 (2001), states that "[a]ny party desiring a continuance of the hearing shall request the same in writing," and 247 Neb. Admin. Code, ch. 1, § 002.06 (2001), defines such parties as "the [DMV]" and "the person who is alleged . . . to have refused to submit to a chemical test or to have submitted to a chemical test and failed." Clearly, Officer Shymkewicz is not a party and was therefore not the proper person to move for a continuance. However, the director of the DMV may properly request a continuance. See, § 60-6,205(6)(b); 247 Neb. Admin. Code, ch. 1, § 010.03 (2001). The DMV requested, as a practical matter, a continuance based on Officer Shymkewicz' unavailability. Had the director of the DMV not continued the hearing, the ALR proceeding would likely have been dismissed for the failure of Officer Shymkewicz to appear. See 247 Neb. Admin. Code, ch. 1, § 017.02 (2001) (failure of arresting officer to appear or be otherwise available for cross-examination shall be cause for dismissal).

[8-11] The language of 247 Neb. Admin. Code, ch. 1, § 010 (2001), regarding continuances, states:

> **010.01 Motions.** Any party desiring a continuance of the hearing shall request the same in writing, stating the reasons for such request and, if required by the Director, submit proof of facts in support of such request in the time and manner specified. If a continuance is granted to either party, all persons who were served Notice of Hearing shall be notified of such continuance.
>
> . . . .
>
> **010.04 Good Cause.** Continuances shall be granted only upon good cause shown.
>
> **010.05 Content of Motion to Continue.** A timely request to change the hearing date or time must state all of the following to be considered:
>
> **010.05A** The reason for not being able to appear at the time or date scheduled; and
>
> **010.05B** Why that reason is beyond the requesting party's control; and

> **010.05C** Any fact which establishes that the need to reschedule arose after the scheduling of the hearing; and
>
> **010.05D** The resulting specific undue hardship which would result if the request were to be denied.
>
> **010.06 Failure to File Timely Motion or to State Grounds.** Any motion for continuance which is untimely filed or which fails to state facts sufficient to make a reasoned decision shall be denied unless substantial injustice would result.

In the instant case, Officer Shymkewicz' fax stated: "I will not be able to attend the hearing set for 3:30 pm on March 21, 2002 concerning the driving privileges for Gregory D. Searcey. I hope the hearing can be rescheduled. If not, I apologize for any inconvenience." Given the skimpy nature of the facts set forth in Officer Shymkewicz' fax and the obvious lack of sufficient grounds as to why he was unable to attend the scheduled hearing, the director of the DMV should not have continued the hearing, as the director did not know whether Officer Shymkewicz was having major surgery or going fishing. Because the director relied solely on Officer Shymkewicz' absence in ordering a continuance, the requirements of § 010 must be satisfied by Officer Shymkewicz or, at least, by the director making a showing of record that the officer's absence falls within the regulations of § 010—without such a requirement, § 010 becomes meaningless. Consequently, the continuance should have been denied under § 010.06 unless a substantial injustice would have resulted. Therefore, to us, the question becomes whether a substantial injustice would have resulted in this case absent the continuance.

The purpose of the ALR statutes is stated in § 60-6,205(1) as follows:

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard (a) by driving with an excessive concentration of alcohol in his or her body or (b) by driving while under the influence of alcohol.

[12-14] The burden of proof is on the State to make a prima facie case for license revocation before the director of the DMV. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). However, once an officer's sworn report is provided, the director's order of revocation has prima facie validity. *Id.* It is then presumed that the revocation will occur unless the offender establishes grounds for reversal by a preponderance of the evidence. *Id.* Officer Shymkewicz' sworn report is prima facie evidence that Searcey refused to submit to a chemical test and was driving under the influence of alcohol. To deny a continuance of 14 days in the instant case would have resulted in a substantial injustice because it would have put the health and safety of all persons using the highways at risk. Moreover, we find that Searcey was not prejudiced by the continuance, because he possessed a temporary license whose duration was extended pending the continuance—although the ALR hearing was held within the original 30-day temporary license period from when he was arrested. While the hearing on April 4, 2002, was held beyond the 20-day limit for a hearing after Searcey's request, see § 60-6,205(6)(b), such time limits are directory, not mandatory. See *Randall v. Dept. of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001). The delay was minor in length, it did not cause Searcey substantial injustice, and the director of the DMV did not abuse her discretion by granting a continuance, during which Searcey retained his privilege to drive.

CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

AFFIRMED.

CASSEL, Judge, concurring.

I agree with that portion of the majority opinion which concludes that the showing of Officer Shymkewicz, the arresting officer, failed to comply with § 010 of the applicable regulations; however, I disagree with that portion which equates mere existence of Officer Shymkewicz' sworn report to a showing of "substantial injustice" under § 010.06. In my view, the same standard applies under the applicable regulation whether continuance is requested by the DMV or by the motorist. Treating mere existence of a sworn

report as a showing of "substantial injustice" would automatically support any continuance requested by the DMV. According a sworn report such weight also presumes that the motorist will not meet his or her "burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect." § 60-6,205(7).

The language of § 010.06, requiring denial of an insufficient motion for continuance "unless substantial injustice *would result*," uses the future tense. (Emphasis supplied.) Thus, a decision of the director of the DMV to grant or deny continuance must be viewed upon the record as it exists at the time the director rules upon the motion. Because no showing of substantial injustice appeared on the record before the director in the case at bar, I conclude that the director erred in granting the continuance. Based upon the candid response of the DMV's counsel at oral argument, I doubt that a motorist's motion for continuance with similar, insufficient content would receive such favorable consideration.

Nonetheless, because I agree with the majority's further explanation that Searcey was not prejudiced by the continuance, I conclude that such error was harmless. Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001) (citing *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)). In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Marshall v. Wimes, supra*. The record shows that the continued hearing provided such process in all respects and that the continuance imposed no disadvantage on Searcey other than the loss of a mere technical claim. While in my view, the continuance was erroneous, it did not affect a substantial right. Accordingly, I concur.

JAMES R. MOORE, APPELLANT, V. NEBRASKA BOARD OF PAROLE ET AL., APPELLEES.

679 N.W.2d 427

Filed May 11, 2004. Nos. A-03-810, A-03-901.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Courts: Affidavits: Judgments: Records.** An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (1) has sufficient funds to pay costs, fees, or security or (2) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within 30 days after the filing of the application. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the ground that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis, which statement shall become a part of the record of the proceeding.
4. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.
5. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
6. **Statutes: Affidavits.** Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis.
7. **Courts: Judgments.** Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) supersedes the requirement set forth in *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995), that a court provide a hearing before denying any application to proceed in forma pauperis.
8. **Mandamus: Words and Phrases.** Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

9. **Mandamus.** In considering whether to grant a writ of mandamus, an appellate court considers whether the duty to be enforced was one which existed at the time the petition was filed.
10. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
11. **Probation and Parole: Appeal and Error.** The Board of Parole's duty to recognize parole eligibility is ministerial, and thus, petition in error proceedings are not available.
12. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. This ex post facto analysis applies when a statutory amendment changes the punishment of a crime.
13. **Statutes: Constitutional Law: Probation and Parole.** Application of a statutory amendment decreasing the frequency of parole suitability hearings under certain circumstances to prisoners convicted before the amendment does not violate the Ex Post Facto Clause of the U.S. Constitution.
14. **Criminal Law: Probation and Parole.** The amendments incorporated into Neb. Rev. Stat. § 83-1,111 (Supp. 2003) simply alter the method to be followed in fixing a parole release date under identical substantive standards as previously established.
15. **Statutes: Constitutional Law: Probation and Parole.** Retroactive application of a statute amended to increase the number of years permitted between parole reconsiderations does not violate the Ex Post Facto Clause of the U.S. Constitution.
16. **Statutes: Criminal Law.** When a change in criminal law does not by its own terms show a significant risk, a challenger must demonstrate, by evidence drawn from the law's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier law.
17. **Statutes: Constitutional Law: Sentences.** The controlling inquiry for determining whether an amended statute violates the Ex Post Facto Clause of the U.S. Constitution is whether retroactive application of the amendment creates a sufficient risk of increasing the measure of punishment attached to the covered crimes.
18. **Criminal Law: Sentences.** The amendments incorporated into Neb. Rev. Stat. § 83-1,111 (Supp. 2003) do not create a sufficient risk of increasing the measure of punishment attached to a sentence.
19. **Criminal Law: Sentences: Probation and Parole.** The amendments incorporated into Neb. Rev. Stat. § 83-1,111 (Supp. 2003) do not modify the statutory punishment imposed for any offenses or alter the standards for determining the initial date for parole eligibility or an inmate's suitability for parole.
20. **Criminal Law: Probation and Parole.** The amendments incorporated into Neb. Rev. Stat. § 83-1,111 (Supp. 2003) merely change the process by which the parole board reviews prisoners' parole possibilities.
21. **Criminal Law: Sentences: Probation and Parole.** Neb. Rev. Stat. § 83-1,111 (Supp. 2003) does not by its own terms show a significant risk of increasing the measure of punishment afforded to prisoners.
22. ____: ____: ____. There is no indication that a prisoner will be incarcerated longer under the practical application of Neb. Rev. Stat. § 83-1,111 (Supp. 2003) than the prisoner would have been under the prior version of the statute.

23. ___: ___: ___. Prisoners will not be incarcerated longer under Neb. Rev. Stat. § 83-1,111 (Supp. 2003) than under the statute as it existed previously.

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

James R. Moore, pro se.

No appearance for appellees.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

James R. Moore appeals the district court's two denials of his applications to proceed in forma pauperis and dismissal of his petition on the basis that it is frivolous. We note that Moore is currently incarcerated and that the appellees did not submit a brief on appeal. Given these facts, this case was ordered submitted without oral argument pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2000).

On appeal, Moore asserts that his petition is not frivolous because he is entitled to the relief he requests and that as such, his applications to proceed in forma pauperis should have been granted. Moore bases his entitlement to relief on the argument that the parole laws in effect at the time of his sentencing should apply to him pursuant to the Ex Post Facto Clause of the U.S. Constitution. However, the U.S. Supreme Court has held that the retroactive application of procedural parole statutory amendments does not violate the Ex Post Facto Clause of the U.S. Constitution. We find that Moore is not entitled to relief because the amended parole laws, which Moore argues are ex post facto laws, are procedural in nature. In addition, the retroactive application of those laws does not create a sufficient risk of increasing the measure of punishment for prisoners or result in increasing Moore's time of incarceration. As such, the parole laws as amended do not violate the Ex Post Facto Clause of the U.S. Constitution, and we thus affirm the district court's denials of his applications to proceed in forma pauperis and dismissal of his petition.

II. BACKGROUND

Given the procedural nature of this case, the record is without many facts. However, the facts of this case do not affect the outcome, so we will summarize them based on Moore's brief on appeal. No brief for appellees was filed.

Moore is an inmate at the Nebraska State Penitentiary in Lincoln, Nebraska. Moore was sentenced in 1980 to a term of 28 to 60 years' imprisonment. In 1995, Moore became eligible for parole. From 1995 until the present, the parole board has deferred Moore's case each year after conducting a parole review.

Moore's most recent deferral in April 2003 instigated his filing a petition for a writ of mandamus. Moore alleged that the parole board "had a clear and legal duty to set a 'final parole hearing.' " Brief for appellant at 3. Moore also filed an application to proceed in forma pauperis. A judge of the district court for Lancaster County, Nebraska, determined that Moore's petition was frivolous and denied his application to proceed in forma pauperis. Specifically, the judge stated that the parole board did not have to conduct a parole hearing unless a parole review established Moore was reasonably likely to be granted parole and that Moore had failed to allege that a parole review had established he was reasonably likely to be granted parole.

Moore filed a notice of appeal, again filing an application to proceed in forma pauperis. Moore's second application was also denied, and the order by a different judge stated that Moore's asserted legal positions lacked merit and that his action was frivolous. Moore then filed a notice of appeal of that order.

Moore's two appeals have been consolidated for purposes of our review.

III. ASSIGNMENTS OF ERROR

Moore assigns as error on appeal that the district court erred and abused its discretion in (1) twice denying him leave to proceed in forma pauperis without a hearing and (2) holding that his petition was frivolous.

IV. ANALYSIS

1. Standard of Review

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de

novo on the record based on the transcript of the hearing or the written statement of the court. *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003) (citing § 25-2301.02(2) and *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002)).

[2] 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. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997) (citing *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996)).

2. Hearing Prior to Denying In Forma Pauperis Status

Moore argues that the district court erred in denying his applications to proceed in forma pauperis without first holding a hearing. Moore asserts that pursuant to *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995), the district courts were required to hold a hearing before denying his applications to proceed in forma pauperis. Moore's argument is without merit.

[3] In *Flora*, 247 Neb. at 262, 526 N.W.2d at 645, the Nebraska Supreme Court stated:

> In 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 Neb. Rev. Stat. § 25-2301 (Reissue 1989), the trial court must certify in writing if, in its judgment, an appeal is frivolous. A written statement of the trial court's reasons, findings, and conclusions for denial of appellant's leave to proceed in forma pauperis must accompany its certification.

However, in 1999, the statute referenced in the above quote was substantially amended, see Neb. Rev. Stat. § 25-2301 (Cum. Supp. 2002), and two statutes were added, see Neb. Rev. Stat. §§ 25-2301.01 (Cum. Supp. 2002) and 25-2301.02. Section 25-2301.02 applies to the case at bar and provides in pertinent part:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall

> be made within thirty days after the filing of the application. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. *An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious.* If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. . . .

(Emphasis supplied.)

[4-6] In *Cole v. Blum*, 262 Neb. 1058, 1061, 637 N.W.2d 606, 609 (2002), the Nebraska Supreme Court stated:

> Except in those cases where the denial of in forma pauperis status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02 allows the court "on its own motion" to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue "a written statement of its reasons, findings, and conclusions for denial." A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.

The Supreme Court further stated: "This statute contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis." 262 Neb. at 1063, 637 N.W.2d at 610.

[7] Clearly, § 25-2301.02 supersedes the requirement set forth in *Flora, supra*, that a court provide a hearing before denying any application to proceed in forma pauperis. Accordingly, the standard which the district court was required to meet in this case was to provide a written statement of its reasons, findings, and conclusions for denying Moore's applications to proceed in forma pauperis.

The first judge's order, which the second judge adopted and attached to his order, stated:

> Neb. Rev. Stat.§81-1111 [(Reissue 1999), presumably the court meant Neb. Rev. Stat. § 83-1,111 (Supp. 2003), since § 81-1111 concerns the Department of Administrative Services and the Accounting Administrator] does not require that a parole hearing be set unless the Board [of Parole] first determines that the offender is likely to be paroled. See *Ditter v*[.] *Nebraska B*[*d.*] *of Parole*, 11 Neb[.] App. 473, 655 N.W. 2d 43 (2002) and *Van A*[*c*]*keren v*[.] *Nebraska B*[*d.*] *of Parole*, 251 Neb[.] 477, 558 N.W.2d 48 (1997). Because [Moore] has not alleged that the Board [of Parole] has determined that he is likely to be paroled, his petition lacks legal merit.

We find that this sufficiently provides a statement of the court's reasons, findings, and conclusions for denying Moore's applications to proceed in forma pauperis. As such, the district court did not err in denying Moore's applications to proceed in forma pauperis without first holding a hearing.

3. Frivolous Petition

Next, Moore alleges that the district court erred in holding that his petition for a writ of mandamus was frivolous. Moore's argument is incorrect.

[8-11] Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). In considering whether to grant a writ of mandamus, we consider whether the duty to be enforced was one which existed at the time the petition was filed. *Id.* Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *Id.* The Board of Parole's duty to recognize parole eligibility is ministerial, and thus, petition in error proceedings are not available. See *id.*

In the case at bar, the district court determined that the parole board did not have a clear duty; specifically, both judges determined that a statutory duty to hold a parole hearing exists only if it is first determined that the offender is reasonably likely to be paroled. The judges then stated in their orders that because Moore did not allege that the parole board had determined that he is reasonably likely to be paroled, his petition lacks legal merit. Moore, on the other hand, alleges that the parole board does have a duty to provide him a hearing pursuant to the statutes as they existed when he was convicted, which he asserts should be applied to him. The district court was correct.

At the time of Moore's conviction, Neb. Rev. Stat. § 83-1,111 (Reissue 1981), provided in pertinent part:

> (1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of his minimum term less any reductions. Every committed offender shall be interviewed within sixty days prior to his final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.
>
> . . . .
>
> (4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or rehearing of the case at any time.

At the time Moore filed his petition, May 29, 2003, § 83-1,111 (Supp. 2003), provided in pertinent part:

> (1) Every committed offender shall be interviewed and have his or her record reviewed by two or more members of the Board of Parole or a person designated by the board within sixty days before the expiration of his or her minimum term less any reductions as provided in [Neb. Rev. Stat. §] 83-1,110 [(Supp. 2003)]. If, in the opinion of the reviewers, the review indicates the offender is reasonably likely to be granted parole, the Board of Parole shall schedule a public hearing before a majority of its members. At such hearing the offender may present evidence, call witnesses, and be represented by counsel. If, in the opinion of

> the reviewers, the review indicates the offender should be denied parole, the offender may request an additional review by a majority of the members of the board. A review by the majority of the members of the board may be conducted not more than once annually. Any hearing and review shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.
>
> . . . .
>
> (4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole review at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

Prior to May 24, 2003, § 83-1,111(4) (Reissue 1999) provided: "If the board defers the case for later reconsideration, the committed offender shall be afforded a parole *hearing* at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time." (Emphasis supplied.)

In 1986, the Nebraska Legislature amended § 83-1,111(1) to incorporate a requirement that rather than a hearing within 60 days of the expiration of the offender's minimum sentence, an interview and parole review would occur. If the reviewers determined the offender was reasonably likely to be paroled, a hearing would be set. If the case was deferred for later reconsideration, the offender was still entitled to a hearing at least once a year until a release date was set. In 2003, the Nebraska Legislature amended § 83-1,111 again and changed the requirement that if a case was deferred for later reconsideration, the offender was entitled to a parole review, rather than a parole hearing, at least once a year until a release date was set. See § 83-1,111(4) (Supp. 2003).

Moore argues that because his case was deferred for later reconsideration, the parole board has a legal duty to grant him a parole hearing at least once a year pursuant to § 83-1,111(4) as it existed at the time of his conviction. Moore claims that application of the parole laws as they exist now, which require a parole review once a year rather than a parole hearing, violates the Ex Post Facto Clause of the U.S. Constitution. Moore's argument is without merit.

[12] A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003) (citing *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000), and *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999)). This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id.*

The Nebraska Supreme Court has not yet addressed whether § 83-1,111 as amended is an ex post facto law. However, the U.S. Supreme Court has addressed whether other similarly amended statutes, if applied retroactively, violated the Ex Post Facto Clause of the U.S. Constitution, which is what Moore claims application of § 83-1,111 as amended does.

[13] In *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), the U.S. Supreme Court held that application of a statutory amendment decreasing the frequency of parole suitability hearings under certain circumstances to prisoners convicted before the amendment did not violate the Ex Post Facto Clause. In *Morales*, the statute at issue initially entitled a prisoner to subsequent suitability hearings on an annual basis after initially being found unsuitable for parole. The statute was amended to authorize the parole board to

> defer subsequent suitability hearings for up to three years if the prisoner has been convicted of "more than one offense which involves the taking of a life" and if the Board [of Prison Terms] "finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding."

Morales, 514 U.S. at 503.

The prisoner in *Morales* argued that the amended statute as applied to him constituted an ex post facto law in violation of the U.S. Constitution. The prisoner argued that the statute as amended stiffened the standard of punishment for a crime already committed and that any legislative change that has any conceivable risk of affecting a prisoner's punishment is forbidden by the Ex Post Facto Clause. The U.S. Supreme Court rejected the prisoner's arguments.

The U.S. Supreme Court in *Morales* stated that the amendment did not lengthen a prisoner's sentence, did not change the substantive formula for securing any reductions to sentence ranges, did not affect the standards for fixing a prisoner's initial date of parole eligibility, and did not affect the standards for determining a prisoner's suitability for parole and setting a release date. The Court stated that the amendment only "introduced the possibility that after the initial parole hearing, the Board [of Prison Terms] would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that [the prisoner] would be deemed suitable for parole in the interim period." 514 U.S. at 507. The Court noted that the focus of the amendment was "merely ' "to relieve the [Board of Prison Terms] from the costly and time-consuming responsibility of scheduling parole hearings" ' for prisoners who have no reasonable chance of being released." *Id.* The Court also noted that the amendment "simply 'alters the method to be followed' in fixing a parole release date under identical substantive standards." 514 U.S. at 508. The Court specifically rejected the prisoner's argument that the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment.

[14] Like the statutory amendment at issue in *Morales*, the amendments to § 83-1,111 at issue in the instant case simply alter the method to be followed in fixing a parole release date under identical substantive standards. Rather than receiving a parole hearing annually after being deferred for later reconsideration, a prisoner receives a parole review annually. If a prisoner is determined to be reasonably likely to be granted parole, then a parole hearing is held. Section 83-1,111 as amended, similar again to the statutory amendment at issue in *Morales*, relieves the parole board from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no reasonable chance of being released.

[15] In *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000), the U.S. Supreme Court held that retroactive application of a statute amended to increase the number of years permitted between parole reconsiderations did not violate the Ex Post Facto Clause of the U.S. Constitution. When the offender in

Garner committed the offense at issue, the relevant state law required parole reconsiderations to occur every 3 years. After the offender had begun his sentence, the law was amended to require parole reconsiderations to occur at least every 8 years. The offender filed an "action under . . . 42 U.S.C. § 1983, claiming [the statute as amended] violated the *Ex Post Facto* Clause." 529 U.S. at 248.

The U.S. Supreme Court stated in *Garner*:

> [N]ot every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited. . . . The question is "a matter of 'degree.' " . . . The controlling inquiry . . . was whether retroactive application of the change in [the] law created "a sufficient risk of increasing the measure of punishment attached to the covered crimes."

529 U.S. at 250 (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)). The Court in *Garner* noted that *Morales* did not suggest that all states model their parole consideration procedures after the law in *Morales*, but, rather, identified factors which convinced the Court that the statutory amendment at issue in *Morales* created an insignificant risk of increased punishment for covered inmates. The Court in *Garner* stated that "[s]tates must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." 529 U.S. at 252.

[16] Regarding the amendment at issue in *Garner*, 529 U.S. at 255, the U.S. Supreme Court stated:

> The standard announced in *Morales* requires a more rigorous analysis of the level of risk created by the change in law [than a determination that a rule seems certain to result in some prisoners serving extended periods of incarceration]. When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

[17-20] In both *Morales* and *Garner*, the controlling inquiry is whether retroactive application of the amendment creates "a

sufficient risk of increasing the measure of punishment attached to the covered crimes." *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000). We find that the amendments to § 83-1,111 do not create a sufficient risk of increasing the measure of punishment attached to a sentence. Like the changes of law at issue in *Morales* and *Garner*, the amendments to § 83-1,111 at issue in the instant case do not modify the statutory punishment imposed for any offenses. The amendments also do not alter the standards for determining the initial date for parole eligibility or an inmate's suitability for parole. Rather, the amendments merely change the process by which the parole board reviews prisoners' parole possibilities. A prisoner is first reviewed by either two or more members of the parole board or by a person designated by the parole board. If the reviewer determines that a prisoner is reasonably likely to be granted parole, a hearing before a majority of the parole board's members is held. There is no indication that a parole review, with fewer people reviewing the prisoner's case, would conclude differently than a parole hearing with a majority of the parole board's members present.

[21,22] Because § 83-1,111, as amended, does not by its own terms show a significant risk of increasing the measure of punishment afforded to prisoners, the next step according to *Garner* is to examine whether the implementation of the rule by the agency charged with exercising discretion will result in a longer period of incarceration than under the earlier rule. There is no indication that a prisoner will be incarcerated longer under the practical application of § 83-1,111, as amended, than the prisoner would have been under the prior version of the statute. The only difference between the prior version and the current version is that under § 83-1,111 as amended, a prisoner undergoes an additional step—a parole review—in the parole process, to determine whether a parole hearing is appropriate. Section 83-1,111 indicates that the difference between a parole review and a parole hearing is who examines the prisoner's case. A parole hearing involves a majority of the parole board's members; a parole review is conducted either by two or more of the parole board's members or by a person designated by the parole board. In either situation,

there is no indication that different standards are used or that different information is evaluated.

[23] Section 83-1,111, as amended, requires a reviewer to determine whether a prisoner is reasonably likely to be granted parole before a parole hearing is permitted. If a prisoner does not receive a parole hearing, it is because that prisoner was not reasonably likely to be granted parole. A prisoner who does not receive a parole hearing still had his or her case reviewed and had a reviewer specifically determine that the prisoner was not reasonably likely to be granted parole. A prisoner is not going to incur a longer period of incarceration in this instance because he or she would not likely have been granted parole anyway. Accordingly, we cannot find that prisoners will be incarcerated longer under § 83-1,111 as amended than under the statute as it existed before the amendment, and we cannot find that application of § 83-1,111 as amended violates the Ex Post Facto Clause of the U.S. Constitution.

4. State-Created Liberty Interest

Finally, Moore argues that he has a state-created liberty interest in being paroled and thus is entitled to a parole hearing. In support of this argument, Moore cites to *Board of Pardons v. Allen*, 482 U.S. 369, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987); *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). These cases are not relevant to the issue at hand in the case at bar.

In *Allen* and *Greenholtz*, the statutes that created a protected liberty interest involved statutorily mandated criteria for determining whether an inmate would be granted parole. These statutes were substantive in nature, rather than procedural as is § 83-1,111. *Hewitt*, on the other hand, did not even involve a statute that the Court determined created a protected liberty interest. In fact, *Hewitt* was expressly denounced by the U.S. Supreme Court in 1995, a fact Moore seems to have overlooked. See *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

We find that the cases discussed above involving parole review proceedings are far more applicable to the case at bar.

Accordingly, Moore's argument that he has a protected state-created liberty interest in being paroled is without merit.

V. CONCLUSION

We find that the district court did not err in denying Moore's applications to proceed in forma pauperis without first holding a hearing or in determining that Moore's legal claim was frivolous. Pursuant to § 25-2301.02, a court is not required to conduct a hearing before denying an application to proceed in forma pauperis if the court has objected to the application on its own motion on the ground that the legal positions asserted therein are frivolous or malicious. Accordingly, Moore was not entitled to a hearing prior to the district court's denials of his applications to proceed in forma pauperis.

Furthermore, the district court did not err in determining that Moore's petition lacked legal merit. Moore's claim to relief depended upon a finding that he was entitled to a parole hearing annually, pursuant to § 83-1,111(4) as it existed at the time of his conviction. However, the U.S. Supreme Court has held that the retroactive application of procedural parole statutory amendments does not violate the Ex Post Facto Clause of the U.S. Constitution. Accordingly, the parole board does not have a legal duty to grant Moore a parole hearing, and thus, Moore's petition for a writ of mandamus is without merit. The district court's rulings are affirmed.

AFFIRMED.

TERRANCE DUKES, APPELLANT, V. UNIVERSITY OF NEBRASKA, DOING BUSINESS AS UNIVERSITY OF NEBRASKA AT LINCOLN, APPELLEE.

679 N.W.2d 249

Filed May 18, 2004. No. A-03-982.

1. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

3. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
4. **Workers' Compensation: Supreme Court.** The Nebraska Supreme Court has consistently given the Nebraska Workers' Compensation Act a liberal construction to carry out justly the spirit of the act.
5. **Workers' Compensation.** The plain language used in Neb. Rev. Stat. §§ 48-139 (Cum. Supp. 2002) and 48-140 and 48-141 (Reissue 1998) indicates that lump-sum settlements in workers' compensation actions cannot be modified in the future or be considered when determining future workers' compensation awards.
6. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred upon it by statute.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Rolf Edward Shasteen, of Shasteen, Linscott & Brock, P.C., for appellant.

Jon Bruning, Attorney General, and John R. Thompson for appellee.

INBODY, CARLSON, and MOORE, Judges.

INBODY, Judge.

INTRODUCTION

Terrance Dukes appeals from the decision of the Workers' Compensation Court review panel affirming the trial court's decision to issue a credit to the University of Nebraska at Lincoln (UNL) for amounts paid in a lump-sum settlement against amounts owed to Dukes for his body as a whole injury. For the reasons set forth herein, we reverse the judgment of the review panel of the Workers' Compensation Court and remand the cause for proceedings consistent with this opinion.

STATEMENT OF FACTS

Dukes began working for UNL on September 19, 1963. Dukes worked as a laboratory mechanic; his duties included building research equipment, spray systems, farm equipment, and furniture. Dukes also did some welding and sheet metal work. On April 5, 1994, Dukes was filling a low-pressure tank with air when the tank exploded. The explosion caused severe injuries to his right hand and arm. The injury made Dukes unable to perform

his duties at UNL, and he has not been able to work at any job since the accident. Dukes experiences constant pain in his arm, takes numerous medications for the pain, and has had trouble with sleeping and with his concentration and memory since the time of the accident. Dukes has also been treated for depression following his injury.

On March 6, 1998, Dukes and UNL entered into an agreement in which UNL would pay Dukes a lump sum for the injury to his right hand and arm. UNL agreed that Dukes had injured his right hand and arm during the course of his employment with UNL and agreed to pay Dukes the lump sum of $46,453.91. The agreement stipulates that after paying that sum, UNL would "be fully and forever released and discharged form [sic] any and all liability to [Dukes] regarding permanent partial disability to [Dukes'] member injury to his right-upper extremity. This agreement does not extend to [Dukes'] alleged body as a whole disability stemming from the accident of April 5, 1994." The agreement stipulates that $15,000 of the lump-sum amount would go to pay Dukes' attorney fees. At the time of the agreement, the parties agreed that Dukes had a remaining life expectancy of 24 years 4 months and that "the balance of $31,453.41 shall be paid to [Dukes] and shall represent a payment of weekly indemnity benefits over the projected term of [Dukes'] remaining life expectancy of 293 months at the rate of $107.35 per month or $24.81 per week." The agreement further provides that Dukes

> also claims that he is permanently and totally disabled as a result of psychological problems associated with his injury. Therefore, he asserts that he is not employable and would not benefit from rehabilitation vocational services. [UNL] denies that [Dukes] is totally and permanently disabled, but concedes that he is entitled to benefits relating to the 100% permanent partial disability to his right upper extremity. [Dukes] and [UNL] have agreed to settle the permanency claim regarding the member disability and to leave the body as a whole claim to be dealt with at a later time.

The Workers' Compensation Court approved the lump-sum settlement in an order dated March 9, 1998.

On July 17, 2000, Dukes filed a petition in the Workers' Compensation Court alleging that he suffered a psychological

injury as a result of his employment with UNL. With regard to the lump-sum settlement, Dukes claims in the petition:

> [T]he agreement between [Dukes] and [UNL] set forth in the Application for Lump Sum Settlement, settled only the claim for injuries to [Dukes'] right arm. [UNL] has continued to pay weekly benefits thereafter to [Dukes] for his permanent and total psychiatric disability as caused by the physical injury to his right arm. [UNL] has also continued to pay for [Dukes'] monthly medication.

The petition alleges that "as a direct and proximate result of [Dukes'] injury on April [5], 1994, he has become permanently and totally disabled. That as a direct and proximate result of medication prescribed for his injury of 1994, [Dukes] has developed symptoms in his left arm." The petition also claims that UNL failed to pay Dukes the lump-sum settlement in a timely fashion; however, this claim was dropped prior to trial. In its answer, UNL admitted that Dukes had an "ongoing psychiatric disability" and that UNL had continued to pay benefits for that psychiatric injury; however, UNL claimed that Dukes had already received all the benefits to which he was entitled.

After a trial was held on the petition on May 30, 2002, the court found that Dukes was permanently and totally disabled as a result of a psychiatric condition that originated out of Dukes' April 5, 1994, accident. The trial court further found:

> On March 6, 1998, [Dukes] entered into a lump sum settlement with [UNL] for payment of 100 percent loss of use of the right arm. The application for lump sum settlement states, "[Dukes] and [UNL] have agreed to settle the permanency claim regarding the member disability and to leave the body as a whole claim to be dealt with at a later time." The body as a whole injury, which would entitle [Dukes] to a loss of earning power award, is the psychiatric/psychological problem [Dukes] has as a result of the accident and injury. The only payment the lump sum settlement covered was the 100 [percent] loss of use of the right arm. The parties agreed in the lump sum settlement that the portion paid to [Dukes] (a sum of $24.81 per week) would be considered the weekly benefit. In addition thereto, was a fee paid to counsel for [Dukes]. If that fee is

> prorated to a weekly benefit (as was the amount paid to [Dukes] for the 100 percent loss of use of the right arm), the weekly benefit would be $11.83. This means that there was total weekly benefit paid of $36.64 per week.

The court further found that at the time of the injury, Dukes' "average weekly wage . . . was $480.68. This would entitle [Dukes] to $320.25 per week." However, the court noted that the statutory maximum benefit Dukes could receive at the time of the injury was $265 per week; thus, the court held that Dukes was "entitled to $265.00 per week, and no more, for this injury."

Regarding the timing of Dukes' disability, the trial court specifically found that Dukes "was temporarily totally disabled from April 5, 1994, through December 20, 1996. On November 26, 1996, [a doctor] gave an opinion that [Dukes] was at maximum medical improvement. On December 20, 1996, [another doctor] gave a rating of 100 percent impairment of the right hand and upper extremity." The court further found that UNL should receive a credit for the lump-sum payment made to Dukes, despite the fact that UNL did not request such a credit in its answer to Dukes' petition or at trial. Specifically, the court found:

> Beginning December 21, 1996, through April 19, 1998, [UNL] is to pay [Dukes] $265.00 per week for permanent total disability. There needs to be an adjustment for payments made after April 19, 1998, because [Dukes] received the lump sum settlement which, according to the application, is to be prorated over his lifetime. I cannot award a weekly benefit in the amount of $265.00 for permanent total disability when [Dukes] has already received an agreed upon amount of $36.64 per week for the rest of his life. The maximum amount I am allowed to award in total for any accident in 1994, no matter how many injuries arise from that one accident, is $265.00 per week.
>
> . . . .
>
> In this case, the weekly benefit cannot exceed $265.00 per week, and it is for this reason that I am giving [UNL] a credit by reducing the amount due after April 19, 1998, by $36.64 per week, because that amount has already been paid (in the lump sum settlement). The result is that beginning April 20, 1998, and for so long as [Dukes] shall remain

> permanently totally disabled the weekly benefit due will be $228.36.

The court further ordered UNL to pay Dukes' current and future additional medical costs and to pay Dukes $863.53 for mileage.

Dukes timely appealed the trial court's decision to a review panel of the Workers' Compensation Court. On appeal, Dukes alleged that the credit given to UNL by the trial court was not in conformity with applicable Nebraska law, that the trial court lacked jurisdiction to allocate benefits that were previously paid pursuant to a lump-sum settlement, and that the credit given by the trial court was not relief sought by UNL. The review panel consolidated these issues into one: "whether the trial court erred by crediting lump sum payments made for a member injury against benefits owed for a body as a whole injury when both resulted from the same accident." The review panel noted:

> As the Nebraska Supreme Court has held that a party cannot recover more than the statutory maximum for injuries suffered in separate accidents . . . it would seem to logically follow that a similar prohibition attends multiple injuries incurred in the same accident. A "maximum" weekly benefit means what it implies.

The review panel found no authority to support Dukes' claim that the trial court lacked jurisdiction to credit UNL for the amount it paid in the lump-sum settlement for Dukes' arm injury against the amounts owed for the psychiatric injury. Ultimately, the review panel found none of Dukes' arguments persuasive, specifically holding:

> The trial court . . . credited the fictional weekly lifetime benefits for the scheduled injury against [Dukes'] entitlement for his whole body injury. [Dukes] cries foul and suggests, in essence, that he is entitled to more than the statutory limit of $265.00 per week. As noted, the panel finds the law to be quite clear regarding the maximum benefits payable per week for injuries sustained in a single accident. This legislative directive survives or supercedes any contrary agreement of the parties or alleged failure by a party to affirmatively request that the statute be implemented as written. [Dukes'] alleged errors are without merit.

The review panel further found that the trial court had committed plain error in its award. Specifically, the review panel found:

> By accepting or otherwise legitimizing the parties' agreement to characterize the lump sum payment as one made over [Dukes'] lifetime (calculated by the parties as 24 years and 4 months), the court conceivably awarded [Dukes] less than he might ultimately be due for his body as a whole injury. The credit applied by the court against [Dukes'] entitlement for his psychiatric condition could arguably extend beyond the aforementioned 24 years and 4 [months of] life expectancy settled upon by the parties in the [lump-sum settlement] document. . . . [T]he court permanently reduced [Dukes'] weekly entitlement for his whole body injury to $228.36 (making no referral to the 24 years and 4 months life expectancy period agreed to by the parties). If [Dukes] remains totally disabled and lives longer than the expectancy figure used by the parties, he will not receive that to which he is entitled. In other words, as drafted, the award provides that the credit against the statutory maximum of $265.00 per week (for [Dukes'] whole body injury) could continue beyond the life expectancy period envisioned by the parties. The court's award makes no provision for the real possibility that [Dukes'] total permanency could exceed the life expectancy period agreed to by the parties.
>
> This shortcoming serves to highlight perhaps the inherent difficulties in applying the credit in the manner found in the award. The better practice would appear to be one that gives full faith and effect to the statutory scheme in place at the time of injury. The panel suggests that [Dukes'] weekly entitlement for the subject injury (body as a whole/psychiatric condition) be established at $265.00 per week and made payable for so long as [Dukes] remains permanently and totally disabled from that injury. Those payments, however, would be due and owing only after [Dukes'] member injury disability entitlement is exhausted.

Accordingly, the review panel remanded the cause to the trial court for further consideration and findings relative to the amount and commencement of Dukes' award. Dukes has timely appealed to this court.

ASSIGNMENTS OF ERROR

Dukes assigns, restated, that the review panel erred in (1) affirming the trial court's award of a credit in favor of UNL against Dukes' weekly permanent total disability award; (2) failing to find that UNL had waived its right to a credit, when UNL failed to raise the issue before the trial court; (3) finding that the trial court had jurisdiction to consider the effect of the previous lump-sum settlement on the benefits awarded for Dukes' psychiatric injury; and (4) holding that UNL was entitled to suspend the entire amount of its permanent total disability payments to Dukes until the lump-sum settlement amount had been recovered.

STANDARD OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003).

ANALYSIS

Credit for Lump-Sum Settlement.

Lump-sum settlements, in the context of workers' compensation, are governed by Neb. Rev. Stat. §§ 48-139 (Cum. Supp. 2002) and 48-140 and 48-141 (Reissue 1998). Section 48-139 provides in relevant part:

> Every such lump-sum settlement or agreement approved by order of the compensation court shall be final and conclusive unless procured by fraud. Upon paying the amount approved by the compensation court, the employer (1) shall be discharged from further liability on account of the injury or death, other than liability for the payment of future medical expenses if such liability is approved by the

compensation court on the application of the parties, and (2) shall be entitled to a duly executed release.

Section 48-140 provides:

> All settlements by agreement of the parties with the approval of the Nebraska Workers' Compensation Court and all awards of compensation made by the compensation court, except those amounts payable periodically, shall be final and not subject to readjustment; *Provided*, no settlement shall be final unless it is in conformity with the Nebraska Workers' Compensation Act and approved by order of the compensation court pursuant to section 48-139.

Finally, § 48-141 provides in relevant part: "All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to section 48-139, shall be final . . . ."

[1-4] "It is well settled that when construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 806, 635 N.W.2d 439, 445 (2001). "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Id.* "If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning." *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 675, 611 N.W.2d 828, 831 (2000). "The Legislature enacted the Nebraska Workers' Compensation Act . . . in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease." *Zavala v. ConAgra Beef Co.*, 265 Neb. at 197, 655 N.W.2d at 700 (2003). "It is in light of this beneficent purpose that we have consistently given the [a]ct a liberal construction to carry out justly the spirit of the [a]ct." *Id.*

[5] The language used in §§ 48-139, 48-140, and 48-141 is both plain and unambiguous; all three statutes indicate that in the area of workers' compensation, lump-sum settlements are "final." Section 48-139 indicates that such settlements are "conclusive

unless procured by fraud," and § 48-140 provides that such settlements are "not subject to readjustment." This statutory language indicates not only that these settlements cannot be modified in the future, but also that such settlements cannot be considered when determining future workers' compensation awards. A different reading of the statutory language would be contrary to the purpose of the Nebraska Workers' Compensation Act, which, as stated previously, was meant to relieve injured workers like Dukes from the adverse economic effects caused by work-related injuries or occupational diseases.

[6] UNL argues that Neb. Rev. Stat. §§ 48-121 (Cum. Supp. 2002) and 48-121.01 (Reissue 1998) dictate that the lump-sum settlement between UNL and Dukes must be considered when determining Dukes' proper workers' compensation award, because neither statute contains "any language qualifying the use of the statutory maximum" of $265 per week. Brief for appellee at 12. UNL states, "[T]herefore, compensation is simply limited to $265.00 according to the plain, direct, and unambiguous meaning of the statutory words and further judicial inquiry is not required." *Id.* This argument might be persuasive were it proper to consider the settlement amount when determining the appropriate amount of Dukes' award. Although we are unable to find any cases directly on point, the Nebraska Supreme Court, in determining that waiting-period penalties apply to the entire amount of a delinquent lump-sum settlement, rejected the employer's argument that penalties should be assessed on the amount of periodic payments which would have accrued as of the date of the court's approval of the lump-sum settlement. In reaching this conclusion, the court referred to § 48-139, which provides that lump-sum agreements approved by the court are final and conclusive. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000). Nothing in §§ 48-139, 48-140, or 48-141 allows for a credit to be given to an employer when the parties have entered into a lump-sum settlement for one injury and have reserved the dispute on another alleged injury that happened at the same time. "As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred upon it by statute." *Dawes v. Wittrock Sandblasting & Painting*,

266 Neb. 526, 550, 667 N.W.2d 167, 189 (2003). While it is true that neither § 48-121 nor § 48-121.01 contain language qualifying the use of the statutory maximum, the plain meanings of §§ 48-139, 48-140, and 48-141 dictate that lump-sum settlements like that between UNL and Dukes cannot be considered in determining future workers' compensation awards, because the settlements are "final." Thus, the lump-sum settlement amount has no bearing on the statutory maximum award in this case, and such amount cannot be used to decrease the amount of benefits awarded. We find that the review panel erred when it affirmed the trial court's determination that UNL should receive credit for the lump-sum payment it made to Dukes for his member injury, and accordingly, we reverse the judgment of the review panel of the Workers' Compensation Court.

Dukes' Additional Assignments of Error.

Given our above finding that the judgment of the review panel of the Workers' Compensation Court must be reversed, we need not address Dukes' further assignments of error.

CONCLUSION

We find that the review panel erred when it found that the trial court properly credited amounts UNL paid to Dukes in a lump-sum settlement against the amounts UNL owed to Dukes for his permanent and total disability. Accordingly, we reverse the judgment of the review panel of the Workers' Compensation Court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD WISINSKI, APPELLANT.
680 N.W.2d 205

Filed May 25, 2004. No. A-03-467.

1. **Rules of Evidence: Other Acts: Proof.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted

in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

2. ____: ____: ____. When evidence is admissible pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.
3. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), upon objection to its admissibility, is required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.
4. **Evidence: Other Acts: Jury Instructions.** Any limiting instruction given upon receipt of other crimes evidence should identify only those specific purposes for which the evidence was received.
5. **Rules of Evidence: Other Acts.** Evidence of prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts, and Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), does not apply to evidence of the former kind.
6. ____: ____. Evidence of prior conduct that forms the factual setting of the crime is not rendered inadmissible by Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995).
7. ____: ____. The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), merely because the acts are criminal in their own right but have not been charged.
8. ____: ____. A court does not err in finding Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), inapplicable and in accepting prior conduct evidence where the evidence is of prior conduct so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime.
9. **Rules of Evidence: Other Acts: Proof: Words and Phrases.** Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime.
10. **Rules of Evidence: Others Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
11. **Other Acts.** The State will not be prohibited from presenting a portion of its case merely because the actions of the defendant proving the State's case were criminal in nature.
12. **Rules of Evidence: Other Acts: Police Officers and Sheriffs: Theft.** Police officers' testimony that a defendant was in possession of the property which he or she is charged with having stolen is foundational, is integral to the State's case that the

defendant committed the crime charged, and thus is not evidence excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995).

13. **Rules of Evidence: Other Acts: Motor Vehicles: Theft.** Testimony by the owner of a vehicle from which a defendant was apprehended that items consistent with those stolen were found in the vehicle and that those items were not owned by the vehicle's owner help establish that the defendant was apprehended in possession of the stolen property. This testimony is integral to the State's case that the defendant committed the crime charged, and thus, it is not evidence excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995).
14. ____: ____: ____: ____. Testimony by the owner of a vehicle from which a defendant had been apprehended that the vehicle was stolen is not evidence of other bad acts of the defendant, and thus, it is not evidence excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), if no evidence was presented that the defendant had stolen the vehicle or that the defendant had knowledge that the vehicle was stolen.
15. ____: ____: ____: ____. To the extent that testimony by the owner of a vehicle from which a defendant had been apprehended that the vehicle was stolen could be construed as evidence excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), admission of such testimony was harmless error if ample other evidence existed on the record proving that the defendant committed the crime charged and, thus, that the defendant was not prejudiced by such admission.
16. **Rules of Evidence: Other Acts: Records: Judgments: Appeal and Error.** A record that fails to include the order of a trial court does not support an assigned error that the trial court failed to properly state for what purpose evidence would be admitted under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995).
17. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed.
18. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
19. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
20. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
21. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
22. ____. For a defendant to be prosecuted for aiding and abetting, mere encouragement or assistance is sufficient participation in the criminal act.
23. **Criminal Law: Evidence: Value of Goods.** The owner of chattels may testify as to their value in a criminal case.
24. **Evidence: Value of Goods: Theft.** Testimony by the owner of chattels may be the only evidence as to the value of stolen property.
25. **Theft: Intent.** A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.

26. **Theft: Value of Goods.** Theft constitutes a Class III felony when the value of the thing involved is over $1,500.
27. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
28. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
29. **Theft: Value of Goods: Proof.** In a theft prosecution, the value of the property stolen is now an essential element of the offense that must be proved beyond a reasonable doubt.
30. **Jury Instructions: Theft: Value of Goods: Proof.** No prejudice occurs when a jury instruction for theft fails to require a specific declaration of value if the instruction includes a value or range of value as an element of the crime and the instruction requires the prosecution to prove that value or range beyond a reasonable doubt.
31. **Jury Instructions: Testimony: Appeal and Error.** A defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error.
32. **Jury Instructions: Evidence: Perjury.** Where an accomplice's testimony is not the only evidence regarding an important matter, the defendant is not entitled to a limiting instruction of the jury to hesitate to convict the defendant if the jury decides that the accomplice testified falsely about that matter.
33. **Aiding and Abetting.** The common-law distinction between principal and aider and abettor has been abolished; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he were the principal offender.
34. **Jury Instructions: Aiding and Abetting.** A defendant need not be charged with aiding and abetting in order for the jury to receive an aiding and abetting jury instruction.
35. **Aiding and Abetting: Proof: Testimony.** The testimony of an accomplice is sufficient to support an allegation that a person aided and abetted another in the commission of a crime.
36. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Patrick J. Boylan, Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Clifford Wisinski appeals from a jury verdict finding him guilty of burglary, a Class III felony, and theft by unlawful taking, more than $1,500, a Class III felony. For the reasons stated below, we affirm.

II. BACKGROUND

On January 31, 2002, Thomas Szynskie and Jana Szynskie went on vacation to Oklahoma. Jana left a key at the home of her friend, Wendy Womochil, with instructions for Womochil to care for Jana's pets while the Szynskies were away. Womochil was not present at her home when Jana left her key, but Womochil's friend, Debra Holub, was present.

Holub contacted a friend, Clesson Wright, and told him about the key Jana had left at Womochil's home. Wright then contacted his friend, Wisinski. According to the testimony of Wright, Wisinski came over to Womochil's home and Wright, Wisinski, and Holub discussed using Jana's key in order to "look for some stuff to take out." Wright testified that he did not have a vehicle and that he had contacted Wisinski because Wisinski did have a vehicle.

The following morning, Wright went over to the Szynskies' home and entered using the key Jana had left at Womochil's house. Wright testified that upon arriving, he removed his boots by the door so as not to track snow or slush into the house and proceeded to feed the Szynskies' cats. Wisinski then arrived and knocked on the door; Wright let Wisinski in. The two men then proceeded to take numerous items from the home, loading them first into the garage so that the items could be loaded into Wisinski's vehicle all at once.

While Wright and Wisinski were looking through the house and loading items into the garage, the telephone rang several times. Wright answered the telephone each time, told the callers that Thomas was out of town, and wrote down their telephone numbers. At trial, Wright stated that he answered the telephone at Wisinski's instructions, "You better answer that. It might be one of the neighbors." Wright also testified that Wisinski took a snowblower and removed the snow from in front of the house and from the driveway. Wisinski told Wright that he did so "[t]o make it look like we're supposed to be there, a strange car in the driveway."

Wright testified that he and Wisinski then loaded all of the items from the garage into the back of Wisinski's vehicle and took them to a friend's home in North Omaha. After unloading the items, they went to a bank. Wright testified that Wisinski had taken a checkbook from the Szynskies' home and that he and Wisinski unsuccessfully attempted to cash a check from that checkbook which they had written to "Melvin Roach." (Wisinski was later found using an identification card with the name "Melvin Roach" on it.) Wright and Wisinski then returned to the Szynskies' home and took some additional items, which they took to Wisinski's home.

The Szynskies returned home early from vacation upon the news that their house had been broken into. An investigation ensued. On February 13, 2002, Wisinski was apprehended in a red truck by police. Located in that truck were some of the items identified as stolen by the Szynskies, including a printer containing some business stationery imprinted with the name of Thomas' business.

At trial, Wisinski was found guilty of burglary and theft by unlawful taking, more than $1,500. Wisinski moved for a new trial. The trial court sentenced Wisinski to 3 to 10 years' imprisonment on each count, to be served concurrently. The trial court also denied Wisinski's motion for new trial. This appeal follows.

III. ASSIGNMENTS OF ERROR

Wisinski alleges, renumbered and restated, that the trial court erred in (1) granting the State's request for a hearing pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995); (2) admitting evidence of value of property over objections on foundation, hearsay, and confrontation rights grounds; (3) failing to grant Wisinski's motion to dismiss because of allegedly insufficient evidence; (4) failing to give correct jury instructions; and (5) hearing Wisinski's motion for new trial after, rather than before, sentencing.

IV. ANALYSIS

1. Rule 404 Hearing

Wisinski argues that the trial court erred in granting the State's request for a rule 404 hearing. The only bases for such error that Wisinski argues in his brief are that the State failed to articulate

the purpose for which it was offering the evidence presented at the rule 404 hearing and that the court failed to properly state the purpose for which the evidence would be admitted. Wisinski's argument is without merit.

[1,2] Rule 404 provides in relevant part:

> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

[3,4] The proponent of evidence offered pursuant to rule 404(2), upon objection to its admissibility, is required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received. *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001) (citing *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000)). Any limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received. *Id.*

However, in the case at bar, the record supports a finding that the trial judge had determined that the evidence presented by the State was not rule 404 evidence. The trial court stated at the beginning of the rule 404 hearing, "Under Rule 404, it's other crimes and so forth. Isn't this just circumstantial evidence of a crime that was committed?" The State responded, "You can certainly view it that way, Judge. We filed this in an abundance of caution because it's several days after the incident and it's a different jurisdiction as well." These statements suggest that at the outset, the trial court did not believe that the evidence to be presented was rule 404 evidence.

At the conclusion of trial, Wisinski requested a limiting jury instruction that stated in part:

> [T]he evidence that [Wisinski] may have (here insert particulars of prior similar acts) has been received only for the limited purpose of helping you to decide whether [he] had the (intent, motive, opportunity, here insert pertinent fact in issue from [rule 404]) to commit the Bur[g]lary and Theft by Unlawful taking charged. You must consider the evidence for that limited purpose and for no other.

The judge denied Wisinski's request and explained:

> Let the record show that we had a [rule] 404 hearing and I said at the time this is just a matter of circumstantial evidence, the fact that he gets in a truck and is chased and so forth. The issue there was what was found in the truck and it's just simply a matter of circumstantial evidence connecting with the burglary. That's why that [instruction] is not given.

Because the trial court appears by its statements and its actions to have determined that the evidence presented at the rule 404 hearing was not rule 404 evidence, we can only presume that that is why the court refused to grant Wisinski's request for a limiting instruction.

We find that the trial court was primarily correct in determining that the evidence Wisinski objects to was not rule 404 evidence. We find that most of the evidence presented by the State was evidence forming the factual setting of the crime and was evidence of events inextricably intertwined with the charged crime. Accordingly, the State did not need to articulate the purpose for which it was offering that evidence, and the court did not need to state the purpose for which that evidence would be admitted.

[5-8] In *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001) (citing *U.S. v. O'Dell*, 204 F.3d 829 (8th Cir. 2000); *U.S. v. Luna*, 94 F.3d 1156 (8th Cir. 1996); and *U.S. v. Tate*, 821 F.2d 1328 (8th Cir. 1987)), this court held that evidence of prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts and that rule 404 does not apply to evidence of the former kind. We stated that evidence of prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. *Powers,*

supra (citing *U.S. v. Phelps*, 168 F.3d 1048 (8th Cir. 1999), and *U.S. v. Williams*, 95 F.3d 723 (8th Cir. 1996)). We also said that the State is entitled to present a coherent picture of the facts of the crime charged and that evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right but have not been charged. *Powers, supra* (citing *Williams, supra*). Finally, we stated that a court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the evidence is of prior conduct so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. *Powers, supra* (citing *U.S. v. Forcelle*, 86 F.3d 838 (8th Cir. 1996)).

[9,10] Similarly, in *State v. Aguilar*, 264 Neb. 899, 909, 652 N.W.2d 894, 903 (2002) (citing *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000)), the Nebraska Supreme Court stated, "Prior bad act evidence is evidence of other crimes, wrongs, or acts, *aside from the crime charged*, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime." (Emphasis supplied.) The Nebraska Supreme Court then stated, "Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage." *Aguilar*, 264 Neb. at 909, 652 N.W.2d at 903 (citing *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997)).

In the case at bar, Wisinski states in the facts section of his brief that he objected to the testimony of Mark Desler, Greg Stanzel, Gary Kula, and Leland Marsh. The testimonies of Desler, Stanzel, and Kula described the apprehension of Wisinski and the contents of the red truck from which Wisinski was apprehended. The testimony of Marsh identified the red truck from which Wisinski was apprehended as a vehicle that had been stolen from Marsh. Marsh's testimony further established that the contents of the truck at the time of Wisinski's apprehension did not belong to Marsh and were consistent with the items Wisinski was charged with having stolen.

[11-13] As we stated in *Powers, supra*, the State will not be prohibited from presenting a portion of its case merely because the actions of the defendant proving the State's case were

criminal in nature. The police officers' testimony in this case is foundational for establishing that Wisinski was in possession of the property which he is charged with having stolen. Marsh's testimony that the items found in the truck which were consistent with the stolen property were not his helped establish that Wisinski was apprehended in possession of the stolen property. This information is integral to the State's case that Wisinski committed the crime charged, and thus, it was not rule 404 evidence.

[14] On the other hand, the testimony of Marsh that the truck recovered by the police had been stolen from him appears problematic at first glance. The record contains no evidence that Wisinski himself stole the truck or that Wisinski had knowledge that the truck was stolen. We note that none of the police officers ever testified that the truck had been stolen. Marsh testified that one of his red trucks from his dealership had been stolen and that the truck recovered by the police was his. Marsh did not, however, testify that Wisinski had stolen the truck or that Wisinski knew that the truck had been stolen. Since no testimony was adduced from Marsh of other bad acts committed by Wisinski, we find that this evidence was not rule 404 evidence and that the court thus did not err in refusing to treat the evidence as such.

[15] To the extent that Marsh's testimony regarding the truck's having been stolen from his dealership could be construed as rule 404 evidence, we find that the trial court's failure to treat the evidence as such was harmless error. Even without Marsh's testimony that the truck in which Wisinski was apprehended was his truck and that the truck had been stolen, there was ample other evidence with which the jury could have found Wisinski guilty of burglary and theft by unlawful taking. Accordingly, Wisinski was not prejudiced by Marsh's testimony about his stolen truck.

[16] Finally, we note that Wisinski's argument that the trial court failed to properly state for what purpose the alleged rule 404 evidence would be admitted is not supported by the record. The record before us does not include the order of the trial court entered after the rule 404 hearing. Wisinski's praecipe for transcript requested "any and all journal entries," but did not request that the signed order be included in the transcript. On February

20, 2003, the trial judge made a journal entry which stated in part, "Order signed. Bailiff to mail copy to counsel." In the facts section of his brief, Wisinski states that the trial judge entered an order permitting the State to use the proposed evidence, and Wisinski cites only to the February 20 journal entry. Wisinski then states, without citing to anything, "In the Order the court merely stated that the [rule] 404 Motion should be granted without any further explanation or clarification." Brief for appellant at 10.

[17] Without a copy of the order in the record, we cannot determine whether Wisinski's statement is accurate. It is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996) (citing *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994)). Wisinski has not provided us evidence to support his assigned error. Further, the trial court's statements and actions support a finding that the court had determined that the evidence presented by the State was not rule 404 evidence. Accordingly, the trial court's decision is affirmed.

2. Evidence of Value of Property

[18] Wisinski assigns as error that the trial court erred in admitting evidence of value of property over objections on foundation, hearsay, and confrontation rights grounds. Wisinski does not, however, argue this in the body of his brief. Errors assigned but not argued will not be addressed on appeal. *Shipferling v. Cook*, 266 Neb. 430, 665 N.W.2d 648 (2003) (citing *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002)). Accordingly, we do not further address this assignment of error.

3. Sufficiency of Evidence

[19] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002) (citing *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001), and *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000)).

Wisinski was found guilty of burglary and theft by unlawful taking, more than $1,500. Wisinski argues specifically that there was no evidence of a breaking and entering to constitute a burglary and that there was insufficient evidence adduced as to the value of the property for the theft to amount to a felony crime. We find Wisinski's arguments to be without merit.

First, Wisinski argues that he did not break and enter because he did not obtain the key to enter the Szynskies' residence, but had arrived later, when his alleged accomplice, Wright, opened the door for him. Wisinski argues that there was no evidence of forced entry because it was an " 'inside job' " and that Jana had given her drug suppliers a key in order to pay them. Brief for appellant at 14. Wisinski is attempting to reargue his case and asks us to reweigh the evidence and testimony, which it is beyond our scope of review to do.

Viewing the evidence in the light most favorable to the prosecution, we find that there is sufficient evidence for a fact finder to have concluded that Wisinski committed burglary. Wright testified that he and Wisinski had discussed going over to the Szynskies' house to "look for some stuff to take out" the night before the theft. Wright also testified that he did not have a vehicle and had involved Wisinski because Wisinski did own a vehicle. Wright stated that the next morning, he had taken the key and gone over to the Szynskies' house, and that Wisinski had arrived shortly thereafter, with his vehicle. Wright also stated that after he let Wisinski into the house, they proceeded to take many items.

[20-22] Neb. Rev. Stat. § 28-507(1) (Reissue 1995) states, "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Neb. Rev. Stat. § 28-206 (Reissue 1995) provides, "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." For a defendant to be prosecuted for aiding and abetting, mere encouragement or assistance is sufficient participation in the criminal act. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992). Wright's testimony, viewed in the light most favorable to the prosecution, provides a sufficient basis on which to find that Wisinski assisted

Wright in committing burglary and, thus, that Wisinski is guilty as an aider and abettor. Specifically regarding the "breaking and entering" issue, Wright's testimony, viewed in the light most favorable to the prosecution, established that Wright entered the home without permission, using the key he had obtained from Holub, with the intent to commit a theft inside. This is sufficient to constitute a breaking and entering, and Wisinski assisted Wright in committing the theft. Accordingly, Wisinski's assignment of error that there was no evidence of a breaking and entering to constitute a burglary is without merit.

Wisinski also argues that insufficient evidence was adduced as to the value of the stolen property for the theft to amount to a felony crime. Wisinski states that the standard of proof for theft requires evidence of the market value of the stolen property.

[23,24] In this case, the Szynskies testified as to the value of the property stolen from them. The Nebraska Supreme Court has stated, "It has long been the rule in this jurisdiction that the owner of chattels may testify as to their value in a criminal case." *State v. Holland*, 213 Neb. 170, 171, 328 N.W.2d 205, 206 (1982). Wisinski does not cite to any authority suggesting that such testimony cannot be the only evidence as to value.

[25,26] The Szynskies in this case testified that the overall value of the items taken from their home was approximately $28,000. Neb. Rev. Stat. § 28-511(1) (Reissue 1995) provides, "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Neb. Rev. Stat. § 28-518(1) (Reissue 1995) provides, "Theft constitutes a Class III felony when the value of the thing involved is over one thousand five hundred dollars." Taking the evidence in the light most favorable to the prosecution, we find that there is ample evidence as to the value of the property for the theft to amount to a felony crime. Accordingly, Wisinski's assignment of error that there was insufficient evidence as to the value of the property taken for the theft to constitute a felony is without merit.

4. Jury Instructions

[27] Wisinski objects to several of the jury instructions given by the trial court. Whether a jury instruction given by a trial court

is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003) (citing *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002)).

(a) Rule 404 Limiting Instruction

Wisinski argues that the trial court erred in refusing to instruct the jury on the limited admissibility of rule 404 evidence. Because we find that the evidence objected to by Wisinski was not rule 404 evidence, he was not entitled to a limiting instruction. Therefore, it was not error for the trial court to refuse Wisinski's request.

(b) Specific Finding as to Value

Wisinski argues that the trial court erred in failing to instruct the jury to make a specific finding as to the value of the property stolen. Wisinski states in his brief that he was prejudiced because "[the jury's] verdict had to set a specific value on the allegedly stolen property." Brief for appellant at 16. Wisinski then states that he has met his burden of showing prejudice. However, stating that he was prejudiced is not sufficient to establish that prejudice actually occurred.

[28] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002) (citing *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001)). Wisinski has failed to establish prejudice. Accordingly, Wisinski has failed to meet his burden.

Nonetheless, despite Wisinski's failure to argue how he was prejudiced, we find that the jury instructions given without a declaration of value did not prejudice Wisinski. At trial, Wisinski requested that the trial court include a declaration of value in the jury instructions based on NJI2d Crim. 3.6 and *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002). The declaration of value jury instruction submitted by Wisinski, which mirrored NJI2d Crim. 3.6, states:

> If you decided that [Wisinski] was guilty of Theft by Unlawful Taking then you must decide beyond a reasonable doubt the value of the property involved on or about January 31 to February 4, 2002 in Sarpy County, Nebraska. Once you have so decided the value, simply record the amount on the appropriate place on the verdict form. If you decide that the property involved had no value, then say so on the verdict form.

The trial court denied Wisinski's request and stated:

> [T]he statute that's cited in that section also cites [§] 28-518, and that's the statutory section, and this is what I read in the statute: "In any prosecution for theft under [Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 1995)], value shall be an essential element of the offense that must be proved beyond a reasonable doubt." That's all it says. It doesn't say they have to do that stair step.

The trial court's jury instructions mirrored NJI2d Crim. 3.6 with the exception of the declaration of value section. However, the trial court's jury instructions specifically required, as an element of the charge of theft of property, that "[t]he value of the property was over $1,500.00." The jury instructions also stated, "If you decide that the State has proven each element of the charges under consideration beyond a reasonable doubt, then you must find [Wisinski] guilty of that charge. Otherwise, you must find [Wisinski] not guilty of that charge."

[29,30] In a theft prosecution, the value of the property stolen is now an essential element of the offense that must be proved beyond a reasonable doubt. *State v. Gartner, supra* (citing § 28-518(8) and *State v. Mohr*, 10 Neb. App. 442, 632 N.W.2d 382 (2001)). Section 28-518(1) states, "Theft constitutes a Class III felony when the value of the thing involved is over one thousand five hundred dollars." The trial court recognized this by including the value stated in § 28-518 as an element of the crime. The jury then found Wisinski guilty of theft by unlawful taking, more than $1,500. According to the jury instructions, the jury must have found that the prosecution proved beyond a reasonable doubt that the value of the property taken was over $1,500 in order to find Wisinski guilty of that charge. We do not find prejudice in the fact that a specific value is not determined

by a jury, so long as it finds that the prosecution proved beyond a reasonable doubt that the property's value was over $1,500.

(c) Accomplice Testimony

Wisinski argues that the trial court committed reversible error by failing to instruct the jury that accomplice testimony was to be closely examined. Wisinski states that Wright's testimony was the only testimony that placed Wisinski at Womochil's home and at the Szynskies' home. Wisinski's argument is without merit.

[31] A defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). In this case, jury instruction No. 10 states, "There has been testimony from . . . Wright . . . a claimed accomplice of [Wisinski]. You should closely examine his testimony for any possible motive he might have to testify falsely." This instruction is virtually identical to the first portion of NJI2d Crim. 5.6.

The trial court's instruction No. 10 does omit the second portion of NJI2d Crim. 5.6, which states:

> [You should hesitate to convict the defendant if you decide that (here insert name) testified falsely about an important matter and that there is no other evidence to support (his, her) testimony.
>
> In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of (his, her) guilt.]

The above portion was expressly excluded by the trial court. The court gave its reasoning for excluding such language by stating:

> You'll notice the proposed jury instruction is in brackets for that latter part and that says that there's no evidence. Well, there's evidence here: testimony of the girlfriend, testimony circumstantially. It's when you don't have any evidence that the accomplice testimony is viewed in that type of a concern. I refuse to give it on that basis.

The record reflects that the State presented evidence beyond the testimony of Wright. Police officers testified about finding the reportedly stolen property in Wisinski's possession. A friend

of Wisinski testified that she had seen Wisinski in possession of property that matched the description of the stolen property. That friend also testified that Wisinski had told her that he had gotten the property from a house, that he knew someone who had a key to a house "full of stuff," and that the people who owned the house were on vacation.

[32] We find convincing the trial court's reasoning that the bracketed portion of NJI2d Crim. 5.6 applies when accomplice testimony is the only evidence. In this case, other evidence did exist, and for that reason, Wisinski was not entitled to have the bracketed portion of NJI2d Crim. 5.6 included in the jury instructions.

(d) Statement Made to Law Enforcement Officer

Wisinski assigns as error the trial court's not giving a voluntariness instruction regarding the testimony of a police officer about a statement Wisinski had made to that officer. As stated above, to establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002) (citing *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001)). Wisinski has failed to meet this burden.

In the facts section of his brief, Wisinski states that the State put on evidence of a statement Wisinski gave to an Iowa State Patrol officer. However, Wisinski does not specify in his argument how he was prejudiced by the court's refusal to give the requested instruction. Wisinski merely states that he "was prejudiced because the jury was never told by the court that [the jury] should measure any defendant's statement to law enforcement on a voluntariness scale," brief for appellant at 15-16, and that he had met his burden of showing prejudice. Again, stating that he was prejudiced is not sufficient to establish that prejudice actually occurred. Accordingly, we find that Wisinski has failed to meet his burden of proof in support of this assignment of error on appeal.

(e) Aider and Abettor

Finally, Wisinski argues that the trial court committed reversible error by giving the jury an aider and abettor instruction, because Wisinski was never charged with aiding and abetting and because there was no evidence to support such a charge. This assignment of error is also without merit.

[33,34] The common-law distinction between principal and aider and abettor has been abolished; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he were the principal offender. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999) (citing § 28-206). Section 28-206 provides, "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Accordingly, aiding and abetting are means to an end rather than ends themselves. Thus, Wisinski need not have been charged with aiding and abetting in order for the jury to receive an aiding and abetting jury instruction.

[35] Wisinski also argues that there was no evidence to support an aiding and abetting jury instruction. This is simply incorrect. Wright testified that he and Wisinski worked together in committing this crime. It is axiomatic that the testimony of an accomplice is sufficient to support an allegation that a person aided and abetted another in the commission of a crime. This assignment of error is without merit.

5. Motion for New Trial

[36] Wisinski's final assignment of error is, "The trial court erred in not hearing [Wisinski's] Motion for New Trial until after it had pronounced sentence on him." We note that Wisinski does not assign as error the trial court's denial of his motion for new trial. Errors which are argued but not assigned will not be considered by an appellate court. *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999) (citing *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998); *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997)). Because Wisinski does not assign the trial court's denial of his motion for new trial as error and does not present any reason why that denial was in error, we see no error in the court's act of ruling on the motion for new trial after sentencing occurred. Wisinski's argument is one of mere

timing, and we find no prejudice to Wisinski due to the trial court's timing.

Furthermore, Wisinski's only stated prejudice was, "It was pointless for [Wisinski] to do anything other than submit the Motion on its face after the court sentenced him." Brief for appellant at 17. Wisinski even admits that "[m]ost of the errors alleged in his Motion are now before this Court on appeal." *Id.* at 16. As a result, we find that Wisinski suffered no prejudice from the trial court's imposing sentence prior to denying his motion for new trial.

V. CONCLUSION

For all of the reasons discussed above, the trial court's rulings and sentences are affirmed.

AFFIRMED.

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

680 N.W.2d 221

Filed June 1, 2004. No. A-03-890.

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 juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Parental Rights: Evidence: Proof.** In cases of termination of parental rights in which the juvenile court determines whether a child comes within the meaning of Neb. Rev. Stat. § 43-292(10) (Reissue 1998), the standard of proof must be evidence which is clear and convincing.
5. **Juvenile Courts: Parental Rights: Homicide.** Under Neb. Rev. Stat. § 43-292(10) (Reissue 1998), the juvenile court may terminate parental rights between the parent and child when it is in the best interests of the child and the parent has committed murder of another child of the parent or committed voluntary manslaughter of another child of the parent.

6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Juvenile Courts: Parent and Child: Homicide.** Neb. Rev. Stat. § 43-283.01 (Reissue 1998) requires reasonable efforts to reunify the family, but excuses the requirement if a court of competent jurisdiction has determined that the parent of the juvenile has committed first or second degree murder to another child of the parent or committed voluntary manslaughter to another child of the parent.
8. **Juvenile Courts.** The juvenile court is the court of competent jurisdiction referred to in Neb. Rev. Stat. § 43-283.01(4)(b) (Reissue 1998).
9. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Jeanine E. Creighton for appellant.

Stuart J. Dornan, Douglas County Attorney, and James M. Masteller for appellee.

SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Kirsten W. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights to Anthony V. Kirsten asserts that the juvenile court erred in finding by clear and convincing evidence that Anthony comes within the meaning of Neb. Rev. Stat. § 43-292(2) and (10) (Reissue 1998) and in finding that termination of her parental rights serves Anthony's best interests. She also assigns that reasonable efforts to reunify her with Anthony were not undertaken. We affirm the decision of the juvenile court.

BACKGROUND

On January 24, 2003, the State filed a petition seeking to adjudicate Anthony under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) and claiming that Kirsten, Anthony's mother, placed him in a situation dangerous to his life, limb, health, or morals.

The petition specifically alleged that on or about November 1, 2002, Kirsten's other child, Brian V., died due to shaken baby syndrome, and that Kirsten admitted to shaking Brian shortly before his death. Although the petition also made allegations against Anthony's father, Jose V., this appeal concerns only the allegations against Kirsten.

At the same time the petition was filed, the State also moved for placement of temporary custody of Anthony with the Nebraska Department of Health and Human Services (DHHS), claiming existence of an immediate and urgent need for Anthony's protection. That same day, the trial court found exigent circumstances supporting an order for immediate custody and placed Anthony in the custody of DHHS, where custody remained throughout these proceedings.

The court held a detention hearing on February 3, 2003. The trial court continued Anthony's temporary custody with DHHS and denied Kirsten visitation until otherwise ordered.

On April 30, 2003, the State filed an amended petition, seeking termination of Kirsten's parental rights. The State repeated its initial allegations and further alleged that reasonable efforts to preserve and reunify the family were not required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998) because Kirsten had committed first or second degree murder or voluntary manslaughter of Brian, that Anthony came within the meaning of § 43-292(2) because of neglect of the child or a sibling and within the meaning of § 43-292(10) because Kirsten had committed murder or voluntary manslaughter of Brian, and that termination of Kirsten's parental rights would be in Anthony's best interests. The petition also stated that Kirsten was incarcerated at the Douglas County Correctional Center.

At the adjudication hearing, James Hospodka, an employee of Cox Communications, testified that at approximately 8:40 or 8:50 a.m. on November 1, 2002, he went to Kirsten's residence to install digital cable television service. Kirsten answered the door and told Hospodka that she could not speak well and her face was swollen because she had had dental surgery the preceding day. Hospodka observed that Kirsten's face did appear to be swollen and that Kirsten slurred her words. Hospodka testified that when Kirsten answered the door, she held in her left

arm an infant who appeared to be less than 1 year old. Another child, about 2 years old, stood next to Kirsten.

Hospodka testified that he told Kirsten he would go outside for a minute to turn on the cable television service and then return and that Kirsten appeared to understand. Hospodka asked Kirsten where she wanted the cable service installed. Kirsten pointed to the entertainment center. Hospodka then left to turn on the cable service. When he returned, the infant was lying in front of the couch on top of one or more blankets and a sleeping bag and Kirsten was resting on the couch. Hospodka thought the infant was awake. The infant appeared to be about to cry but could not; instead, the infant perhaps let out a squeak. Kirsten remained on the couch and did not pick up the infant. The older child played with toys close to the couch, became rowdy, and hammered something with a toy for a couple of minutes. Kirsten told the child to calm down. According to Hospodka, Kirsten redirected the child without exhibiting any frustration. Hospodka testified that Kirsten moved once from the couch, without any apparent difficulty, to get a larger television from the bedroom and that he took a smaller television into the bedroom from the living room. Hospodka reported that Kirsten moved only that one time during his visit, and he admitted that Kirsten appeared "pretty spaced out."

Hospodka testified that after he finished the installation, he asked Kirsten if she had any questions. Kirsten replied that she did not. Kirsten signed a work order for Cox Communications, and Hospodka departed. Hospodka testified that he spent approximately 45 minutes at the residence.

Hospodka testified that he did not see anyone other than Kirsten and the two children inside the apartment. He claimed that the children were present throughout his entire installation of the cable television service and that he observed no bruises or marks on either child.

Robert Wiley, an Omaha police officer, testified that on the afternoon of November 1, 2002, he responded to a call to go to Creighton University Medical Center to investigate Brian's death. When Wiley arrived at the hospital, the doctors and nurses were performing cardiopulmonary resuscitation on Brian. Wiley spoke to Kirsten shortly after he arrived. Kirsten

appeared to be upset and was crying and difficult to understand, but she appeared to understand his questions. Wiley testified Kirsten told him that she had laid Brian down for a nap at 11 a.m. and that she had lain down for a nap at 11:15 a.m. At 1:15 p.m., Kirsten awoke from her nap and fed Anthony. At 1:30 p.m., she checked on Brian. Kirsten said she found Brian lying face down on his bed, not moving and unresponsive. Kirsten told Wiley that she immediately took Brian to the hospital. Wiley testified that when he interviewed Kirsten, Kirsten was wearing pajamas, and that it did not appear that she had taken time to dress before coming to the hospital. Kirsten informed Wiley that Brian had been having problems with phlegm. During the interview, Kirsten asked Wiley more than once about Brian's condition.

Dr. Charles Denton, an emergency room physician board certified in emergency and internal medicine, testified that he had worked as an emergency room physician for 25 years. He testified that on November 1, 2002, at approximately 1:30 p.m., Brian arrived in the emergency room of Creighton University Medical Center and appeared lifeless. Denton stated that Brian's extremities had a purplish or bluish color secondary to lack of oxygen. Brian was not breathing or moving and had casts on both legs. He bore no outward signs of trauma. The emergency team initiated cardiopulmonary resuscitation on Brian. Because Brian lacked any heartbeat, the emergency team administered intubation and medicines. The team ceased efforts to revive Brian at 2:07 p.m., and Denton pronounced Brian dead.

Denton testified that at some point, he looked in Brian's ears, checking for blood behind the eardrums which would indicate trauma. Denton looked in at least one of Brian's eyes and saw some hemorrhages in the retina. Denton also felt Brian's head to detect swelling of the spine. Denton testified that other than the hemorrhages in the retina, he did not observe anything abnormal. He attributed significance to the hemorrhages in the eye because that could indicate the baby had been shaken or suffered some kind of trauma. Denton suspected Brian had died of shaken baby syndrome. Denton admitted that he had not received training specifically regarding shaken baby syndrome, though it may have been discussed at an annual meeting.

Denton testified that in the emergency room, Brian's rectal temperature was 93 degrees, compared to a normal temperature between 95 and 100.3 degrees for a healthy infant. Denton opined that because Brian's temperature was low, whatever happened had occurred more than 5 or 10 minutes before he was found. He concluded that Brian's temperature showed that Brian had been dead for more than 10 or 15 minutes before he arrived at the emergency room. Denton admitted that he could not state the rate at which body temperature decreases following death.

Denton testified that he had questioned Kirsten about the circumstances which led her to bring Brian to the hospital. Kirsten told him that Brian was placed prone for about 2 hours for a nap and that when she checked on him, he was not breathing. Denton testified that while cardiopulmonary resuscitation was being administered to Brian, the emergency team asked Kirsten questions about Brian's medical history. Kirsten reported that Brian had been born prematurely and that casts were placed on his feet to correct clubfoot. Kirsten also reported that Brian had been diagnosed with hypocalcemia (abnormally low concentration of calcium in the blood) of prematurity.

Dr. Jerry Wilson Jones, a licensed physician since 1958 specializing in pathology, testified that he was board certified in anatomic and clinical pathology, with a subspecialty board certification in forensic pathology, which focuses on both natural and violent deaths. Jones testified that he had performed over 7,000 autopsies and approximately 12 autopsies on victims of shaken baby syndrome.

Jones performed an autopsy on Brian at approximately 8 a.m. on November 2, 2002. He observed no external injuries other than the casts on both feet for treatment of clubfoot. Jones detected no fractures from x rays of Brian's body. Jones examined Brian's brain and detected an acute subdural hemorrhage over the surface of the left side and diffuse swelling of the brain. Jones testified that "acute" means the subdural hemorrhage happened "now" rather than days or weeks ago. He also noted old focal brain contusions on both sides of the surface of the brain, but he could not determine the cause of the old injuries. Further examination by Jones of Brian's brain resulted in no additional findings.

Jones testified that he also detected retinal hemorrhages in both of Brian's eyes. Jones noted that retinal hemorrhaging results from injury to the brain, when increased pressure in the brain is transmitted to the back of the eyes.

Jones opined that taken in the context of the entire case, the subdural hemorrhage and the diffuse brain swelling were "a result of diffuse injury to the brain or produced by the same action which is vigorous shaking of the infant." He stated that in his opinion, the vigorous shaking which produced the subdural hemorrhage also produced the diffuse swelling and injury in the brain and the increased pressure was then transmitted to the back of the eyes, producing the retinal hemorrhages. Jones concluded that shaken baby syndrome caused Brian's death.

Jones testified that the "vigorous shaking" required for shaken baby syndrome is a "very forceful act" and that "innocent, playful actions with an infant do not result in subdural hemorrhage . . . brain injury with brain swelling, and . . . retinal hemorrhages." He testified that an infant could not inflict these symptoms on himself or herself and that he did not believe a 2-year-old child could exercise sufficient force to produce such symptoms. Jones testified that if an infant is shaken with sufficient force to induce death, the force immediately renders the infant unconscious and unresponsive, with no subsequent period of lucidity. The infant may exhibit irregular breathing, stop breathing, or have convulsions. Death occurs very shortly after the shaking or almost simultaneously upon cessation of the shaking.

The court received into evidence Brian's death certificate listing the cause of death as a homicide and describing how the injury occurred as "child shaken by another individual."

Lance Worley, an Omaha police officer, testified that he had been trained in the identification and investigation of child abuse and that as part of his duties, he investigates child abuse and neglect situations and deaths involving children. Worley testified that on November 1, 2002, he was called to Creighton University Medical Center, where he spoke to emergency room staff and interviewed Kirsten privately in a conference room for approximately 20 minutes.

Worley conducted a second interview alone with Kirsten at the police station on November 5, 2002. Kirsten told Worley that

she and Brian had gone to bed at approximately 11 p.m. on October 31 and that there were no problems with Brian at that time. Worley testified that he had gotten the impression from Kirsten that both Kirsten and Jose were caring for Brian that evening. Kirsten told Worley that at approximately 3 a.m., she checked on Brian and Jose fed him, and that Brian experienced no problems at that time. Kirsten told Worley that at 8 a.m., Jose left for work, leaving Kirsten with the two boys. Kirsten informed Worley that she had contact with Brian between 7 and 8 a.m. and that he experienced no problems. At 9 a.m., the cable television system installer arrived and stayed for about 45 minutes. Kirsten told Worley that after the cable system installer left, Anthony was asleep and she was attempting to get Brian to go to sleep, but Brian was fussing and crying. She informed Worley that eventually, she laid Brian down for a nap sometime before 11 a.m. Kirsten told Worley that she napped until about noon or 12:30 p.m., then made lunch, went to check on Brian, and discovered that Brian was unresponsive. She told Worley that she approached Brian, put her hand on his buttocks, and shook him, but that he did not respond. She also put her hand on his back and shook him, but got no response. She then turned Brian over and found him totally unresponsive. Kirsten told Worley that she picked Brian up and ran to her sister-in-law's apartment downstairs and then took Brian to the hospital.

Worley testified that he had a third interview alone with Kirsten on January 22, 2003, at the police station. Worley testified that on the way to the interview room, Kirsten told him that she "wanted to get this over with and [that] she was going to cooperate." Once in the interview room, Worley read Kirsten her *Miranda* rights. Worley testified that he spoke to Kirsten about the funeral services for Brian and what had transpired since the last time they had talked. Worley had received the results of Brian's autopsy and advised Kirsten of the cause of death. Worley testified that Kirsten was very emotional and said she had already seen the death certificate with shaken baby syndrome listed as the cause of death. Worley testified that he asked Kirsten whether she shook Brian on November 1, 2002, and that she initially denied doing so. Worley testified he explained to Kirsten that the medical evidence was clear, that a complete

investigation had been conducted, and that it was time for Kirsten to tell the truth. Worley testified that he also explained to Kirsten that he had "investigated such matters before and that people sometimes reach their breaking point, they have their frustrations and that [he] knew she had shaken [Brian]." Worley testified that Kirsten initially nodded her head up and down in response to this statement. He testified that he also told Kirsten that he knew she had never intended to hurt Brian. Worley testified that he then asked Kirsten how long she had shaken the baby and that Kirsten replied, "Three to four minutes." Worley testified Kirsten said that Brian's head was going back and forth from front to back and that about 15 minutes after the cable system installer left, she shook Brian because he would not be quiet and go to sleep. Kirsten told Worley that after she shook Brian, he whimpered and became quiet, and that she then put him to her chest, walked him to the bedroom, and laid him down. After laying Brian down, Kirsten fell asleep. Worley testified Kirsten told him that when she put Brian down for his nap, Brian's eyes were fine and he was still whining.

Worley testified that he attended the autopsy and that based on his investigation and his conversations with the coroner, he determined Brian's cause of death to be shaken baby syndrome. Worley admitted that before the interview with Kirsten, he knew the admissions Kirsten would have to make to conform to the theory of shaken baby syndrome as the cause of death. Worley testified that based on his conversations with Kirsten and the other officers' reports, no one but Kirsten and the children was in the house after 10 a.m. on November 1, 2002. Worley testified that he did not believe Kirsten woke up that morning intending to harm Brian, but Worley believed the stresses and frustrations in her life, as well as her recent dental surgery, were factors that led her to the "breaking point."

Worley testified that Kirsten did not agree with everything he said on January 22, 2003. He testified that three or four times during the January 22 interview, he either stated that Kirsten had shaken Brian or asked whether she had, and that she denied it each time. Worley testified that initially, these were the only statements with which Kirsten disagreed. He testified that he did "a good portion of the talking" and that Kirsten just agreed.

When Worley asked Kirsten to demonstrate how she had shaken Brian, she raised her arms, but then she dropped them and began to cry. Worley testified that he then demonstrated a shaking motion with his arms and that Kirsten agreed the motion accurately portrayed how she had shaken Brian.

Shayne Schiermeister, a state Child Protective Services worker, testified that he does initial assessments on families whose children have been removed or where there is an investigation to determine risk to children. He testified that his agency received a referral reporting a child had died in Kirsten's home and that he was assigned to conduct the investigation. Schiermeister testified that he interviewed Kirsten, Jose, Worley, and Brian's grandmother.

Schiermeister interviewed Kirsten on January 27, 2003, at the Douglas County Correctional Center. He stated that Kirsten seemed upset about Anthony being placed in foster care. Schiermeister testified that he reviewed police reports regarding Brian's death, which reports contained interviews with Kirsten. Schiermeister testified that he had gleaned from the police reports and his interview with Worley that Kirsten had admitted to shaking Brian. Schiermeister testified that when he asked Kirsten about Brian's death, she stated that she was "tricked" into admitting to the officers that she had shaken Brian. Kirsten told Schiermeister that she would never harm one of her children, and she denied shaking Brian. Schiermeister testified that during his discussion with Kirsten regarding Brian's death, she seemed relatively calm and did not show much emotion. Schiermeister contrasted this with the upset and tearful demeanor Kirsten exhibited while discussing Anthony. Schiermeister testified that he also asked Kirsten about previous domestic violence issues as well as chemical and alcohol use.

Schiermeister testified that he independently investigated some but not all of the events on the day Brian died. Based on Schiermeister's entire investigation, he concluded that Anthony should remain in foster care and that the case should be transferred to an ongoing worker for family assessment and case planning. He stated that he had several concerns, including Brian's death under Kirsten's care and previous domestic violence issues.

Schiermeister testified that a realistic permanency plan for Anthony could include termination of Kirsten's parental rights.

Jackie Rowe, a DHHS caseworker, testified that her duties included completing family assessments to evaluate safety and to develop case plans for safe reunification. She was assigned to Anthony's case on January 31, 2003. Rowe conducted a family assessment by meeting with Kirsten and Jose on two separate occasions, speaking to a family member, attending a supervised visit between Jose and Anthony, and meeting with Anthony several times.

Rowe testified that she first met with Kirsten on February 12, 2003. Rowe explained her job and the court process to Kirsten, and Rowe asked Kirsten about her family history and her parenting of Anthony. On that occasion, Rowe did not question Kirsten about Brian's death.

Rowe testified that she interviewed Kirsten a second time on May 14, 2003, at the Douglas County Correctional Center. Rowe explained to Kirsten that a motion to terminate her parental rights had been filed, and Rowe talked about Anthony's placement and progress. Rowe did not ask Kirsten about Brian's death, but Kirsten told Rowe that she did not do anything to harm Brian. Kirsten mentioned that she had witnessed behavior by Jose which concerned her and that she was beginning to wonder if Jose had had a role in Brian's death. Kirsten told Rowe that the evening before Brian's death, Kirsten underwent oral surgery and had followed up by taking prescription medications. Kirsten said she had asked Jose to watch Brian that evening because she did not know whether she would awaken if Brian cried. Rowe testified that Kirsten told her that at the time of Brian's death, Jose was employed full time during the day and Kirsten stayed home with the children. Kirsten reported a fairly significant history of domestic violence between herself and Jose.

Rowe testified that based on all the evidence she had read, including police reports containing statements by Kirsten, Rowe believed Kirsten had killed Brian. Rowe testified that there was no indication in the file that Brian had died of sudden infant death syndrome. Rowe admitted that she was not aware of any criminal conviction surrounding Brian's death.

Rowe testified that Kirsten had given Rowe cards, gifts, and letters for Anthony but that Rowe had put them in the file and had not given them to Anthony.

Rowe testified that through the family assessment, she identified potential risks to Anthony as the risk involving domestic violence and the risk related to Brian's death in the home, and she testified that these risks existed when the State filed its petition for termination of parental rights and continued to exist. Rowe testified that in her opinion, termination of Kirsten's parental rights was in Anthony's best interests because Brian's death posed a serious risk to Anthony's future safety, due to his age and vulnerability. Rowe also stated that violence between two adults puts a child at risk because the child could become involved in an incident of violence and be harmed and because witnessing such incidents causes an emotional impact on the child. Rowe testified that services are available to correct domestic violence.

With respect to Kirsten, the trial court found that Anthony came within the meaning of § 43-247(3)(a) by a preponderance of the evidence, that Anthony came within the meaning of § 43-292(2) and (10) by clear and convincing evidence, and that termination of Kirsten's parental rights was in Anthony's best interests. The trial court accordingly terminated Kirsten's parental rights to Anthony.

ASSIGNMENTS OF ERROR

On appeal, Kirsten alleges (1) that DHHS failed to make reasonable efforts to reunify her with Anthony, violating her rights under the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to the U.S. Constitution, and (2) that the State failed to prove by clear and convincing evidence (a) that Kirsten had neglected Anthony and refused to give him necessary protection under § 43-292(2), (b) that Kirsten was guilty of committing murder or manslaughter of Anthony's sibling as required under § 43-292(10), and (c) that termination of Kirsten's parental rights was in Anthony's best interests.

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 juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

ANALYSIS

Statutory Factors.

[2,3] Kirsten contends that the court erred in finding that the State met its burden of proof concerning the statutory grounds for termination of parental rights under § 43-292(2) and (10). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). See Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998). Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

We digress to comment on the standard of review we apply in our analysis of § 43-292(10), which requires us to determine if Kirsten has committed murder or manslaughter of Anthony's sibling. In *Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), the U.S. Supreme Court held that the clear and convincing evidence standard was sufficient to satisfy the requirements of due process in termination of parental rights cases and stated, "We further hold that determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts." The Legislature and the courts of Nebraska have consistently applied the clear and convincing standard to termination of parental rights cases. See, e.g., § 43-279.01(3); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999); *In re Interest of Shepherd*, 211 Neb. 313, 318 N.W.2d 288 (1982).

In *In re Interest of Storee J.*, No. A-01-638, 2002 WL 975977 (Neb. App. May 14, 2002) (not designated for permanent publication), this court found clear and convincing evidence that the

parent had subjected the child to sexual abuse as provided in § 43-292(9), which subsection was added as a ground for termination of parental rights along with subsection (10). In that case, the parent argued that subsection (9) requires a " 'certified conviction.' " 2002 WL 975977 at 3. We responded, "There is no requirement that allegations against a parent which also could serve as the basis for criminal charges must be proven only with evidence of 'a certified conviction.' Rather, there must only be clear and convincing evidence that such conduct occurred." *Id.* at 4. See, also, *In re Adoption of A.F.M.*, 15 P.3d 258 (Alaska 2001) (statute authorizing court to terminate parental rights of biological parent in adoption proceeding if it finds that child's conception resulted from act of sexual assault and that termination is in child's best interests is noncriminal measure; thus, right to jury trial and requirement of proof beyond reasonable doubt are not implicated); *In re Clarence T.B.*, 215 Ill. App. 3d 85, 574 N.E.2d 878, 158 Ill. Dec. 765 (1991) (fact that parents were acquitted of criminal charges did not preclude finding of sexual abuse in proceeding to terminate parental rights; in criminal prosecution, trier of fact determined that State of Illinois failed to prove beyond reasonable doubt that parents committed charged offenses, whereas in termination proceeding, State of Illinois only needed to prove that parents committed such offenses by lesser standard of clear and convincing evidence).

In *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), the Nebraska Supreme Court acknowledged that differing standards of proof apply to criminal and juvenile cases and determined that a parent's conduct may be grounds for a juvenile court to acquire jurisdiction under the clear and convincing standard, notwithstanding that the parent was acquitted of a criminal charge for conduct detrimental to the child under the beyond a reasonable doubt standard. See, also, *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995) (because civil judgments have lower burden of proof than criminal trials, doctrines of res judicata and collateral estoppel are not applicable as bases for admission of prior civil judgments in subsequent criminal trial; but judgment in civil paternity adjudication is res judicata as between same parties in subsequent civil action such as support modification proceeding because burdens of proof for two actions are same).

[4] In light of the standard of review for evaluating termination of parental rights cases, set forth in § 43-279.01 and the above-cited cases, and considering that this case does not involve a criminal prosecution, we apply the clear and convincing evidence standard to determine whether Anthony comes within the meaning of § 43-292(10).

[5,6] Under § 43-292(10), the juvenile court may terminate parental rights between the parent and child when it is in the best interests of the child and "[t]he parent has (a) committed murder of another child of the parent [or] (b) committed voluntary manslaughter of another child of the parent . . . ." We find no appellate cases interpreting or applying § 43-292(10). However, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003). The plain language of § 43-292(10) does not require a criminal conviction or proof beyond a reasonable doubt that a parent has committed voluntary manslaughter or murder of his or her child, but merely clear and convincing evidence that the parent "committed" murder or voluntary manslaughter of his or her child. Under the criminal statutes of this state, a person commits manslaughter when he or she "kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305(1) (Reissue 1995). "A person commits murder in the second degree if he [or she] causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304(1) (Reissue 1995).

Hospodka testified that he saw Brian alive and conscious on November 1, 2002. From the time Hospodka left, approximately 9:30 a.m., until the time Kirsten discovered that Brian was unconscious and unresponsive, approximately 12:30 p.m., Kirsten remained alone with her children in the apartment. At approximately 1:30 p.m., she arrived at the hospital with Brian, who was still unconscious and unresponsive. The doctor pronounced Brian dead at 2:07 p.m.

Denton testified that based on the retinal hemorrhaging he discovered, he suspected Brian had died of shaken baby syndrome.

Jones performed an autopsy of Brian. Jones observed subdural hemorrhaging in Brian's brain, diffuse swelling of Brian's brain, and retinal hemorrhaging in Brian's eyes, and Jones concluded that shaken baby syndrome caused Brian's death. Jones testified that the hemorrhaging he observed in Brian resulted from vigorous shaking and could not have been caused by innocent play, by Anthony, or by Brian himself. Jones also stated that immediately after the cessation of shaking, an infant will become unconscious and unresponsive and may have difficulty breathing, stop breathing, or have convulsions. The only opportunity for these injuries existed while Brian was under Kirsten's sole care.

Kirsten admitted to Worley that she had shaken Brian for 3 or 4 minutes on the day he died because he was crying and would not sleep. She also admitted that Brian's head was moving in a front to back motion as she shook him and that Brian whimpered and then became quiet. While there is evidence, consisting of Kirsten's own assertions, that she did nothing to harm Brian, the trial court apparently rejected that evidence. We give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

Upon our de novo review of the record, we find clear and convincing evidence that Kirsten caused the death of Brian, Anthony's sibling, and thereby committed either murder or voluntary manslaughter. We conclude that Anthony comes within the meaning of § 43-292(10).

Because the State need show by clear and convincing evidence only one of the grounds for termination of parental rights in § 43-292 to be present, we need not address whether Anthony comes within the meaning of § 43-292(2). See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

Best Interests.

Kirsten argues that the trial court erred in finding that terminating her parental rights served Anthony's best interests. The termination of parental rights should be used only as a last resort. *In re Interest of M.M., C.M., and D.M.*, 234 Neb 839, 452

N.W.2d 753 (1990). To terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001).

The State removed Anthony from Kirsten's home upon evidence that Kirsten had caused the death of Anthony's younger sibling, Brian. At trial, the State presented clear and convincing evidence showing that Kirsten shook Brian, resulting in his death. The State also presented testimony referring to drug use by Jose and domestic violence between Kirsten and Jose. Rowe testified that domestic violence posed a danger to Anthony, both physically and emotionally, and that in light of Anthony's age and vulnerability, the manner in which Brian died signaled a significant risk to Anthony.

Although Anthony has not yet experienced actual injury or physical harm, "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." See *In re Interest of S.L.P.*, 230 Neb. 635, 639, 432 N.W.2d 826, 830 (1988). Further, a child cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000). Upon de novo review, we conclude that Anthony's best interests require termination of Kirsten's parental rights.

Efforts to Reunify.

[7,8] Kirsten argues that DHHS failed to make reasonable efforts to reunify her with Anthony as required by § 43-283.01, violating her state and federal constitutional rights to due process. Section 43-283.01 requires reasonable efforts to reunify the family, but subsection (4) excuses the requirement if "a court of competent jurisdiction has determined that . . . (b) [t]he parent of the juvenile has (i) committed first or second degree murder to another child of the parent [or] (ii) committed voluntary manslaughter to another child of the parent . . . ." The juvenile court is the "court of competent jurisdiction" to make such a determination under § 43-283.01(4)(b). See *In re Interest of Janet J.*, 12 Neb. App. 42, 666 N.W.2d 741 (2003), *disapproved*

on other grounds, In re Interest of Jac'Quez N., 266 Neb. 782, 669 N.W.2d 429 (2003).

On appeal, Kirsten argues that only a preexisting judicial determination of criminal or civil guilt can support the condition under § 43-283.01(4)(b). Certainly, a final conviction in the district court, which tries such felony crimes as murder and manslaughter, would fulfill the condition of § 43-283.01(4)(b). But, the statute does not limit satisfaction of the condition to that situation. A probate court possesses competent jurisdiction to determine, without any prior criminal conviction, existence of a homicide to preclude inheritance by the killer from the victim. See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). Similarly, the juvenile court possesses competent jurisdiction to determine existence of a homicide by a parent to protect the victim's sibling. See *In re Interest of Janet J., supra.*

Upon de novo review, we have concluded that clear and convincing evidence shows that Kirsten caused the death of Anthony's sibling, as described under § 43-292(10). The language of that statute is substantially similar to § 43-283.01(4)(b). Upon the same evidence and for the same reasons, we find that clear and convincing evidence of the killing under § 43-283.01(4)(b) excuses DHHS from the requirement to make reasonable efforts to reunify Kirsten with Anthony.

[9] Kirsten argues that her due process rights under the 5th and 14th Amendments to the U.S. Constitution and the equivalent provision of the Nebraska Constitution were violated by DHHS' lack of efforts to reunify her with Anthony. However, Kirsten did not raise the constitutional issue before the trial court, and "an appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court." See *In re Interest of Phyllisa B.*, 265 Neb. 53, 58, 654 N.W.2d 738, 742 (2002). Accordingly, we decline to do so.

CONCLUSION

Upon our de novo review, we find that clear and convincing evidence supports the existence of the condition specified in § 43-292(10), that termination of Kirsten's parental rights was in Anthony's best interests, and that reasonable efforts to reunify

were excused by § 43-283.01(4)(b). We therefore affirm the juvenile court's order terminating Kirsten's parental rights to Anthony.

AFFIRMED.

CARLSON, Judge, participating on briefs.

SUSAN D. GRAHOVAC, APPELLANT, V.
MICHAEL G. GRAHOVAC, APPELLEE.
680 N.W.2d 616

Filed June 8, 2004. No. A-03-015.

1. **Modification of Decree: Visitation: Child Support: Alimony: Appeal and Error.** Modification of a dissolution decree, child visitation, and amount of child support and alimony are matters entrusted to the trial court's discretion, 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. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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. **Modification of Decree: Alimony: Good Cause.** An award of alimony may be modified or revoked if the moving party can show good cause.
4. ____: ____: ____. In an action for modification of alimony, good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
5. ____: ____: ____. Whether good cause exists for modification of an order for alimony depends upon the circumstances of each case.
6. **Modification of Decree: Alimony: Appeal and Error.** In a case involving modification of an alimony award, an appellate court does not determine whether it would have made the same modification as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
7. **Modification of Decree: Alimony.** A petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.
8. ____: ____. An increase in income is a circumstance that may be considered in determining whether an award of alimony should be modified.
9. ____: ____. A modification of an award of alimony is only warranted when a change of circumstances is of a material and substantial nature and was not contemplated at the time of the decree.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

11. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.
12. **Modification of Decree: Child Support: Alimony: Good Cause.** A material change in circumstances in modification of child support cases is analogous to the good cause standard articulated for modification of alimony.
13. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** A rebuttable presumption establishing a material change of circumstances occurs when application of the Nebraska Child Support Guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months.

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

Charles O. Forrest, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, for appellant.

Thomas J. Garvey, of Hascall, Jungers & Garvey, for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Susan D. Grahovac appeals from the decision of the district court for Sarpy County, Nebraska, on Michael G. Grahovac's petition to modify a decree of dissolution as to child support and alimony. The district court granted the modification and reduced Michael's child support and alimony obligations.

FACTUAL AND PROCEDURAL BACKGROUND

Susan and Michael were married on April 2, 1983. The parties have two children: Ryan, born November 13, 1989, and Rachel, born October 16, 1991. A decree of dissolution of marriage was entered on January 15, 1999, and a property settlement agreement was incorporated as part of the decree. The parties agreed Michael would pay alimony of $675 per month for 84 months or until he paid $56,700.

At the time of the decree, Susan earned approximately $750 per month working at Methodist Hospital and Michael earned

approximately $100,000 per year working at Physicians Mutual Insurance Company (Physicians Mutual). The decree awarded Susan full custody of both children, with Michael's visitation being in accord with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). Michael was ordered to pay monthly child support of $1,550 for two children and $1,100 for one child. No child support worksheet was adopted by the trial court and attached to the decree.

Michael filed a petition for modification of the decree on April 15, 2002, to reduce child support and alimony because of a material change of circumstances. At the modification hearing, Susan's pay stub from her employer, Blue Cross Blue Shield, was submitted, showing her 2002 gross bimonthly earnings to be $1,262.50. Michael testified that he took "early retirement" from Physicians Mutual and that his employment there ended December 31, 2000. His severance package included 1 year's salary, $106,530, paid during 2001 according to his tax return. Michael was 58 years old at the time of the modification hearing. He testified that he had worked for Physicians Mutual for 31 years and that he had attended college for 2 years.

Michael testified that after retiring, he hired an employment consultant, but that he did not have any interviews or receive any offers until July 2002, when he obtained a job as a courier with Capital Express. His gross income with Capital Express is approximately $650 to $800 every 2 weeks. He is considered an independent contractor, so he pays his own expenses, including gas, insurance, and vehicle payments. Michael also receives a pension of $1,860 per month from Physicians Mutual. Michael's 2001 income tax return shows that in addition to his severance package, he also had income of $49,452 from a pension. Michael testified that his 2001 disposable income was approximately $131,000.

Michael testified that he has had a problem with alcohol and that at the time of the decree, he was a "practicing alcoholic." Further, he admitted that he has received inpatient treatment for alcoholism in the past but that since January 1, 2001, he has not had any inpatient or outpatient treatment. Michael said that he has attended Alcoholics Anonymous for 10 years and has been sober since March 1, 2002. Summarized, the evidence shows that

Michael's drinking was a significant factor in both Physicians Mutual's decision to offer him early retirement and his decision to accept the offer.

The trial court found that both parties had a "substantial change" in income that constituted a material change in circumstances, which justified a reduction in Michael's child support and alimony obligations. Consequently, the court reduced child support to $785 per month for two children and $550 per month for one child. Michael's alimony payments were reduced to $25 per month for the remaining 48 months of the original 84 months of alimony as set forth in the decree. Susan appeals.

ASSIGNMENTS OF ERROR

Susan asserts, reassigned and restated, that the trial court erred in (1) finding a material change of circumstances justifying a downward modification of alimony, (2) finding a material change of circumstances justifying a downward modification of child support, (3) finding that the alimony was modifiable, and (4) conducting an ex parte review of prior proceedings without notice to the parties' counsel.

STANDARD OF REVIEW

[1] Modification of a dissolution decree, child visitation, and amount of child support and alimony are matters entrusted to the trial court's discretion, 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. See, *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997); *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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. *Crawford v. Crawford, supra.*

ANALYSIS

Alimony.

[3-6] Susan asserts that the trial court erred in finding that there was a material change in circumstances to justify reducing

the amount of alimony as stated in the decree. An award of alimony may be modified or revoked if the moving party can show good cause. See *Pope v. Pope, supra*. In an action for modification of alimony, good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order. *Id.* Whether good cause exists for modification of an order for alimony depends upon the circumstances of each case. *Krause v. Krause*, 9 Neb. App. 774, 619 N.W.2d 611 (2000). An appellate court does not determine whether it would have made the same modification as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id.* The trial court in the instant case determined that both parties had incurred a substantial change in income compared to their respective incomes at the time of the original decree. Thus, the court reduced the amount of alimony to be paid from $675 per month to $25 per month. Susan contends that Michael failed to show good cause, because the reduction in his income was attributable to his alcoholism.

In *Lambert v. Lambert*, 9 Neb. App. 661, 617 N.W.2d 645 (2000), the trial court modified the divorce decree by reducing the father's child support and alimony obligation, even though his reduction of income resulted from his employment resignation precipitated by a failed random drug test. He had failed several random drug tests given by his employer, and after the third failed test, his employer offered him the option to enroll in an Employee Assistance Program or be terminated. He did not enroll in the program and was subsequently given the opportunity to resign or be terminated. He resigned and then filed a petition to modify the divorce decree to reduce his child support and alimony obligations. The district court granted his motion for modification and reduced the child support and alimony. The mother appealed, asserting that the father did not demonstrate good cause to reduce the alimony and that there was no material change in circumstances warranting a reduction in child support.

[7] Relying on *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997), we found that the trial court erred in reducing the father's

alimony obligation in *Lambert v. Lambert, supra.* In *Pope*, the Nebraska Supreme Court said that a petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. While the financial condition of the father in *Lambert* had obviously changed, we found that such change was his fault or constituted his voluntary wastage of his talents because he chose to use marijuana. We stated that he used marijuana despite "knowing that it would put his livelihood in jeopardy and knowing that losing his job would affect his ability to meet his court-ordered financial obligations." *Lambert v. Lambert*, 9 Neb. App. at 668, 617 N.W.2d at 650. Therefore, we found that his conduct was blameworthy and that he did not demonstrate good cause to warrant a reduction in alimony payments, and we reversed the decision of the trial court.

In the present case, the trial court reduced Michael's child support and alimony obligations, based on a reduction in his income and an increase in Susan's income. Similar to the situation in *Lambert*, in this case, Michael's resignation or "early retirement," which reduced his income, was due to his own behavior—his alcoholism and his refusal to secure effective treatment. Michael admitted to being an alcoholic and said that he had had a conversation with his boss relating to his alcoholism, in which conversation his boss told him that "unless something big changes in your life, you know, two months from now I am going to have to terminate you." That his boss would tell him this likely should not have been a surprise, given that in May 1998, Physicians Mutual had offered Michael treatment, which he accepted but which did not produce a long-lasting effect. Michael admitted that in January 1999, he was a "practicing alcoholic," and that he knew if he did not quit drinking, he could lose his job. Nonetheless, shortly before Michael's resignation, he went on a 2-week "binge" during which he never went to work. The record shows that "early retirement" and "resignation" are merely euphemisms for "fired for excessive drinking." Further, in the year after Michael left Physicians Mutual, he had income of over $155,000 but ran up credit card debts of $30,000 and did not go to even one job interview. He ultimately ended up as a courier earning $650 to $800 every 2

weeks. If this does not describe waste and dissipation of one's talents and abilities, to the obvious detriment of his family, we have a hard time envisioning what would.

Similar to the facts in *Lambert v. Lambert*, 9 Neb. App. 661, 617 N.W.2d 645 (2000), in this case, Michael's financial position has clearly changed, but only due to his own fault by his voluntary wastage and dissipation of his talents and assets. Michael knew that if he continued drinking, he would lose his job. Even though Michael also asserted that he retired because his boss told him that Physicians Mutual needed to "clear out some of the older, higher paid guys and bring up some young blood," it is apparent from the record that Michael's employment ended because of his continued drinking. Therefore, the reduction in Michael's income was not from good cause, and he is not entitled to any reduction on such basis. However, the trial court based the modification on a substantial change in both parties' incomes. Thus, we turn to the matter of the increase in Susan's income.

[8,9] An increase in income is a circumstance that may be considered in determining whether an award of alimony should be modified. *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991). However, a modification is only warranted when a change of circumstances is of a material and substantial nature and was not contemplated at the time of the decree. See *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985). Since the time of the decree in January 1999, Susan's income has increased from $750 per month (the record does not reveal if such amount was gross or net income) to a gross income of $2,735 per month in 2002. At the modification hearing, Susan testified regarding whether the parties contemplated her working full time at the time of the decree as follows:

> Q. When the decree was entered in January of 1999, was part of the arrangement going to be that you would seek full-time employment?
>
> A. I knew that I would have to go back to work full time, yes.
>
> Q. And both parties knew that; is that correct?
>
> A. Yes.
>
> . . . .

> Q. When the decree was entered . . . in January of 1999, were you working full time at that point in time?
>
> A. No. . . .
>
> Q. And at that point in time, it was anticipated that you were going to seek employment on a full-time basis at the highest rate you could find?
>
> A. Yes.

Michael did not dispute this testimony. Further, the decree of dissolution provides that Michael would pay 80 percent of the monthly daycare expenses while Susan was working and 50 percent of the monthly daycare expenses while Susan attended college. This provision and the record, read as a whole, show that at the time of the decree, the parties anticipated that Susan would obtain full-time employment. Therefore, the trial court abused its discretion in finding that Susan's increased income constituted a material change of circumstances which justified in any way a reduction in the amount of Michael's alimony obligation.

[10] Because we find that there was no good cause justifying modification of alimony, it is unnecessary to address Susan's last two assignments of error relating to alimony. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001). We reverse the trial court's order reducing the amount of Michael's alimony obligation.

Child Support.

[11,12] Susan also asserts that the trial court erred in finding a material change in circumstances to justify reducing Michael's child support obligation. A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Lambert v. Lambert*, 9 Neb. App. 661, 617 N.W.2d 645 (2000). It is well established that a "material change in circumstances" in modification of child support cases is analogous to the "good cause" standard articulated for modification of alimony. See *id.* See, also, *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). We have already determined that Michael's diminished financial position was due to his own fault

or voluntary wastage and dissipation of his talents and assets. Thus, we find that Michael's income reduction cannot constitute a material change in circumstances for reduction in child support for the same reasons as we have articulated above concerning reducing alimony. See *Lambert v. Lambert, supra.*

[13] Nonetheless, that does not end our inquiry. We still must determine whether Susan's increase in income, standing alone, justified a reduction in Michael's child support obligation. A rebuttable presumption establishing a material change of circumstances occurs when application of the child support guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months. Nebraska Child Support Guidelines, paragraph Q.

In order to determine whether there was a 10-percent variation, we must complete a child support worksheet because there was not one attached by the trial court. Once again, we reiterate the importance of attaching a child support worksheet, since the trial court failed to do so for the original decree as well as for the modification order. See *Gallner v. Hoffman*, 264 Neb. 995, 1002, 653 N.W.2d 838, 844 (2002) (" 'trial courts must show the appellate courts, and the parties, that they have "done the math" ' "), quoting *Stewart v. Stewart*, 9 Neb. App. 431, 613 N.W.2d 486 (2000). At the time of the original decree in 1999, Susan was earning $750 per month. In 2002, her monthly gross income was $2,735. Because we have found that Michael's change in employment was not done in good faith, to calculate child support, we use Michael's income as stated in his 1999 tax return because it most closely reflects his income at the time of the decree. Michael's 1999 gross monthly income, based on his annual gross income of $99,788, was $8,315. According to the child support worksheets we have prepared and attached to our opinion as appendix A, Michael's monthly child support obligation is $1,376 for two children and $930 for one child. In comparing this to the $1,550 Michael was ordered to pay monthly for two children in the original decree, we find there has been an 11-percent decrease, which constitutes a material change in circumstances under the child support guidelines. The trial court

did not abuse its discretion in reducing the child support obligation. However, the court did abuse its discretion in the amount it ordered Michael to pay. Therefore, on remand, we instruct the trial court to adopt our child support worksheets (appendix A) and set monthly child support at $1,376 for two children and $930 for one child, effective May 1, 2002, given that the petition to modify was filed April 15, 2002.

CONCLUSION

Because there was no good cause to justify a reduction in alimony, we find that the district court abused its discretion, and we reverse that decision of the district court. However, as to child support, we find that the trial court did not err in decreasing Michael's child support obligation but that it did err in calculating the amount to be paid. Therefore, we remand the cause to the trial court with directions to modify the decree, ordering Michael to pay monthly child support in the amount of $1,376 for two children and $930 for one child, retroactive to May 1, 2002.

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

WORKSHEET 1

Grahovac v. Grahovac **BASIC NET INCOME AND SUPPORT CALCULATION FOR TWO CHILDREN**

		MOTHER	COMBINED	FATHER
1.	Total month income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	2,735.00		8,315.00
2.	Deductions**			
	a. Taxes***	180.97		1,974.48
	b. FICA	209.23		569.76
	c. Health insurance ****	0.00		0.00
	d. Retirement	109.40		0.00
	e. Child support previously ordered for other children	0.00		0.00
	f. Regular support for other children	0.00		0.00
	g. Total deductions	499.59		2,544.25
3.	Monthly net income (line 1 minus line 2g)	2,235.41		5,770.75
4.	Combined monthly net income		8,006.16	
5.	Combined annual net income		96,073.90	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	27.9%		72.1%
7.	Monthly support from table 1		1,908.37	
8.	Each parent's monthly share for two children (line 7, times line 6, for each parent)	532.84		1,375.53

* Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

** All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

*** Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

**** The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

***** In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

APPENDIX "A", Page 1

WORKSHEET 1

Grahovac v. Grahovac **BASIC NET INCOME AND SUPPORT CALCULATION FOR ONE CHILD**

		MOTHER	COMBINED	FATHER
1.	Total month income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	2,735.00		8,315.00
2.	Deductions**			
	a. Taxes***	180.97		2,137.23
	b. FICA	209.23		569.76
	c. Health insurance ****	0.00		0.00
	d. Retirement	109.40		0.00
	e. Child support previously ordered for other children	0.00		0.00
	f. Regular support for other children	0.00		0.00
	g. Total deductions	499.59		2,707.00
3.	Monthly net income (line 1 minus line 2g)	2,235.41		5,608.00
4.	Combined monthly net income		7,843.41	
5.	Combined annual net income		94,120.90	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	28.5%		71.5%
7.	Monthly support from table 1		1,300.60	
8.	Each parent's monthly share for one child (line 7, times line 6, for each parent)	370.68		929.93

* Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

** All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

*** Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

**** The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

***** In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

APPENDIX "A", Page 2

MELISSA N. SMITH, APPELLEE, V.
JAMES F. SMITH, APPELLANT.
681 N.W.2d 57

Filed June 15, 2004. No. A-02-1138.

1. **Child Support.** When an individual is incarcerated at the time initial child support is determined, the individual's preincarceration earnings should not be considered.
2. **Child Support: Alimony.** Where a party is still awaiting sentencing at the time of the initial award of child support and alimony and there is no evidence from which the court can determine whether the party will be sentenced to a term of incarceration, the court properly treats the party more like an individual who is not incarcerated at the time of the initial determination of child support and alimony.

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Affirmed.

James R. Welsh and Robert J. Meyer, of Welsh & Welsh, P.C., L.L.O., for appellant.

Richard H. Hoch, of Hoch, Funke & Kelch, for appellee.

IRWIN, Chief Judge, and HANNON and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

James F. Smith appeals from a decree of dissolution of marriage entered by the district court for Nemaha County, Nebraska, dissolving his marriage to Melissa N. Smith. On appeal, James challenges the district court's orders of child support and alimony, arguing that the district court should not have based the awards on his previous earnings, because he was incarcerated at the time the decree was entered. Because we find that the record indicates that James had not yet been sentenced for his criminal conduct at the time the decree was entered, we affirm the district court's child support and alimony awards.

II. BACKGROUND

On December 28, 2001, Melissa filed a petition for dissolution of her marriage to James. Melissa alleged that there were four children of the parties' marriage born between October 17, 1987, and June 21, 1994. Melissa requested temporary and permanent child support and alimony.

On December 28, 2001, Melissa filed an affidavit of financial condition. Melissa provided a child support worksheet indicating that her total monthly income was $1,000 and that James' total monthly income was $2,500. A hearing was held on January 9, 2002, regarding Melissa's request for temporary allowances. Melissa's affidavit of financial condition and her child support worksheet were received by the district court. James acknowledged to the court that his "monthly income before taxes [was] about $2500," as reflected on Melissa's child support worksheet. James indicated that he did not want to present any evidence to the contrary. On January 14, the district court entered an order for temporary allowances and ordered James to pay child support in the amount of $896.28 per month.

On August 14, 2002, a hearing on the petition for dissolution was held before the district court. The record indicates that at that time, James was incarcerated, and Melissa testified that James was incarcerated. The court again received Melissa's affidavit of financial condition and her child support worksheet indicating that James' total monthly earnings were $2,500. James did not object to the court's receipt of the affidavit and worksheet. James presented no evidence to contradict Melissa's evidence concerning his total monthly income. James indicated to the court that he was incarcerated and was awaiting sentencing on a charge of possession of methamphetamine.

On August 14, 2002, the district court entered a decree dissolving the parties' marriage. The record indicates, as noted above, that James personally appeared at the dissolution hearing, although the decree indicates that James "was not present in court nor represented by counsel." The court ordered James to pay child support in the amount of $896 per month while all four children remain unemancipated minors and made provisions for the amount of child support to decrease as each child reaches the age of majority. The court also ordered James to pay alimony in the amount of $300 per month for 60 months. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, James has assigned two errors. First, James asserts that the district court erred in ordering him to pay monthly child support amounts based on his earning capacity, when the record

indicates that he was incarcerated at the time of the decree. Second, James asserts that the district court erred in ordering him to pay alimony, when the record indicates that he was incarcerated at the time of the decree.

IV. ANALYSIS

James' primary contention, with regard to both the child support and alimony awards, is that the court erred in basing the awards on his earning capacity, because the record indicates that he was incarcerated at the time of the initial award. On the facts of this case, where the record indicates that James was still awaiting sentencing at the time of the award, we find James' assertions to be without merit.

[1] We recently addressed how district courts should treat a parent's incarceration when calculating child support and how the treatment of a parent's incarceration differs depending on whether the court is making an initial award of child support or a modification of child support. See *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 544 (2003). In *Longnecker*, we stated that where an individual is incarcerated at the time initial child support is determined, the individual's preincarceration earnings should not be considered, and we distinguished that factual scenario from a situation where a court is called upon to modify a previous award based on incarceration. See, also, *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000).

[2] The factual scenario in the present case, however, is different from the factual scenario in *State v. Porter, supra*. The record in the present case indicates that James was still awaiting sentencing at the time of the initial award of child support and alimony. As such, when the district court made the award, there was no evidence from which the court could determine whether James would be sentenced to a term of incarceration. On the record presented, it is not apparent that James will be unable to realize his earning capacity due to incarceration, because it is not apparent whether he will be incarcerated. In *Porter*, the obligor was serving a sentence of incarceration and it was apparent that he was not capable of realizing his earning capacity; such is not the situation in the present case. As such, we conclude that the district court properly treated James more like an

individual who is not incarcerated at the time of the initial determination of child support and alimony, and we do not find error with the district court's awards of child support or alimony. The decree is affirmed.

V. CONCLUSION

Because James was still awaiting sentencing at the time of the decree, this case presents a factual scenario more akin to where an individual is not incarcerated at the time of the initial child support award. As such, we find no error with the district court's use of James' earning capacity to support the child support and alimony awards. The decree is affirmed.

AFFIRMED.

EARL P. AND KATHLEEN M. STEPHENS, HUSBAND AND WIFE, ET AL., APPELLANTS AND CROSS-APPELLEES, V. JAMES D. PILLEN ET AL., APPELLEES AND CROSS-APPELLANTS.

681 N.W.2d 59

Filed June 15, 2004. No. A-02-1360.

1. **Nuisances: Injunction: Damages: Evidence: Appeal and Error.** In an appeal of a nuisance action for both injunctive relief and damages, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, and when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Nuisances: Real Estate: Words and Phrases.** A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land.
3. **Nuisances: Real Estate: Liability.** One is subject to liability for a private nuisance if, but only if, his or her conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is intentional and unreasonable.
4. **Nuisances: Real Estate: Words and Phrases.** An intentional invasion of another's interest in the private use and enjoyment of land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct.
5. **Nuisances: Intent.** In a nuisance case, it is the knowledge that an actor has at the time he or she acts or fails to act that determines whether the invasion resulting from the actor's conduct is intentional or unintentional.
6. **Courts: Equity: Jurisdiction: Damages.** When an equity court has properly acquired jurisdiction in a suit for equitable relief, it has jurisdiction to make a complete adjudication of all matters properly presented and involved in the case, including awarding monetary damages.

7. **Nuisances: Damages: Proof.** Although damages such as depreciation in market or rental value of property, medical expenses, and psychological expenses may be recoverable in a nuisance action, such damages would be special damages and would require specific proof to be awarded.
8. **Damages: Proof: Juries: Words and Phrases.** General damages, which do not require specific proof, are such as the jury may give when the judge cannot point to any measure by which they are to be assessed except the opinion and judgment of a reasonable person.
9. **Damages: Words and Phrases.** By definition, the very nature of general damages is such that a court cannot point out any measure of damages for things such as discomfort, annoyance, or inconvenience.

Appeal from the District Court for Boone County: MICHAEL OWENS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Shelley A. Horak, of Horak & Associates, and Patricia A. Knapp for appellants.

David A. Domina and Nora M. Kane, of Domina Law, P.C., for appellees.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

A group of 18 plaintiffs appeals from an order of the district court which granted the plaintiffs injunctive relief against the defendants for a private nuisance but denied monetary damages. The defendants cross-appeal from the court's order granting injunctive relief. We find that the district court was correct in finding a private nuisance and granting injunctive relief. We further find that the district court was correct in denying monetary damages to some of the plaintiffs. However, we also find that the district court was incorrect in denying monetary damages to some of the plaintiffs. Accordingly, we affirm in part, and in part reverse and remand with directions.

II. BACKGROUND

On December 27, 2000, the group of 18 plaintiffs filed a petition against James D. Pillen and various other defendants alleging that four of the defendants' hog confinement operations, in Boone and Nance Counties, were being operated as integrated

parts of a single operation and constituted a private nuisance. The petition alleged that the hog confinement operations had been a nuisance since 1997, that the plaintiffs had been deprived of the normal use and enjoyment of their property, that the defendants had been notified of the plaintiffs' concerns but had failed to take action, and that the plaintiffs had no adequate remedy at law. The petition specifically sought injunctive relief, costs, and general damages to be determined at trial.

A bench trial was held in August 2002. Pillen testified about the various facilities at issue in this case, which he indicated are each classified as "5,000 sow units." Pillen testified that construction began on the Beaver Valley facility in Boone County in September 1996, that production began at the Northern Plains facility in Nance County in late 1997, that the Mount Echo facility in Boone County had been started shortly after the Northern Plains facility, and that production began at the Northern Nance facility in Nance County in late 1999. Pillen testified that animals were placed in the Beaver Valley facility by January 1997. Pillen further testified that he was aware in May 1997 of a complaint from Nebraska's Department of Environmental Quality (DEQ) concerning "the odor from [an] incinerator" constructed at the Beaver Valley facility, which complaint Pillen believed was a result of a complaint by one of the plaintiffs to the DEQ about the Beaver Valley facility. Pillen also testified that he had discussed an odor problem with some of the plaintiffs prior to September 29, 1997.

During the course of the trial, all 18 plaintiffs testified concerning how the defendants' hog confinement operations had impacted the plaintiffs' lives and use and enjoyment of their property. The testimony generally concerned the impact of odors from the hog confinement operations. The plaintiffs described the odors from these facilities as "unbearable"; as "overwhelmingly, a suffocating stench"; as a "musty hog shit smell"; as a "sewage odor"; as a "gas[-like] smell"; and as a smell that "chokes you." The plaintiffs further testified that the smell from the facilities is significant enough that it has impacted their daily lives; various plaintiffs testified to being forced to keep their houses closed up at all times, to not being able to spend time outside in their yards or gardens, to not being able to hang laundry

on a clothesline, and to not being able to spend time outside with children or grandchildren. One of the plaintiffs testified that she is a "prisoner in [her] house." More specific details of the particular plaintiffs' testimony will be set forth below in the discussion section of this opinion.

Pillen testified that the defendants have tried various procedures to diminish the odors emanating from the facilities and the waste lagoons at the facilities, including food additives, waste additives, and lagoon treatments. Pillen testified that despite the testimony of the plaintiffs to the contrary, he does not think that the hog confinement operations have changed the plaintiffs' quality of life or would ever disrupt someone's daily activities to such an extent that the operations should be changed.

On October 31, 2002, the district court entered an order. In the order, the court found that the plaintiffs all live within 2 miles of at least one of the four hog confinement facilities. The court found that all of the plaintiffs testified to having "almost daily encountered significant odors" from the hog confinement facilities. The court found that virtually all of the plaintiffs testified that they are compelled by the odors to use air conditioning rather than opening windows and that two of the plaintiffs testified that they have been forced to resort to sleeping in the basement of their home to avoid the odors. The court ultimately found that the plaintiffs had proven that the four hog confinement facilities constituted an intentional nuisance.

The court ordered the defendants to explore the utility of processes to mitigate the odors from the facilities and to implement such processes. The court stated that "within [a] twelve (12) month period, the Defendants are ordered to abate the nuisance or cease operating their facilities which are subject to this lawsuit." The court also found that the plaintiffs had suffered at least "some damage" as a result of the nuisance. Nonetheless, the court found that "none of the Plaintiffs [was] able to quantify any request for damages, [that] each generally indicated that [he or she] did not want damages," and that "the Plaintiffs ha[d] not adduced any evidence sufficient for the Court to award them specific damages." As a result, the court awarded no monetary damages to any of the plaintiffs. This appeal and cross-appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, the plaintiffs have assigned as error only that the lower court erred in not awarding monetary damages. On cross-appeal, the defendants have made two assignments of error which challenge the lower court's finding that the plaintiffs proved that the hog confinement facilities constitute a nuisance.

IV. ANALYSIS

1. Standard of Review

[1] This is an appeal of a nuisance action for both injunctive relief and damages. In such a proceeding, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, and when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Thomsen v. Greve*, 4 Neb. App. 742, 550 N.W.2d 49 (1996). See, also, *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

2. Preliminary Notes

We initially note that the record in this case consists of six volumes of testimony spanning approximately 1,500 pages and 129 exhibits constituting another seven volumes. As noted, the plaintiffs' only assignment of error on appeal concerns the lower court's failure to award monetary damages. A review of the plaintiffs' brief in this appeal reveals that there is no reference in the brief to any of the testimony within those 1,500 pages which supports an award of damages. Instead, the plaintiffs have cited to factual findings in the transcript and, in their reply brief, have indicated that their "counsel began the exercise of compiling references to testimony supporting an award of damages [but it] became readily apparent rather quickly that references to testimony regarding damages consist essentially of references to the entire record." Reply brief for appellants at 6.

Neb. Ct. R. of Prac. 9D (rev. 2000) requires parties to annotate to the record each and every recitation of fact, whether in the statement of the facts or elsewhere in the brief. Suffice it to say that the entirety of the 1,500 pages of testimony does not

concern the issue of damages and that the plaintiffs' appellate counsel's failure to provide even examples of testimony which supports an award of damages made resolution of this case more time consuming and difficult than necessary. Further, we note that the fact that this case is subject to a de novo review does not alleviate the plaintiffs' appellate counsel's obligation to fulfill the court rules. This court's treatment of the issue of damages is more in spite of than because of the work of the plaintiffs' appellate counsel. In the future, greater care must be taken to comply with the court rules.

3. Cross-Appeal

We first address the issue raised on cross-appeal concerning whether the district court was correct in finding that the plaintiffs proved that the hog confinement facilities constitute a nuisance. The defendants assert that the district court erred in this regard and should have sustained the defendants' motion to dismiss. We disagree because we conclude that the evidence supports a finding that the defendants have known since 1997 that the hog confinement facilities have invaded the plaintiffs' private use and enjoyment of their land.

We first note that the defendants' brief on cross-appeal argues primarily that the plaintiffs failed to adduce sufficient evidence to establish negligence; the defendants assert that there was no expert testimony adduced to establish what duty was owed and no evidence to support a finding of a breach of any such duty. This appears to be the only basis for the defendants' cross-appeal and their assertions that the district court's finding of a nuisance and overruling of the defendants' motion to dismiss were incorrect. We find, however, as the plaintiffs assert in their reply brief, that this case proceeded under the theory of intentional nuisance, not negligent nuisance. That being the case, the bulk of the defendants' argument on cross-appeal is inapplicable to this case.

[2,3] The appellate courts of Nebraska have adopted the law of nuisance as articulated in the Restatement (Second) of Torts (1979). See, *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989); *Kruger v. Shramek*, 5 Neb. App. 802, 565 N.W.2d 742 (1997); *Thomsen v. Greve*, 4 Neb. App. 742, 550 N.W.2d 49

(1996). A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land. *Hall v. Phillips, supra*; *Kruger v. Shramek, supra*. Section 822 of the Restatement, *supra*, provides that one is subject to liability for a private nuisance if, but only if, his or her conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is intentional and unreasonable. See, *Kruger v. Shramek, supra*; *Thomsen v. Greve, supra*.

[4,5] An intentional invasion of another's interest in the private use and enjoyment of land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct. See, *Hall v. Phillips, supra*; *Thomsen v. Greve, supra*. As noted in *Hall v. Phillips, supra*, the Restatement, *supra*, § 825, comment *c.* at 118, provides in part:

> *c. Meaning of "intentional invasion."* To be "intentional," an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm. It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional.

In this case, our review of the record indicates that the defendants knew, at least as early as September 1997 and perhaps as early as May 1997, that the operation of these facilities was causing an interference with the plaintiffs' enjoyment of their land. Several of the plaintiffs testified that they complained to the defendants about the odor from the facilities. Pillen testified that he discussed the odor with some of the plaintiffs and wrote them a letter on the subject in September 1997. Pillen also testified that he had received complaints about other facilities in the past. Further, as discussed more fully below, the evidence indicates that the interference with the plaintiffs' enjoyment of their land was substantial and unreasonable.

The defendants' arguments on cross-appeal are inapplicable to this case because, since the case was presented to the trial

court under an allegation of intentional nuisance, there was no requirement to demonstrate a duty or breach of duty. Further, the record adequately supports the district court's finding that the plaintiffs proved that the defendants' operation of these facilities constituted a knowing and intentional nuisance. As such, the assertions of the cross-appeal are meritless.

4. Appeal

The issue raised in the plaintiffs' appeal is whether the record supported an award of monetary damages, i.e., whether the district court erred in finding that it did not. Our review of the record indicates that many of the plaintiffs did present sufficient evidence to entitle them to an award of monetary damages. Some plaintiffs did not present sufficient evidence, and still other plaintiffs presented evidence which would have supported an award of monetary damages but affirmatively testified that they did not want any monetary damages.

(a) Sufficient Evidence

We find that 11 of the plaintiffs presented sufficient evidence to support an award of monetary damages. Those 11 plaintiffs are Earl P. Stephens, Kathleen M. Stephens, Bradley E. Stephens, Cindy Stephens, Wendell Francis, Arletta Francis, James McIntosh, Anna McIntosh, Dorian Kaspar, Daniel S. Kaspar, and Wanda Loseke. Each of these plaintiffs presented testimony that he or she has suffered significant discomfort, annoyance, and inconvenience in the use of his or her property.

[6] We note that although this is mainly an equitable action, the trial court has the authority to award damages. See *Thomsen v. Greve*, 4 Neb. App. 742, 550 N.W.2d 49 (1996). When an equity court has properly acquired jurisdiction in a suit for equitable relief, it has jurisdiction to make a complete adjudication of all matters properly presented and involved in the case, including awarding monetary damages. See, *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Thomsen v. Greve, supra*. As such, there is no dispute in this case that the district court had the authority to award monetary damages.

[7] Our review of the district court's order leads us to conclude that the district court mistakenly applied rules applicable to special damages to the plaintiffs' request for general damages. A

review of the defendants' brief on cross-appeal indicates a similar misunderstanding of the law governing damages. Although damages such as depreciation in market or rental value of property, medical expenses, and psychological expenses may be recoverable in a nuisance action, such damages would be special damages and would require specific proof to be awarded. See *Thomsen v. Greve, supra.*

[8,9] General damages, however, do not require specific proof. General damages are such as the jury may give when the judge cannot point to any measure by which they are to be assessed except the opinion and judgment of a reasonable person. *Id.* By definition, the very nature of general damages is such that a court cannot point out any measure of damages for things such as discomfort, annoyance, or inconvenience. See *id.* Nonetheless, such damages are recoverable in a nuisance action. See *id.*

The 11 plaintiffs listed above all presented sufficient testimony to establish significant damage to their way of life and their quality of life as a result of the nuisance in this case. They variously testified about significant interferences with their abilities to use and enjoy their homes and yards, including hanging laundry on the clothesline, spending time outside with children and grandchildren, opening their windows to enjoy fresh air, and generally enjoying time outside. They variously testified that they are forced to make sure that windows and doors to their homes are closed at all times so that the odor does not invade the inside of their homes. Some of them testified that they had air-conditioning and used it to keep their homes cool when the windows were shut. Kathleen Stephens identified herself as a "prisoner" in her own home and testified that she could not even eat things grown in her own garden because they had been "out in that smell" and thus were unappetizing as a result of the hog confinement facilities. Earl Stephens testified that he and Kathleen Stephens were considering moving and leaving land that had been in his family for years. James McIntosh testified that as a result of the odors, his family no longer plans any outdoor activities. Wanda Loseke testified that she has to put "mentholatum" in her nose to be able to tolerate sitting on her porch to read. The 11 plaintiffs listed above all presented sufficient

similar testimony to establish that they have suffered compensable general damages as a result of the nuisance.

Although many of the 11 plaintiffs listed above testified that they could not put a specific monetary value on these damages, none of them testified that he or she actually did not want compensation for such damages. We specifically disagree with the defendants' assertions in their brief on cross-appeal, witness by witness, that these 11 plaintiffs were not asked about or did not testify about general damages. Our review of the record indicates that although they were not asked about special damages, they were asked and did testify extensively about general damages. The defendants' assertions to the contrary are inaccurate and border on being misleading. The plaintiffs' petition specifically requested general damages for all of the plaintiffs, and these 11 plaintiffs presented testimony which entitled them to such an award. As a result, we reverse the order of the district court denying monetary damages to these 11 plaintiffs and remand the matter to the district court with directions to award appropriate monetary damages to each of them, considering the extent of interference demonstrated by their testimony.

(b) Insufficient Evidence

In contrast to our findings regarding the 11 plaintiffs listed above, we find that 2 of the plaintiffs specifically did not present sufficient evidence to entitle them to a monetary damages award. These two plaintiffs are Delmar Keehn and Stanley A. Czarnik. Because these two plaintiffs did not present sufficient evidence of discomfort, annoyance, or inconvenience, we affirm the district court's denial of damages to them.

Keehn testified generally that his property was on the fringe of the properties that experienced odor from the hog confinement facilities. He did not testify about any significant impact on his daily activities, way of life, or quality of life. He testified that he sometimes smells one of the facilities, depending on the wind, and that the facility "stinks." He specifically testified, however, that it does not affect the way he moves around his farm at all.

Similarly, Czarnik testified generally that there is strong odor from the facilities, but did not testify about any significant impact on his daily activities, way of life, or quality of life. He

specifically testified that the only change in his life as a result of the facilities was that traffic sometimes woke him up earlier in the morning than usual.

We find insufficient evidence in the testimony of Keehn and Czarnik to support an award of monetary damages. Consequently, we find the appeal concerning them to be without merit and affirm the district court's denial of damages to them.

(c) Waiver

Finally, we find that five of the plaintiffs presented sufficient evidence to entitle them to an award of damages but specifically testified that they did not want the district court to award them damages. Those five plaintiffs are Donald C. Loseke, Bill E. Smith, Janice Smith, Beverly E. Kemper, and Neal E. Kemper. As a result, although there was sufficient evidence to support an award of monetary damages to them, we affirm the district court's decision not to award them damages. These five plaintiffs are the only ones regarding whom the district court's and the defendants' assertions that the plaintiffs specifically testified that they did not seek monetary damages are accurate.

Although Donald Loseke testified that he used to enjoy working outdoors and in his shop and that he now has to endure a "musty hog shit smell" to do so, he also indicated that he did not want monetary damages. On cross-examination, he was asked, "So you're not asking for [a] money judgment at all, are you?" He answered, "No." There was little further discussion of his desire, or lack thereof, to receive a monetary judgment, and this testimony is sufficient to support the conclusion that he specifically testified that he did not want monetary damages.

Similarly, Bill Smith testified that the odor from the facilities has changed the way he enjoys his property and that his family can no longer hang laundry out on the clothesline, picnic outside, enjoy working out in the yard, or open the windows of the family home. He specifically testified that he has lost the freedom to do what he wants on his property when he wants to. However, on cross-examination, he was asked, "You don't want any money, do you?" He answered, "No, I don't." On redirect examination, he testified that his goal was "to get the air quality back to where it was."

Bill Smith's wife, Janice Smith, also testified that she has suffered damages as a result of the nuisance. She testified that she used to spend a great deal of time outdoors in her garden and with her children, that she used to enjoy yardwork and being outside, and that the nuisance has changed her ability to enjoy those things. She further testified that she can no longer leave laundry on the clothesline or open the windows of her house. Like Bill Smith, however, she specifically testified that she was not requesting an award of money.

Beverly Kemper also presented substantial testimony that would have supported an award of damages. She testified that her grandchildren visit her less often because of the smell; that although she and her husband, Neal Kemper, do not have air-conditioning, they still keep their house closed up in the summertime; that she has stopped working outside of the house because of the nuisance; and that she and Neal Kemper sometimes sleep in the basement of their house to avoid the odors. On cross-examination, she was asked, "[A]re you asking for money here[?]" She replied, "No, I'm not." There was little further discussion of her desire, or lack thereof, to receive a monetary judgment, and this testimony is sufficient to support the conclusion that she specifically testified that she did not want monetary damages.

Finally, Neal Kemper provided similar testimony. He testified that the nuisance has impacted his sleep, laundry, and meals. He characterized the nuisance's effect upon him as a loss of freedom and likened that loss to "having to go to jail" because of the odors from the hog confinement facilities. However, on cross-examination, he was asked, "You're not asking for a money judgment or award, are you?" He replied, "No, I'm not." As with the other plaintiffs' questioning at trial, there was little further discussion of his desire, or lack thereof, to receive a monetary judgment, and this testimony is sufficient to support the conclusion that he specifically testified that he did not want monetary damages.

These five plaintiffs presented sufficient testimony to support an award of general damages. Nonetheless, they each specifically testified unambiguously that they did not desire to receive a monetary damages award. Consequently, we find the appeal concerning

damages to be without merit regarding these five plaintiffs and affirm the district court's denial of damages to them.

V. CONCLUSION

The defendants' cross-appeal is meritless. Because this case was presented as an intentional nuisance action, the lack of evidence concerning duty and breach has no bearing on the sufficiency of the evidence to support the court's finding of nuisance. There was sufficient evidence to support the court's finding of a nuisance, and the district court's order is affirmed in that respect. With respect to damages, we find that each member of the group of 11 plaintiffs listed above presented sufficient evidence to support an award of general damages, and as to those plaintiffs, the district court's denial of damages is reversed and the matter remanded with directions to enter an appropriate damages award. With respect to the remaining seven plaintiffs, the district court's order denying damages is affirmed.

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

IN RE INTEREST OF MONIQUE H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SHEILA H., APPELLANT.

681 N.W.2d 423

Filed June 22, 2004. No. A-03-963.

1. **Juvenile Courts: 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 juvenile court's findings.
2. **Juvenile Courts: Evidence: Appeal and Error.** When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Abandonment: Words and Phrases.** In family law, the terms "abandoned" and "abandonment" can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes characterized as neglect.
4. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a)

(Cum. Supp. 2002), the State must prove the allegations of the petition by a preponderance of the evidence.

5. **Judgments: Parental Rights: Evidence.** An order terminating parental rights must be based on clear and convincing evidence.
6. **Juvenile Courts: Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
7. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, a court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002).
8. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** If the pleadings and evidence at an adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, the juvenile court has no jurisdiction to order a parent to comply with a rehabilitation plan; nor does it have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proved by new facts at a new adjudication-disposition hearing.

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

Richard K. Bollerup, of Bollerup Law Offices, P.C., for appellant.

Jodi L. Nelson, Deputy Lancaster County Attorney, and Katherine Gregg, Senior Certified Law Student, for appellee.

INBODY, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Sheila H. appeals from an order of the separate juvenile court of Lancaster County in which the court found that Monique H. was a juvenile as defined by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) in that Monique had been abandoned by Sheila, her mother. For the reasons set forth herein, we affirm.

BACKGROUND

On October 11, 2002, the State filed a petition alleging that Monique, born August 3, 1992, was a juvenile as defined by § 43-247(3)(a) by reason that Sheila had abandoned Monique, in that Monique had lived with Barbara F., her great-aunt, for most of her life and in that Sheila had had inconsistent and sporadic involvement in Monique's life since 1999 and had generally failed to provide Monique with any parental care or support.

An adjudication hearing was held on the petition on June 6, 2003. At the hearing, Barbara testified that Monique had been living with her in Lincoln, Nebraska, since 1999. Barbara further testified that from the time Monique was born until she began living with Barbara in 1999, Monique stayed with Barbara at least 75 percent of the time. Barbara testified that Sheila moved to Wellington, Kansas, in October 1999 because there was a warrant out for Sheila's arrest. Barbara testified that Monique was already living with her at the time Sheila moved out of Nebraska. Barbara testified that Monique originally began living with her because Sheila was having problems getting Monique to school and because Sheila was not able to take care of Monique. Barbara testified that after Sheila moved out of Nebraska, she would drive Monique to Council Bluffs, Iowa, once a month, and occasionally twice a month, where they would meet Sheila so that Monique and Sheila could spend time together. Barbara testified that the three of them would meet at either a truckstop or a restaurant in Council Bluffs and that the visit would last between 2 and 3 hours. Barbara testified that when Sheila had subsequently moved to Tarkio, Missouri, and to Maitland, Missouri, Monique would sometimes spend the weekend with Sheila. Barbara testified that while Sheila lived out of state, Sheila would talk to Monique on the telephone once a week or once every other week. Barbara testified that after Sheila moved back to Nebraska in August 2002, Sheila came to visit Monique about every other day.

Barbara also testified that between October 1999 and August 2002, there were four or five planned visits that Sheila did not show up for. During this timeframe, there were also five to seven times when Sheila called Barbara and told her to pack up Monique's belongings and to bring Monique to Council Bluffs because she wanted Monique to come and live with her. Barbara testified that she did as Sheila requested but that Sheila actually took Monique home with her on only two of these occasions. Barbara testified that when Sheila did take Monique home with her, Sheila called Barbara a couple of days later and asked Barbara to come and get Monique.

Barbara testified that between October 1999 and August 2002, Sheila did not give her any money for Monique's support but did

occasionally purchase clothes and shoes for Monique. She testified that Sheila purchased around a dozen clothing items during this time period and that the clothes Sheila bought were often too small for Monique. Barbara also testified that Sheila routinely gave Monique birthday and Christmas presents and had visits with Monique at or near those times. Barbara further testified that Sheila took Monique on vacation to North Carolina for about a week in August 2002 and to Florida the year before.

Barbara testified that when she would take Monique to visit Sheila, she would bring Monique's school papers to share with Sheila. Barbara testified that Sheila was uninterested in the papers and kept them on only one occasion. She further testified that Sheila did not participate in any of Monique's extracurricular activities or interests.

Barbara testified that in August 2002, Sheila gave her $5,000 cash and asked her to keep it until Sheila needed it and asked for it back. Barbara opened a new bank account and deposited the money in the account. Barbara testified that in September 2002, Sheila asked for the money and Barbara gave her the $5,000 back.

Barbara further testified that she and Sheila both signed a handwritten agreement giving Barbara permission to enroll Monique in school for the 2000-2001 school year. The agreement was entered into evidence. Barbara testified that for the previous school years, she and Sheila had had similar written agreements. Barbara testified that in August 2001, Sheila granted her a power of attorney over Monique so Barbara could enroll Monique in school for the 2001-2002 school year. The power of attorney document was entered into evidence and showed that Barbara was to have temporary custody over Monique for a period of no more than 6 months. Barbara also testified about a custodial agreement that she and Sheila entered into at the same time as they did the power of attorney. The agreement, which was entered into evidence, gave Barbara temporary custody of Monique and stated that Barbara was not to restrict Sheila's access to Monique.

Sheila testified that Monique started living with Barbara in October 2000. She testified that prior to October 2000, Monique stayed overnight with Barbara only about once a month. Sheila testified that it was also in October 2000 when she moved out of state. Sheila testified that she had Monique live with Barbara

because Sheila was having difficulties in her life and was struggling to support herself. Sheila could not remember whether there was a warrant out for her arrest at the time, and she testified that she moved out of Nebraska to start a new life. She testified that she originally planned to have Monique come and live with her after she found a job and got settled, but later decided to let Monique finish the school year in Nebraska. Sheila testified that while she lived out of state, she had visits with Monique every weekend or every other weekend. She testified that either she would come to Lincoln to visit Monique or pick her up for a weekend visit or she would meet Barbara and Monique at some other location outside of Nebraska for a day visit. Sheila also testified that she would call Monique on the telephone almost every night.

Sheila testified that every time she saw Barbara and Monique, she would either give Barbara money to help with Monique's expenses or spend money on Barbara and Monique, such as buying them dinner. She estimated that she had given Barbara a total of $25,000 but admitted that she had no receipts for any payments because she always gave Barbara cash. Sheila also testified that the amount she gave Barbara at any one time varied. She further testified that she bought Monique something every time she saw her, such as clothes, knickknacks, or stuffed animals. She testified that she never asked Barbara to hold any money for her and that she knows nothing about the $5,000 Barbara claims Sheila gave her in August 2002.

Sheila testified that she tried to stay up to date on Monique's school progress by asking Barbara to bring Monique's school papers and projects to visitations. She testified that Barbara would say that she would bring them but then would show up without them. She testified that she went to one parent-teacher conference for Monique during the time she lived out of state. Sheila further testified that she paid one medical bill for Monique and took her to the dentist on one occasion during the time she lived out of state.

Sheila testified that during the summer of 2002, she took Monique to North Carolina, but further testified that she did not take Monique to Florida in 2001 as Barbara claimed. She testified that Monique spent most of the summer of 2001 with her.

Sheila testified that when she moved back to Nebraska, she visited Monique almost every day.

Sheila's former attorney also testified. He testified that in August 2002, he witnessed Sheila give $5,000 in cash to Barbara and heard Sheila tell Barbara to use $1,000 for Monique and to hold the rest for her.

Monique's deposition testimony was also entered into evidence. Monique testified that she started living with Barbara around the time she started kindergarten and has lived with her ever since. She testified that at the time of her deposition, she was in fourth grade. She testified that when Sheila was living outside Nebraska, she saw Sheila about every other weekend. She testified that Barbara would drive her to Iowa or to wherever Sheila was living at the time for visits. Monique testified that about half of these visits were for an entire weekend. She further testified that during her visits, Sheila would sometimes buy her clothes and shoes. She testified also that when Sheila lived out of state, she talked to Sheila on the telephone about every 2 days. She testified that when Sheila moved back to Nebraska, Sheila came to Barbara's house "about every day." She also testified that in the summer of 2002, she went to North Carolina with Sheila.

On rebuttal, Barbara testified that Sheila never gave her money for Monique and that Sheila only bought Barbara meals twice in a 2-year period. She testified that while Sheila lived out of state, she never came to Nebraska to visit Monique or to pick her up for the weekend. She testified that since 2000, she has taken Monique to all medical appointments and has paid all of Monique's medical bills. In regard to the $5,000, Barbara recalled that Sheila did tell her to use $1,000 for Monique and to hold the rest, but that when Sheila later asked for the money, she gave her the full $5,000 back.

On August 1, 2003, the juvenile court entered an order finding that the State had proved by a preponderance of the evidence that the allegations of the petition were true. The juvenile court found that Monique was a juvenile as defined by § 43-247(3)(a) because she had been abandoned by Sheila, in that Monique had lived with Barbara for most of her life and in that Sheila had had inconsistent and sporadic involvement in Monique's life since

1999 and had generally failed to provide Monique with any parental care or support.

ASSIGNMENT OF ERROR

Sheila assigns that the juvenile court erred in finding that she had abandoned Monique for a period of at least 6 months and, thus, erred in adjudicating Monique pursuant to § 43-247(3)(a).

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Sheila argues that the juvenile court erred in adjudicating Monique on the basis that she had abandoned Monique for a period of 6 months prior to the filing of the petition; she contends that the evidence does not support such a finding. The "6 months" language asserted by Sheila is found in Neb. Rev. Stat. § 43-292(1) (Reissue 1998), which allows for termination of parental rights when a parent has abandoned a juvenile "for six months or more immediately prior to the filing of the petition." Such language is not found in § 43-247(3)(a), and the juvenile court did not use such language in its order. Section 43-247 states:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) . . . who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile . . . .

The State's petition alleged:

> [Monique] is abandoned by her parent, Sheila[, the] Mother of said child[,] in that:
>
> A) Monique . . . has lived with Barbara[,] her great aunt[,] for most of her life. Sheila . . . has had inconsistent and sporadic involvement in [Monique's] life since 1999 and has generally failed to provide said child with any parental care or support.

In the trial court's order adjudicating Monique, it found:

> The allegations of the Petition are true by a preponderance of evidence. . . . While in the custody of . . . Sheila[, Monique] is abandoned by her parent, Sheila[,] mother of said child, in that: Monique . . . has lived with Barbara[,] her great aunt[,] for most of her life. Sheila . . . has had inconsistent and sporadic involvement in [Monique's] life since 1999 and has generally failed to provide said child with any parental care or support. . . . Monique . . . is a child as defined by Neb. Rev. Stat. §43-247(3a) by reason of the lack of proper support, through the fault or habits of . . . Sheila . . . .
>
> . . . .
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Monique . . . is a child as defined by Neb. Rev. Stat. §43-247(3a) by reason of the lack of proper parental care and she is without proper support through the fault or habits of . . . Sheila . . . .

[3] It is clear from the petition and the trial court's findings that the court adjudicated Monique not only on the basis that she is an abandoned child, but also on the basis that she lacks proper parental support and parental care. In family law, the terms "abandoned" and "abandonment" can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes characterized as neglect. See Black's Law Dictionary 1-2 (7th ed. 1999). In any case, what is clear is that the proffer by Sheila's counsel at oral argument of the applicability of Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 1998) was misplaced. Section 43-283.01(4) provides in relevant part: "Reasonable

efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that: (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, *abandonment*, torture, chronic abuse, or sexual abuse." (Emphasis supplied.) The court's order and findings clearly do not reach the level of abandonment contemplated in § 43-283.01(4)(a).

In addition, in arguing that the evidence does not support a finding of abandonment, Sheila relies entirely on cases involving termination of parental rights based on § 43-292(1). Specifically, Sheila claims that based on *In re Interest of B.A.G.*, 235 Neb. 730, 735, 457 N.W.2d 292, 296 (1990), to prove abandonment, the evidence must show that "the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities." The quoted language sets forth what must be proved in a parental rights termination case alleging abandonment. We are unaware of any case where the standard set for such termination cases has been applied to adjudication cases based on abandonment.

[4,5] Further, the adjudication stage and the termination stage require different burdens of proof. At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). See Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998). The termination stage requires a higher burden of proof: An order terminating parental rights must be based on clear and convincing evidence. See, *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003). Thus, Sheila's reliance on case law involving termination of parental rights in the present adjudication case is misplaced.

[6-8] The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of*

Sabrina K., 262 Neb. 871, 635 N.W.2d 727 (2001); *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). To obtain jurisdiction over a juvenile, a court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Rebekah T. et al., supra.* If the pleadings and evidence at an adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, the juvenile court has no jurisdiction to order a parent to comply with a rehabilitation plan; nor does it have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proved by new facts at a new adjudication-disposition hearing. *Id.*

Again, the quantitative proof required for an adjudication based on § 43-247(3)(a) is a preponderance of the evidence. See, *In re Interest of Jac'Quez N., supra*; *In re Interest of T.M.B. et al., supra*; § 43-279.01(3). Although Barbara and Sheila presented significantly different versions of Sheila's involvement in Monique's life, the evidence shows that Monique has lived with Barbara since 1999 or 2000 and, thus, that Sheila has not provided a home for Monique during that time. The evidence also shows that for most of the time Monique has lived with Barbara, Sheila has lived out of state. During this time, Barbara was clearly Monique's primary caregiver. Barbara also testified that from the time Monique was born up until the time Monique came to live with her, Monique spent a lot of time with her. Although Sheila testified to the contrary, the juvenile court believed Barbara's testimony. When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jac'Quez N., supra*; *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). The evidence also shows that during the time Sheila lived out of state, Sheila was not actively involved in Monique's education or in her extracurricular activities or interests. In addition, since 2000, Sheila has not been responsible for Monique's medical care and medical expenses.

There is conflicting evidence as to whether Sheila provided financial support for Monique during the time Monique has lived with Barbara. However, Sheila has provided no documentation of

any financial support, claiming that her payments to Barbara were all made in cash. Barbara denies receiving any financial assistance from Sheila. Sheila and Barbara also provided conflicting testimony as to how often Sheila bought clothes and meals for Monique. Again, the juvenile court apparently accepted Barbara's testimony, and we give weight to the fact that the juvenile court observed the witnesses and accepted Barbara's version of the facts over Sheila's version. See, *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of Joshua R. et al., supra.*

Although the evidence shows that Sheila has been a part of Monique's life in some respect, she has not provided the consistent care and support of a parent. The evidence shows Sheila's unwillingness or inability, whichever the case may be, to be involved in Monique's daily life and to be a constant, full-time parent to Monique. After a de novo review of the record, we find that the evidence shows by a preponderance that Sheila has abandoned Monique for the purpose of § 43-247(3)(a) in failing to provide Monique with proper support and parental care and that the juvenile court did not err in adjudicating Monique under that statute.

CONCLUSION

We conclude that the State proved by a preponderance of the evidence that Monique is a juvenile as defined by § 43-247(3)(a). Therefore, the juvenile court did not err in adjudicating Monique. The order of the juvenile court is affirmed.

AFFIRMED.

LEONARD J. VESELY, APPELLANT, V. NATIONAL TRAVELERS LIFE COMPANY, AN INSURANCE STOCK COMPANY, APPELLEE.

682 N.W.2d 713

Filed July 6, 2004. No. A-03-050.

1. **Motions for New Trial: Motions to Vacate: Demurrer: Dismissal and Nonsuit: Time: Appeal and Error.** A motion, after the sustaining of a demurrer and a dismissal, requesting a new trial and requesting that the judgment be vacated is a motion to alter or amend judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which tolls the time to appeal.

2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jurisdiction: Appeal and Error.** It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **New Trial.** A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, a report of a referee, or a trial and decision by the court.
5. **Pleadings: Judgments.** A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
6. ____: ____. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must seek substantive alteration of the judgment.
7. **Trial: Words and Phrases.** A trial is a judicial examination of the issues, whether of law or fact in an action.
8. **Summary Judgment: Trial.** Summary judgment is not a trial within the meaning of the new trial statute, Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002).
9. **Insurance: Contracts.** An insurance policy is a contract which requires an offer and acceptance to be effective.
10. ____: ____. An application for insurance is simply an offer, as is the issuance of an insurance policy, and must have acceptance to have contractual effect.
11. ____: ____. If an insurance company issues a policy that conforms to the application, the contract is accepted and becomes complete on delivery, but if the policy issued differs from the terms proposed, then it constitutes a mere counteroffer.
12. ____: ____. The tender of a policy substantially different from that requested will not entitle the insurer to recover premiums for the policy, unless the insured accepts the policy.
13. ____: ____. The issuance of an insurance policy is merely an offer and must be accepted to have contractual effect.
14. **Contracts.** A counteroffer is a rejection of the original offer.
15. **Pleadings: Waiver.** Matters contained in pleadings are judicial admissions insofar as the adversary is concerned, and admissions contained in a defendant's answer waive all controversy concerning the matter.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

L.J. Karel, of Karel & Seckman, for appellant.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

[1] Leonard J. Vesely appeals the decision of the Colfax County District Court, which sustained the summary judgment

motion of National Travelers Life Company (Travelers) and overruled Leonard's summary judgment motion in an action for declaratory judgment. We address the jurisdictional question raised by the filing of a "pure" motion for new trial following the entry of summary judgment and whether such filing tolls the running of the 30 days in which to perfect an appeal to this court. We do so in light of the recent decision in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004), which held that a motion, after the sustaining of a demurrer and a dismissal, requesting a new trial and requesting that the judgment be vacated was a motion to alter or amend judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which tolled the time to appeal.

FACTUAL BACKGROUND

On November 9, 1998, Leonard and his wife, Darlene Vesely, along with general insurance agent Lonnie Hackbarth, completed Leonard's application for a "Major Medical Expense" policy with Travelers. The application stated that the "[e]ffective [d]ate of this policy is to be 11-9-98 to save Darlene's age of 57." Leonard and Darlene issued a check for a premium on the policy based on Darlene's age of 57. Travelers then issued a policy, and Hackbarth met with Leonard and Darlene to review the policy on December 22.

The policy issued by Travelers differed in several respects from the policy applied for. The issued policy included two loss elimination amendments, one excluding "[a]rthritis, including degenerative joint disease and any operation or treatment [there]for or complications thereof," and the other excluding "[i]nternal fixation of the left ankle, including removal or complications thereof." Coverage was in place in July 1999 when Leonard fell from a horse and injured his hip. Leonard filed a claim under his Travelers policy, which claim Travelers denied on the basis that the injury was arthritis related. Additional factual details are not necessary for our decision.

PROCEDURAL BACKGROUND

Leonard filed a petition for a declaratory judgment on June 8, 2001, asking the court to determine the rights, duties, and obligations of the parties under the Travelers policy. Both parties

then filed motions for summary judgment alleging that there was no genuine issue of material fact. On November 6, 2002, the district court entered an order, sustaining Travelers' motion and overruling Leonard's motion for summary judgment and dismissing the petition. Leonard filed a "Motion for New Trial," which we detail in our jurisdictional discussion.

ASSIGNMENTS OF ERROR

Leonard asserts, restated, that the trial court erred in overruling his motion for summary judgment and granting Travelers' motion for summary judgment.

STANDARD OF REVIEW

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

JURISDICTIONAL ANALYSIS

[3] It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003); *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). We earlier overruled Travelers' motion to dismiss Leonard's appeal for lack of jurisdiction, but now write in detail about that subject. We ordered that the case proceed without oral argument pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2000).

After the trial court granted Travelers' motion for summary judgment and denied Leonard's similar motion, on November 12, 2002, Leonard filed a motion for new trial. The trial court overruled such motion on December 18. Leonard then filed his notice of appeal on January 15, 2003, more than 30 days after the entry of summary judgment but within 30 days of the overruling of the motion for new trial. Consequently, for us to have jurisdiction, the motion had to be a tolling motion.

[4] In 2000, the Nebraska Legislature amended the statute governing a motion for new trial in a civil action, see Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002), altering the definition of a "new trial." Prior to the amendment, the statute defined a new

trial as "a reexamination in the same court of an issue of fact after a verdict by a jury, [a] report of a referee, or a decision by the court." See § 25-1142 (Reissue 1995). After the amendment, § 25-1142 (Cum. Supp. 2002) provides that a new trial "is a reexamination in the same court of an issue of fact after a verdict by a jury, [a] report of a referee, *or a trial and decision by the court*." (Emphasis supplied.)

We note that the Nebraska Supreme Court in *Cerny, supra*, recognized the change in the statute. But, for the instant case, it is the *Cerny* dicta which draw our attention:

> The plaintiffs argue that a motion for new trial was procedurally improper in this case because there was never a "verdict by a jury," a "report of a referee," or a "trial and decision by the court." We agree that the 2000 amendment to § 25-1142 raises a legitimate question of whether a motion for new trial can ever be utilized as a means of seeking review by the trial court of a summary judgment or other final disposition which is not the result of a trial. We note that § 25-1329, which authorizes a motion to alter [or] amend a judgment, does not contain a similar reference to a "trial." However, we need not resolve this issue here because of a related but distinct jurisdictional deficiency.

266 Neb. at 30, 661 N.W.2d at 699-700.

The jurisdictional issue which the Supreme Court foresaw in *Cerny* is now rather squarely before us. But, after *Cerny*, the Supreme Court decided *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). The latter decision causes us to examine the nature of a motion for new trial because in 2000, when the Nebraska Legislature amended the new trial statute, it also, in the same legislation, authorized a new procedural device, a "motion to alter or amend a judgment." § 25-1329. Like a motion for new trial, a motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment and tolls the running of the 30 days in which to file a notice of appeal. See Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2002). However, the motions are distinguishable because a motion to alter or amend does not reference a new trial; nor does the motion to alter or amend statute set forth statutory grounds for its employment, as does the motion for new trial

statute, § 25-1142. The comments prepared by the reporter for the Nebraska Supreme Court Committee on Practice and Procedure, which developed the language for the enactments and presented such language to the Nebraska Legislature's Judiciary Committee, provide the reason for and explanation of the amendment to the new trial statute and the creation of a new device, the motion to alter or amend. The reporter's comments state:

> The additional language in [§] 25-1142 is intended to make clear that the motion for a new trial is appropriate only where there has been a trial, and that this section does not provide a general motion for reconsideration. . . .
>
> . . . .
>
> The proposed section defining a motion to alter or amend a judgment is comparable to the motion defined in [Fed. R. Civ. P.] 59(e). It provides a procedure other than a motion for a new trial for obtaining immediate reconsideration in the trial court of a decision based on something other than a trial. . . . [I]t could be used to obtain immediate reconsideration of [a] grant of summary judgment.

Judiciary Committee Hearing, L.B. 921, 96th Leg., 2d Sess. 6-7 (Jan. 19, 2000). Therefore, a motion to alter or amend and a motion for new trial were, at least, intended to be different.

[5,6] A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002). In order to qualify for treatment as a motion to alter or amend a judgment, a motion must seek substantive alteration of the judgment. *Bellamy, supra*. In contrast, a motion for new trial is based on "the following causes, affecting materially the substantial rights of [the] party [aggrieved]: . . . (6) . . . the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law." See § 25-1142.

In the present case, Leonard's pleading is entitled "Motion for New Trial," and by his use of the statutory language, we conclude that Leonard filed a motion for new trial: "COMES NOW [Leonard], by and through his undersigned counsel, and moves the court for a new trial for the following reasons, to-wit: 1. That

the verdict is not sustained by sufficient evidence. 2. That the verdict is contrary to law."

The jurisdictional issue presented in the instant case is whether a trial court's decision on a motion for summary judgment is a "trial and decision by the court," § 25-1142, because if so, the motion for new trial would toll the running of the 30 days in which to appeal. We first discuss this issue without consideration of the effect of *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

[7] Clearly, after a summary judgment, there is a decision by the trial court; but has there been a trial? Neb. Rev. Stat. § 25-1103 (Reissue 1995) defines a trial as a "judicial examination of the issues, whether of law or fact in an action." In *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960), the Nebraska Supreme Court was faced with the issue of whether an order vacating a summary judgment and granting a new trial is an order or judgment from which an appeal may be taken. In *Otteman*, the trial court sustained the defendant's motion for summary judgment and dismissed the plaintiff's petition. The plaintiff then filed a motion denominated as a motion for new trial, which motion was sustained. The defendant appealed the order sustaining the motion for new trial. The plaintiff asked the Supreme Court to dismiss the appeal on jurisdictional grounds. The Supreme Court said that "the proceedings which lead to a summary judgment and the rendition of such a judgment must be regarded as a trial" before the order sustaining the motion for new trial is appealable. *Id.* at 152, 105 N.W.2d at 586. In short, the court said that in order to grant a new trial, which is a " 're-examination in the same court of an issue of fact after a verdict by a jury, [a] report of a referee, or a decision by the court,' " *id.* at 154, 105 N.W.2d at 587, there must have been a trial or initial examination.

The *Otteman* court defined a trial as " '[t]he examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.' " 171 Neb. at 153, 105 N.W.2d at 586, quoting Black's Law Dictionary (3d ed. 1933). This definition is substantially similar to the definition of trial found in § 25-1103. The *Otteman* court said that the summary judgment process

"avoids the weighing of evidence and requires the determination to be based upon the sole question of whether or not there is any genuine issue of fact." 171 Neb. at 151, 105 N.W.2d at 586. Thus, the *Otteman* court determined, "[T]he Legislature in the enactment of the summary judgment act attempted to and at least inferentially did distinguish the summary judgment process from a trial." 171 Neb. at 153, 105 N.W.2d at 587. See Neb. Rev. Stat. §§ 25-1332 and 25-1333 (Reissue 1995). Therefore, the *Otteman* court concluded:

> In the light of this [examination of the summary judgment statutes,] the conclusion reached is that an exercise of the process prescribed by the summary judgment act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial.

171 Neb. at 154, 105 N.W.2d at 587. Further, the court stated, "There having never been a trial [because summary judgment was granted,] an order vacating a judgment and allowing for the first time a trial on the issues in the action cannot be regarded as the granting of a new trial." *Id.* Thus, the *Otteman* court, finding that the order vacating and setting aside the summary judgment was not an appealable order, sustained the plaintiff's motion to dismiss the appeal.

[8] In addition to the foregoing authority that a summary judgment is not a trial, we also examine the legislative intent concerning the 2000 amendments at issue. First, a comment regarding the amendment to the new trial statute, § 25-1142, discusses "trial" in the context of "actual trial" and "a party who has actually litigated and obtained a verdict." See Judiciary Committee Hearing, L.B. 921, 96th Leg., 2d Sess. 6 (Jan. 19, 2000). The comment also provides that a motion to alter or amend is a way to seek relief concerning summary judgment because the motion to alter or amend is for "a decision based on something other than a trial." *Id.* at 7. Therefore, based on the legislative intent as to the amendment to the new trial statute, on the addition of a "motion to alter or amend" to our procedures, and on the Supreme Court's decision in *Otteman v. Interstate Fire & Casualty Co.*, 171 Neb. 148, 105 N.W.2d 583 (1960), we hold that summary judgment is not a trial within the meaning of the new trial statute, § 25-1142.

Except for the opinion in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004), we would quite obviously conclude at this point that Leonard's "pure" motion for a new trial ("pure" in the sense that it requests only a new trial and is premised on two grounds directly from § 25-1142) did not toll the running of the 30 days to appeal after summary judgment. However, we must now consider the impact of *Central Neb. Pub. Power* on this case.

In *Central Neb. Pub. Power, supra*, the trial court said that the motion at issue which asked for a new trial after dismissal on a demurrer could not be a proper motion for new trial because there was no verdict by a jury or trial and decision by the court. The Supreme Court then examined whether the motion could be treated as a motion to alter or amend under § 25-1329, which would toll the appeal time. The motion, which also asked that the operative order of dismissal be vacated on the ground that the decision was contrary to law, was said by the Supreme Court to seek "substantive alteration" of the order—meaning that it could be treated as a motion to alter or amend, because the motion questioned the correctness of the judgment. *Id.* at 1000, 679 N.W.2d at 239. By focusing on the motion's request to "vacate" the order of dismissal, *id.*, the *Central Neb. Pub. Power* court found that the motion was a tolling motion to alter or amend. In short, the request that the order of dismissal be vacated was the magic bullet which saved the appeal from being dismissed for lack of jurisdiction. We now apply the lesson of *Central Neb. Pub. Power* to the instant case.

Here, Leonard's motion, while asking for a new trial on two statutory grounds, does not ask for vacation of the judgment, and thus, the saving grace of the word "vacate" to make a "pure" motion for new trial into a tolling motion to alter or amend is missing. However, we cannot find that this omission prevents tolling, despite our recitation of authority dictating the conclusion that a summary judgment proceeding is not a trial and decision by the court—the prerequisite for tolling when a motion for new trial is filed. Our rationale is that the new trial statute, § 25-1142, says that when such a motion is to be sustained, the "former verdict, report, or decision shall be vacated and a new trial granted." To us, this language makes a request for vacation

of the judgment inherent in any motion for new trial and makes an actual request to that effect superfluous because granting a new trial without vacating the earlier judgment would be an empty and meaningless act. Thus, pursuant to *Central Neb. Pub. Power*, the motion for a new trial here can be treated as a motion to alter or amend because, of necessity, it asks for vacation of the earlier judgment. Such a request, under *Central Neb. Pub. Power*, tolls the 30-day appeal time and makes Leonard's appeal timely. Thus, we turn to the merits of the case, as we have jurisdiction.

ANALYSIS

Leonard asserts that the trial court erred in granting summary judgment in favor of Travelers because the loss elimination amendments that excluded coverage for arthritis and internal fixation of the left ankle were not part of the policy. Leonard argues that his failure to sign an "Amendment of Application" agreement, which provided a different effective date and stop-loss level than he applied for, constituted a denial of the accompanying loss elimination amendments, even though he signed the loss elimination amendments. Leonard claims, "The three [loss elimination] amendments rise or fall together based upon whether or not the amendment of application [agreement] is sufficient to constitute amendment of the application and of the effective policy date." Brief for appellant at 12.

[9,10] An insurance policy is a contract which requires an offer and acceptance to be effective. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An application for insurance is simply an offer, as is the issuance of an insurance policy, and must have acceptance to have contractual effect. *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993); *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). Thus, under those principles, Leonard's application for insurance constituted merely an offer to Travelers.

[11,12] Based upon Leonard's offer found in his application, Travelers had to decide whether to accept the offer by issuing a policy as applied for or to counteroffer by issuing a policy different from that applied for. If an insurance company issues a policy that conforms to the application, the contract is accepted and becomes complete on delivery, but if the policy issued differs

from the terms proposed, then it constitutes a mere counteroffer. See *Lindsay Ins. Agency, supra*. The tender of a policy substantially different from that requested will not entitle the insurer to recover premiums for the policy, unless the insured accepts the policy. See *id.*

In *Hemenway, supra*, the issue before the court was whether an insurance policy issued by the defendant provided coverage, based on the effective date of the policy, for a heart condition which manifested itself on March 13, 1978. The application for insurance was submitted on February 9, but the policy issued on March 25 stated that the effective date of the policy was March 16. The defendant argued that because the application for insurance did not contain any request to exclude coverage for inguinal hernias and the policy issued had an endorsement exempting coverage for inguinal hernias, the policy issued was a counteroffer, making the effective date March 16. The plaintiff argued that he had met all the conditions required by a conditional receipt, that the policy conformed to the insurance he applied for, and that therefore, the policy was not a counteroffer and coverage began February 9.

The *Hemenway* court found that the insurance applied for provided coverage under a benefit schedule "G," but that schedule "G" excluded surgical and in-hospital treatment for hernias of any kind. The court concluded that

> since the policy of health insurance applied for by [the] plaintiff provided for the exclusion of hernia coverage of any kind, the addition of the inguinal hernia endorsement by [the defendant] does not vary the terms of the insurance applied for by [the] plaintiff and cannot constitute a counteroffer of insurance.

211 Neb. at 202, 318 N.W.2d at 75-76. Therefore, the court found that the plaintiff had met the requirements under the conditional receipt and that the policy was effective as of February 9, which effectiveness had the result of providing coverage for the heart condition occurring on March 13.

In the present case, the only reference in the policy to an exclusion for arthritis, which exclusion is the subject of the loss elimination amendment at issue, is found in a preexisting conditions limitation within the "Exceptions and Limitations" section.

The preexisting conditions exclusion states: "Pre-existing conditions, not excluded by name or specific description [are not covered] during the first twelve months your coverage is in force." However, in his application, when asked whether he had had diagnosis of or treatment for "the muscles, bones or joints, including back, spine or feet, arthritis, gout, rheumatism, back pain [et cetera]," Leonard answered, "No." Thus, unlike the circumstances in *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982), here, the application for insurance was not substantially similar to the policy issued, because the policy applied for excluded arthritis only if it was preexisting; the policy issued specifically excluded not only preexisting, but *any*, "[a]rthritis, including degenerative joint disease and any operation or treatment [there]for or complications thereof." In short, the application Leonard submitted did not indicate that arthritis or degenerative joint disease was a preexisting condition, but the policy issued excluded any arthritic condition, resulting in a variation of the insurance for which Leonard applied. Therefore, we find that the Travelers policy constituted a counteroffer that had to be accepted by Leonard in order for Travelers to recover premiums on the policy. See *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

The issue, then, is whether Leonard accepted the policy. On December 22, 1998, upon delivery of the policy, Hackbarth explained the amendments to Leonard. Leonard then signed both loss elimination amendments, but did not sign the "Amendment of Application" agreement. Additionally, he signed the "Delivery Receipt," which stated in part: "I hereby acknowledge receipt of the policy delivered to me by my agent. The agent has explained to me and I understand the benefits, expenses, limitations to the coverage, [and] the date on which the insurance begins, as they all appear in the policy." Further, Leonard paid the premiums on the policy until October 2001. Therefore, we find that Leonard's signature on the delivery receipt and the loss elimination amendments, as well as payment of the premium, constituted acceptance of the policy, including both loss elimination amendments. Even though Leonard did not date the amendments when he signed them, he did not object to Hackbarth's inserting the date; nor did his acceptance depend on his writing the date. See *Gesell*

v. Reeves, 229 Neb. 842, 429 N.W.2d 363 (1988) (party to contract can waive provisions of contract made for his or her benefit). Therefore, the policy included the loss elimination amendment that excluded coverage for arthritis.

[13-15] Even if Leonard did not accept Travelers' counteroffer—the policy including the amendments—his argument that the original policy that he applied for was revived by his failure to accept the amendments is without merit. Because Travelers' policy was a counteroffer, if Leonard failed to accept such counteroffer by not signing or dating the amendments, as he argues, then there simply was no contract, and no insurance coverage. See *Lindsay Ins. Agency, supra* (issuance of insurance policy is merely offer and must be accepted to have contractual effect). The original offer—Leonard's application, which does not exclude arthritis—was not "revived" if he did not accept Travelers' counteroffer, because a counteroffer is a rejection of the original offer. See *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991). Because Travelers issued a policy different from that applied for, which issuance constituted a counteroffer, Leonard's application was rejected. Thus, Leonard's original offer was terminated by the counteroffer. Further, if Leonard did not accept Travelers' counteroffer, then the original offer would have been revoked and there would have been no effective insurance policy because there was no contract. However, that was not the case here, as admitted by Leonard in his petition. He alleges, and Travelers concedes in its answer, that the Travelers policy was in full force and effect at the time of the accident. Matters contained in pleadings are judicial admissions insofar as the adversary is concerned, and admissions contained in a defendant's answer waive all controversy concerning the matter. *Dorszynski v. Reier*, 6 Neb. App. 877, 578 N.W.2d 457 (1998). Therefore, we find that Leonard accepted the counteroffer, which was the policy that included the loss elimination amendment excluding coverage for arthritis, because that was the only pending offer providing coverage. Thus, we find that the trial court did not err in granting Travelers' summary judgment motion. The trial court's order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ESTELLE M. CONN, APPELLANT.

685 N.W.2d 357

Filed July 13, 2004. No. A-03-438.

1. **Rules of Evidence.** In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
4. **Trial: Motions to Strike: Appeal and Error.** The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
5. **Effectiveness of Counsel: Proof.** To establish that he or she was denied effective assistance of counsel, the defendant must show that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. The defendant must also make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
6. ____: ____. The two-part test for ineffective assistance of counsel may be addressed in any order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
7. **Hearsay: Conspiracy: Rules of Evidence.** Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995), provides that a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
8. **Conspiracy: Evidence.** To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects; and if the statements took place after the conspiracy had ended, or if merely narrative of past occurrences, they are not admissible.
9. **Hearsay: Conspiracy: Evidence.** Before a trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.
10. **Conspiracy: Evidence: Proof.** In establishing a prima facie case of conspiracy, the phrase "prima facie" can probably be defined only in terms of sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy.
11. **Conspiracy: Rules of Evidence: Proof.** The State need not necessarily establish prima facie proof of the conspiracy before the coconspirator statements falling under Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995), are admissible, if the sum of the evidence ultimately makes the prima facie showing.

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

Michael J. Shaughnessy, of Shaughnessy Law Office, for appellant.

Jon Bruning, Attorney General, Kimberly A. Klein, and, on brief, Ronald D. Moravec for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Estelle M. Conn appeals from the decision of the district court for Sherman County finding her guilty of conspiracy to commit murder in the first degree, a Class II felony.

FACTUAL BACKGROUND

Bobby Joe Conn and Alicia L. Conn were married on January 20, 2000, and had a daughter, Breeahana Lee Conn (Bree), on May 26. Bobby Joe and Alicia separated on February 15, 2001. For several months prior to the separation, Bobby Joe, Alicia, and Bree had been living in the home of Bobby Joe's parents, Robert Conn and Estelle, in Johnson, Nebraska. During that time, conflicts concerning Bree's care arose between Alicia and Bobby Joe, Robert, and Estelle. After Alicia's separation from Bobby Joe, she moved to Litchfield, Nebraska, with Bree and filed a petition for legal separation from Bobby Joe in which she sought physical custody of Bree. Thereafter, Bobby Joe filed a petition for divorce, seeking joint custody of Bree.

During the summer and early fall of 2001, Bobby Joe, Robert, and Estelle had various conversations with Benjamin J. Biaggi and Thomas D.A. Moore, soliciting the murder of Alicia due to her alleged mistreatment of Bree. Although, during at least the initial conversation, Estelle remained silent. Biaggi, who had been acquainted with Bobby Joe and Alicia in high school, moved into Bobby Joe, Robert, and Estelle's residence in August 2001. In the early morning hours of September 26, Biaggi and Moore drove from Johnson to Litchfield at the behest of Bobby Joe, Robert, and Estelle. At Alicia's apartment in Litchfield, Biaggi fired a shotgun at Alicia in an unsuccessful attempt to kill

her. Afterward, Biaggi and Moore returned to Bobby Joe, Robert, and Estelle's residence in Johnson. Later on September 26, Estelle drove Biaggi to Lincoln, Nebraska, where he boarded a bus bound for Colorado.

Pursuant to agreements with the State for reduced charges, Moore and Biaggi both testified that Estelle was an active participant in the conversations in which the solicitation of Alicia's murder was discussed. Both testified that Estelle made comments like "[Alicia] needs to be taken out" and "I want the F-ing bitch dead." Prior to September 25, 2001, Estelle first showed Moore a computer-generated picture of Alicia and later showed him an actual photograph. Estelle told Moore that he would be able to identify Alicia because she had a tattoo of "Tweetie Bird" on her leg. Estelle also drove Biaggi to his grandmother's house near Humboldt, Nebraska, to retrieve the shotgun that was to be used to kill Alicia. On September 25, Estelle gave Biaggi a bag containing a cellular telephone and a radar detector. Estelle said the cellular telephone was to be used to keep in contact and to let her know when the job was done.

PROCEDURAL BACKGROUND

Robert was subsequently charged, convicted, and sentenced in the district court for Sherman County for false reporting and conspiracy to commit murder in the first degree for his involvement in the conspiracy to kill Alicia. Robert appealed to this court. See *State v. Conn*, No. A-02-1421, 2003 WL 22331485 (Neb. App. Oct. 14, 2003) (not designated for permanent publication). Bobby Joe was also charged, convicted, and sentenced in the district court for Sherman County for conspiracy to commit murder in the first degree for his involvement in the conspiracy to kill Alicia. Bobby Joe appealed to this court, and we affirmed the district court's decision. See *State v. Conn*, No. A-02-1260, 2003 WL 22479491 (Neb. App. Nov. 4, 2003) (not designated for permanent publication).

In the instant case, Estelle was charged in the district court for Sherman County with conspiracy to commit murder in the first degree in violation of Neb. Rev. Stat. §§ 28-202 and 28-303 (Reissue 1995), a Class II felony, for her alleged involvement in the conspiracy to kill Alicia. Trial was held on February 3 through

6, 2003. The jury found Estelle guilty of conspiracy to commit murder in the first degree. On March 21, Estelle was sentenced to a prison term of 10 to 20 years. Estelle appeals.

ASSIGNMENTS OF ERROR

Estelle alleges, restated, that (1) the district court erred in allowing testimony of alleged coconspirators and (2) she was denied her right to a fair trial because of trial counsel's ineffectiveness in failing to object to the hearsay testimony of the coconspirators Moore and Biaggi.

STANDARD OF REVIEW

[1,2] In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Hobby*, 9 Neb. App. 89, 607 N.W.2d 869 (2000). The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Id.*

ANALYSIS

[3,4] Estelle argues that the district court erred in allowing the testimony of Moore and Biaggi, two of her alleged coconspirators. However, "[a] party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection." *State v. Harris*, 263 Neb. 331, 339, 640 N.W.2d 24, 33 (2002). Furthermore, the failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *Id.* Because Estelle did not object at trial to the testimony of her coconspirators Moore and Biaggi, she may not now raise the issue on appeal except in the context of the claim of ineffective assistance of counsel, which she makes.

[5,6] We use the well-known two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). To establish that he or she was denied effective assistance of counsel, the defendant must

show that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. The defendant must also make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *Strickland, supra.* The two-part test for ineffective assistance of counsel may be addressed in any order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). Because the record does not contain any evidence why trial counsel did not object and because there could be valid strategic reasons for not objecting, we focus on the prejudice component of the *Strickland* test.

[7-10] Because Estelle's claim of ineffective assistance of counsel derives from the admissibility of Moore's and Biaggi's testimonies as coconspirators, we turn to the admissibility of their testimonies as to what Estelle said, which, if believed, obviously places her at the heart of the plot to kill Alicia. The Nebraska rules of evidence provide that a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995). To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects; and if the statements took place after the conspiracy had ended, or if merely narrative of past occurrences, they are not admissible. *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977). However, the matter of the admissibility of a coconspirator's statements about what a defendant said is a bit more complicated.

> [T]he rule is well established that before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. . . . The purpose for this rule is to prevent hearsay evidence from being lifted by its own bootstraps, i.e., relying on the hearsay statements to establish the conspiracy

> and then using the conspiracy to permit the introduction of the hearsay as evidence in the case.

State v. Hansen, 252 Neb. 489, 498, 562 N.W.2d 840, 848 (1997). Accord *Bobo, supra*. The phrase "prima facie" can " 'probably be defined only in terms of sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy.' " *State v. Copple*, 224 Neb. 672, 693, 401 N.W.2d 141, 156 (1987) (quoting *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966)), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

> "The requirement of prima facie proof is less stringent than that of a preponderance of the evidence. The former requires only enough evidence to take the question to the jury whereas the latter requires 'proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.' "

Id. (quoting *United States v. Trotter*, 529 F.2d 806 (3d Cir. 1976).

The record in the instant case contains evidence establishing a prima facie case of conspiracy. First, Estelle showed Moore a computer-generated picture of Alicia and an actual picture of her. Second, Estelle drove Biaggi to his grandmother's house to retrieve the shotgun which was later used in an attempt to kill Alicia. Third, Estelle gave Biaggi a bag with a cellular telephone and a radar detector. Finally, on September 26, 2001, Estelle drove Biaggi to Lincoln, where he fled via a bus bound for Colorado. But the testimony about what Estelle said was admitted before such other evidence.

Pursuant to the rule stated in *Hansen, supra*, ideally the State should have established a prima facie case of conspiracy before Moore's and Biaggi's hearsay statements were offered into evidence. The State failed to adduce its evidence in the order necessary to establish the prima facie case that a conspiracy existed before it offered the evidence of the statements made by Estelle in the presence of Moore and Biaggi. Nonetheless, there was independent evidence of the conspiracy apart from Moore's and Biaggi's testimonies of Estelle's statements. Had the State offered the evidence in a different order, there would be no question that the testimonies of Moore and Biaggi—stating that Estelle had said "[Alicia] needs to be taken out" and "I want that

F-ing bitch dead"—would be admissible under the coconspirator exception to the hearsay rule, because the statements were made in the course and in furtherance of the conspiracy.

In our view, *Hansen, supra*, makes it quite clear that the test ultimately is whether there is prima facie proof of the conspiracy, independent of the hearsay statements of the conspirator. The issue present in *Hansen* as in the instant case is whether trial counsel should have objected to what one conspirator testified regarding what another conspirator had said. The court in *Hansen*, 252 Neb. at 498-99, 562 N.W.2d at 848, said:

> Regardless of whether a prima facie case of conspiracy had been established at the time Murry's statement was first introduced, we conclude that the sum of the evidence submitted at trial, considered independently from the declaration in question, established a prima facie case of a conspiracy between Murry and Hansen. As such, the declaration would ultimately have been admissible under the coconspirator exception to the hearsay rule.

Other jurisdictions have also recognized that the order of proof is not necessarily determinative. See, *United States v. Fleishman*, 684 F.2d 1329 (9th Cir. 1982) (independent evidence may be circumstantial, order of proof is within discretion of trial judge, and facts presented must be viewed in light most favorable to government); *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966) (ordinarily, hearsay statements of alleged coconspirators should not be admitted until prima facie showing of existence of conspiracy is made, but some latitude must be allowed trial court in determining order of proof; where examination of record as whole shows facts from which trial court could reasonably infer existence of conspiracy, case ought not to be reversed because proof of conspiracy came at wrong time).

[11] From the foregoing authority, we hold that the State need not necessarily establish prima facie proof of the conspiracy before the coconspirator statements falling under § 27-801(4)(b) are admissible, if the sum of the evidence ultimately makes the prima facie showing. This is particularly true in the context of an ineffective assistance of counsel claim, as in the instant case. Thus, while it can be argued that an objection should have been made regarding Moore's and Biaggi's hearsay statements, there

was no prejudice to Estelle, because the prima facie case was eventually established when the entirety of the State's evidence was considered. Finally, while clearly wary of potential problems in jury instruction created by the conditional admission of conspirator evidence subject to later " 'connecting up' " by other evidence, the court in *State v. Copple*, 224 Neb. 672, 694, 401 N.W.2d 141, 157 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), recognizes that such an approach has validity. In conclusion, Estelle's claim of ineffective assistance of counsel is without merit, because while it is arguable that trial counsel could have objected to Moore's and Biaggi's statements, Estelle suffered no prejudice as a result of such failure.

CONCLUSION

Therefore, we affirm Estelle's conviction and sentence for conspiracy to commit murder in the first degree.

AFFIRMED.

JUSTIN WILLIAMSON, APPELLANT, V.
WERNER ENTERPRISES, INC., APPELLEE.
682 N.W.2d 723

Filed July 13, 2004. No. A-03-987.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Notice.** Neb. Rev. Stat. § 48-133 (Reissue 1998) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that therefore, the employer should investigate the matter further.
5. ____: ____. A lack of prejudice is not an exception to the requirement of notice under Neb. Rev. Stat. § 48-133 (Reissue 1998).

6. ____: ____. Neb. Rev. Stat. § 48-133 (Reissue 1998) requires notice of the injury, not merely notice of the accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Paul M. Smith for appellant.

Ryan C. Holsten, of Atwood & Associates Law Firm, P.C., L.L.O., for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this workers' compensation case, Justin Williamson filed a claim for benefits against Werner Enterprises, Inc. (Werner), concerning a motor vehicle incident. A trial judge of the Workers' Compensation Court determined that Williamson failed to give the required notice of injury to Werner "as soon as practicable" after the occurrence and dismissed Williamson's amended petition. Williamson appealed, and the review panel affirmed. Williamson now appeals to this court. We conclude that the factual findings of the trial judge upon the disputed evidence were not clearly wrong and that those findings support the trial judge's determination. We therefore affirm.

BACKGROUND

Incident and Subsequent Treatment.

Werner employed Williamson as an over-the-road truckdriver. While Williamson operated a truck on December 23, 2000, a car in front of him slowed suddenly. Williamson braked hard, causing the load in his truck to shift forward and slam against the front of the attached trailer. The load weighed approximately 44,000 pounds. Williamson took the truck to a dropyard, where a tow truck was summoned to readjust the load. Williamson testified that by the time he delivered the load, his back ached with pain unlike any he had previously experienced.

Williamson testified that he "was hurting" after the incident and that when he reported the accident, he told the supervisor in Werner's safety department that he had pain in his back.

However, in his deposition testimony, Williamson said that he had not reported any injury to Werner until May 2001. At the hearing before the trial judge, Williamson testified that he did not tell anyone from Werner before May 2001 that he had suffered an injury in the December 2000 accident. However, he also testified that he had told the safety department supervisor that he was in pain. The written accident report, dated December 24, 2000, fails to mention any personal injury. Williamson continued to drive for Werner until May 14, 2001.

Williamson saw his chiropractor on December 26, 2000. The medical record shows that the visit concerned the December 23 incident. Williamson did not submit the bill to Werner for payment; nor did he submit it under his own workers' compensation coverage. Williamson next visited a medical care provider on May 13, 2001.

At trial, Williamson testified that the pain in his back never went away. He testified that on a scale from 0 to 10, with 0 being no pain and 10 being severe pain that will not subside, he continuously experienced level-9 pain.

In his deposition, Williamson testified that he started seeing his chiropractor after the accident in December and that he saw the chiropractor once in January and once in March 2001.

Trial Court's Order.

The trial court entered an order of dismissal on February 4, 2003. The trial judge found that Werner employed Williamson on the date of the alleged accident, determined Williamson's average weekly wage, and found that Williamson's back injury was causally linked to the December 23, 2000, accident. However, the court found that Williamson failed to give Werner the required notice of his injury as soon as practicable after it occurred and dismissed the petition. Williamson timely filed an application for review, and the review panel affirmed. Williamson timely filed an appeal to this court.

ASSIGNMENT OF ERROR

Williamson alleges that the court erred in interpreting and applying Neb. Rev. Stat. § 48-133 (Reissue 1998), the statute requiring that notice of injury be given as soon as practicable.

STANDARD OF REVIEW

[1-3] 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 did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

The parties agree that an accident occurred on December 23, 2000. The trial judge of the workers' compensation court found that Werner employed Williamson on that date and that Williamson's injury arose out of and in the course of his employment. The sole issue here is whether Williamson provided notice of his injury in compliance with § 48-133. That statute provides:

> No proceedings for compensation for an injury under the Nebraska Workers' Compensation Act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof . . . . The notice shall be in writing and shall state in ordinary language the time, place, and cause of the injury. . . . A notice given pursuant to this section shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under the Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury.

The requirement that notice be given "as soon as practicable" has been a part of the workers' compensation statutes since their inception in 1913. See Rev. Stat. § 3674 (1913). In discussing the requirements of § 3674, the Nebraska Supreme Court stated in *Good v. City of Omaha*, 102 Neb. 654, 655-56, 168 N.W. 639 (1918):

> [T]he requirement of the statute is only what a person acting in good faith would be likely to do without a statute. One receiving an injury, for which he expects to hold another liable, would feel called upon, as soon as practicable after receiving the injury, to give the other notice of it, and would feel called upon, as soon as he knew the nature and extent of his injury, to make his demand for compensation. In courts of justice, the good faith of a claim is always more or less discredited by the fact that no immediate demand was made or that prosecution was long delayed. The employer is entitled to an early demand, so that he may know the nature and amount of the claim; may settle it, if possible, or, if not, may investigate the facts and preserve his evidence.

The substance of § 3674 later became Comp. Stat. § 3056 (1922) and then Comp. Stat. § 48-133 (1929).

From 1913 to 1977, § 48-133 and its predecessors contained two limitations: (1) the requirement that "notice" be given to the employer "as soon as practicable" and (2) the mandate that a "claim" be "made within six months after the occurrence" of the injury. The Legislature amended § 48-133 in 1977 to "eliminate the requirement for a claim but [to] still keep the notice requirement and [to] change the time in which to file a petition from one year to two years." Statement of Purpose, L.B. 144, Committee on Business and Labor, 85th Leg., 1st Sess. (Jan. 21, 1977). The legislative history shows that the Supreme Court's decision in *Raymond v. Buckridge, Inc.*, 195 Neb. 212, 237 N.W.2d 412 (1976), precipitated that amendment.

In *Raymond*, the employee scraped his ankle against a brake pedal when leaving his automobile in the employer's parking lot on May 3, 1972. The injury was complicated by the employee's diabetic condition and caused the employee to be hospitalized on June 28. His foot was amputated on July 3, but the employee did not make any claim against his employer for compensation

benefits until May 31, 1973. The employee argued that the period for making a claim should be extended during the time when he did not know that he might be entitled to compensation for an injury sustained in the employer's parking lot. The trial court found that the employer was aware on and after July 3, 1972, that the employee was making a claim for benefits against the group health and accident insurance coverage furnished by the employer to employees and that the employer knew or should have known that in the process of making such claim, the employee was asserting that the accidental injury occurred on the employer's premises. Upon appeal, the Nebraska Supreme Court held that the action could not be maintained because the employee failed to make a claim within 6 months from July 3, 1972. Thus, the *Raymond* decision turned upon the 6-month limitation for making a claim, which limitation the Legislature eliminated in 1977 while retaining the requirement that an employee give notice of an injury "as soon as practicable."

During testimony before the committee considering L.B. 144, Judge Ben Novicoff explained the requirement that notice be given "as soon as practicable":

> Now, for example, if somebody is injured out in Denver, Colorado and he goes into the hospital, obviously it may be difficult for him to give notice right away. So that is why it says as soon as practicable. As soon as he is able to, he is obligated to give that notice. . . .
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> . . . .
>
> . . . It means that the employee who made [a] claim to be injured can't come in three years later and say "oh yeah, I had an accident three years ago, I forgot to tell you about it.["] He would be out. Or if he says that [after] any [period of] time which is not [prior to] a practicable time . . . and that could be a much shorter period. If the employer doesn't know about it. The whole intent is that the employer knows that that employee was injured so that [the employer] then can save his records, can do his investigation, he needs to do, the [employer's insurance] carrier can do it . . . in order to be able to properly handle the claim. That's the whole purpose of the notice. . . .
>
> . . . .

> [B]ut as long as we have the safeguard that notice must be given right away, then I think you eliminate a lot of problems that you're talking about and that is not being changed in the bill. I think that is the important thing.

Business and Labor Committee Hearing, L.B. 144, 85th Leg., 1st Sess. (Jan. 26, 1977).

[4,5] The Nebraska Supreme Court stated in *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 65, 541 N.W.2d 49, 53 (1995), that "[§] 48-133 [(Reissue 1993)] contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further." The *Scott* court also stated that a lack of prejudice is not an exception to the requirement of notice under § 48-133. The purposes of the notice requirement are "[f]irst, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2003).

We were unable to find any cases in Nebraska where compensation was denied based upon a notice's not being given "as soon as practicable," but the courts of other states have denied compensation upon that ground. In *Maryland Casualty Co. v. Industrial Com.*, 33 Ariz. 490, 266 P. 11 (1928), the accident occurred on December 18, 1925, but was not reported until March 1926. The Arizona Supreme Court stated, "We are satisfied that a delay of three months is not 'forthwith.' The law provides that, if the report of the accident is not made 'forthwith,' no compensation is to be paid for the injury." *Id.* at 493, 266 P. at 12. The Kentucky Court of Appeals, in *Buckles v. Kroger Grocery & Baking Co.*, 280 Ky. 644, 134 S.W.2d 221 (1939), reasoned that it was apparent to the appellant that he suffered a compensable injury at the time of the accident on November 4, 1937, and certainly by November 10, when a doctor told him that he had a hernia. On November 10, the appellant was still working for the same employer and had had every opportunity to provide notice of the injury but failed to do so for 54 days. The court concluded

that notice had not been provided as soon as practicable after the employee knew of the injury. The court stated:

> [I]t is our view that that part of the statute requiring notice of an injury to be given as soon as practicable is as mandatory in its nature as it is in requiring notice at all, and if there is delay in giving notice, the burden is upon the injured person to show that it was not practicable to give notice sooner. While the rule of liberal construction will be applied to the workmen's compensation statutes, yet, liberal construction does not mean total disregard for the statute, or repeal of it under the guise of construction. And furthermore, it must not be forgotten that the very nature of appellant's injury was such that [the injury] needed immediate attention. Hernia is a progressive injury and will increase with time. Whether or not appellant's hernia was an old one or a fresh one sustained at the time he claims was indeed of much importance to appellee, since, if it was of the former class, appellee would not have been liable. And, if appellant had received immediate treatment, his disability, in all reasonable probability, might have been lessened if not entirely cured. Appellee was entitled to the benefit of an early opportunity to ascertain whether appellant sustained the hernia at the time claimed by him or whether it existed previous[ly] thereto, and also an opportunity to have him treated in an effort to cure, or, at the least, minimize the extent of his disability.

Buckles, 280 Ky. at 647-48, 134 S.W.2d at 223.

In *Kaufman-Straus Co. v. Bennett*, 275 Ky. 264, 121 S.W.2d 1 (1938), the same court stated that in order for an injured employee to be entitled to compensation, the employee must give the employer notice of any injuries received in an accident, and not merely notice of the accident, as soon as practicable. In that case, on February 10, 1936, the employee was on a ladder when it slipped and struck a workbench. His back began to hurt soon afterward, but the employee worked the rest of the day and continued working without loss of time until May 19, when he quit due to a misunderstanding with the boss. He had sought treatment from a chiropractor shortly after the accident, and he consulted a physician on April 4, since the trouble with his back had not

improved. The employee saw a couple of doctors on May 8 and told each about the ladder's slipping. However, the employee did not report the injury to his employer until July 1, and the court held that such notice was not given as soon as practicable. The court reasoned that the employee's back began to hurt a short time after the accident, that he was treated by three different doctors, and that he knew as much after his May 8 doctor visit as he did on July 1, when he finally made a complaint to the employer, seeking compensation.

In *Whittle v. General Mills*, 252 S.W.2d 55 (Ky. 1952), the employee injured his back in February 1949, made no report of the accident at the time it occurred, and continued doing the same type of work for the next 3 weeks without complaint to his employer. He was examined by a doctor on February 26 and advised that he was suffering from a herniated disk. Approximately 2 months later, the employee complained of pain in his back and was assigned to lighter duties. Some 5 months after the accident, the employee first notified the employer of the injury. The employee claimed that he was a man of modest education and was unaware of the technicalities of making a claim or giving notice under the workers' compensation act. Nonetheless, the Kentucky Court of Appeals concluded that notice was not given as soon as practicable after the injury.

In *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), the employee was injured on December 2, 1960, and experienced a feeling of sprain in his back. He did not work the next few days, then saw a physician, who hospitalized him until December 28. The employee's notice of injury and claim for compensation was dated February 25, 1961. The court found that notice was given 85 days after the accident and that there was no evidence showing any reason for the delay or why it was impracticable to give notice with 60 days of the accident.

In the case at hand, Williamson testified inconsistently regarding whether he reported an injury on the date of the accident. The trial judge's decision noted that Williamson was adamant at the hearing that he reported his injury to Werner's safety department supervisor. Williamson testified in his deposition, however, that he did not know he was injured until the first part of January and that he did not report the pain to Werner

because he thought it would go away. However, records show that Williamson sought chiropractic treatment on December 26, 2000, in response to the December 23 incident, and he stated in his deposition that he saw a chiropractor in January and March 2001. Williamson testified at trial that ever since the accident, he experienced level-nine pain on a continuous basis. Further, he testified in his deposition that he did not talk to anyone at Werner about his back pain until May 2001. Williamson did not submit any chiropractic bills to Werner for payment or request leave from work to see a doctor. The trial judge found that Williamson did not report any injury to Werner on or about December 23, 2000, and that the first notice of injury supported by credible evidence was in May 2001.

[6] Resolving the conflicting testimony, the trial court determined that Williamson's report of load shifting omitted any mention of injury. The mere report of load shifting, without any mention of injury, failed to put Werner on notice of the injury at the time of the accident. Section 48-133 (Reissue 1998) requires notice of the *injury*, not merely notice of the accident. The record provides sufficient support for the trial judge's factual finding that Williamson failed to report the injury before May 2001. We cannot conclude that such finding was clearly wrong.

The next question is, given the factual determinations that the accident occurred on December 23, 2000, and that the injury was reported in May 2001, whether the notice of injury was given "as soon as practicable." The Nebraska Supreme Court has not determined whether such question constitutes a question of law or fact. We note that upon consideration of a similar issue, the Supreme Court of Wyoming stated, "The finder of fact is charged with determining the time and cause of a compensable injury; however, whether an employee's claim is to be barred for failure to timely file notice or a claim is a mixed question of fact and law." *Rice v. Workers' Safety and Comp. Div.*, 19 P.3d 508, 513 (Wyo. 2001). In *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995), the Nebraska Supreme Court determined that where the facts concerning reporting were not disputed, whether such facts constituted notice to the employer pursuant to § 48-133 (Reissue 1993) was a question of law. There, however, the question was whether the undisputed facts

constituted notice. Here, the question is whether the trial court's findings upon disputed facts fulfill the statutory requirement. If the question constitutes an issue of fact, we must accept the trial court's determination unless we determine that it is clearly wrong. However, if the question presents an issue of law, we must make an independent determination.

The Nebraska Supreme Court considered an analogous question in *Cobbey v. Buchanan*, 48 Neb. 391, 67 N.W. 176 (1896), where the court determined that the meaning of the term "necessaries" cannot be fixed by a general rule applicable to all cases and that the question of the term's meaning is a mixed one of law and fact to be determined in each case from the particular facts and circumstances of the case. Here, the trial court reached its determination after weighing credibility and determining which version of the facts to accept. Just as the meaning of "necessaries" depends upon the particular facts and circumstances, so does the meaning of "as soon as practicable." The trial court's determination of practicability upon disputed facts was not clearly wrong.

If we view the disputed facts in the light most favorable to Werner, the appellee, the question whether notice was given "as soon as practicable" becomes a question of law upon which we must make a determination independent of that of the trial court. When so viewed, we independently determine, the facts show that Williamson failed to report the injury as soon as practicable. In so determining, we recall that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). In light of this beneficent purpose, we must give the act a liberal construction. See *id.*

"Practicable" generally means capable of being done, effected, or put into practice with the available means, i.e., feasible. Webster's Encyclopedic Unabridged Dictionary of the English Language 1127 (1989). It has also been described as meaning possible or feasible, able to be done, or capable of being put into practice. *Id.* During the floor debate on L.B. 144, Senator Ralph Kelly inquired whether the bill defined the word "practical," and Senator Bill Brennan answered, "No, Senator, but I don't think it would be necessary because that wording has been in the law

since workman's comp[ensation] was instigated." Floor Debate, L.B. 144, Committee on Business and Labor, 85th Leg., 1st Sess. (Feb. 15, 1977). A motion to bracket the bill until "practical" was defined failed. Senator Brennan later stated, "As soon as practical means just what it says. A person can't report an accident until he has knowledge of the seriousness of the accident." *Id.* In another context, the Nebraska Supreme Court considered the meaning of "practicable." It determined that the presence of a number of proposed plans for legislative district redistricting leaving Madison County as a single district made following that county's boundaries "'practicable.'" *Day v. Nelson*, 240 Neb. 997, 1001, 485 N.W.2d 583, 586 (1992).

Viewed in the light most favorable to Werner, the facts show that Williamson experienced an unusual event. He promptly perceived substantial pain that he connected with the event. Within days, he sought chiropractic treatment. The chiropractic record shows that Williamson attributed the pain to the event. Even if we assume that a liberal construction requires allowance of some time between that perception and the first instance of reporting, the period from December to May exceeds the outer limit of any reasonable delay. Williamson presented no evidence showing that it was not "practicable" to give notice to Werner soon after he sought chiropractic treatment for severe pain that he attributed to the incident. We conclude that it was practicable to report the injury within a reasonable time after Williamson sought chiropractic treatment for the perceived pain which he related to the load-shifting incident and that Williamson failed to do so. The trial court correctly determined that Williamson failed to give notice as soon as practicable.

CONCLUSION

The findings of fact by the trial court support the court's conclusion that Williamson did not give the notice required by § 48-133 (Reissue 1998) "as soon as practicable," and the review panel's affirmance of the trial court's judgment must be affirmed.

AFFIRMED.

CARLSON, Judge, dissenting.

I respectfully dissent from the majority's determination that the trial court was correct in its conclusion that Williamson

should be denied benefits in that he did not give notice as required by § 48-133. A review of the entire record dictates a conclusion that Williamson gave Werner notice "as soon as practicable."

In its order denying Williamson benefits, the trial court made a finding that Williamson's "back injuries and complaints [were] causally linked to the December 23, 2000, accident." The court also found that "the first notice of injury supported by any credible evidence occurred in May 2001." It is clear from the record, and I do not disagree with the majority's finding, that Williamson gave Werner actual notice of his injury in May 2001, approximately 4-plus months after the December 23, 2000, accident and injury.

The relevant statute in this case, § 48-133, requires, "No proceedings for compensation for an injury under the Nebraska Workers' Compensation Act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof." I note that prior to its present language, § 48-133 included a provision that required not only a reporting "as soon as practicable" but also that "the claim for compensation with respect to such injury shall have been made within six months after the occurrence." § 48-133 (1943). In 1977, this 6-month provision was removed, leaving the statement first included in 1917 that "all disputed claims for compensation or benefits shall be first submitted" to the Nebraska Workers' Compensation Court. See § 48-133 (Reissue 1978).

As the majority notes, the law was changed after the Nebraska Supreme Court's decision in *Raymond v. Buckridge, Inc.*, 195 Neb. 212, 237 N.W.2d 412 (1976). Therein, the Supreme Court found that the employee's claim for benefits was barred given that although he had given his employer proper notice, he had neither filed a claim within 6 months of his accident nor filed a petition for benefits within 1 year of the accident. The Legislature then changed § 48-133 by adopting L.B. 144, deleting the requirement that employees file a claim within 6 months and extending the time in which employees have to file a petition from 1 year to 2 years. These changes give us an insight into the ongoing liberal interpretation of all aspects of the workers' compensation law.

More recently, in *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003), the Nebraska Supreme Court stated:

> We have recognized that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. . . . In light of this beneficent purpose of the act, we have consistently given the act a liberal construction to "'"carry out justly the spirit of the Nebraska Workers' Compensation Act."'"

In the instant case, Williamson testified that he did not tell Werner about his injury immediately after the accident because he thought that his pain would go away. Williamson also testified that he continued to work for Werner for several months after the accident, but in May 2001, the pain in his back and additional radiating leg pain got to the point where his grandmother talked him into going to the doctor.

Specifically, Williamson testified as follows in response to his attorney's questions:

> Q [W]here was your pain located?
>
> A Center of my back.
>
> Q Anywhere else?
>
> A No.
>
> Q Would it occasionally shoot down your legs?
>
> A Well, when I get back spasms at night and [pains] shoot down my legs, radiate down my legs, and any way —
>
> Q What kind of pain is it in your back? Is it ach[ing], sore, or is it stabbing, sharp?
>
> A It's a sharp pain.
>
> Q Now, in between December of 2000 and May of 2001, were some days better than others?
>
> A Yes.
>
> Q Was the pain always there?
>
> A Yes.
>
> Q Did you feel that it was gradually getting worse?
>
> A Yes.

After Williamson's visit to the doctor in May 2001, when physical therapy but not surgery was recommended, tests in July revealed that Williamson had a "[b]road-based disk bulge at

T11-12" and that this large central disk herniation required surgery. As noted above, Williamson had given Werner notice of his accident and injury in May.

In Nebraska workers' compensation cases where the substantial character of the injury was known at the time of the worker's accident, the Nebraska Supreme Court has uniformly upheld the literal terms of the limitations contained in § 48-133. *Surratt v. Otoe Food Products Co.*, 146 Neb. 854, 21 N.W.2d 862 (1946), citing *Lind v. Nebraska National Guard*, 144 Neb. 122, 12 N.W.2d 652 (1944); *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N.W. 425 (1936); *Dunlap v. City of Omaha*, 131 Neb. 632, 269 N.W. 422 (1936); *Park v. School District*, 127 Neb. 767, 257 N.W. 219 (1934); *Welton v. Swift & Co.*, 125 Neb. 455, 250 N.W. 661 (1933); and *Kurtz v. Sunderland Bros. Co.*, 124 Neb. 776, 248 N.W. 84 (1933).

However, the Supreme Court has also held that where it was found that the true character of the injuries was not known at the time of the accident and that the injuries were progressive, the limitations set out in § 48-133 did not literally apply. *Surratt, supra*, citing *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N.W. 734 (1933); *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N.W. 925 (1932); *Astuto v. V. Ray Gould Co.*, 123 Neb. 138, 242 N.W. 375 (1932); *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929); *City of Hastings v. Saunders*, 114 Neb. 475, 208 N.W. 122 (1926); *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N.W. 615 (1924); and *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N.W. 316 (1923).

Additionally, we note that when asked about the term "as soon as practical [sic]," Senator Brennan, proposer of L.B. 144, stated, "As soon as practical [sic] means just what it says. A person can't report an accident until he has knowledge of the seriousness of the accident." Floor Debate, L.B. 144, 85th Leg., 1st Sess. (Jan. 10, 1977).

Under the above law, it is difficult to deny Williamson benefits that were admittedly caused by a work-related accident but were not reported until Williamson's pain became such that he could not work and doctors specifically diagnosed Williamson with a thoracic disk herniation requiring surgery. On this record,

the evidence shows that Williamson was not aware of the true character or the seriousness of his injuries until May or even July 2001. I believe that awarding Williamson benefits would comport with the true spirit of the Nebraska Workers' Compensation Act.

Therefore, I would reverse the affirmance of the review panel, directing it to reverse the trial court's order of dismissal and remand the cause with directions to the court to determine the benefits Williamson is entitled to under the law.

STATE OF NEBRASKA, APPELLEE, V.
JOHN W. McARTHUR, APPELLANT.
685 N.W.2d 733

Filed July 20, 2004. No. A-03-505.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Jurisdiction: Parties.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
3. **Jurisdiction: Waiver.** Subject matter jurisdiction may not be waived.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
6. **Motions to Suppress: Property: Legislature: Intent: Appeal and Error.** The Legislature's omission of Neb. Rev. Stat. §§ 29-824 to 29-826 (Cum. Supp. 2002) from Neb. Rev. Stat. § 25-2728(2) (Cum. Supp. 2002) indicates an intent that Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2002) apply to §§ 29-824 to 29-826.
7. **Fees: Legislature: Intent: Appeal and Error.** Neb. Rev. Stat. § 33-106 (Reissue 1998) is indicative of a legislative intent that the State pay a docket fee when appealing pursuant to statute, unless otherwise prohibited by law.
8. **Fees: Motions to Suppress: Property: Appeal and Error.** Nothing within Neb. Rev. Stat. §§ 29-824 to 29-826 (Cum. Supp. 2002) prohibits the State from paying a docket fee when appealing an order of the county court.
9. **Motions to Suppress: Property: Appeal and Error.** The requirements contained in Neb. Rev. Stat. §§ 29-824 to 29-826 (Cum. Supp. 2002) are in addition to the requirements contained in Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2002).

10. **Criminal Law: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
11. **Criminal Law: Statutes: Appeal and Error.** To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal.
12. **Motions to Suppress: Property: Jurisdiction: Appeal and Error.** Where the State is appealing an order of a county court granting a motion for the return of seized property or to suppress evidence pursuant to Neb. Rev. Stat. §§ 29-824 to 29-826 (Cum. Supp. 2002), the State must comply with the standard procedures for appeal as provided in Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2002), as well as with the requirements specified within §§ 29-824 to 29-826. Failure to do so deprives the district court of subject matter jurisdiction to review the order.
13. **Motions to Suppress: Property: Jurisdiction: Time: Appeal and Error.** Failure to timely file an appeal under Neb. Rev. Stat. § 29-826 (Cum. Supp. 2002) deprives a district court of jurisdiction to hear the State's appeal.

Appeal from the District Court for Otoe County, DANIEL BRYAN, JR., Judge, on appeal thereto from the County Court for Otoe County, JOHN F. STEINHEIDER, Judge. Judgment of District Court reversed and remanded with directions.

Michael Ziskey, Deputy Otoe County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

John W. McArthur appeals a conviction by the county court for Otoe County, Nebraska, for operating a vehicle while under the influence of alcohol. The county court originally granted a motion made by McArthur to suppress evidence, which grant the district court for Otoe County subsequently reversed. McArthur argues that the district court did not have subject matter jurisdiction to reverse the county court's order to suppress evidence, because the State failed to file a docket fee with its appeal pursuant to Neb. Rev. Stat. §§ 29-824 to 29-826 (Cum. Supp. 2002). We agree.

II. BACKGROUND

On April 24, 2002, a complaint was filed against McArthur, charging him with operating a vehicle while under the influence

of alcohol and with possession of alcohol in an opened container. McArthur pled not guilty and, on July 2, filed a motion to suppress evidence. McArthur alleged that the stop of his vehicle, and the subsequent arrest, search, and questioning, violated his constitutional rights.

After a hearing, the county court granted McArthur's motion to suppress evidence, ordering that there had been no probable cause for McArthur to be stopped. The court ordered that all evidence obtained as a result of the stop of McArthur's vehicle be suppressed. The court's order was entered on July 26, 2002.

On August 7, 2002, the State appealed the county court's ruling to the district court pursuant to §§ 29-824 to 29-826, which permit the State to appeal from an order granting a motion for the return of seized property or to suppress evidence and which provide the procedures for doing so. The record contains no evidence indicating that the State filed a docket fee at that time, which filing Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2002) requires. Section 25-2729 governs appeals generally from the county court to the district court. On October 1, the district court reversed the county court's order to suppress evidence. The case was then remanded for trial, and McArthur was convicted of one count of operating a vehicle while under the influence of alcohol.

On February 5, 2003, McArthur appealed his conviction to the district court. McArthur filed a "Statement of Errors" with the district court, alleging that the district court had lacked subject matter jurisdiction to reverse the county court's order to suppress evidence. Specifically, McArthur argued that the district court had lacked subject matter jurisdiction because the State had failed to pay the docket fee as required by § 25-2729.

The district court affirmed McArthur's conviction. In its order, the district court acknowledged that the State had not filed a docket fee with the clerk of the county court. The court found, however, that §§ 29-824 to 29-826, the statutory authority for the State to appeal from orders granting motions to suppress, provide only that the State must file a notice of appeal, and that because §§ 29-824 to 29-826 do not indicate that the State must file a docket fee, no such fee is required. The court relied on the Nebraska Supreme Court's opinion in *State v. Bailey*, 225 Neb. 66, 69, 402 N.W.2d 319, 321 (1987), in which the Supreme Court

stated, "The only requirement to vest jurisdiction in this court on a § 29-824 appeal is to file in the district court the notice required by § 29-826 within the time fixed by that court, but not to exceed 10 days from the entry of the order of suppression."

In the case at bar, the district court acknowledged that Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2002), which expressly designates certain statutory sections to which § 25-2729 does not apply, does not expressly exclude §§ 29-824 to 29-826 from the requirements contained within § 25-2729. However, the court stated that § 25-2728 also does not expressly exclude Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995) from the requirements of § 25-2729 and that to exclude such sections was "contrary to legislative intent." We are unable to determine the court's reasoning for this statement. The court stated that *Bailey* was dispositive and that it required the court to conclude that § 25-2729 did not apply to §§ 29-824 to 29-826 because *Bailey* contains the "only clear pronouncement on this issue by [the Nebraska] Supreme Court [and] to ignore it would be unreasonable." The court also stated, "The prevailing party should have the benefit of any clear pronouncements by [the Nebraska] Supreme Court, until that court revisits [the issue] and finds it did not mean what it said or say what it meant."

The district court then affirmed McArthur's conviction, and McArthur now appeals to this court.

III. ASSIGNMENT OF ERROR

McArthur's only assignment of error is that the district court erred in finding that it had subject matter jurisdiction to hear the State's appeal from the county court's order granting McArthur's motion to suppress evidence at trial.

IV. ANALYSIS

1. Standard of Review

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003) (citing *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002)).

2. Filing of Docket Fee

[2,3] We first note that McArthur did not raise the issue of whether the district court lacked subject matter jurisdiction to hear the State's appeal when the State first appealed to the district court. However, parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Cummins Mgmt., supra* (citing *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000)). Subject matter jurisdiction may not be waived. *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986). Thus, we consider whether the district court lacked subject matter jurisdiction to hear the State's appeal from the county court's order granting McArthur's motion to suppress evidence.

[4,5] Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Creighton St. Joseph Hosp., supra* (citing *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995)). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt., supra* (citing *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002)).

In the case at bar, the county court granted McArthur's motion to suppress evidence. The State appealed this ruling pursuant to §§ 29-824 to 29-826. Section 29-824 provides:

> (1) In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion . . . to suppress evidence in the manner provided in sections 29-824 to 29-826.
>
> . . . .
>
> (3) If such motion has been granted in the county court, the . . . county attorney . . . may file his or her application with the clerk of the district court in the district in which

> the motion has been granted asking for a summary review of the order granting the motion.

Section 29-825 provides in part:

> The application for review provided in section 29-824 shall be accompanied by a copy of the order of the trial court granting the motion to suppress and a bill of exceptions containing all of the evidence, including affidavits, considered by the trial court in its ruling on the motion, and so certified by the trial court.

Section 29-826 provides:

> In making an order granting a motion to suppress . . . the trial court shall in such order fix a time, not exceeding ten days, in which the county attorney . . . may file a notice with the clerk of such court of his or her intention to seek a review of the order.

The State filed its "Notice of Appeal in Order to Seek Review of Order to Suppress Evidence" on August 7, 2002. The notice stated that the State intended to appeal pursuant to §§ 29-824 to 29-826 and requested the court "to fix a time in which the Application for Review shall be filed with the District Court of Otoe County, Nebraska." The State did not file a docket fee.

Section 25-2729 states in relevant part:

> (1) In order to perfect an appeal from the county court, the appealing party shall within thirty days after the entry of the judgment or 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 in the amount of the filing fee in district court.

Section 25-2728(2) expressly states that Neb. Rev. Stat. §§ 25-2728 to 25-2738 (Reissue 1995 & Cum. Supp. 2002) "shall not apply to" and then lists several statutes, among which §§ 29-824 to 29-826 are not included. McArthur argues that because § 25-2728(2) does not exclude application of § 25-2729 to §§ 29-824 to 29-826, § 25-2729 must necessarily apply to §§ 29-824 to 29-826. We agree.

On the State's appeal to the district court of the county court's ruling on the motion to suppress, the district court held otherwise for two reasons. First, the court noted that § 25-2728(2)

also does not expressly exclude §§ 29-2317 to 29-2319, which sections permit a prosecuting attorney to "take exception to any ruling or decision of the county court made during the prosecution of a cause," § 29-2317. The court stated that to require a prosecuting attorney to pay docket fees in reviews pursuant to §§ 29-2317 to 29-2319 would be "contrary to legislative intent." As we indicated above, we are perplexed by this reasoning.

We find no basis for the court's conclusion that requiring a prosecuting attorney to pay a docket fee when seeking a review pursuant to §§ 29-2317 to 29-2319 is contrary to legislative intent. Sections 29-2317 to 29-2319 contain no language specifically addressing whether a prosecuting attorney need not pay a docket fee. Furthermore, we find the Legislature's recognition in § 25-2728(1) of a prosecuting attorney's right to obtain review by exception proceedings pursuant to §§ 29-2317 to 29-2319, and then its omission of those sections from § 25-2728(2), indicative of an intent that the docket fee requirement contained in § 25-2729 *does* apply to §§ 29-2317 to 29-2319.

In addition, a review of the sections that § 25-2728(2) states are excluded from the application of §§ 25-2728 to 25-2738 reveals that their exclusion does not mean that a docket fee need not be filed. In fact, subsections (b) to (f) of § 25-2728(2) all involve statutes which provide for appeal from a county court *to the Court of Appeals in the same manner as an appeal from a district court to the Court of Appeals*. Subsection (a) of § 25-2728(2) refers to statutes for eminent domain proceedings. Those statutes specifically provide that a party may appeal by filing a notice of appeal in the county court within 30 days and that

> [w]ithin thirty days after the filing of such notice of appeal, the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings had concerning the parcel or parcels of land as to which the particular condemnee takes the appeal *upon payment of the fees provided by law for preparation thereof.*

(Emphasis supplied.) Neb. Rev. Stat. § 76-717 (Reissue 2003). See, also, Neb. Rev. Stat. § 76-715 (Reissue 2003).

[6] It is clear to this court that § 25-2728(2) states that §§ 25-2728 to 25-2738, the procedural rules for appeals from county court to district court, do not apply to the sections specified

in § 25-2728(2) because other procedural rules—either those for appeals from district court or others provided for in the specified sections—apply. We note that the procedural rules for appeals from district court *do* require the filing of a docket fee. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002). Accordingly, we find that the Legislature's omission of §§ 29-824 to 29-826 from § 25-2728(2) indicates an intent that § 25-2729 apply to §§ 29-824 to 29-826.

[7,8] We also point out that Neb. Rev. Stat. § 33-106 (Reissue 1998) provides in relevant part:

> In addition to the judges['] retirement fund fee and the fee provided in [Neb. Rev. Stat. §] 33-106.03 [(Reissue 1998)] and *except as otherwise provided by law,* the fees of the clerk of the district court shall be as follows: There shall be a docket fee of forty dollars for each civil and criminal case except (1) a case commenced by filing a transcript of judgment as hereinafter provided, (2) proceedings under the Nebraska Workers' Compensation Act and the Employment Security Law, when provision is made for the fees that may be charged, and (3) a criminal case appealed to the district court from any court inferior thereto as hereinafter provided. There shall be a docket fee of twenty-five dollars for each case commenced by filing a transcript of judgment from another court in this state for the purpose of obtaining a lien. *There shall be a docket fee of twenty-five dollars for each criminal case appealed to the district court from any court inferior thereto.*

(Emphasis supplied.) We find that this statute is also indicative of a legislative intent that the State pay a docket fee when appealing pursuant to statute, unless otherwise prohibited by law. Further, we find nothing within §§ 29-824 to 29-826 which would prohibit the State from paying a docket fee when appealing an order of the county court.

The second reason the district court held that § 25-2729 does not apply to appeals pursuant to §§ 29-824 to 29-826 was on the basis of *State v. Bailey*, 225 Neb. 66, 402 N.W.2d 319 (1987). Quoting *Bailey*, the district court stated that the Nebraska Supreme Court's only pronouncement on the issue is, " 'The only requirement to vest jurisdiction in [the Supreme Court] on a

[§] 29-824 appeal is to file in the district court the notice required by [§] 29-826 within the time fixed by that court, but not to exceed 10 days from the entry of the order of suppression.' " In the case at bar, the district court concluded that the Supreme Court's statement in *Bailey* was dispositive on whether the State must pay a docket fee when appealing under §§ 29-824 to 29-826, until the Supreme Court "revisits [the issue] and finds it did not mean what it said or say what it meant."

We find that the district court's interpretation of *Bailey* was incorrect. First, the issue in *Bailey* was whether the State's notice was sufficient and was filed within the proper time. In fact, in *Bailey*, the State had filed a $50 docket fee when it filed its notice of appeal.

[9] Furthermore, the Supreme Court in *Bailey* did not state that the application of procedures contained within §§ 29-824 to 29-826 superseded the application of procedures contained within § 25-1912, which is the equivalent of § 25-2729 for an appeal from district court. We find that the requirements contained in §§ 29-824 to 29-826 are in addition to the requirements contained in § 25-2729. This is logical because of the purpose of these different sections.

[10] Section 29-824 provides the *right* of a prosecuting attorney to appeal certain orders. In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002) (citing *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000)). Section 25-2729, on the other hand, is purely procedural in nature and applies generally to appeals from county court.

[11] To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal. *Jones, supra* (citing *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991)). Sections 29-824 to 29-826 provide certain terms that a prosecuting attorney must comply with when appealing under those sections, such as with which court to file the application for review, by what time the application for review must be filed, and what items of the record must be attached to the application for review.

We can find no case law stating that when the State is taking an appeal in accordance with statute and is constrained by the terms of that statute, the State is *not* constrained by other statutes generally governing appeal procedures. In addition, nothing in §§ 29-824 to 29-826 suggests that those sections completely supersede the requirements contained in § 25-2729. The only requirement within § 25-2729 that is necessarily superseded by §§ 29-824 to 29-826 is the time limit within which the State must file its application for review. Section 29-826 places a *more stringent* time limit on the State, thus superseding the time limit specified in § 25-2729.

Sections 29-824 to 29-826 are silent, however, with regard to paying a docket fee. We find that this silence simply means that there is not a more stringent requirement placed upon the State than the standard requirement for appeals. Further, we can find no reason why the State would have a more stringent requirement with regard to time in which to file an appeal, but a less stringent requirement with regard to paying a docket fee, particularly when §§ 29-824 to 29-826 are silent on this matter. Furthermore, as stated above, § 25-2728(2) does not expressly exclude §§ 29-824 to 29-826 from the requirements contained within § 25-2729.

[12] Accordingly, we hold that where the State is appealing an order of a county court granting a motion for the return of seized property or to suppress evidence pursuant to §§ 29-824 to 29-826, the State must comply with the standard procedures for appeal as provided in § 25-2729, as well as with the requirements specified within §§ 29-824 to 29-826. Failure to do so deprives the district court of subject matter jurisdiction to review the order. In the case at bar, the State failed to pay its docket fee as required by § 25-2729 and thus failed to perfect its appeal. Consequently, the district court was without jurisdiction to reverse the county court's order suppressing evidence.

3. Timely Notice of Appeal

Even if the State had paid its docket fee in this case, there is yet another reason why the State's appeal must be dismissed. As stated above, § 29-826 provides in relevant part:

> In making an order granting a motion to suppress . . . the trial court shall in such order fix a time, *not exceeding ten*

> *days,* in which the county attorney . . . may file a notice with the clerk of such court of his or her intention to seek a review of the order.

(Emphasis supplied.)

[13] In the case at bar, the record does not reflect that the county court fixed a time in which the State could appeal. Accordingly, pursuant to § 29-826, the State was required to file notice of its intention to seek review of the order within 10 days. The court's order was entered Friday, July 26, 2002, making the filing deadline under § 29-826 Monday, August 5. The State, however, did not file its "Notice of Appeal in Order to Seek Review of Order to Suppress Evidence" until Wednesday, August 7. Therefore, the State failed to timely file its appeal under § 29-826, and because failure to timely file an appeal under that statute deprives a district court of jurisdiction to hear the State's appeal, the district court did not have jurisdiction to hear the appeal at issue. See *State v. Bailey*, 225 Neb. 66, 402 N.W.2d 319 (1987).

V. CONCLUSION

For the reasons stated above, we find that the district court did not have subject matter jurisdiction over the State's appeal of the county court's order granting McArthur's motion to suppress evidence. Accordingly, we reverse the holding of the district court that reversed the county court's order to suppress evidence. We remand the case with directions to reinstate the original order of the county court to suppress evidence and for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JABRECO G., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
JABRECO G., APPELLANT.
683 N.W.2d 386

Filed July 20, 2004. Nos. A-03-950, A-03-1171.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from

determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.

2. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** If there is no detention or seizure within the meaning of the Fourth Amendment to the U.S. Constitution, then the Fourth Amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer.
5. **Search and Seizure.** Without a seizure, reasonable suspicion is not required.
6. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
7. **Constitutional Law: Investigative Stops: Search and Seizure.** The Fourth Amendment to the U.S. Constitution applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.
8. **Criminal Law: Police Officers and Sheriffs: Investigative Stops.** A law enforcement officer may legally conduct an investigatory stop of a person suspected of criminal activity if the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity.
9. **Police Officers and Sheriffs: Investigative Stops.** In determining whether an officer acted reasonably in making an investigatory stop, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
10. **Constitutional Law: Investigative Stops: Search and Seizure.** The same standard used to determine whether an investigatory stop is justified under the Fourth Amendment to the U.S. Constitution is applied in determining the propriety of an investigatory stop under Neb. Const. art. I, § 7, which forbids the unreasonable seizure of persons by state authorities.
11. **Police Officers and Sheriffs.** Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances.
12. **Criminal Law: Investigative Stops: Police Officers and Sheriffs.** Where the police have reasonable suspicion, they may pursue their investigation either to confirm their suspicion or to dispel the suspicion that crime is afoot.
13. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common investigation.

14. **Criminal Law: Investigative Stops.** If a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that a wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information.
15. **Investigative Stops: Police Officers and Sheriffs: Telecommunications.** It is irrelevant whether an officer making a stop in reliance on a radio bulletin is aware of the factual foundation for the bulletin, so long as the factual foundation is sufficient to support a reasonable suspicion.
16. **Investigative Stops: Police Officers and Sheriffs: Search and Seizure: Weapons.** When an officer conducts a valid investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), if the officer is justified in believing that the individual stopped is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search of the individual to determine whether he or she is carrying a weapon.
17. **Search and Seizure: Weapons.** If a pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed.
18. **Investigative Stops: Search and Seizure: Weapons: Controlled Substances.** A search under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), must be carefully limited to a search for weapons, and a search for both weapons and controlled substances is beyond the scope permitted under *Terry*.
19. **Juvenile Courts: Police Officers and Sheriffs.** Neb. Rev. Stat. § 43-248(5) (Reissue 1998) allows a peace officer to take a juvenile into temporary custody without a warrant or order of a court when there are reasonable grounds to believe that the juvenile has run away from his or her parents, guardian, or custodian.
20. **Juvenile Courts: Probation and Parole: Appeal and Error.** A juvenile court exceeds its authority when it enters a dispositional order of probation while an appeal from the juvenile's adjudication is pending.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Juvenile Court Judge, and JOHN A. COLBORN, District Court Judge. Judgment in No. A-03-950 affirmed. Judgment in No. A-03-1171 vacated, and cause remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Margene M. Timm for appellant.

Gary E. Lacey, Lancaster County Attorney, and Daniel D. Packard for appellee.

INBODY, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

This case involves two appeals consolidated for our review, the appeal of an adjudication of Jabreco G. pursuant to Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2002) for possession of marijuana and an appeal from the subsequent dispositional order entered while the adjudication was pending appeal. For the reasons set forth herein, we affirm the order adjudicating Jabreco and vacate the dispositional order.

BACKGROUND

In case No. A-03-950, a supplemental petition was filed in the Lancaster County Separate Juvenile Court on January 3, 2003, alleging that Jabreco, a child under 18 years of age, was a juvenile as defined by § 43-247(1) for the reason that on or about December 9, 2002, Jabreco knowingly or intentionally possessed marijuana weighing 1 ounce or less, in violation of Neb. Rev. Stat. § 28-416(13)(a) (Cum. Supp. 2002). On February 21, 2003, Jabreco filed a motion to suppress evidence alleging that evidence was obtained in violation of Jabreco's constitutional rights, and the hearing on that motion was held on April 28. At the start of the hearing, Jabreco made an oral motion to suppress statements he made to a Lincoln Police Department school resource officer, Jerome Blowers. Both motions to suppress were taken up at the hearing. Two witnesses testified at the hearing: Sandra Myers, a detective sergeant with the Lincoln Police Department, and Blowers.

Myers testified that on December 9, 2002, at approximately 12:43 p.m., she was in the area of 30th and P Streets in Lincoln, looking for an individual named Courtney S. in regard to a shooting and robbery that had happened 2 months earlier. Myers had received information that Courtney had been in that area a few days earlier with an individual known as Jonathan H., who lives in the area. Myers drove her unmarked police car through an alley near Jonathan's residence to see whether Courtney, or anyone else whom Myers knew to be associated with Courtney, was outside. Myers knew who Courtney and Jonathan were from prior contacts with them. As she drove down the alley, she saw four young, black, male individuals getting into a car. She recognized one of

the individuals as Jonathan, but she did not recognize the other three. She notified dispatch that she would be out of her police car, gave dispatch her location, and then exited her police car. As she approached the individuals' car, three of the individuals were in the car and the fourth was just starting to get into the rear passenger side of the car. The rear passenger door was open at the time she approached. Myers stood by the passenger side of the car and asked the individuals for identification. While she did so, the individual who was not yet in the car remained outside the car, standing beside her at the rear passenger door. All four individuals told Myers that they did not have identification on them. When Myers asked the individual standing by the car what his name was, he replied "Jabreco," and he then began running northbound.

Myers notified dispatch that one of the individuals she had contacted had taken off running, gave a description of him, and requested backup at her location. She told dispatch that she was remaining with the three other individuals. Myers testified that there was an odor of marijuana coming from either the car or the individuals and that she smelled marijuana both before and after Jabreco took off running. However, Myers could not recall at trial whether she relayed the information regarding the odor of marijuana at the time she called dispatch upon Jabreco's taking off running or relayed that information at a later time.

Blowers testified that he works as a school resource officer for 10 elementary schools. On December 9, 2002, at approximately 12:43 p.m., he was working in uniform at one of his assigned schools when he heard a police radio broadcast stating that Myers would be contacting three or four black, male individuals in a car at a location which was three or four blocks south of the school he was at. Blowers then heard a second radio broadcast stating that one of the individuals Myers was attempting to contact had run from the car and was heading northbound. Blowers also heard a description of the individual who ran. Blowers went outside the school to see whether there was anyone coming into the area matching the description of that individual. He then saw an individual matching the description given by Myers walking northbound on a sidewalk. Blowers got into his police car and proceeded to drive up next to the individual. Blowers then said something to the individual to get his

attention, but he could not recall at trial what he had said. Blowers next parked his car, at which point the individual stopped walking, and got out and walked up to the individual, who was later identified as Jabreco. Standing about 5 feet away from Jabreco, Blowers noticed that Jabreco was breathing heavily and seemed short of breath and that the carotid artery in Jabreco's neck was pulsating. Blowers introduced himself and asked Jabreco whether he needed medical attention, and Jabreco "mumbled or he said no." Blowers then asked Jabreco whether he was out of breath because he had run from a police officer, to which query Jabreco responded in the affirmative. Blowers did not observe any weapons, drugs, or contraband. Blowers then asked Jabreco to walk over to Blowers' police car. Jabreco complied with Blowers' request, and as they were walking over to the car, Jabreco told Blowers that the reason he ran from the police officer was because "he was wanted out of Omaha." Blowers asked Jabreco why he was wanted out of Omaha, and he replied that he was a runaway or a missing person.

After Jabreco said that he was a runaway or missing person, Blowers told Jabreco that he was going to place him in the back of his police car because he ran from Myers and because he indicated that he was wanted out of Omaha. Blowers then did a pat-down search of Jabreco's exterior coat pockets and jeans pockets. Blowers testified that the purpose of the search was to check for weapons or contraband. However, Blowers testified that he did not see any weapons at any time during the stop and did not have any suspicion of weapons based on his observations of Jabreco.

When Blowers was patting Jabreco's right front coat pocket, he felt "little bulky stuff" that "felt a little hard, and then some of it was a little soft." Blowers reached into the pocket and found a small plastic baggie containing marijuana. Blowers testified that prior to the pat-down search, when he and Jabreco were standing by the police car, he detected a strong marijuana smell coming from Jabreco. Blowers further testified that either prior to or at some point during his contact with Jabreco, Myers transmitted over the radio that there was possibly marijuana in the car that Jabreco had run from. Blowers could not recall when he had received this information.

Following the search, Blowers placed Jabreco in the back of his police car. Blowers then called in over his police radio to check whether Jabreco was wanted in Omaha for being a runaway, and based on the information Blowers received, he concluded that Jabreco was not listed as missing or as being a runaway. Blowers testified that only 5 or 6 minutes elapsed between the time at which he exited his police car and the time at which he put Jabreco in the back of his car.

The juvenile court overruled Jabreco's written motion to suppress evidence and his oral motion to suppress his statements to Blowers. An adjudication hearing was held on July 1, 2003. The parties stipulated that Jabreco's date of birth was March 3, 1987, and that venue was proper in Lancaster County. They further stipulated to the chain of custody of the marijuana seized by Blowers from Jabreco and that the marijuana weighed 1.61 grams. The transcript from the hearing on the motions to suppress was received into evidence without objection from Jabreco, but Jabreco renewed the issues raised in his motions to suppress. The juvenile court found that the allegations contained in the supplemental petition were true beyond a reasonable doubt and adjudicated Jabreco as a juvenile as defined by § 43-247(1). Jabreco filed an appeal on August 8.

In case No. A-03-1171, the juvenile court held a disposition hearing on September 9, 2003. It found that it had jurisdiction to enter a dispositional order even though the adjudication was on appeal. The juvenile court ordered that Jabreco be placed on probation for 1 year, with a 6-month review. Jabreco filed an appeal from the dispositional order on October 6. Jabreco filed a motion to consolidate his two appeals, which motion we granted.

ASSIGNMENTS OF ERROR

Jabreco assigns that the juvenile court erred in (1) overruling his motion to suppress evidence and his motion to suppress statements and (2) determining that it had jurisdiction to enter a dispositional order while the adjudication is on appeal.

STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory

stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *In re Interest of Adrian B.*, 11 Neb. App. 656, 658 N.W.2d 722 (2003).

[3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003); *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

ANALYSIS

Under his first assignment of error, Jabreco argues that his motions to suppress should have been sustained because the marijuana found on him and the statements he made were results of an illegal investigatory stop. Jabreco contends that the stop was unconstitutional because Blowers did not have a reasonable suspicion that Jabreco had committed or was committing a crime.

[4-7] We must first determine whether Jabreco was "seized" for the purpose of the Fourth Amendment to the U.S. Constitution. If there is no detention or seizure within the meaning of the Fourth Amendment, then the Fourth Amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer. *State v. Soukharith, supra*; *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). It is axiomatic that without a seizure, reasonable suspicion is not required. *State v. Soukharith, supra.* A seizure in the Fourth Amendment context occurs " ' "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." ' " *State v. Twohig*, 238 Neb. at 102, 469 N.W.2d at 351, quoting

Michigan v. Chesternut, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988). " 'The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.' " *State v. Hicks*, 241 Neb. 357, 361, 488 N.W.2d 359, 363 (1992), quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

The parties agree that Jabreco was seized by Blowers either when he was stopped by Blowers on the sidewalk or when Blowers asked him to walk over to his police car. Based on the evidence before us, we conclude that Jabreco was seized when Blowers initially stopped Jabreco as he was walking down the sidewalk. Thus, the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment applies to this case and we must determine whether Blowers had reasonable suspicion of criminal activity to stop Jabreco.

[8-12] A law enforcement officer may legally conduct an investigatory stop of a person suspected of criminal activity if the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* held that the public's interest in law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect an individual's right to personal security free from arbitrary interference by law officers, limited investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person has been, is, or is about to be engaged in criminal activity. *Id.* In determining whether the officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *Id.* The same standard is applied in determining the propriety of an investigatory stop under Neb. Const. art. I, § 7, which forbids the unreasonable seizure of persons by state authorities. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997); *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993). Whether a police officer has a reasonable

suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000); *State v. McCleery, supra*. Where the police have reasonable suspicion, they may pursue their investigation either to confirm their suspicion or to dispel the suspicion that crime is afoot. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

Jabreco argues that Blowers did not have reasonable suspicion of criminal activity at the time he stopped Jabreco because the only information Blowers had was that Myers contacted three or four black, male individuals in a car; that one of them took off running northbound; and that Jabreco matched the description of the running individual given by Myers. Jabreco points out that although Blowers testified that he received information from Myers that there was possibly marijuana in the car she approached, he could not recall whether he received that information prior to or at some point after stopping Jabreco.

Jabreco relies on *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), which held that an individual's flight from a police officer, without more, does not give the officer a reasonable suspicion of criminal activity that would justify an investigative stop. The *Hicks* court stated that flight from a police officer can justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal activity. The *Hicks* court found that because the officers who stopped the defendant therein were not able to point to specific facts corroborating the inference of guilt gleaned from the defendant's flight, the investigatory stop was constitutionally infirm.

[13-15] Jabreco contends that similarly to the circumstances in *Hicks*, the only information that Blowers had when he stopped Jabreco that created suspicion of criminal activity was that Jabreco had fled from Myers. While the flight from Myers may have been the only information Blowers had at the time of the stop, we must also consider what information Myers had at the time of the radio broadcast stating that Jabreco had fled. An investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

> "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information."

State v. Soukharith, 253 Neb. at 321-22, 570 N.W.2d at 354, quoting *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). It is irrelevant whether an officer making a stop in reliance on a radio bulletin is aware of the factual foundation for the bulletin, so long as the factual foundation is sufficient to support a reasonable suspicion. *State v. Soukharith, supra.*

Blowers stopped Jabreco based on a radio broadcast from Myers. If Myers' radio broadcast was supported by articulable facts supporting reasonable suspicion, Blowers was justified in stopping Jabreco based on the broadcast, which simply stated that Jabreco had fled from Myers. Myers testified that she smelled marijuana coming from the car she approached or from the four individuals whom she found with that car. She further testified that she noticed the odor both before and after Jabreco fled. We conclude that Jabreco's flight from Myers, coupled with Myers' smelling marijuana, gave Myers reasonable suspicion that Jabreco was involved in criminal activity and distinguishes the present case from *State v. Hicks, supra.* It is irrelevant whether Myers relayed the information regarding the marijuana over the radio before or after Blowers stopped Jabreco. See *State v. Soukharith, supra.* Because Myers had reasonable suspicion that Jabreco was involved in criminal activity, Blowers was justified in relying on the radio broadcast from Myers and, in turn, in stopping Jabreco, asking him questions, and briefly detaining him. Thus, we conclude that the investigatory stop of Jabreco was valid and did not violate Jabreco's constitutional rights.

[16-18] Jabreco next argues that even if the investigatory stop was justified, the search conducted by Blowers was unconstitutional in that it was not a search permitted on a *Terry* stop. When an officer conducts a valid *Terry* stop, if the officer is justified in believing that the individual stopped is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search of the individual to determine whether he or she

is carrying a weapon. See *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997), citing *Terry*. If the pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed. *State v. Craven, supra*, citing *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). A search under *Terry* must be carefully limited to a search for weapons, and a search for both weapons and controlled substances is beyond the scope permitted under *Terry*. *State v. Craven, supra*; *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996).

[19] Jabreco contends that Blowers had no reason to believe that Jabreco was armed or dangerous and that thus, Blowers' pat-down search was not justified under *Terry*. We agree. However, we determine that the search was justified on a different basis. Neb. Rev. Stat. § 43-248(5) (Reissue 1998) allows a peace officer to take a juvenile into temporary custody without a warrant or order of a court when there are reasonable grounds to believe that the juvenile has run away from his or her parents, guardian, or custodian. "No juvenile taken into temporary custody under section 43-248 shall be considered to have been arrested, except for the purpose of determining the validity of such custody under the Constitution of Nebraska or the United States." Neb. Rev. Stat. § 43-249 (Reissue 1998). In *In re Interest of Adrian B.*, 11 Neb. App. 656, 658 N.W.2d 722 (2003), this court addressed whether a search incident to temporary detention under § 43-248 may be performed on juveniles who are "in custody" but have not been arrested. The court reasoned:

> Allowing a search incident to temporary detention of a juvenile after the juvenile is taken into temporary custody protects the juvenile, law enforcement officers, and others with whom the juvenile may come into contact. Further, denying law enforcement officers the authority to conduct searches of juveniles being taken into temporary custody would require officers to take unnecessary risks in the performance of their duties.

In re Interest of Adrian B., 11 Neb. App. at 665, 658 N.W.2d at 729. The court held that when a juvenile is taken into temporary custody pursuant to § 43-248, the peace officer may conduct a search incident to temporary detention. It further held that the

law regarding a warrantless search pursuant to a lawful custodial arrest is equally applicable to searches incident to the lawful temporary detention of juveniles pursuant to § 43-248. Thus, a law enforcement officer may conduct a search of the juvenile taken into temporary custody and of the immediately surrounding area in order to remove any weapons that the juvenile may use to resist custody or effect an escape and in order to prevent the concealment or destruction of evidence.

In the instant case, once Jabreco stated to Blowers that he was a runaway or a missing person, Blowers had reasonable grounds to believe that Jabreco had run away from his parents, guardian, or custodian and Blowers had the authority to take Jabreco into temporary custody pursuant to § 43-248(5). Blowers could then conduct a search of Jabreco in order to remove any weapons and in order to prevent the concealment or destruction of evidence. Thus, based on § 43-248(5) and *In re Interest of Adrian B., supra*, we conclude that the search of Jabreco was constitutionally permissible.

In summary, we conclude that the search and seizure of Jabreco by Blowers did not violate Jabreco's constitutional rights. Therefore, the juvenile court did not err in overruling Jabreco's motions to suppress.

Jabreco next assigns that the juvenile court erred in determining that it had juridiction to enter a dispositional order while an appeal from the adjudication order is pending. The Nebraska Supreme Court recently addressed this very issue in *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004). Therein, a separate juvenile court adjudicated a child to be a juvenile meeting the definition of § 43-247(1) because he had allegedly received stolen property, and that court continued disposition until a report could be prepared by a juvenile probation office. The child appealed the adjudication, and after the notice of appeal was filed, the separate juvenile court conducted what it described as a "'dispositional hearing.'" 267 Neb. at 262, 673 N.W.2d at 556. At the time of the dispositional hearing, the child had been residing at a juvenile detention center for 3 months. It was determined that the appropriate level of care for the child was that of a residential treatment center, and all involved agreed that it was not in the child's best interests to

remain at the juvenile detention center. There was a waiting period for placement at the residential treatment center, and the guardian ad litem opposed returning the child to his parents' home. Thus, the separate juvenile court concluded that the child's best interests required that his temporary custody be transferred to the Department of Health and Human Services, Office of Juvenile Services, for placement in a residential treatment center. On appeal to this court, we concluded that the separate juvenile court had jurisdiction to enter the dispositional order. See *In re Interest of Jedidiah P.*, Nos. A-02-429, A-02-695, 2003 WL 21647681 (Neb. App. July 15, 2003) (not designated for permanent publication). The Nebraska Supreme Court granted further review and affirmed the decision of the Court of Appeals. The Supreme Court held that pursuant to Neb. Rev. Stat. § 43-2,106 (Reissue 1998), county courts sitting as juvenile courts, as well as separate juvenile courts, continue to exercise supervision of a juvenile during an appeal until the appellate court enters an order making other disposition. It also determined that pursuant to Neb. Rev. Stat. § 43-295 (Reissue 1998), a separate juvenile court retains jurisdiction to order a temporary change in custody if it is in the child's best interests. The Supreme Court further held that the exercise of this jurisdiction pursuant to §§ 43-2,106 and 43-295 is not without limits and that the extent of the court's jurisdiction must be determined by the facts of each case. The Supreme Court specifically held:

> [P]ending an appeal from an adjudication, the juvenile court does not have the power to enter a permanent dispositional order. [Citation omitted.] Any order regarding the disposition of a juvenile pending the resolution of an appeal of the adjudication can only be made on a temporary basis upon a finding by the court that such disposition would be in the best interests of the juvenile.

In re Interest of Jedidiah P., 267 Neb. at 264, 673 N.W.2d at 557.

[20] In the present case, the dispositional hearing was held after Jabreco filed his notice of appeal from the adjudication order. At the dispositional hearing, Jabreco challenged the juvenile court's authority to go forward with disposition. The juvenile court stated that it was proceeding with disposition, and it

ordered that Jabreco be placed on probation for 1 year, with a 6-month review. It is clear that the order of probation is not an order of a change in custody pursuant to § 43-295. We further conclude that the dispositional order was not made "on a temporary basis upon a finding by the court that such disposition would be in the best interests of the juvenile," *In re Interest of Jedidiah P.*, 267 Neb. 258, 264, 673 N.W.2d 553, 557 (2004). It is apparent that the juvenile court intended its order of probation to be a permanent dispositional order. In addition, the juvenile court made no finding that the dispositional order was in Jabreco's best interests. Thus, we conclude that the juvenile court exceeded its authority when it entered the dispositional order of probation while an appeal from the adjudication was pending. We therefore vacate the order of disposition.

CONCLUSION

Having determined that Jabreco's motions to suppress were properly overruled, we affirm the decision of the juvenile court in case No. A-03-950 adjudicating Jabreco as a juvenile as defined by § 43-247(1). Having further determined that the juvenile court did not have jurisdiction to enter the dispositional order in case No. A-03-1171, we vacate such order and remand the cause for further proceedings.

JUDGMENT IN NO. A-03-950 AFFIRMED.
JUDGMENT IN NO. A-03-1171 VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

ALAN JOSEPH BOYLE, APPELLANT, V.
MICHELLE MARIE BOYLE, APPELLEE.
684 N.W.2d 49

Filed July 27, 2004. No. A-02-1384.

1. **Divorce: Final Orders: Intent: Appeal and Error.** In the context of interpretation of an unambiguous dissolution decree, neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

2. **Divorce: Intent.** If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree.
3. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
4. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
5. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
7. **Contracts: Intent: Appeal and Error.** When a document is ambiguous, the meaning of the document is a question of fact and the trier of fact determines the intent of the parties from all the facts and circumstances. Such findings will be upheld on appeal unless clearly erroneous.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Christopher A. Vacanti, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

John F. Eker III for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Alan Joseph Boyle appeals from an order of the district court which granted Michelle Marie Boyle's application to modify the parties' dissolution decree and which overruled Alan's cross-application to modify the decree. On appeal, Alan challenges the court's conclusion that a provision of the parties' dissolution decree and parenting plan prohibits him from exercising overnight visitation with the parties' minor child while Alan's girl friend is present in the home. Finding no clear error, we affirm.

II. BACKGROUND

The parties were married on June 3, 1995. One child was born during the marriage, on February 3, 1997. The parties' marriage

was dissolved by a decree entered by the district court on May 14, 2001.

In the dissolution decree, the court awarded Michelle custody of the parties' child. The decree included a parenting plan in which the court awarded visitation rights to Alan, including overnight visitation "each weekend from Saturday at 6:00 p.m. to Sunday at 6:00 p.m." The parenting plan also included a provision that reads as follows:

> When the child is present in their home, Petitioner and Respondent agree to the following:
>
> . . . .
>
> d. Neither parent shall have guests unrelated of the opposite sex stay overnight when the child is present.

The parenting plan, including the above provisions concerning overnight visitation, was entered into by the parties as part of a property settlement agreement approved by the court.

In early October 2001, Alan moved in with his girl friend. On October 17, Michelle filed an application to modify the dissolution decree. Michelle alleged that Alan had moved into his girl friend's home and that the existing visitation schedule was presenting difficulties for Michelle's wishes to involve the parties' minor child in various religious activities which overlapped with Alan's visitation schedule. On March 7, 2002, Alan filed an answer in which he admitted to moving into his girl friend's home in October 2001, but affirmatively alleged that his cohabitation did not violate the terms of the parenting plan. On August 1, 2002, Alan filed a cross-application for modification of the dissolution decree, alleging that the intent of the parenting plan provision was not to prohibit cohabitation in a meaningful relationship.

On November 5, 2002, the district court entered an order modifying the dissolution decree. The vast majority of the parties' disputed issues were resolved by the parties in a stipulation presented to the court at the beginning of the hearing on the applications to modify. Relevant to this appeal, the court specifically ordered that the provision of the decree prohibiting overnight guests of the opposite sex when the minor child is present should continue in effect. In findings made at the end of the hearing, the court indicated it was interpreting the provision

to mean that "the child's not supposed to be present when there's a member of the opposite sex there overnight." This appeal followed.

III. ASSIGNMENTS OF ERROR

Alan has assigned four errors on appeal. All four assignments of error concern Alan's assertion that the lower court erred in interpreting the provision of the decree prohibiting overnight guests of the opposite sex when the minor child is present to include Alan's cohabitation with his girl friend. Alan asserts that the district court erred in so finding and in finding that he failed to demonstrate a material change of circumstances which justified removing the provision from the decree.

IV. ANALYSIS

1. Overnight Guest Provision

Alan's assignments of error on appeal can all be read to challenge the district court's conclusion that the provision of the decree prohibiting overnight guests of the opposite sex when the minor child is present should continue in effect and that the provision should be interpreted to mean that "the child's not supposed to be present when there's a member of the opposite sex there overnight." Alan argues that the provision should not be interpreted to prohibit cohabitation, but, rather, only to prohibit "casual" relationships and "one night stands." We do not agree.

(a) Ambiguity in Decree Language

The record reveals that at the time of the decree, the parties agreed on the language used in the provision, and that the court incorporated the language into the decree by adopting the parenting plan as part of the decree. See Neb. Rev. Stat. §§ 43-2903(3), 43-2915(4), and 43-2917 (Reissue 1998). Neither party perfected an appeal from the dissolution decree, and as a result, the decree became final. The current action was brought as a modification proceeding, during which the parties presented testimony and argument concerning what they thought the disputed language was intended to prohibit.

[1,2] This testimony and argument was appropriate only if the disputed provision of the decree is considered ambiguous. In the

context of interpretation of an unambiguous decree, the Nebraska Supreme Court has held:

> "[T]he fact is that neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant."

Metropolitan Life Ins. Co. v. Beaty, 242 Neb. 169, 173, 493 N.W.2d 627, 630 (1993), quoting *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree. See *Metropolitan Life Ins. Co. v. Beaty, supra*. See, also, *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

[3-6] As such, we conclude that the first issue presented on this appeal is whether the disputed provision of the decree is ambiguous. General principles governing ambiguity of documents are applicable and govern issues concerning ambiguity of court decrees. See, *Metropolitan Life Ins. Co. v. Beaty, supra*; *Neujahr v. Neujahr, supra*; *Bokelman v. Bokelman, supra*. Whether a document is ambiguous is a question of law initially determined by a trial court. *Metropolitan Life Ins. Co. v. Beaty, supra*. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Id.* Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*

In the instant case, the trial court did not make a specific finding of ambiguity. Implicit in the court's "interpretation" of the disputed provision, based on the testimony and argument presented concerning the parties' respective beliefs about what was intended when the provision was originally drafted and included in the parenting plan, however, is a conclusion that the disputed provision is ambiguous. See *Dammann v. Litty*, 234 Neb. 664,

452 N.W.2d 522 (1990) (finding of ambiguity implicit in trial court's decision).

We reach the same conclusion in our review of the matter because we conclude that the term "guests" in the provision at issue is susceptible of at least two reasonable but conflicting interpretations or meanings. The disputed provision says only that "[n]either parent shall have guests unrelated of the opposite sex stay overnight when the child is present." There is no definition of the term "guests" provided anywhere in the parenting plan or the decree, and in the context of the present case, we find that both parties' conflicting interpretations or meanings are reasonable.

First, we do not find it unreasonable to interpret the provision in a narrow fashion that would not prohibit cohabitation, as urged by Alan. It is not entirely unreasonable to read the provision such that the term "guests" does not include an unrelated member of the opposite sex who is in a committed relationship with either party and is sharing a residence with the party; in such a situation, it is not unreasonable to conclude that the unrelated member of the opposite sex is not a guest in their own shared residence, as Alan argues on appeal.

However, we also conclude that it cannot be unreasonable to read the provision in a broader fashion to mean that neither party is to have a member of the opposite sex stay overnight, whether in a cohabitation setting or a more "casual" setting, to use the term suggested by Alan. To say the only reasonable interpretation of the provision is a literal and narrow reading of the term "guest" as that term would be defined in the dictionary would suggest, among other conclusions, that either party could take the child to the residence of any unrelated member of the opposite sex and stay overnight, whether that person was part of a committed relationship or a "casual" one night stand. In that situation, the member of the opposite sex would not literally be a "guest" in his or her own residence, as argued by Alan, and the provision would not prohibit such conduct. Therefore, we find it reasonable to interpret the provision in a broader fashion to prohibit the parent from having any unrelated member of the opposite sex present overnight when the child is present.

We note that the question of whether a prohibition of overnight "guests" also prohibits cohabitation does not appear to have been

directly addressed by the appellate courts of Nebraska. Other jurisdictions, however, have reached conclusions which further suggest that a broader interpretation of the term "guest" is reasonable and appropriate. For example, in *Shipman v. Shipman*, 357 N.C. 471, 477, 586 S.E.2d 250, 255 (2003), there was a consent order entered which "forbade either party from having 'non-familial overnight guests of the opposite sex in the presence of the minor child.' " The record indicated that the father "lived with his girlfriend" during the period of time at issue in the case. *Id.* The record further indicated, however, that the minor child did not spend the night in the father's home with the girl friend present overnight. As such, the court concluded that the father did not violate the provisions of the consent order. The court specifically found that the cohabitation did not violate the consent order, but the only basis for the court's finding in that regard was the fact that the child did not spend the night with the girl friend in the home, not because "cohabitation" could not reasonably be prohibited by the "overnight guests" language of the consent order. *Id.* The court's conclusion suggests that cohabitation could, in fact, be considered a violation of the "guest" provision.

In *Campbell v. Campbell*, 336 Ark. 379, 381, 985 S.W.2d 724, 725 (1999), the dissolution court entered an order awarding custody to the father and granting visitation to the mother. The court's order prohibited both parties "from having guests of the opposite sex overnight when the children were present." The evidence indicated that both parties had violated the terms of the agreement and had, at times, had overnight guests of the opposite sex. In discussing the parties' violations of the court order, the appellate court specifically applied principles of law concerning "non-cohabitation order[s]." *Id.* at 389, 985 S.W.2d at 730. The court's use of such principles suggests that at the very least, agreements which explicitly prohibit only "guests," and do not explicitly prohibit cohabitation, can be read broadly enough to be governed by law dealing with cohabitation.

Although we do not find unreasonable Alan's interpretation that the term "guests" should be construed narrowly to not prohibit cohabitation, we also do not find unreasonable Michelle's interpretation that the term "guests" should be construed more broadly to prohibit more than just literal "guests" in Alan's

home. Because we find that both parties' interpretations, while conflicting, are reasonable, we conclude that the disputed provision is ambiguous.

(b) Interpretation of Decree's Language

[7] Having concluded that the disputed provision of the decree is ambiguous, we must next review the trial court's interpretation of the provision. In other situations, the Nebraska Supreme Court has held that when a document is ambiguous, the meaning of the document is a question of fact and the trier of fact determines the intent of the parties from all the facts and circumstances. See, *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993); *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990). See, also, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). The trier of fact's determination in this regard will be upheld on appeal unless clearly erroneous. See *Hensman v. Parsons, supra.*

There is no authority in Nebraska which would suggest that an appellate court, in circumstances such as this where the appellate court is affirming a trial court's conclusion that an earlier decree is ambiguous, is free to interpret the language of the decree as a question of law independent of the trial court's decision. For example, in *Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986), the Supreme Court dealt with a trial court's attempt to interpret the language of a prior decree and indicated that "[w]hat the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant." In *Neujahr*, however, the Supreme Court clearly implied that the decree at issue was not an ambiguous decree, but, rather, an unambiguous decree. Although the court noted in dictum that in "instances when a decree *is* ambiguous," the court may be called upon to resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears, the Supreme Court did not indicate how an appellate court would subsequently review that resolution. (Emphasis supplied.) *Id.* at 728, 393 N.W.2d at 51.

In light of the Nebraska Supreme Court's clear holdings that when a document is found to be ambiguous, the meaning of the

document is a question of fact and subject to a clearly erroneous standard of review, it seems more appropriate to follow this more explicit guidance rather than the unclear implications of dicta. This seems especially appropriate where, as in the present case, the ambiguous language of the decree was not crafted by the trial court in the first instance, but, rather, was adopted by the trial court as agreed to by the parties in a contractual parenting plan.

Despite Alan's arguments to the contrary concerning the "plain and ordinary meaning" of the term "guests," we do not find clearly erroneous the district court's conclusion that the language be read to prohibit cohabitation as well as "one night stands." As noted above, such an interpretation is entirely reasonable, and the district court's conclusion that the provision should be so interpreted is supported by Michelle's testimony. Further, as also noted above, adopting Alan's argument and accepting a literal dictionary definition of the term "guest" as the only reasonable interpretation would also result in the seemingly unreasonable conclusion that even "casual" relationships or "one night stands" would be permissible while exercising overnight visitation so long as the overnight visitation occurred at the residence of the unrelated member of the opposite sex, where he or she could not be considered a "guest." As such, we do not find clearly erroneous the district court's conclusion that Michelle's interpretation of the provision is the more reasonable one.

(c) Loss of Visitation Time

Alan also argues that the court's interpretation of the provision results in him "losing" the equivalent of "more than 44 days" of visitation during the course of a year. (Emphasis omitted.) Brief for appellant at 22. We disagree. As noted, the language of the provision was agreed to by Alan and was included in the decree with his knowledge and agreement, and no appeal was taken from the decree. Nonetheless, Alan voluntarily chose to move in with his girl friend less than 5 months later. It is Alan's decision to share a residence with an unrelated member of the opposite sex, which decision has placed into question his overnight visitation with the child. Further, the court's order in this case does not prevent Alan from exercising

overnight visitation; it only provides that such overnight visitation cannot occur if Alan's girl friend is at the residence on that particular night.

(d) Sexual Behavior and Adverse Impact

Finally, we disagree with Alan's interpretation of Nebraska law concerning the need for Michelle to demonstrate an adverse impact on the child to prohibit Alan's cohabitation with his girl friend. Alan cites a number of cases discussing the fact that one parent having overnight guests of the opposite sex is not necessarily contrary to the best interests of the child in the absence of a demonstration of an adverse impact on the child. See, *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996); *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); *Anderson v. Anderson*, 5 Neb. App. 22, 554 N.W.2d 177 (1996). Similarly, the dissent emphasizes this same authority and characterizes "the matter really at issue" as "the sexual activities of divorced parents when their children are nearby." The present case differs significantly from the cited cases, however, because the provision prohibiting overnight guests of the opposite sex and, according to the district court's reasonable interpretation, prohibiting Alan's cohabitation with his girl friend was included in the decree with the consent of the parties. In the cited cases, the question was raised without a specific provision of the decree to be considered, especially a provision agreed to by the parties. In addition, in the cited cases, the issue was usually whether there should be a change in custody or custodial arrangements; in such a situation, an adverse impact may be required. In the present case, however, the court declined to modify the custodial arrangement on this issue.

The cited cases may, as the dissent suggests, support a conclusion that the public policy of this state with regard to the parties' sexual behavior after divorce where children are concerned is that the court should not impose a morality-based restriction on such behavior. But the cited cases are inapplicable to a case such as the present one, where the language at issue, and its ultimate impact, was not imposed by the court but by the parties themselves. In such a situation, there is simply no basis for requiring Michelle to demonstrate that Alan's behavior had an adverse impact on the

minor child, because Alan's behavior was prohibited by the provision which Alan agreed to and which the court adopted at the request of the parties.

2. Resolution

With respect to Michelle's application to modify, the specific items which were actually modified are not at issue on this appeal. With respect to Michelle's objection to Alan's exercise of overnight visitation when his girl friend is present in the residence, the court actually did not modify the decree, but, rather, held that the provision would continue in effect as set forth in the decree. With respect to Alan's cross-application to modify, the court found that Alan failed to demonstrate a material change of circumstances which justified modifying the decree. In light of our discussion above, we find that the disputed provision is ambiguous and we find no clear error by the district court in its interpretation of the provision at issue. Accordingly, we disagree with Alan's assertion on appeal that Michelle's "misinterpretation" of the provision should be considered a material change of circumstances. Brief for appellant at 12. As such, we affirm the order of the district court.

V. CONCLUSION

We find no clear error by the district court. The district court's order is affirmed.

Affirmed.

Cassel, Judge, concurring.

I agree with the majority's opinion in every respect save one. In my opinion, interpretation of an ambiguous *judgment*, as contrasted with an ambiguous contract or other document, presents a question of law to be determined on review of the entire record independently of the trial court's decision. In *Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986), the court stated that when faced with an ambiguous decree, in an appropriate action brought by the parties, the trial court should "resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears." I believe that if one accepts the Supreme Court's dictum in *Neujahr*, it follows that an appellate court would review the trial court's decision as it would any other question of

law, i.e., independently. See, e.g., *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004) (on question of law, appellate court is obligated to reach conclusion independent of determination reached by court below). Based upon the same authorities relied on in the majority's opinion, I would reach the same interpretation but I would do so independently as a matter of law and without deference to the trial court's decision. To that extent, I concur.

SIEVERS, Judge, dissenting.

With all due respect, I find I must dissent from the majority's opinion. Given that the majority's opinion contains the necessary background, we can get to the point that the key word under discussion is "guests" and the key question is whether that word is ambiguous. The standard, as the majority says, is whether there are two reasonable but conflicting interpretations of the word "guests." I submit that the majority manufactures an ambiguity by engaging in a discussion about guest status, cohabitation, "one night stands," and the location where such things occur. But the applicable law requires that we first look to the "four corners of the decree," *Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986), and initially focus on the word "guests," putting aside these other matters. The notion that we first look to see if the word or words in question have a common and ordinarily understood meaning is so prevalent in our law that no citation of authority is needed. This concept has been used in examining the meanings of insurance policies, deeds, contracts, wills, and court decrees. Here, we are examining a court-approved agreement which may properly be viewed as a contract between Michelle and Alan.

Black's Law Dictionary 714 (7th ed. 1999) defines "guest" as "1. A person who is entertained or to whom hospitality is extended. 2. A person who pays for service at an establishment, esp[ecially] a hotel or restaurant. 3. A nonpaying passenger in a motor vehicle." Webster's Encyclopedic Unabridged Dictionary of the English Language 628 (1989) defines "guest" as

> 1. a person who spends some time at another person's home in some social activity, as a visit, dinner, or party. 2. one who receives the hospitality of a club, a city, or the like. 3. a person who patronizes a hotel, restaurant, etc., for the lodging, food, or entertainment it provides.

Obviously, there is a commonly understood definition, given the similarity between the law dictionary and the ordinary dictionary. The hallmarks of a "guest" involve spending a limited time at a location for socialization or hospitality.

The parties agreed that "[n]either parent shall have *guests* unrelated of the opposite sex stay overnight when the child is present." (Emphasis supplied.) The majority correctly notes that we should ignore the intentions and thoughts of the parties, as well as those of the trial court which approved the parties' agreement, unless there is an ambiguity—which, as the majority notes, is not established by the fact that the parties have or suggest opposing interpretations. The majority then unfortunately jumps the track, so to speak, by finding an ambiguity, because it says that there is "no definition of the term 'guests'" in the agreement and that "both parties' conflicting interpretations or meanings are reasonable." However, a term with a commonly understood meaning needs no definition, because by its very nature, reasonable people know what it means—unless by agreement the parties write that it means something else. Thus, the two predicates by which the majority finds the term "guests" to be ambiguous are flawed, because under the majority's premise, every word in an agreement is ambiguous, unless defined. Additionally, the dictionaries show that the parties' self-serving interpretations are not necessarily reasonable.

The majority then discusses liberal or restrictive readings of the clause, and the majority brings the parties' self-serving testimony about their intentions into the discussion. Additionally, the majority discusses whether a prohibition against guests also prohibits cohabitation. This is done without looking to whether the term "cohabit" has a common ordinary meaning which in itself distinguishes such arrangement from that of being an overnight "guest."

Because the majority buys into Michelle's notion, as well as the trial court's notion, that the prohibition against overnight "guests" of the opposite sex can be reasonably construed to exclude "cohabitation," we should at least look to the same two dictionaries for a common and ordinary meaning of the term "cohabitation" and then contrast it with the term "guests." Black's Law Dictionary, *supra* at 254, defines "cohabitation" as

"[t]he fact or state of living together, esp[ecially] as partners in life, usu[ally] with the suggestion of sexual relations." Webster's Encyclopedic Unabridged Dictionary of the English Language, *supra* at 287, defines "cohabit" as "to live together as man and wife, usually without legal or religious sanction." It seems apparent, at least to me, that "guest" and "cohabitation" both have common, accepted, and ordinary definitions which are as different as night and day. Therefore, it follows that the parties' agreement that "[n]either parent shall have guests unrelated of the opposite sex stay overnight when the child is present" simply does not apply to or restrict Alan's overnight visitation because of his cohabitation arrangement with his girl friend.

Thus, the district court's interpretation of the provision to mean that "the child's not supposed to be present when there's a member of the opposite sex there overnight" is patently wrong under the applicable law, since it is a completely unwarranted extension and expansion of the parties' agreement. The parties' limited agreement prohibited, by its simple and straightforward terms, visitation when there were overnight guests of the opposite sex, but the agreement said nothing about visitation when one of the divorced parents was in a cohabitation relationship.

Even if I could somehow agree that this clause must be construed, I fail to understand why the majority says there is no clear error in the district court's restrictive construction which clearly runs counter to the pronouncements of this court and the Supreme Court about the matter really at issue—the sexual activities of divorced parents when their children are nearby. Both courts have said, and I summarize generally, that the sex life of divorced parties is not a concern of the courts absent evidence of indiscretion, evidence of inappropriate behavior, or evidence that such is harmful to the children. See *Anderson v. Anderson*, 5 Neb. App. 22, 554 N.W.2d 177 (1996) (when litigants seek to use custodial parent's sexual activity as basis for change in custody or custody arrangements, Nebraska Supreme Court has repeatedly found overriding factor to be whether children are directly exposed to sexual activity or whether there is other proof that children are being adversely affected). See, also, *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986) (mother's violation of anti-cohabitation provision of decree was not given much

weight by Supreme Court absent evidence that cohabitation adversely affected her son); *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984). Surely our view of this matter does not change for visitation cases.

There is no evidence of any such harm in this record. Yet, the majority affirms Michelle's highly restrictive interpretation of this clause, which runs counter to the public policy of this state with regard to sex after divorce when children are concerned. I return to what this court wrote in *Anderson v. Anderson, supra.* In many instances, the legal relationship of the man and woman spending time together with the children of one party is not nearly so important as is the behavior of the man and woman in what they model about respect, trust, love, and caring for one another. While I understand that there still exists a societal view that an unmarried man and woman should not live together, the reality is that they frequently do. The simple fact is that if Michelle wanted the agreement to produce the restrictive effect she now advances, the agreement should have said, "If a parent cohabits with a member of the opposite sex, there shall be no overnight visitation by the cohabitating parent when the child of the parent in cohabitation is present." This language would do the trick and is simple and concise. But it is not in the agreement, and this court should avoid appellate gymnastics to write into the agreement that which was never there.

What the majority has done in this case is manufacture an ambiguity where none exists, examine the "intent" of the parties, and affirm the trial court's choice of Michelle's view, which view is counter to the public policy expressed by the appellate courts of this state on the matter of sexual relationships of parents after divorce. In the final analysis, the majority creates a prohibition against overnight visitation if a parent is in a cohabitation relationship, when the agreement never even mentioned any prohibition against overnight visitation by a cohabitating parent. The parties prohibited overnight guests while the children were present, and I, for one, have no trouble understanding what their words meant. Because the word "guests" is unambiguous, the parties' intention in using that word is simply not relevant. A guest is a guest, and a cohabitant is a cohabitant—and they are remarkably different. A guest is a temporary visitor for social purposes

(which could include sex), and a cohabitant is one who lives in a semipermanent arrangement (which surely involves sex) that looks like a marriage. I would reverse and vacate the district court's interpretation of the clause, finding that Alan's cohabitation with his girl friend does not affect his visitation rights.

STEVEN M. JACOB, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

685 N.W.2d 88

Filed August 3, 2004. No. A-02-1096.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
3. **Standing: Statutes.** An exception allowing standing exists where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action.
4. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
5. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
6. **Actions: Taxation: Governmental Subdivisions: Standing.** In an action involving the illegal expenditure of public funds or an increase in the burden of taxation, the plaintiff must be a taxpayer of the governmental body.
7. **Constitutional Law: Prisoners.** Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
8. ____: ____. Because prison inmates retain certain constitutional rights does not mean that these rights are not subject to limitation.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
10. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Steven M. Jacob, pro se.

Jon Bruning, Attorney General, and Maureen Hannon for appellees.

INBODY, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Steven M. Jacob, an incarcerated individual, filed in the district court for Lancaster County a petition for declaratory and injunctive relief, wherein he alleged that 2001 Neb. Laws, L.B. 85, was enacted in violation of article III, § 14, of the Nebraska Constitution. The district court found that Jacob lacked standing to bring the action, and the court dismissed his petition. Jacob appeals from the court's order denying his subsequent motion to alter or amend the judgment. For the reasons set forth herein, we affirm.

BACKGROUND

On October 29, 2001, Jacob, an inmate at the Nebraska State Penitentiary serving a life sentence, filed a petition for declaratory and injunctive relief, naming the State of Nebraska, its Governor, and its Attorney General as defendants (collectively the Appellees). Jacob alleged that L.B. 85 (1) was a bill containing more than one subject, (2) was not before the Legislature for 5 days prior to final passage, (3) did not clearly express in its title that it provided for fines and penalties, and (4) amended Neb. Rev. Stat. § 73-301 et seq. (Reissue 2003) without so stating, all in violation of article III, § 14, of the Nebraska Constitution. L.B. 85, as enacted, is now found at Neb. Rev. Stat. §§ 47-801 through 47-807 (Cum. Supp. 2002) and is entitled the Private Prison Contracting Act. Such act authorizes the Department of Correctional Services (the Department) "to provide for incarceration, supervision, and residential treatment at facilities other than those operated by the Department" and "to contract for the operation of correctional institutions of the [D]epartment by private prison contractors." § 47-802(1) and (2).

In response to Jacob's petition, the Appellees, in their official capacities, filed an answer wherein they raised the issue of standing. The Governor and the Attorney General filed a demurrer in their individual capacities. Jacob and the Appellees, in their official capacities, both filed motions for summary judgment.

The court heard the parties' motions on March 26 and April 15, 2002. The parties offered as exhibits various legislative histories and similar documents, which items were received into evidence by the court.

The district court entered an order on August 1, 2002, finding that Jacob lacked standing to sue in this matter and dismissing his petition. The court noted that pursuant to L.B. 85, the Department contracted with Correctional Medical Services (CMS) to provide medical care to inmates housed at the Tecumseh State Correctional Institution. The court noted Jacob's assertion that the contract with CMS obligated CMS to provide services which are only " 'reasonable and humane,' " in contrast to the Department's statutory obligation to provide inmates with health care services that meet the standard of care in the community. The court also noted Jacob's assertion that L.B. 85 was being used by the Department to circumvent the protections of Nebraska law that guarantee him a higher standard of medical care. Finally, the court noted Jacob's assertions that he could be transferred to the Department's Tecumseh facility, that he has needed medical services in the past, and that he undoubtedly will need them again in the future.

The court reviewed the requirements necessary to establish standing and the exceptions thereto. The court found that Jacob had neither alleged nor offered proof of any injury peculiar to him and distinct from that of the public generally. As to the public interest exception to the standing rule, the court found that the matter raised in Jacob's petition was not one of great public interest. The court further found that the inmates housed at the Tecumseh facility were more appropriately entitled to present the claim set forth in Jacob's petition than was Jacob on their behalf. As to the exception allowing taxpayers to challenge the constitutionality of statutes that involve the expenditure of public funds or an increase in the burden of taxation, the court concluded that public funds would be expended to pay CMS under a contract

entered pursuant to L.B. 85 and that if L.B. 85 were unconstitutional, such expenditure would be illegal. The court noted Jacob's application to proceed in forma pauperis, wherein Jacob stated that he owned no property and earned no more than $1,384 per year. The court concluded that for standing purposes, while Jacob may pay sales tax on purchases from the prison commissary or private vendors, that fact did not confer upon him the status of taxpayer. In reaching this conclusion, the court relied on *Stumes v. Bloomberg*, 551 N.W.2d 590 (S.D. 1996), which we further discuss below. Because standing is a jurisdictional prerequisite to maintaining an action, the court found that it had no authority to consider the parties' motions for summary judgment or the demurrer filed by the Governor and the Attorney General in their individual capacities. The court dismissed Jacob's petition.

Jacob filed a timely motion to alter or amend the judgment. Jacob asserted that the district court erred in relying on *Stumes v. Bloomberg, supra*, as a basis for finding that Jacob did not have standing, because of fundamental differences between the Nebraska sales tax statutes and the South Dakota statutes relied on by the South Dakota Supreme Court in *Stumes*. Specifically, Jacob asserted that in Nebraska, unlike in South Dakota, the consumer, rather than the retailer, is the taxpayer for purposes of the sales tax statutes.

On September 5, 2002, the district court entered an order denying Jacob's motion. The court again found that Jacob had suffered no direct injury by the passage of L.B. 85 or by the subsequent contract with CMS and that even if the matter Jacob set forth in his petition was one of great public interest, there were other persons better suited to bring the claim. The court agreed with Jacob's assertion that in Nebraska the consumer, rather than the retailer, is the taxpayer of sales tax. The court did not conclude, however, that this difference was sufficient to grant Jacob standing under the taxpayer exception. The court stated as follows:

> The theory which has led courts to grant standing to taxpayers in cases which challenge the expenditure of public money is that a taxpayer has such an individual and common interest in public funds as to entitle him [or her] to maintain an action to prevent their unauthorized appropriation. The question is whether the payment of sales tax creates such an

> interest. It seems to me that it does not. What about the individual driving from New York to California who stops to buy a candy bar in Grand Island? Does [that person] have standing? How about the person in Montana who orders some cold weather gear from Cabelea's [sic]? Does [that person] have standing? The answer is obviously not.

The court found that the fact that Jacob pays sales tax on some purchases from the prison commissary or other Nebraska retailers is not sufficient to grant him standing. Jacob subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Jacob asserts that the district court erred in finding that he lacked standing to challenge the constitutionality of L.B. 85 and in not permitting him to amend his petition.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

ANALYSIS

Standing.

[2-6] Jacob asserts that the district court erred in finding that he lacked standing to challenge the constitutionality of L.B. 85. In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). Jacob apparently concedes that he has not suffered a direct injury because of the passage of L.B. 85, but he claims that he is entitled to bring this action because certain exceptions to the standing requirements are applicable. An exception allowing standing exists where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring

the action. *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000). See, also, *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999) (threshold question is whether there exists another party whose interests are more at issue in action). A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn., supra*. A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Chambers v. Lautenbaugh, supra*. In an action involving the illegal expenditure of public funds or an increase in the burden of taxation, the plaintiff must be a taxpayer of the governmental body. *City of Elkhorn v. Duncan*, 252 Neb. 666, 565 N.W.2d 726 (1997). We proceed to discuss both of these exceptions separately below.

Public Concern Exception.

With regard to the public concern exception, Jacob argues that the issues of private prison contracting and inmate medical care are issues of great public concern. However, for this exception to apply, L.B. 85 must involve a matter of great public concern and there must exist the risk that its enactment would otherwise go unchallenged unless Jacob were allowed to bring this action. See *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn., supra*. The district court focused on the second factor and found that the issue raised in Jacob's petition did not extend "beyond the interest of those individuals needing medical care who are in the custody of the Department and housed at Tecumseh." The Nebraska Supreme Court has discussed the fact that standing is granted in certain cases because of the concern that judicial review would not otherwise occur. See *Ritchhart v. Daub, supra*. In that case, the Supreme Court noted that in determining whether to grant standing in such cases, " ' "[c]onsideration must be given to other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or *the*

existence of other persons better situated to assert the claim." '" (Emphasis in original.) *Ritchhart v. Daub*, 256 Neb. at 808, 594 N.W.2d at 293. We agree with the district court's assessment that the claim presented by Jacob in the present case would be more appropriately advanced by the inmates of the Department's Tecumseh facility or those housed at some other Department facility subject to a contract signed pursuant to L.B. 85 as enacted. Jacob cannot be afforded standing on the theory that the interests of the public would otherwise go unprotected.

Taxpayer Exception.

In its order of August 1, 2002, the district court relied on *Stumes v. Bloomberg*, 551 N.W.2d 590 (S.D. 1996), to find that Jacob's payment of sales tax on purchases from the prison commissary or private vendors did not grant him taxpayer standing. In *Stumes*, 551 N.W.2d at 592, the South Dakota Supreme Court considered the question of whether a prisoner—under the exception, judicially created to protect a public right, allowing "taxpayers" and "electors" standing without demonstrating a special interest in the action—was a taxpayer with standing to challenge the constitutionality of a special appropriations bill.

The prisoner in *Stumes* was unemployed during the proceedings, had no assets, and carried a negative balance in his prison spending account. But he was charged a sales tax on items purchased from the inmate commissary system or from a local business. On appeal, the South Dakota Supreme Court referenced the South Dakota sales tax statutes, which statutes impose a tax upon the privilege of engaging in business as a retailer, which tax may be passed along to the consumer. See S.D. Codified Laws §§ 10-45-2 and 10-45-22 (Michie 1996). The court concluded that under the South Dakota statutory scheme, the mere payment of sales tax by a consumer did not fit within the definition of a taxpayer. The court further found that because the taxpayer standing exception was judicially created, it was within the power of the court to limit its meaning. The court reasoned that lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen and concluded that the inmate in that case, by his conviction and incarceration, had forgone his constitutional right as a taxpayer when the door closed at the penitentiary. The

Stumes court acknowledged that by becoming a prisoner, the inmate had not left behind all of his constitutional rights, but the court concluded that incarcerated individuals should not be " 'litigating engines' " in the taxpayer standing arena. 551 N.W.2d at 594, citing *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). The court then affirmed the trial court's decision, finding that the inmate did not have standing. A concurring opinion in *Stumes v. Bloomberg, supra*, noted that "it would be illogical and inconsistent to permit someone who has no right to vote for legislators to challenge a general legislative act." 551 N.W.2d at 595.

In the present case, Jacob asserted in his motion to alter or amend the district court's judgment of August 1, 2002, that the court erred in relying on *Stumes v. Bloomberg, supra*, because of fundamental differences between the Nebraska sales tax statutes and the South Dakota sales tax statutes. Jacob relies on *Governors of Ak-Sar-Ben v. Department of Rev.*, 217 Neb. 518, 349 N.W.2d 385 (1984), wherein the Nebraska Supreme Court noted that the language of Nebraska's sales tax statutes clearly states that the purchaser must pay the tax on the cost of his or her purchase to the retailer. See Neb. Rev. Stat. § 77-2703 (Reissue 2003). In South Dakota, the tax is imposed on the retailer, who may then pass it along to the consumer.

The Nebraska sales tax scheme appears to be similar to that of Texas. In *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001), the Texas Supreme Court considered the question of whether the payment of sales tax was sufficient to confer taxpayer standing. In that case, a former inmate claimed that she had taxpayer standing by virtue of her payment of sales tax. The former inmate sought taxpayer standing to sue the county and its sheriff for allegedly running an unconstitutional religious-education program at the county jail. The Texas court noted that taxpayers fall under a limited exception to the general standing rule and that taxpayers in Texas have standing to enjoin the illegal expenditure of public funds without demonstrating a particularized injury. The court stated that "[i]mplicit in this rule are two requirements: (1) that the plaintiff is a taxpayer; and (2) that public funds are expended on the allegedly illegal activity." *Id.* at 179. The former inmate seeking taxpayer standing in that case

did not own property and thus did not pay property taxes. The Texas court noted that other jurisdictions have held that merely paying sales tax does not confer taxpayer standing under statutes that impose a sales tax on the seller of goods rather than the purchaser. The Texas court also noted that such other jurisdictions have reasoned that although a retailer may pass the sales tax cost along to the purchaser, payment of sales tax does not make a purchaser a taxpayer for purposes of standing. The *Williams* court found that Texas characterized its state sales tax differently than these other jurisdictions in that both sellers and purchasers are considered taxpayers under Texas law.

Despite this distinction, the Texas court was not persuaded that paying sales tax should be grounds for conferring taxpayer standing. The Texas court noted, as did the South Dakota court in *Stumes v. Bloomberg*, 551 N.W.2d 590 (S.D. 1996), that taxpayer standing is a judicially created exception to the general standing rule and that the court had already limited the applicability of the exception by narrowly defining the type of action a taxpayer could maintain. The *Williams* court stated:

> Extending taxpayer standing to those who pay only sales tax would mean that even a person who makes incidental purchases while temporarily in the state could maintain an action. This would eviscerate any limitation on taxpayer suits. It would allow a person with virtually no personal stake in how public funds are expended to come into court and bring the government's actions under judicial review. This is not what this [c]ourt envisioned in crafting the taxpayer-standing exception.

52 S.W.3d at 180. The court accordingly held, "for prudential reasons," that paying sales tax does not confer taxpayer standing on a party. *Id.*

In the present case, the district court employed similar reasoning in its September 5, 2002, order ruling on Jacob's motion to alter or amend the judgment. Jacob, however, urges that the reasoning employed by the Texas court in *Williams v. Lara, supra*, and by the district court in the present case (regarding the payment of sales tax by nonresidents making purchases while temporarily in the state) is obviated by the requirement that taxpayer standing in Nebraska is granted to "resident taxpayers."

See, *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993) (standing of party to bring action must be based on special injury to himself or herself or on his or her status as resident taxpayer); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). Jacob argues that he does not lose his status as a resident of Nebraska because of incarceration and that thus, he should be considered a "resident taxpayer" for standing purposes by virtue of his payment of sales tax and his residency in the State of Nebraska.

We note that the basic proposition setting forth the taxpayer exception to the standing rule does not employ the phrase "resident taxpayer." See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002) (stating that person seeking to restrain act of public board or officer must show special injury peculiar to himself or herself aside from and independent of general injury to public unless it involves illegal expenditure of public funds or increase in burden of taxation). The phrase "resident taxpayer" seems to be employed more frequently in cases involving illegal expenditures of public funds. See *id.* (stating that resident taxpayer, without showing any interest or injury peculiar to itself, may bring action to enjoin illegal expenditure of public funds raised for governmental purposes). However, a careful perusal of Nebraska law shows that the phrase "resident taxpayer" has been used in connection with both aspects of the taxpayer exception, that is to say, both the illegal expenditure of public funds and an illegal increase in the burden of taxation. See *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth., supra* (plaintiff who was resident taxpayer had standing to bring resident taxpayer's action as representative of municipality for illegal expenditure of public funds or illegal increase in burden of taxation). We conclude, however, that neither the apparent addition of the word "resident" to the requirements of the taxpayer exception in Nebraska nor the differences between the Nebraska and South Dakota sales tax statutes compel a different result in the present case than was reached by the district court in this case or the courts in *Stumes v. Bloomberg*, 551 N.W.2d 590 (S.D. 1996), and *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001). Under the facts of the present case, we conclude that Jacob, as an incarcerated individual who owns

no property and pays only limited sales tax on purchases from the prison commissary or private vendors, does not have standing under the exception allowing taxpayers to make challenges to an alleged illegal expenditure of public funds or an increase in the burden of taxation.

[7-9] We are mindful of the fact that prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (1987). However, just because prison inmates retain certain constitutional rights does not mean that these rights are not subject to limitation. *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986). The taxpayer standing exception was judicially created in Nebraska, and it is within our power to limit its meaning. We agree that incarcerated individuals should not be " 'litigating engines' " in the taxpayer standing arena. See *Stumes v. Bloomberg*, 551 N.W.2d at 594, citing *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). We decline to extend the resident taxpayer exception to those incarcerated individuals who, like Jacob, own no property and pay sales tax only on a limited basis. Our holding in no way limits the ability to challenge the constitutionality of a statute by those prisoners who have a direct interest or who are better suited under the public interest exception than was Jacob in the present case, or even those prisoners who bear a different tax burden than does Jacob. Additionally, by our holding, we make no ruling on the question of whether a nonincarcerated individual, who resides in Nebraska and pays only sales tax, might have standing under the taxpayer exception. That question was not presented in the instant appeal, and an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

Amendment of Petition.

[10] Jacob asserts that the district court erred in not permitting him to amend his petition. The Nebraska Supreme Court has stated that if, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Harsh*

International v. Monfort Indus., 266 Neb. 82, 662 N.W.2d 574 (2003). In the present case, the district court did not reach either the demurrer or the motions for summary judgment because it found that Jacob lacked standing. No amendment to Jacob's petition can create standing where none exists. Jacob's assignment of error is without merit.

CONCLUSION

The district court did not err in finding that Jacob lacked standing to challenge the constitutionality of L.B. 85, and it did not err in not permitting Jacob to amend his petition.

AFFIRMED.

IN RE INTEREST OF STACEY D. AND SHANNON D., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. PAM N., APPELLANT.

684 N.W.2d 594

Filed August 3, 2004. No. A-03-818.

1. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Parental Rights: Proof.** Only one ground for termination under Neb. Rev. Stat. § 43-292 (Reissue 1998) need be proved in order to terminate parental rights.
6. **Parental Rights.** Termination of parental rights under Neb. Rev. Stat. § 43-292(2) (Reissue 1998) requires a finding that a parent has substantially and continuously

or repeatedly neglected and refused to give the juvenile necessary parental care and protection.

7. ____. Termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1998) requires a finding that following a determination that the juvenile is one as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), reasonable efforts to preserve and reunify the family if required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998), under the direction of the court, have failed to correct the conditions leading to the determination.
8. ____. Termination of parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 1998) requires a finding that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
9. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
10. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
11. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
12. **Parental Rights: Parent and Child.** According to Neb. Rev. Stat. § 43-293 (Reissue 1998), an order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other.
13. **Juvenile Courts: Jurisdiction.** Under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the juvenile court continues to have jurisdiction over adjudicated children, either until their age of majority or until they become adopted, and until such time, the court has the authority to enter orders that are in the best interests of the children.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Sandra E. Stern for appellant.

Stuart J. Dornan, Douglas County Attorney, and James M. Masteller for appellee.

CARLSON, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Pam N. appeals from an order of the separate juvenile court of Douglas County, Nebraska, that terminated her parental rights to her two minor children based upon the grounds set forth in Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). For the reasons set forth herein, we affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

Pam is the natural mother of Shannon D. and Stacey D., who were ages 9 and 11, respectively, at the time of the last termination hearing on June 9, 2003. Pam was unemployed and had been receiving disability benefits since 1991 due to an injury that resulted in permanent disability. Pam is also the parent of two other children who have reached the age of majority and are not subject to the instant proceedings. Although Pam was married to George N. at the time of Shannon's and Stacey's births, the record reflects that Ron D. may be the biological father of Shannon and Stacey. Our record does not contain an order determining Ron's paternity, although genetic testing was apparently performed at some point during the proceedings. Pam and Ron have never been married. On November 27, 2002, the State moved to have Pam's parental rights terminated. The termination proceedings consisted of a series of hearings held on March 12, April 7, May 14 and 19, and June 9, 2003.

On July 7, 2000, Shannon and Stacey were brought to the attention of the Department of Health and Human Services (the Department) after the Omaha Police Department discovered Shannon and Stacey living with Ron in a tent in an Omaha park. At the time the girls were discovered, Pam was incarcerated and Ron was at work and had allegedly left the girls in the care of another camper in the immediate area, but no one else was present or in the vicinity. Ron and the two girls had been living in the tent for approximately 4 weeks. Shannon and Stacey were immediately placed in protective custody. On October 11, the two girls were adjudicated because they lacked proper parental care by reason of the faults or habits of Pam and Ron in that Pam and Ron had failed to (1) provide proper and sufficient housing, (2) provide for the girls' medical needs, and (3) provide proper parental supervision and care. See Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The State further alleged that Shannon and Stacey were at risk for harm based upon the above-stated allegations.

Following the adjudication hearing, Pam and Ron were ordered to undergo psychiatric evaluations and to complete chemical dependency evaluations. In December 2000, Pam underwent an abbreviated mental health examination at the Immanuel Medical Center. Dr. Philip McLeod, a clinical psychologist, testified that

he conducted the initial evaluation of Pam, that he diagnosed her with major depression, and that she needed treatment at the time. McLeod testified that during his initial interview with Pam, he found that Pam attributed a considerable amount of externalization for many of the troubles that have occurred in her life, including the removal of Shannon and Stacey from Pam's care, and did not see herself as being responsible for many of the occurrences. McLeod further testified that Pam reported she had been a user of heroin in the past and also took an assortment of other drugs for anxiety attacks. After this initial evaluation, McLeod did not have any further contact with Pam until February 2002.

In July 2001, Camas Diaz, a protection and safety worker for the Department, was assigned to this case. At that point in time, Pam had been incarcerated at the York Correctional Center for Women since June 2001 on a felony shoplifting conviction and was scheduled to be released in August. However, due to Pam's noncompliance with her prison treatment plan and goals, Pam was not released until December 2001.

In a September 25, 2001, report prepared for the court, Diaz stated that Pam had not yet completed the psychiatric or chemical dependency evaluations. Diaz reported that Shannon and Stacey were doing well overall and had been referred for individual therapy. Diaz also noted in the report that while Pam was incarcerated, Pam initiated involvement in the prison's parenting program which allowed her to have extended visits with the girls, and that Pam exercised regular visitation during this time. As of the date of this report, the primary permanency plan was reunification.

In September 2001, Shannon and Stacey started therapy with Gretta Crisman, a social worker and mental health therapist. Crisman testified that Shannon and Stacey were referred to her because the two girls were fighting among themselves and because they were struggling with the uncertainty of not knowing when they were going to be returned to Pam and Ron. Crisman further testified that the two girls had issues with self-esteem, anger control, relationship and friendship skills, and adjustment to their new environment. Crisman met with Shannon and Stacey on a weekly basis and reported in March 2002 that the girls had made significant progress. Crisman indicated that family therapy began in March, but that Pam and Ron consistently canceled or

did not show up for appointments, which behaviors caused frustration and disappointment for Shannon and Stacey.

On December 28, 2001, Diaz prepared a second report for the court. Diaz reported that Pam had still not completed the psychiatric and chemical dependency evaluations as previously ordered and that Pam had scheduled and missed several appointments at Immanuel Medical Center, which behavior resulted in Immanuel Medical Center's refusing to any longer accept Pam for an evaluation. The Department subsequently referred Pam to Greater Omaha Community Action to complete the evaluations, but Pam again failed to attend those scheduled appointments. Diaz further reported that Pam and Ron had been regularly exercising supervised visitation with Shannon and Stacey. The permanency objective continued to be reunification to be achieved by April 30, 2002, with a concurrent plan of adoption or guardianship.

In preparation for a review hearing scheduled for March 21, 2002, Diaz updated the court in a letter dated March 18, 2002, which stated that Pam had completed a psychological evaluation in February at Immanuel Medical Center rather than a psychiatric evaluation, but that Pam had scheduled a psychiatric evaluation for the end of March. McLeod conducted the psychological evaluation of Pam and again diagnosed Pam with major depression and noted a history of social anxiety. McLeod further testified that based upon his limited evaluation and judgment, Pam's capacity to successfully parent two children was "at best marginal." The record also reflects that Pam completed a chemical dependency evaluation on January 14, 2002, at Richard Young Center. That evaluator concluded that Pam did not need any further chemical dependency services, but noted that she was likely addicted to her pain medication and that this issue should be further evaluated. Thereafter, Pam tested positive for cocaine on June 28.

Pam voluntarily sought to be evaluated at the University Drug and Alcohol Program in June 2002 to determine if she was eligible for the methadone maintenance program. Dr. Donald Swanson, a psychiatrist with the University of Nebraska Medical Center and former medical director of the University Drug and Alcohol Program, testified that he conducted the initial evaluation of Pam on June 4. During the evaluation, Pam admitted to recent use of opiates, cocaine, and amphetamines. She further admitted

to using numerous other substances, such as heroin, on a regular basis during her lifetime. As a result of the initial evaluation, Swanson determined that Pam was eligible to participate in the program and recommended that she start treatment. Thereafter, Pam started treatment, and over the course of approximately the next 7 months, Pam's compliance with the program was continuously determined to be unsatisfactory in that Pam failed to attend group and individual therapy sessions on a regular basis, had positive urine analyses, and was delinquent on the payment of program fees. Swanson testified that at the time of trial, Pam was still a patient in the program.

The record reflects that Pam also participated in a drug and alcohol evaluation at Helem's Counseling and Consulting Services (Helem's) in August 2002. Frances Isaacson, a chemical dependency counselor and program coordinator for the substance abuse program at Helem's, testified that during the course of Pam's evaluation, Pam admitted to having serious problems with heroin, cannabis, and cocaine and considered herself an intravenous drug user. Isaacson also testified Pam indicated that she did not need any substance abuse treatment and that her use of illegal drugs was under control. Isaacson recommended outpatient treatment for Pam in addition to attendance at "12 step meetings" and support groups. In September 2002, Pam started a 12-week outpatient treatment program at Helem's. Isaacson testified that Pam had very poor attendance at individual and group therapy sessions, had positive urine analyses (but denied that she had used drugs), and ultimately did not complete the program. Isaacson stated that Pam always had numerous excuses as to why she did not attend and that Helem's eventually lost contact with Pam.

On August 19, 2002, a third report was prepared for the court and submitted by Diaz. Diaz reported that Shannon and Stacey had been in foster care for 25 months and that the permanency objective continued to be reunification with a concurrent alternative plan of adoption. Diaz also reported that Pam had completed a court-ordered parenting class and that there was an ongoing concern about housing. Diaz testified that Pam and Ron had lived in approximately four to five different locations, none of which were adequate to accommodate their family, with the exception

that Pam and Ron had recently secured a two-bedroom apartment. Diaz also expressed concerns about Pam's demonstrating appropriate behavior during visitation with the girls.

In November 2002, Crisman, Shannon and Stacey's therapist, provided an update as to the girls' progress, reporting that the girls had problems in reconciling the inconsistent information they had been given concerning the possibility of Pam's parental rights being terminated and the uncertainty of their future. However, Crisman testified at trial that overall, the girls had made improvements in their communication skills, had better self-esteem, and got along with each other much better. Crisman further testified that the girls would benefit if they had a consistent, safe environment to live in and that it would be in Shannon and Stacey's best interests to terminate Pam's parental rights. Crisman testified that the basis for her opinion is because the girls need closure and because Pam's prognosis was poor due to the fact that she has been unable to provide emotional stability, continues to use drugs, has chronic health problems, and does not have the capacity to effectively parent the girls.

At trial, Diaz testified that in her opinion, Pam had not made sufficient progress to have Shannon and Stacey returned to her and it was in the best interests of the girls to terminate Pam's parental rights. Diaz further testified that the Department has provided numerous services to Pam and that Pam has failed to comply or successfully complete any of the court orders with the exception of visitation.

Testimony was given at trial concerning Pam's past visitation with Shannon and Stacey and the possibility of continued contact between Pam and the girls in the future in the event that Pam's parental rights were terminated. Pam's visitation with the girls had been consistent and generally appropriate. The visitations were supervised and occurred primarily at public locations, such as the library, the park, and an eating establishment. The visits were semisupervised for a short period of time in the summer of 2002, whereby the visitation worker would provide the transportation but not stay during the visitation. This practice was discontinued and supervision was reinstituted due to Pam's telling the girls that she wanted to harm herself and the resulting concern for the emotional stability of the girls.

Shannon and Stacey each testified by deposition that they would like to continue to see Pam in the future in the event that they were not returned to her custody. The record reflects that efforts were being made to explore placement with a relative in Illinois and that the possibility of an open adoption was being discussed, whereby Pam would still be allowed some contact with the girls. Crisman testified that it would be in the best interests of Shannon and Stacey to maintain a relationship and have continued visitation with Pam, as long as the contact was supervised and monitored to ensure the emotional stability of the girls. Diaz agreed with Crisman that ongoing contact between Pam and the girls would be in the girls' best interests if the contact was "strictly" monitored. Diaz suggested, however, that the bond between the girls and Pam was perhaps an unhealthy one in that the girls have taken on the role of parent, feeling anxious about Pam's well-being and wanting to take care of her.

Pam also testified on her own behalf at trial. She admitted to a history of health problems, mental health issues, and chemical dependency problems, and she further admitted that she had not successfully completed a drug treatment program. In addition, despite Pam's belief that the group therapy she had participated in with Shannon and Stacey was beneficial, Pam admitted that she stopped attending those therapy sessions due to a disagreement she had had with the girls' counselor. Pam further testified that due to the extent of her numerous problems, she was not in a position to have Shannon and Stacey live with her, but she wanted to continue to be part of their lives. Pam stated that she would like to have Shannon and Stacey go to a "nice foster home" or adoptive home and that she would like to be able to exercise visitation with them.

In an order entered May 22, 2003, the separate juvenile court found Shannon and Stacey to be juveniles within the meaning of § 43-292(2), (6), and (7) and that it was in their best interests that Pam's parental rights be terminated. The court further denied Pam's motion for continued visitation for the reason that the court has no jurisdiction to order visitation once parental rights are terminated. Pam's motion for new trial was denied on June 9, and Pam timely appealed.

ASSIGNMENTS OF ERROR

Pam alleges, reordered, that the separate juvenile court erred in (1) terminating Pam's parental rights and (2) finding that it did not have jurisdiction to order continued contact between Pam and the girls after Pam's parental rights were terminated despite evidence that demonstrated it would be in Shannon and Stacey's best interests.

STANDARD OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

ANALYSIS

[3-5] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000); *In re Interest of Marcus W. et al.*, 11 Neb. App. 313, 649 N.W.2d 899 (2002). Only one ground for termination under § 43-292 need be proved in order to terminate parental rights. *In re Interest of Heather G. et al., supra.*

[6-8] In the instant case, the juvenile court found that termination of Pam's parental rights was in the best interests of Shannon

and Stacey and that the State proved by clear and convincing evidence the grounds for termination specified in § 43-292(2), (6), and (7). Section 43-292(2) requires a finding that a parent has substantially and continuously or repeatedly neglected and refused to give the juvenile necessary parental care and protection. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family if required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998), under the direction of the court, have failed to correct the conditions leading to the determination. And, § 43-292(7) requires a finding that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.

Termination of Parental Rights Under § 43-292(7).

The evidence adduced by the State at the termination hearing clearly shows that the termination of Pam's parental rights was proper according to § 43-292(7), which requires that the State prove that the juveniles have been in an out-of-home placement for 15 or more months of the most recent 22 months. Shannon and Stacey were removed from Pam on approximately July 7, 2000, and they had been in out-of-home placements continuously from that time up until November 27, 2002, the day the State filed its motion to terminate Pam's parental rights. Pam was provided more than "reasonable opportunities" to rehabilitate herself and failed to do so. See *In re Interest of Ty M. & Devon M.*, 265 Neb. at 169, 655 N.W.2d at 688. Therefore, based upon our de novo review of the record in this case, we conclude there is clear and convincing evidence that Shannon and Stacey have been in out-of-home placements for more than 15 months out of the last 22 months.

Having determined that the State has proved by clear and convincing evidence one of the grounds for termination of parental rights under § 43-292(7), we must next examine whether the State has also shown that termination of Pam's parental rights would be in the best interests of Shannon and Stacey.

Best Interests.

[9-11] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory

grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003). A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

At the time of the last termination hearing, Shannon and Stacey had been in foster care for approximately 3 years. It is clear from the record that Pam is unable or unwilling to rehabilitate herself. She has been given approximately 3 years to demonstrate that she is capable of caring for Shannon and Stacey without the presence of drugs in her life and has failed to do so. Pam has also failed to demonstrate that she can provide adequate, safe housing or that she can provide any type of stability, emotional or otherwise, for her family. The record further reflects numerous services that were made available to Pam that would have enabled her to regain custody of the girls. However, it is apparent that Pam has never been able to fully confront her addiction to drugs or commit to being sober and raising her family, as she conceded in her testimony at trial. While we recognize that Pam has a strong bond with Shannon and Stacey and that she consistently exercised her visitation rights over the past 3 years, even while incarcerated, this is certainly not enough to justify a reversal of the order to terminate Pam's parental rights. Therefore, we agree with the juvenile court that it is in Shannon and Stacey's best interests to terminate Pam's parental rights and allow the girls to obtain closure to what has been, at best, an unstable and chaotic life. This assignment of error is without merit.

Jurisdiction to Order Visitation Subsequent to Termination.

Pam also alleges that the separate juvenile court erred in finding that it did not have jurisdiction to order continued contact

between Pam and the girls after Pam's parental rights were terminated despite evidence that demonstrated it would be in Shannon and Stacey's best interests.

[12,13] Clearly, once Pam's parental rights are terminated, she has no standing to assert entitlement to continued visitation with Shannon and Stacey. According to Neb. Rev. Stat. § 43-293 (Reissue 1998), "[a]n order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other . . . ." See, also, *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982) (when parental rights of surviving parent have been terminated, that parent's parents lack standing to request visitation rights). However, the juvenile court continues to have jurisdiction over adjudicated children, either until their age of majority or until they become adopted, and until such time, the court has the authority to enter orders that are in the best interests of the children. See, § 43-247(3)(a) (jurisdiction of juvenile court); Neb. Rev. Stat. § 43-284 (Cum. Supp. 2002) (disposition orders); Neb. Rev. Stat. § 43-295 (Reissue 1998) (continuing jurisdiction to order changes in custody or care if in best interests of juvenile). Pam argues that this authority of the juvenile court extends to entering orders regarding continued contact between a parent and child after the termination of parental rights, so long as such request is made prior to the actual termination. We note that the issue of continued contact was addressed throughout the trial in this matter and was requested prior to the court's having entered its order terminating Pam's parental rights. We also note that the juvenile court, in denying the request for continued visitation, admitted that the evidence supported Pam's having continued contact with Shannon and Stacey. The court held that it lacked jurisdiction to enter such an order, even if it was in the best interests of the girls.

We agree with Pam that the juvenile court has authority, based upon its continuing jurisdiction over the children, to enter orders that are in the best interests of the children, including an order with respect to continued contact with a natural parent whose parental rights are being terminated. While we have found no cases which discuss this issue from the jurisdictional standpoint, the Nebraska Supreme Court has previously discussed the

request for visitation by a parent whose parental rights are being terminated pending appeal in *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989), and *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988). In both cases, the Supreme Court held that the record did not support granting visitation to the parent in question pending the appeal of the termination order. " 'After parental rights have been terminated, visitation while an appeal is pending would not be in the best interests of children who already have been in limbo for months or years.' " *In re Interest of J.H. et al.*, 233 Neb. at 350, 445 N.W.2d at 607, quoting *In re Interest of Z.D.D. and N.J.D., supra*. In *In re Interest of Z.D.D. and N.J.D., supra*, the father's parental rights were terminated, in part, under § 43-292(1) (Reissue 1984), based upon the county court's finding that the father had not seen his children for almost 10 months at the time the termination petition was filed and that such lack of contact, together with the other evidence of lack of support or contact, satisfied the abandonment requirement. In *In re Interest of J.H. et al., supra*, the evidence showed that the mother, whose parental rights were being terminated, had failed to consistently exercise visitation and had "vanished" for approximately 6 months, during which time she had no contact with the children.

The import of the above cases is that the Supreme Court based its decisions to affirm the denial of the request for post-termination visitation on the best interests of the children, not upon a lack of jurisdiction to consider the request. In both of the foregoing cases, the record clearly supported the denial of the request based upon the previous history between the parents and children with regard to visitation. In the present case, the record shows that Pam regularly exercised her visitation with Shannon and Stacey and that the visitations were generally appropriate and enjoyed by the girls. We are presented with the unusual situation in this case where the experts agree that continued contact between Pam and the girls, pending an adoptive placement, would be in the best interests of Shannon and Stacey.

We conclude that the juvenile court erred as a matter of law in determining that it lacked jurisdiction to consider Pam's request for continued visitation with Shannon and Stacey following the termination of Pam's parental rights. We hold that the

juvenile court retains continuing jurisdiction to enter orders, following the termination of a parent's parental rights, that are consistent with the best interests of the children, which orders may include providing for continued contact with a natural parent. While the juvenile court in this case recognized that the evidence supported continued contact between Pam and the girls, it did not make any specific findings with regard to the best interests of Shannon and Stacey and, of course, did not address the type of contact or visitation that should occur in this case. Therefore, we reverse that part of the order of the juvenile court denying the motion for continued visitation and remand the cause for further proceedings consistent with this opinion.

CONCLUSION

Based upon our de novo review of the record, we conclude that the State has proved by clear and convincing evidence that Shannon and Stacey have been in out-of-home placements for more than 15 months out of the last 22 months. We also conclude that termination of Pam's parental rights is in the best interests of Shannon and Stacey. We further conclude that the juvenile court erred in determining that it lacked jurisdiction to consider Pam's request for continued visitation following the termination of her parental rights. Accordingly, we affirm in part, and in part reverse and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PIONEER CHEMICAL COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF NORTH PLATTE, A MUNICIPAL CORPORATION OF THE STATE OF NEBRASKA, AND UNION PACIFIC RAILROAD COMPANY, APPELLEES.

685 N.W.2d 505

Filed August 17, 2004. No. A-02-854.

1. **Jurisdiction: Appeal and Error.** It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.

2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Actions: Parties: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002) allows an appeal only where multiple causes of action are presented or multiple parties are involved and the trial court expressly directs the entry of a final judgment as to one cause of action or party and expressly determines that there is no just reason for delay of an immediate appeal.
4. **Judgments: Claims: Words and Phrases.** A claim for relief under Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002) is not synonymous with an issue or a theory of recovery.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

George G. Vinton for appellant.

Douglas L. Stack for appellee City of North Platte.

Stephen W. Kay, of Kay & Kay, for appellee Union Pacific Railroad Company.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Pioneer Chemical Company (Pioneer) appeals from the district court's order overruling Pioneer's motion for summary judgment against Union Pacific Railroad Company (UPRR) and granting UPRR's motion for summary judgment against Pioneer. Pioneer brought this action in the district court to appeal an award by court-appointed appraisers in an action condemning property interests associated with the construction of a viaduct in North Platte. Because this action involved multiple parties and the court's order adjudicated fewer than all of the claims or the rights and liabilities of fewer than all of the parties, and because the court did not make an express determination that there was no just reason for delay and direct the entry of a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002), we are without jurisdiction over the instant appeal. Accordingly, the appeal is dismissed.

II. BACKGROUND

This action concerns Pioneer's appeal in the district court from an award of court-appointed appraisers which granted Pioneer damages resulting from the City of North Platte's condemnation of property interests for a viaduct construction project.

On December 4, 2000, Pioneer filed a notice of appeal in the county court indicating its desire to appeal the appraisers' award to the district court. On February 13, 2001, Pioneer filed an amended petition on appeal in the district court, naming the City of North Platte as the defendant. Pioneer alleged that the appraisers appointed by the court had awarded Pioneer $18,750 in damages, that the award was inadequate, and that Pioneer would suffer damages as a result of the condemnation and construction project. Pioneer indicated that its property interest in the property at issue was a leasehold interest arising from a written lease wherein Pioneer was leasing the land from UPRR. Pioneer further alleged that it had a building on the property and that the condemnation and construction project would impede access to the property and building and result in Pioneer's no longer being able to use the property for Pioneer's present purposes. Pioneer attached a copy of the lease with UPRR to the amended petition. The lease contains a provision specifically addressing the respective rights of Pioneer and UPRR concerning compensation awarded for condemnation proceedings.

On March 26, 2001, the court entered an order directing Pioneer to file a second amended petition naming UPRR as a defendant. The court found that the lease provision concerning compensation for condemnation proceedings suggested that UPRR was an indispensable party to the present action. On May 21, Pioneer filed a second amended petition naming both the City of North Platte and UPRR as defendants and alleging substantially the same allegations as the amended petition.

On June 11, 2001, the City of North Platte filed an answer to the second amended petition. On June 18, UPRR filed an answer to the second amended petition. On March 1, 2002, UPRR filed an amended answer and counterclaim.

On May 9, 2002, UPRR filed a motion for summary judgment against Pioneer. On June 10, the City of North Platte filed

a motion for judgment on the pleadings. On June 12, Pioneer filed a motion for summary judgment against UPRR.

On June 23, 2002, the court entered an order on various motions, including the motions for summary judgment and for judgment on the pleadings. The court granted UPRR's motion for summary judgment and denied both Pioneer's motion for summary judgment and the City of North Platte's motion for judgment on the pleadings. The court also made specific findings concerning who was entitled to an award of damages at trial and restricting what damages Pioneer could claim at trial.

Pioneer filed this appeal. On October 4, 2002, this court dismissed Pioneer's appeal for lack of jurisdiction, referencing § 25-1315. On October 15, Pioneer filed a motion for rehearing. On November 22, this court sustained Pioneer's motion for rehearing, specifically indicating that the issue of jurisdiction would be reconsidered upon briefing and argument of the parties.

III. ANALYSIS

[1,2] Although Pioneer has assigned various errors concerning the district court's order of June 23, 2002, we must first address the issue of jurisdiction. It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000); *Washington Cty. Bd. of Equal. v. Rushmore Borglum*, 11 Neb. App. 377, 650 N.W.2d 504 (2002). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003); *Bailey v. Lund-Ross Constructors Co., supra*; *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002).

The jurisdictional issue presented in this case is whether § 25-1315 prohibits an immediate appeal of an order which adjudicates fewer than all of the claims, or the rights and liabilities of

fewer than all of the parties, where the order affects a substantial right in a special proceeding. Pioneer argues that § 25-1315 is not applicable to special proceedings, such as condemnation actions, and that appeals in such proceedings, irrespective of whether they involve multiple claims or multiple parties, are governed only by Neb. Rev. Stat. § 25-1902 (Reissue 1995). We disagree.

Section 25-1315(1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1902 provides, in part:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, [or] an order affecting a substantial right made in a special proceeding . . . is a final order which may be vacated, modified or reversed [on appeal].

Pioneer relies heavily on the Nebraska Supreme Court's decision in *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998) (*SID No. 1*), in support of its contention that § 25-1315 is not applicable in condemnation proceedings. Specifically, Pioneer's argument is that the Nebraska Supreme Court analyzed § 25-1902 to determine whether jurisdiction existed and concluded that jurisdiction did exist because the order being appealed from affected a substantial right in a special proceeding. Pioneer argues that even though the order being appealed from in *SID No. 1* did not resolve all of the issues

presented, the Nebraska Supreme Court held it to be a final order because it affected a substantial right in a special proceeding.

We conclude that Pioneer has misconstrued the Nebraska Supreme Court's holding in *SID No. 1*. First, we note that the pertinent language of § 25-1315, originally codified as Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), was not effective until July 15, 1998, approximately 5 months after the Nebraska Supreme Court's decision was released in *SID No. 1*. See *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999). That being so, the Nebraska Supreme Court analyzed jurisdiction in *SID No. 1* under only § 25-1902 primarily because, at the time, § 25-1902 was the only statute implicated. This factor alone necessitates a conclusion that the Nebraska Supreme Court's holding in *SID No. 1* cannot be interpreted in any way to suggest that § 25-1315 does not apply in special proceedings; the very fact that § 25-1315, or its predecessor, § 25-705(6), did not even exist at the time precludes the *SID No. 1* opinion from any holding involving those statutes.

Further, we note that in *SID No. 1*, it appears that there were neither multiple claims nor multiple parties. Rather, the issues in *SID No. 1* all appear to have concerned a single claim for relief, a single plaintiff, and a single defendant. Although the plaintiff in *SID No. 1* listed several "causes of action" in its petition on appeal to the district court, it appears that these were actually multiple theories of recovery; the Nebraska Supreme Court indicated that the plaintiff "asserted several defenses" to the condemnation proceedings and listed them as " 'causes of action.' " *SID No. 1*, 253 Neb. at 919-20, 573 N.W.2d at 464. Thus, if § 25-1315 had been effective at the time of *SID No. 1*, it is likely that the Nebraska Supreme Court would have found that § 25-1315 was not implicated in the case, because there were not multiple claims or multiple parties.

[3,4] Section 25-1315 allows an appeal only where multiple causes of action are presented or multiple parties are involved and the trial court expressly directs the entry of a final judgment as to one cause of action or party and expressly determines that there is no just reason for delay of an immediate appeal. See, *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). See,

also, *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001). A "claim for relief" under § 25-1315 is not synonymous with an "issue" or a "theory of recovery," as Pioneer's argument concerning *SID No. 1* in this appeal would suggest, but, rather, is equivalent to a separate "cause of action." See, *Bailey v. Lund-Ross Constructors Co., supra*; *Keef v. State, supra.*

Similarly, the Nebraska Supreme Court's recent decision in *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004), appears to be another case where § 25-1315 was not implicated because the trial proceeding involved multiple "theories" or "issues" but not multiple "causes of action." In *Harris*, the Nebraska Supreme Court noted that the appellant had raised the possible jurisdictional question of whether an order granting an evidentiary hearing on *some issues* and denying a hearing on others is a final order in the light of § 25-1315. In finding that jurisdiction existed, the Nebraska Supreme Court specifically noted that § 25-1315 requires an express determination by the trial court that no just reason exists for delay and an express direction for the entry of judgment in order to create a final order for appeal "when less than all claims have been decided." 267 Neb. at 777, 677 N.W.2d at 153. In finding that the adoption of § 25-1315 did not change the resolution of the jurisdictional issue in postconviction proceedings where multiple "issues" are involved, the Nebraska Supreme Court cited to *Keef v. State, supra*, in which the Nebraska Supreme Court specifically held that "claim for relief" under § 25-1315 is not synonymous with "theory of recovery" and, by implication, is not synonymous with "issue." As such, it appears that in *Harris*, as in *SID No. 1*, there were not multiple "claims for relief" as required to implicate § 25-1315, but, rather, multiple "issues" or "theories of recovery."

We also note that the present case does involve multiple parties. Pursuant to the district court's order of March 26, 2001, Pioneer filed a second amended petition naming multiple defendants, namely both the City of North Platte and UPRR.

Although Pioneer argues on appeal that UPRR should not have been a party to these proceedings, resolution of that issue is not properly before us unless we first have jurisdiction over the appeal. As the case is presented, there are multiple parties. See *Bailey v. Lund-Ross Constructors Co., supra* (petition named multiple defendants; thus, multiple parties were involved).

The Nebraska Supreme Court recently discussed the interaction of § 25-1315 and § 25-1902 in *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). The issue in *Bailey* was actually, in some ways, the opposite of the issue in the present case; in *Bailey*, the issue was whether an order in a special proceeding that did not affect a substantial right could, nonetheless, be considered a final and appealable order under § 25-1315 if the district court made the requisite specific findings set forth in § 25-1315. The Nebraska Supreme Court in *Bailey* concluded that despite the district court's compliance with the "'express determination'" requirement of § 25-1315, 265 Neb. at 544, 657 N.W.2d at 921-22, the order entered was still not a "final, appealable order" because "'it d[id] not determine the action and prevent a judgment,'" *id.* at 548, 657 N.W.2d at 924. The clear implication of the ruling is that in cases where there are multiple claims or multiple parties, *both* § 25-1315 and § 25-1902 must be satisfied.

The Nebraska Supreme Court noted that § 25-1315's federal counterpart, Fed. R. Civ. P. 54(b), permits a court to enter a judgment as to fewer than all parties or claims and allow such judgment to be immediately appealable even though the action may continue as to the other parties and claims to facilitate the entry of a final judgment where the parties demonstrate a need for making review available on some of the claims or parties before entry of a final judgment as to all. See *Bailey v. Lund-Ross Constructors Co., supra*. See, also, *Soliday v. Miami County, Ohio*, 55 F.3d 1158 (6th Cir. 1995). The Nebraska Supreme Court specifically noted, however, that in federal cases involving multiple parties or multiple claims, there must *also* be a final order. See *Bailey v. Lund-Ross Constructors Co., supra*. Similarly, the Nebraska Supreme Court in *Bailey* specifically held that in Nebraska, when a claim involves multiple parties or claims, the trial court must *both* enter a final order (pursuant to

§ 25-1902) *and* comply with the requirements of § 25-1315 in order for the appellate court to acquire jurisdiction.

In *Bailey*, the Nebraska Supreme Court ultimately concluded that there was no jurisdiction to hear the appeal because, although the district court had complied with § 25-1315 and although the district court's order had been entered in a special proceeding, the order did not determine the action and prevent a judgment and was therefore also not a final appealable order under § 25-1902. As such, because both § 25-1315 and § 25-1902 had not been satisfied, there was no jurisdiction.

Similarly, in the present case, there is no jurisdiction for this court to hear the appeal because, although Pioneer may be correct in asserting that the district court's order affects a substantial right in a special proceeding and would constitute a final order pursuant to § 25-1902, the district court did not make an express determination that there was no just reason for delay and an express direction for the entry of judgment, as are required to make the order appealable pursuant to § 25-1315 where the order adjudicated fewer than all of the claims or the rights and liabilities of fewer than all of the parties. As such, because both § 25-1315 and § 25-1902 were not satisfied, there is no jurisdiction.

IV. CONCLUSION

The court is without jurisdiction over the instant appeal because the order granting UPRR's motion for summary judgment and denying Pioneer's motion for summary judgment and the City of North Platte's motion for judgment on the pleadings does not include an express determination that there was no just reason for delay and an express direction for the entry of judgment, as are required by § 25-1315. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

TRAVIS ARMSTRONG, APPELLANT, V. WATKINS CONCRETE BLOCK, APPELLEE.

685 N.W.2d 495

Filed August 17, 2004. No. A-04-026.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. ____: ____. Upon appeal to a Workers' Compensation Court review panel, the findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed unless they are clearly wrong on the evidence or the decision was contrary to law.
4. **Workers' Compensation: Witnesses: Testimony.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
5. **Workers' Compensation: Evidence: Appeal and Error.** In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence.
6. **Workers' Compensation: Proof.** A workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment.
7. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous.
8. **Pleadings: Appeal and Error.** The right to amend pleadings rests within the discretion of the trial court, and the allowance of an amendment will not be error unless prejudice results.
9. ____: ____. Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.
10. **Words and Phrases.** Repetitive trauma is to be tested under the statutory definition of "accident."
11. **Workers' Compensation: Words and Phrases.** Whether an employee's injury is considered to be an accident or an occupational disease, the employee must meet certain requirements in order to receive compensation for the injury, including that (1) the injury is unexpected or unforeseen, (2) the accident happened suddenly and violently, and (3) the accident produces at the time objective symptoms of the injury.
12. **Workers' Compensation: Proof: Time: Medical Assistance.** If an employee stops work and seeks medical treatment, then the employee has established the identifiable point in time when the injury occurred.

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

Thomas F. Dowd, of Dowd, Dowd & Howard, for appellant.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

Travis Armstrong appeals the decision of the Nebraska Workers' Compensation Court review panel which affirmed the decision of the Workers' Compensation Court trial judge determining that Armstrong's petition for workers' compensation benefits should be dismissed because there was no expert opinion that Armstrong suffered injury on or about May 11, 2001, in an accident arising out of and in the course of his employment.

FACTUAL BACKGROUND

Armstrong was initially hired by Watkins Concrete Block (Watkins) in 1994 as a "cuber," but in 2000, he was transferred to Watkins' brickyard. Armstrong alleges that on May 11, 2001, he was helping to load concrete blocks onto a customer's truck when he picked up two blocks and felt a pull on the "left low side" of his back. The blocks weighed between 10 and 15 pounds each. Armstrong claims that the customer had parked "too close," which left Armstrong in an awkward position to load the blocks.

On May 16, 2001, Armstrong went to see Dr. Kent Bohac, a chiropractor, complaining of pain in the lower left side of his back. The "Case History" that Armstrong filled out during his initial trip to Dr. Bohac's office indicates that Armstrong was injured "On the Job." Armstrong visited Dr. Bohac again on May 18, and then did not return until August 17.

On February 8, 2002, Armstrong was involved in a motor vehicle accident in which his vehicle struck a concrete barrier and went into a ditch. Armstrong claims that he only cut his ear and did not injure his back or leg. On February 11, Armstrong

went to see Dr. Brent A. Crouse. Dr. Crouse's "progress note" says that Armstrong was seeking medical attention for his ear, that Armstrong was concerned "about low back pain in the left side which has happened in the last few days as well," and that Armstrong complained of "an ache which radiates down the back of his leg." According to Dr. Crouse, Armstrong awoke on April 16 "with severe left sided low back pain with inability to get up." On June 3, Dr. Douglas J. Long performed surgery on Armstrong to repair a herniated disk. Armstrong returned to work at Watkins on June 27, running a forklift and doing paperwork.

PROCEDURAL BACKGROUND

On June 3, 2002, Armstrong filed an amended petition in the Nebraska Workers' Compensation Court alleging that "on or about May 11, 2001, [he] sustained a personal injury arising out of and in the course of his employment with [Watkins] in which he sustained a herniation of a lumbar disc as a result of engaging in lifting activities." At trial, after Armstrong rested, he moved to "conform the pleadings to the proof." Armstrong's counsel argued in support of the motion that while the injury's "onset occurred" on May 11, 2001, as alleged in the pleadings, whether the "onset was the result of repetitive trauma or that separate lifting incident on May 11th, that caused the herniation[,] is the determination for the trier of fact." Armstrong's counsel told the court that there was evidence in the record that the trier of fact could find that Armstrong's condition requiring surgery resulted from either "repetitive trauma" or a "single episode."

Watkins' counsel objected to the motion to conform the pleadings to the proof because, he said, he did not understand what Armstrong's counsel was seeking and because the motion was made on the day of trial. The exchange between Armstrong's counsel and the trial judge which followed the motion makes it clear that Armstrong's counsel was not seeking to actually file another amended petition or claim, and we quote his comment: "[The] trier of fact [is] to determine [whether the movant has] come up with another theory[;] then, the pleadings are conformed to whatever that [determination] is, so you don't have a variation between the pleadings and the proof." Armstrong's counsel also stated in this exchange, "[W]ith all of the gray areas

in Workers' Compensation on date of injury, and repetitive trauma, and single episode, from a conservative standpoint, that's why we're making that motion to conform to the proof." The court then asked, "So, what do you want the amendment to say?" and Armstrong's counsel replied, "I'm not amending[; I move n]ot to amend, [but] to conform to the proof." The court denied the motion.

Following the trial, the court entered an order of dismissal because the injury was "not the product of an accident that happened on or about May 11, 2001." Armstrong appealed the trial court's decision to the Nebraska Workers' Compensation Court review panel, which affirmed the trial court's decision without a detailed opinion. Armstrong appeals.

ASSIGNMENTS OF ERROR

Armstrong asserts, reassigned and restated, that the review panel erred in (1) failing to find that the trial court abused its discretion in refusing to grant his motion to conform the pleadings to the proof, (2) affirming the trial court's finding that there was insufficient evidence to support an injury date of May 11, 2001, (3) affirming the trial court's finding that a repetitive cumulative trauma injury date cannot be established in the absence of expert medical opinion specifically identifying the date thereof, and (4) affirming the failure of the trial court to find the repetitive cumulative trauma date of his accident on the basis of the evidence adduced.

STANDARD OF REVIEW

[1,2] 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. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

[3,4] Upon appeal to a Workers' Compensation Court review panel, the findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed unless they are clearly wrong on the evidence or the decision was contrary to law. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

[5] In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

[6,7] A workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997).

ANALYSIS

Motion to Conform Pleadings to Proof.

Armstrong alleges that the trial court abused its discretion in overruling his motion to amend the pleadings to conform to the evidence. However, as earlier recounted, the trial record is clear that his counsel was not seeking leave to actually amend the pleadings. Rather, under the guise of a motion "to conform to the proof," Armstrong's counsel was suggesting that the trial court should determine whether the herniated disk was a product of repetitive trauma or of a specific incident. After denying this motion, the trial court decided the case, writing that the "first issue for the Court to resolve, as set out in the pretrial order, is whether [Armstrong] suffered injury on or about May 11, 2001,

in an accident arising out of and in the course of his employment." The trial court found:

> [Armstrong's] herniated lumbar disc may be the result of repetitive lifting performed at [Watkins], but it is not the product of an accident that happened on or about May 11, 2001. If it happened in August of 2001, and no physician says that it did, the Court believes that such an accident is too remote in time to have occurred "on or about May 11, 2001." The pleadings and pretrial order frame the issue. The Court does not find any expert opinion to the effect that [Armstrong] suffered injury arising out of his employment on or about May 11, 2001, and accordingly finds that [his] petition should be dismissed.

Thus, it appears from the order that the trial court, while acknowledging evidence supporting a repetitive trauma injury, did not decide whether the injury was the result of repetitive trauma, because the court found that the issue was narrowly framed by the pleadings and pretrial order to be whether the injury was the product of an accident that happened on or about May 11, 2001.

While the technical or formal rules of procedure do not bind the compensation court other than as provided in the Nebraska Workers' Compensation Act, see Neb. Rev. Stat. § 48-168(1) (Reissue 1998), it is nevertheless helpful to look to the statute dealing with "conform[ing] the pleadings to the proof," as Armstrong's counsel moved for the trial court to do. But, first, we note that Neb. Rev. Stat. § 48-173 (Reissue 1998) dictates the contents of the plaintiff's petition in a workers' compensation case. Section 48-173 could easily be read as calling only for the minimalist detail required by "notice pleading."

[8,9] Neb. Rev. Stat. § 25-852 (Reissue 1995), although now repealed with the advent of notice pleading in civil actions, was in effect at the time this action was filed. Section 25-852 allows a party, upon motion, to amend any pleading in a number of situations, including "when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." The right to amend pleadings rests within the discretion of the trial court, and the allowance of an amendment will not be error unless prejudice results. *Foremost*

Ins. Co. v. Allied Financial Services, Inc., 205 Neb. 153, 286 N.W.2d 740 (1980). Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996).

Armstrong's pleading states that "on or about May 11, 2001, in Omaha, Douglas County, Nebraska[, Armstrong] sustained a personal injury arising out of and in the course of his employment with [Watkins] in which he sustained a herniation of a lumbar disc as a result of engaging in lifting activities." Once Armstrong rested, he moved to amend the pleadings to "conform to the proof" because, in his attorney's view, there was evidence in the record on which the trier of fact could find that "the condition for which he went to surgery was the result of repetitive trauma." Armstrong contended that whether his injury was the result of repetitive trauma or a separate lifting incident on May 11, 2001, was to be determined by the trier of fact. Armstrong did not present the trial court with a specific amendment to the pleadings.

While there are numerous cases citing § 25-852, few are workers' compensation cases. See *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946) (workers' compensation case suggesting that § 25-852 applies in workers' compensation cases, despite workers' compensation court's not being bound by rules of formal procedure in situation where plaintiff sought to amend petition between first hearing and rehearing). However, we find no support in any of the decided cases for the notion advanced by Armstrong's counsel that the fact finder, upon a motion to "conform the pleadings to the proof," picks and chooses a rationale for an award of benefits from among those that have some plausible support in the record, rather than the claimant's amending his or her petition to advance another rationale for recovery. The numerous cases under § 25-852 involve an actual amendment by a party—not something done by the court, as Armstrong's counsel proposed to the trial judge. Further, the Nebraska Legislature amended § 25-852 in 1993 to clarify that "a court may permit a party to amend any pleading, process, or proceeding at any time in the furtherance of justice, *but that a court may not make such an amendment on its own initiative*." (Emphasis supplied.)

Introducer's Statement of Intent, L.B. 29, Judiciary Committee, 93d Leg., 1st Sess. (Jan. 26, 1993). In presenting the amendment to the Judiciary Committee, Senator Doug Kristensen noted that prior to the amendment, § 25-852 seemed to indicate that

> the court amends the pleadings and not necessarily the parties. Actually it's the parties' pleadings. . . . What this does is to make sure and to clarify . . . the fact that it is the parties who are requesting the court to do so, and the court is not doing so upon [its] own motion, upon [its] own action. It is actually the parties who are amending their own pleadings.

Judiciary Committee Hearing, L.B. 29, 93d Leg., 1st Sess. 30 (Jan. 27, 1993). Given the procedural posture of the motion, the way it was made and argued to the trial court, and the abundant authority showing that "conform[ing] the pleadings to the proof" involves an actual amendment by the moving party, we find no abuse of discretion by the trial court in denying Armstrong's motion to "conform to the proof."

Failure of Trial Court to Find Compensable Injury.

We address Armstrong's other assignments together because they are argued in a blended presentation which, when summarized, asserts that one way or another, either a specific accident in May 2001 was proved, a repetitive trauma injury with an injury onset of May 11 or 16 was proved, or a compensable repetitive trauma injury was established without any need for proof of a specific date of onset. Given that Armstrong's argument on the remaining assignments ranges over considerable ground, we think a logical starting point is to recap Armstrong's work history and the medical evidence.

Armstrong claims that he was helping to load concrete blocks into a customer's truck and that he picked up two blocks at a time and then "felt a pull" in the "left low side of [his] back." However, his testimony was that he worked as a "cuber" for Watkins from 1994 through 2000. During that time, he did "a lot of heavy lifting, a lot of bending, twisting, fast pace." In 2000, he transferred to Watkins' brickyard because he "got tired of lifting all the heavy blocks." While in the brickyard, he still did "bending and stooping" and lifted heavy cement bags. As a cuber

and in the brickyard, he lifted objects weighing more than 100 pounds. Armstrong's supervisor at Watkins testified that when Armstrong came to work at Watkins in 1994, he did not have any physical limitations or restrictions and seemed to be a strong, physically fit young man.

On May 16, 2001, several days after the event of May 11, Armstrong went to see Dr. Bohac, the chiropractor, complaining of "acute [low-back pain]." On the intake form for Dr. Bohac's office, Armstrong indicated that his injury had occurred on the job. Dr. Long, who performed Armstrong's surgery to repair a herniated disk, opined in several letters submitted as exhibits at the hearing that the cause of Armstrong's disk herniation was "a result of his repetitive lifting activities of concrete blocks at Watkins." Dr. Long recognized that Armstrong had been receiving treatment from a chiropractor since May 16. Dr. Long did not state a specific date on which the disk herniation may have occurred, but opined that it did not occur as a result of the motor vehicle accident earlier mentioned herein, because Armstrong had symptoms prior to that accident.

[10] Thus, there was evidence, including expert medical opinion, adduced at trial that Armstrong's injury was the result of repetitive trauma. Had the trial court considered Armstrong's claims under a repetitive trauma theory, it would not have substantially changed Watkins' defense of the claim as a general proposition because repetitive trauma is to be tested under the statutory definition of "accident." See, *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001); *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). These holdings mean that the same statutory language from the Nebraska Workers' Compensation Act is used to determine whether a specific injury has occurred or whether the injury is the result of repetitive trauma. As a result, the defense would not be compromised unless the defendant was without any knowledge before trial of evidence tending to establish that the injury was based on repetitive trauma. But, in this case, examination of the joint pretrial conference memorandum shows disclosure of Dr. Long's letter of July 7, 2002, wherein his opinion that the cause of the injury was repetitive lifting is found.

Therefore, the defense was not compromised by Armstrong's claim at trial that the injury was from repetitive lifting at work.

[11] Whether an employee's injury is considered to be an accident or an occupational disease, the employee must meet certain requirements in order to receive compensation for the injury. *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). The first element of the statutory definition of an accident is that the injury must be "unexpected or unforeseen." The second element is that the accident must happen "suddenly and violently." The third element is that the accident must produce "at the time objective symptoms of an injury." *Id.*, citing *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The first element is satisfied if the cause was of an accidental character or the effect was unexpected or unforeseen, and the third element, that the accident produced objective symptoms, is satisfied if the symptoms manifested themselves according to the natural course of such things without any independent intervening cause. *Jordan v. Morrill County, supra.*

[12] The second element requires that the accident happen "suddenly and violently."

> [T]he term "suddenly and violently" does not require that an accident occurred "instantaneously and with force." Rather, the element is satisfied if (1) the employee has sustained an injury at an identifiable point in time arising out of and in the course of his or her employment, (2) the employee discontinues employment because of the injury, and (3) the employee seeks medical treatment because of the injury.

Vonderschmidt v. Sur-Gro, 262 Neb. 551, 557, 635 N.W.2d 405, 410 (2001). "If an employee stops work and seeks medical treatment, then the employee has established the identifiable point in time when the injury occurred." *Id.* at 558, 635 N.W.2d at 410. In *Vonderschmidt*, the high court ruled that stopping work to seek medical attention, after which attention the employee returns to work, is sufficient to establish the "identifiable point in time" component of the "suddenly and violently" test. While foretelling our final decision, it appears from the above authority that the trial judge erred in apparently viewing a specific injury case as completely different from a cumulative trauma case, when the core principle has been established by the Nebraska Supreme Court

that whether a cumulative trauma injury has been proved is to be tested under the definition of "accident." Additionally, the trial judge incorrectly ruled that the pleading of a specific injury date of May 11, 2001, precluded his consideration of whether a cumulative trauma injury had been proved. Finally, we find as a matter of law that Armstrong's failure to specifically plead that his injury resulted from repetitive trauma instead of from a single incident is not dispositive of his claim.

In *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the construction worker plaintiff pleaded a specific incident in her petition. However, her physician's opinion was that her preexisting knee condition (tilted kneecaps having a tendency to dislocate) had been aggravated and that the aggravation " 'could have been caused by an accident such as [the incident when she felt a tear in her knee while lifting I-beams with a coworker] or by the repetitive kneeling and squatting that she was required to do.' " 224 Neb. at 581-82, 400 N.W.2d at 246. The physician further stated that he could not tell " 'which may have caused it.' " *Id.* at 582, 400 N.W.2d at 246.

The Nebraska Supreme Court held that because the employer was not misled by the plaintiff's pleading a specific, single incident as the cause of her injury, instead of cumulative trauma, which the trial court found was the actual cause, the finding was not outside the issues of the case. The *Hayes* court upheld the finding of the workers' compensation court that the plaintiff had suffered an accidental injury arising out of and in the course of employment. While we recognize that *Hayes* was a four-to-three decision, it still remains a precedent whose viability may well be strengthened as the differences between specific injury accidents and cumulative trauma accidents become less and less distinct, as cases such as *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), have been distinguished and disapproved. See *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999).

Similarly to the employer and circumstances in *Hayes*, Watkins was not misled by Armstrong's pleading that he was injured on May 11, 2001, due to a single incident. Watkins was

aware that Dr. Long had opined that Armstrong's injury was a result of repetitive trauma, and certainly, the factual circumstances for developing repetitive trauma injuries are present in jobs like the one Armstrong performed for many years at Watkins. In the final analysis, because the formal procedural and pleading rules do not apply in the Workers' Compensation Court and because *Hayes* does not require specific election between cumulative trauma and specific injury, the trial court erred in limiting its consideration of the evidence to whether the evidence had proved a specific instance of accidental injury on May 11. The trial court should have considered Armstrong's request that an accident by cumulative trauma be considered as proved by the evidence adduced at trial.

Workers' Comp. Ct. R. of Proc. 11(A) (2004) provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

Because the trial court failed to provide a reasoned decision as to whether Armstrong's injury was the result of cumulative trauma, we are precluded from providing a meaningful appellate review on the issue. Therefore, we reverse the review panel's decision affirming the trial court's decision to dismiss Armstrong's petition. We remand the cause to the review panel for further remand to the trial court, with directions to reconsider such cause on the record made as to whether Armstrong has proved either a specific injury or a cumulative trauma injury, complying with rule 11 in its decision. We neither express nor suggest any opinion on what that decision should be.

REVERSED AND REMANDED WITH DIRECTIONS.

SHAE D. GARTNER, APPELLEE, V. JENA R. HUME, APPELLANT.

686 N.W.2d 58

Filed August 24, 2004. No. A-03-620.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, 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.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Custody.** To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
6. **Child Support: Rules of the Supreme Court: Pensions.** Tier I railroad retirement contributions are deductible under paragraph E(2) of the Nebraska Child Support Guidelines.
7. ____: ____: ____. Tier II railroad retirement contributions constitute mandatory retirement contributions and, as such, are deductible under paragraph E(4) of the Nebraska Child Support Guidelines.
8. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
9. **Modification of Decree: Child Support: Time.** The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
10. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
11. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
12. **Rules of the Supreme Court: Child Support: Modification of Decree.** Under certain circumstances, an amendment to the Nebraska Child Support Guidelines can

itself be considered a material change in circumstances warranting modification of a parent's child support obligation.

Appeal from the District Court for Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed as modified.

Philip M. Kelly, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellant.

Kimberly J. Quandt, of Sonntag, Goodwin & Quandt, P.C., for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

In this proceeding to modify a paternity judgment, Jena R. Hume appeals from the district court's order denying permission to remove the child to Colorado and granting an increase in child support. Because we conclude that the trial court did not abuse its discretion except in determining the mandatory retirement deduction and in granting only a prospective increase in child support, we affirm as modified.

II. BACKGROUND

1. INITIAL ACTION

On October 7, 1999, Shae D. Gartner filed this paternity action against Jena, asserting that Shae was the father of Triston G. Gartner-Hume, who was born on September 30, 1999. Shae also filed a motion for paternity testing. Court-ordered paternity testing confirmed Shae to be Triston's father. On July 3, 2000, the parties filed a stipulation regarding child custody, visitation, and child support.

On July 25, 2000, the trial court entered an order pursuant to the parties' stipulation. The court awarded joint legal custody of Triston to both parties and primary physical custody to Jena, subject to Shae's reasonable visitation rights including, but not limited to, every other weekend, a 4-hour weeknight visitation once each week, alternating holidays, Triston's birthday, and summertime visitation. The court granted both parties the "right of first refusal to have [Triston] in his or her care when the other

party requires a day care provider." The court ordered Shae to pay $350 per month in child support and to maintain health insurance for Triston. Each party was ordered to pay half of Triston's uncovered medical expenses, and the parties were ordered to take turns claiming Triston as a dependent for income tax purposes.

2. Previous Modification Proceeding

On June 14, 2001, Shae filed an application for modification of physical custody. On February 26, 2002, Jena filed her amended response to Shae's motion, together with a counterclaim for modification. Jena alleged that because of her employment with the Colorado Department of Corrections, the State of Colorado had offered her an opportunity to pursue her degree as a registered nurse; that Jena would have to move to Colorado to continue that employment; that she was engaged to a man also employed by the Colorado Department of Corrections and planned to live in Colorado upon her marriage; that it was in Triston's best interests to move to Colorado with Jena; and that upon Jena's move to Colorado, Shae would have reasonable visitation with Triston. Jena prayed for permission to relocate with Triston to Colorado. The court conducted a hearing on June 19.

On August 21, 2002, the trial court entered an order denying Shae's motion to modify custody, granting Jena's request to move Triston to Fort Lyon, Colorado, and providing for visitation by Shae. The order further provided:

> In the event that [Jena] does not complete her intended marriage to her co-worker by October 1, 2002, she is required to move [Triston] back to Sidney, Nebraska.
>
> [Jena] is ordered to maintain employment with the Department of Corrections in Ft. Lyons [sic] upon her move from Nebraska. Failure to do so will result in [Triston's] being returned to Sidney, Nebraska.
>
> [Jena] is ordered to pursue her R.N. degree in accordance with her testimony.

We note that insofar as the trial court's August 21, 2002, order purported to require that Triston be returned to Nebraska if Jena did not comply with certain requirements regarding her education, employment, and marital status, that order constituted a void conditional order. If a judgment looks to the future in an attempt

to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). However, Jena never attempted to utilize the order and did not remove Triston to Colorado under its provisions.

3. Current Proceeding

On September 11, 2002, Jena filed a motion to modify child support and to modify the court's order concerning the relocation of Triston. Jena alleged that a material change in circumstances had occurred since the July 25, 2000, order in that the incomes of both parties had changed significantly, and she prayed that the court modify the child support pursuant to the Nebraska Child Support Guidelines (Guidelines) to reflect the parties' incomes. Jena also requested that Shae be ordered to pay for both daycare and medical expenses pursuant to the Guidelines. Jena further alleged that after the trial on her previous request to relocate Triston, she was advised the nursing program had been canceled by the school in Fort Lyon; that she had not moved to Colorado as planned; and that she had postponed her marriage because she had not moved to Fort Lyon. Jena requested leave to move to Sterling, Colorado, where she worked for the Colorado Department of Corrections. Jena alleged that she would be able to pursue her nursing degree at a school in Fort Morgan, Colorado. She requested that the court modify its August 21, 2002, order to allow her to move to Colorado without specifying the town in which she would live and to remove the requirements regarding her employment with the Colorado Department of Corrections. Jena also prayed for an order requiring the parties to share responsibility for transporting Triston between Nebraska and Colorado for visitation.

In Shae's answer, he alleged that Jena's motion was frivolous and that based on the unclean hands doctrine, Jena should be estopped from requesting relief. Shae requested an order requiring that Triston remain in Nebraska.

On April 29, 2003, the court conducted a trial on Jena's motion to remove Triston to Sterling and on her motion for modification of child support.

(a) Jena's Testimony

Jena testified at length. Jena was 27 years old at the time of trial. She had been a licensed practical nurse (LPN) for 6 years and lived in Sidney, Nebraska. At the time of the original order, she worked as an LPN at Beverly Healthcare in Sidney, which work required daycare for Triston. At the time of trial, she worked for the Colorado Department of Corrections in Sterling and wanted to return to school to become a registered nurse (RN). Jena never implemented the move to Fort Lyon because the community college she had planned to enroll at temporarily canceled its nursing program. The college informed Jena of the cancellation during the latter part of July 2002 (prior to the trial court's August 21 order). Jena refrained from marrying her fiance because she could not move to Colorado after the nursing program had been canceled and because she did not want to live apart from him after getting married. Jena never obtained employment in Fort Lyon by the Colorado Department of Corrections.

Jena requested specific permission to move to Sterling, rather than generally to the State of Colorado. She claimed that she intended to continue her employment with the Colorado Department of Corrections. She expressed the intention to remain in Sidney with Triston, if the court would not approve her request to move to Sterling. Sterling is approximately 40 miles from Sidney. Commuting from her home in Sidney to her work in Sterling required approximately 45 minutes.

Jena's fiance lives and works in Fort Lyon. The Colorado Department of Corrections, where Jena's fiance works, had placed all transfers on hold for "a couple of months" due to budget constraints. If Jena's fiance were not transferred to Sterling, Jena probably would not marry him; at least at the time of trial, she disclaimed any firm plans to marry.

At the time of trial, Jena, Triston, and Jena's daughter from a previous relationship were living with Gwen Hume, Jena's mother, and with Gwen's boyfriend. Jena had moved three times since Triston's birth.

Jena asserted that she and Shae had always worked well together to accomplish visitation and to accommodate their respective schedules. She intended for that cooperation to continue

if she was allowed to move to Sterling with Triston. With that in mind, Jena offered that on Wednesday evenings, she would bring Triston to Sidney to visit Shae, and that for weekend visits, she would take Triston to Sidney, arrange for Shae to pick Triston up in Sterling, or meet Shae halfway between Sterling and Sidney. She claimed that Triston is accustomed to traveling between Sidney and Sterling on a daily basis. For that reason, she asserted that transporting him for visitation would not be a problem.

All of Jena's family members, except her sister, lived in Sidney, and all of Shae's family members lived there. Jena maintained that if she were to move, Shae and his family would have as much time with Triston as before. Jena acknowledged that Shae and Triston have a close relationship. She agreed that Triston had bonded with his relatives in Sidney and that those relatives all have maintained active roles in Triston's life.

Jena had signed a contract to purchase a house in Sterling, subject to obtaining permission to move. The house has two stories, a finished basement, four bedrooms, and 1½ bathrooms. There is a large play area in the backyard, and a park is located two blocks away. Jena had been preapproved for a loan at a 6- or 8-percent interest rate to purchase the house. The purchase price of the house was to be $155,000, and Jena's monthly payments were to be $1,189.

While Jena was at work, Natasha Wilcox provided daycare for Triston in Sterling and would continue to do so in the event that Jena moved to Sterling. Wilcox had provided daycare since September 2002, and Jena opined that Wilcox is an "excellent" daycare provider. Wilcox is licensed to provide daycare by the Colorado Department of Social Services.

If Jena moved to Sterling, she would live approximately 5 miles from Wilcox and 1 or 2 miles from work. Moving to Sterling would reduce the time she and Triston spent traveling each day from 90 minutes to 10 or 20 minutes. Jena claimed to feel more comfortable having Triston at daycare in the city in which she worked rather than leaving him in daycare in Sidney.

Jena named two Sidney daycare providers that she had contacted "before school started" who did not have any openings. If Triston attended daycare in Sidney, Shae could take him to daycare in the morning after Jena left for work and could easily pick

up Triston from daycare after work and care for him until Jena's 12-hour workday ended.

If Jena relocated to Sterling, Jena's daughter and Triston would attend an elementary school located approximately five blocks from the house Jena intended to purchase. The school operates a preschool program in which Triston could participate, and Jena stated that she had taken both children to the school to meet the principal and teachers. Jena opined that the school is "excellent" and related that the children of some of her acquaintances and colleagues attend that school.

Jena claimed that Sterling offers more activities for children than does Sidney and that she had contacted people in Sterling regarding T-ball, karate, gymnastics, and swimming. Sterling also has a community center. Jena considered Sterling to be a safe place to rear children.

Jena claimed that facilities exist in Sterling to accommodate Triston's asthma condition and that the Sterling hospital is larger than the Sidney hospital. She related that she is familiar with the doctors in Sterling and that Triston could obtain the same level of medical care in Sterling as he receives in Sidney.

Jena's 2000 tax return reflected that Jena's adjusted gross income, including wages from Beverly Healthcare and profits from her nursing care business, was $15,452. Jena's 2000 tax return also shows that Triston attended daycare in Sidney. According to Jena's 2001 tax return, Triston attended the same daycare in Sidney and Jena's adjusted gross income from working for the Colorado Department of Corrections and from her nursing care business totaled $30,545. Jena earned $39,342 in 2002, which reflected shift differential and overtime income. Her employment also provides retirement and health insurance benefits for herself and dental insurance for her children.

Jena generally worked the day shift from 7 a.m. to 3 p.m. She stated that if she moved to Sterling, she would work two 12-hour shifts each week, 6 a.m. to 6 p.m., and two 8-hour shifts, 6 a.m. to 2 p.m., receiving $16.25 per hour. She would ask her employer not to schedule her for evening hours, and she would probably work 24 hours during the week and work on the weekends when Triston was visiting Shae. If she were to move, Jena probably would not work overtime because of nursing school. The

Colorado Department of Corrections would provide a flexible schedule to accommodate her schooling. Her employer notifies Jena on a monthly basis of the hours she will work for the entire month. She does not know which days she will be working from month to month.

Jena had contacted Morgan Community College in Fort Morgan about a nursing program there. Sterling is approximately 30 minutes from Fort Morgan. Jena stated that Morgan Community College offers a part-time nursing program, consisting of half days from 9 a.m. to 1 p.m. on Mondays, Wednesdays, and Fridays, but that the schedule is subject to change each year. If she attended the part-time program at Morgan Community College, she would begin in September 2003 and obtain her degree in approximately 2 years. Jena claimed to have fulfilled all the requirements for admission to the nursing program except for obtaining "Colorado IV certification." Jena testified that she had not applied to Morgan Community College because her employer would not pay her tuition until she became a Colorado resident. Jena testified that she had heard that Morgan Community College might offer a satellite nursing program in Sterling in the future.

Jena claimed that if she became a Colorado resident, her employer would pay for her tuition, fees, and books, as long as she maintained a "B" average. Based on her past schooling, she expected no difficulty in maintaining the required average. Her employer would schedule her work to accommodate her classes. The need for RN's at the Colorado Department of Corrections in Sterling is very high, because there are unfilled RN positions. Once Jena has her nursing degree, she could be employed by the Colorado Department of Corrections as an RN and earn $4,600 per month, rather than the approximately $2,816 she earns each month as an LPN. There are other RN positions available at the Sterling hospital, and she did not want to be limited by the court to working at the Colorado Department of Corrections.

Sidney does not have a nursing program, and the closest Nebraska program is in Scottsbluff, about 75 miles from Sidney. If Jena attended the nursing program in Scottsbluff, she would have to quit her job with the Colorado Department of Corrections; would have to pay for her own books, tuition, and fees; and would be without health insurance and other benefits.

Jena believed that being an RN would benefit her children because she would have a larger income to pay for "material things, fun things, . . . programs for them to join, [and] vacations."

(b) Gwen's Testimony

Gwen, Jena's mother, testified that Jena was living with Gwen temporarily while Jena recovered from injuries sustained in a car accident. At the time of trial, Gwen had been an RN for 3 years and was working as such for the Colorado Department of Corrections in Sterling, earning $25.50 per hour. Gwen claimed that she is familiar with the department's policies and procedures regarding employee educational benefits. She asserted that the Colorado Department of Corrections would pay for the further nursing education of interested LPN's on staff because there is a shortage of RN's. Gwen was formerly employed as an RN at the hospital in Sidney, making $16.75 per hour, and 6 weeks prior to trial, she had been approached about returning to the Sidney hospital to work for $18.35 per hour. She stated that LPN's at the Sidney hospital earned between $14 and $16 per hour, depending on their experience.

(c) Shae's Testimony

Shae also testified at length. He claimed to have a "[g]reat" relationship with Triston and stated that Triston was "a lot of fun." When Triston visited Shae, Triston would also see Shae's parents, grandmother, and other relatives who live nearby. Shae stated that either his parents or relatives would come to his home or he would take Triston to see them and that Triston sees them all as much as possible. Triston also sees relatives around town and talks about his cousins. Of Shae's family, Triston most frequently sees Shae's parents. Triston had a growing relationship with Shae's live-in girl friend. Shae stated that his girl friend is a loving adult figure who loves and cares for Triston. Shae and his girl friend had talked about marrying in the future but wanted to defray some financial debts first. Shae and his girl friend live in a quiet neighborhood in a three-bedroom house located approximately one block from his parents' house and 2½ blocks from Gwen's house.

Shae disputed Jena's claim that Sterling has more benefits for Triston than does Sidney. Shae claimed that in comparison to

Sterling, Sidney lacks only an indoor swimming pool. Sidney has activities for children, programs at the community center, and good schooling. Sidney has preschools, and when Triston starts school, Shae wants to be able to attend Triston's school activities.

Shae asserted that he and Jena got along with one another in general and with regard to visitation issues. For a time, Shae worked 4 days each week in Las Vegas, Nevada, returning to Sidney each Friday morning and leaving on Sunday to return to work. Jena and Shae adjusted the visitation schedule to accommodate Shae's work schedule. Shae admitted that Jena had always been committed to working out a visitation schedule, and Shae hoped that she would do the same if she moved to Sterling.

The original order required that Shae have visitation one weeknight each week and every other weekend. Shae testified that since the original order, Jena provided more visitation than the order required. Shae maintained that it was important to have Triston in his care as much as possible and to have the option to care for Triston anytime Jena was working.

If Jena and Triston moved to Sterling, Shae maintained that while the visitation schedule would not change, he anticipated visitation problems due to bad weather, vehicle breakdowns, and "just running late." If Shae missed a visit with Triston due to bad weather or some other cause, Shae would expect Jena to accommodate him in making up the missed visit. If Jena moved, Shae would not be able to watch Triston on short notice as he had in the past. Although Shae thought it was "great" that Jena wanted to continue her education, he did not want to lose time with Triston. Jena was not certain what her schedule would be, and Shae claimed that it could conflict with visitation.

Shae had contacted a daycare provider in Sidney who had agreed to watch Triston. If Jena took Triston to a daycare provider in Sidney, Shae could pick up Triston and would enjoy doing so. Shae also has family members in Sidney who could watch Triston on occasion, including Shae's parents and grandmother.

Shae objected to Jena's moving Triston out of Nebraska because he did not believe it was in Triston's best interests. He stated that Triston has family, friends, and relatives in Sidney and that Triston had been in Sidney his entire life. Shae believed that considering the changes in Triston's residences and daycare

providers, Shae's house was the closest thing that Triston had resembling a stable home. Shae opined that if Triston did move to Colorado, moving to Sterling would be better for Triston than moving to Fort Lyon.

Shae is employed by the Union Pacific Railroad. According to Shae's tax returns, he earned $37,926 in 2000, $44,474 in 2001, and $42,189 in 2002. Shae testified that he earned overtime pay in 2000, 2001, and 2002 and that such overtime pay is reflected in his gross income. Shae expected to earn less income in 2003 than he did in 2002 because he would not work "on the road" as he did in 2002 and would not earn as much overtime pay. Shae's March 15, 2003, pay stub reflected a little less income than what he would be earning if he worked in Sidney rather than out of town.

As an employee of the railroad, Shae had deductions from his income for tier I and tier II railroad retirement benefits, but he did not have traditional Medicare and FICA deductions. He stated that he put 6 percent of his income toward his 401K plan. His employer deducts $48.25 per month from his paycheck for union dues. We summarize Shae's income in more detail in the analysis portion of this opinion.

Shae did not plan to continue taking out-of-town jobs because staying in Sidney would allow him to be at home in the evenings and on weekends and to therefore spend more time with Triston. Although Shae would be making less money by working in Sidney, he expressed a willingness to sacrifice the extra income in order to "make the best possible situation for Trist[o]n."

At the time of trial, Shae was paying Jena $350 per month for child support and was not paying for daycare expenses. Shae included Triston on Shae's medical and prescription plan and tried to split with Jena those expenses not covered by insurance. Because Shae no longer travels in his job, he claimed that it would be difficult for him to reimburse Jena for daycare expenses.

(d) Judicial Notice of Prior Hearing

At the close of evidence and at the request of both parties' attorneys, the trial court took judicial notice of a June 2002 hearing in this case, which appears in the record in the form of a supplemental bill of exceptions. To the extent that the testimony from that hearing has any bearing upon our review, we will address such testimony in the analysis section of this opinion.

4. TRIAL COURT'S ORDER

On May 5, 2003, the trial court entered an order increasing Shae's child support obligation to $489 per month commencing April 1, 2003. The order denied Jena's request to modify the payment of uncovered medical costs. Regarding Jena's motion to remove Triston from Nebraska, the trial court stated:

> The threshold question is whether there is a material change of circumstances that has occurred since the last hearing. Truly, other than [Jena's] changing her mind, nothing has changed. She is working at the same place, living at the same place and doing the same things. There is no material change of circumstances since the last hearing. As there is no material change of circumstances, this Court has no authority to modify the order of the Court. As the Court is without authority to modify[,] the Motion to Allow the Removal of [Triston] from the State of Nebraska is dismissed.

III. ASSIGNMENTS OF ERROR

On appeal, Jena alleges that the district court abused its discretion (1) in denying Jena's motion to remove Triston from Nebraska, (2) in not applying the modification of child support retroactively to the first day of the month following the filing date of the application for modification, (3) in calculating child support by deducting Shae's 401K contributions, (4) in determining the parties' monthly income, and (5) in denying Jena's request that Shae pay a share of daycare expenses.

IV. STANDARD OF REVIEW

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

[3] Modification of child support payments is entrusted to the trial court's discretion, 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. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[4] Interpretation of the Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

V. ANALYSIS

1. Removal of Triston From Nebraska

Jena argues that the trial court incorrectly applied the "material change in circumstances test" to determine whether she could remove Triston from Nebraska. Brief for appellant at 14. We agree that the existence of a material change does not directly apply to an application for removal. However, the best interests of the child dictate the court's determination regarding either a modification of child custody or a proposed removal of children from the state. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

In this instance, we believe the trial court used "material change of circumstances" as a shorthand phrase to address the application of one of the doctrines concerning finality of prior adjudications, such as res judicata, collateral estoppel, or law of the case. The circumstances of Jena's successive motions requesting leave to remove Triston to Colorado might have supported consideration of one or more of these principles. However, Shae did not raise them as affirmative defenses in his answer. See, e.g., *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982) (res judicata is affirmative defense which must ordinarily be pleaded to be available). An appellate court may raise the issue of res judicata sua sponte, but infrequently elects to do so. See *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991). Without determining whether the trial court erred in considering the matter not raised by the pleadings, on our de novo review, we address the merits of Jena's request for removal of Triston from Nebraska under the factors set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[5] To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.*

(a) Legitimate Reason to Leave State

A reasonable expectation of improvement in the career or occupation of the custodial parent is a legitimate reason to relocate. See *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). The Nebraska Supreme Court has also recognized the pursuit of educational opportunities as a legitimate reason to move to another state. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Jena testified that moving to Colorado would allow her to obtain her nursing degree at the expense of her employer and in turn significantly increase her income and improve the quality of life for herself and her children. She testified that she would not be able to obtain her nursing degree while living in Sidney without quitting her job in Sterling and incurring significant expenses. On our de novo review, we determine that Jena established a legitimate reason to move to Colorado.

(b) Triston's Best Interests

The Nebraska Supreme Court has set forth three factors to be considered in determining whether removal to another jurisdiction is in a child's best interests: (1) each parent's motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. See *Farnsworth v. Farnsworth, supra.*

(i) Each Parent's Motives

Jena and Shae each have valid reasons for taking their respective positions on Triston's removal from Nebraska. Jena seeks to further her education and better her career, which we have determined is a legitimate motive. No evidence suggests that Shae resists removal in bad faith or for manipulative purposes. Shae's

testimony demonstrates that he is primarily concerned with maintaining frequent and regular contact with Triston. This also constitutes a valid motive. Thus, it appears that the motives of each party are equally balanced.

(ii) Quality of Life

The factors to consider in determining the effect removal to another jurisdiction would have on the quality of life of the parent seeking removal and of the child include (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent, because the best interests of the child are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.* We consider only those factors relevant to the case at hand, in light of the evidence before us.

a. Enhancement of Income or Employment

Jena testified that once she obtained her nursing degree, she would be eligible for an RN position with her employer and for a raise in pay from the approximately $2,816 per month she earns as an LPN to approximately $4,600 per month. On our de novo review, we conclude that Jena established at least a reasonable probability that enhanced income and employment would be realized by moving to Colorado.

b. Improvement of Housing or Living Conditions

At the time of trial, Jena, Triston, and Jena's daughter were residing with Gwen and Gwen's boyfriend. Jena adduced no evidence regarding the characteristics or quality of that residence.

Jena testified that she had signed a contract to buy a four-bedroom house in Sterling, subject to receiving permission to move to Colorado. The house has a large play area in the backyard and is near a park and a school. Jena described the house in Sterling as a favorable environment for her children. Although we have no specific evidence to compare Jena's present residence with the Sterling house, at least an inference suggesting improvement arises, because most adults would prefer an independent housing arrangement rather than residing with their parents.

We also note that the purchase price of the house in Colorado is $155,000. Jena had obtained financing at an interest rate of 6 or 8 percent, and her monthly payments were to be $1,189. Jena testified that the nursing program in which she planned to enroll would take approximately 2 years to complete and that without a nursing degree, she earns approximately $2,816 per month. We cannot determine whether this obligation would strain Jena's finances or, if so, whether any financial difficulties would adversely affect Triston. On de novo review, we find little evidence that housing or living conditions would be significantly improved by moving to Sterling.

c. Educational Advantages

Jena testified that Sterling has more activities for children than does Sidney, but Shae testified that compared to Sterling, Sidney lacks only an indoor swimming pool. Jena testified that the school she had chosen in Sterling is excellent, and Shae testified that Sidney has "good schooling." However, the parties provided mere opinion testimony, with no objective evidence to compare the respective educational environments. Shae testified that if Triston attended school in Sterling, Shae would not be able to attend Triston's school activities. We conclude that Jena did not prove that Triston would gain any significant educational advantage by moving to Sterling.

d. Physical Needs

Jena testified that facilities exist in Sterling to accommodate Triston's asthma condition; however, she also testified that Triston would receive the same level of care that he currently receives in Sidney. Thus, with regard to Triston's physical needs, Jena did not establish that Sterling has any advantage over Sidney.

e. Quality of Relationship Between Triston and Parents

The effect of the removal to another jurisdiction must be evaluated in light of the child's relationship with each parent. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (considering which parent had primary relationship with child); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000) (concluding that close relationship and extensive contacts between father and children weighed against long-distance relocation with mother).

There was no specific testimony about Jena's relationship with Triston. However, the evidence does show that Jena is Triston's primary caretaker and that she was making arrangements for Triston's schooling and daycare with Triston's best interests in mind. Jena testified that after her initial motion for removal of Triston to another state, she had chosen to stay in Nebraska and maintain custody of Triston rather than move to Colorado and get married. She also testified that she would choose to stay in Nebraska with Triston if her second motion for removal was denied.

Shae testified that he had a good relationship with Triston, and Jena acknowledged that Shae had a close relationship with Triston. Shae stated that he strove to regularly and consistently exercise visitation, compensating for visits he missed while working out of town. Shae stated that he is concerned that a move to Colorado would reduce the time he spends with Triston. Shae expressed an interest in attending school activities when Triston started school.

This evidence establishes that both parents have a good relationship with Triston.

f. Ties to Sidney and Extended Family

Triston has extended family in Sidney on both parents' sides. At the time of trial, he and Jena were living with Gwen, Jena's mother, just a few blocks from Shae's house and Shae's parents' house. Shae testified that Triston would see his paternal grandparents and other relatives while visiting Shae and that Triston spoke of his cousins and encountered relatives around town. Jena testified that Triston had bonded with his relatives in Sidney and

that they all had active roles in his life. Shae testified that because Jena has changed residences several times, he feels his house in Sydney is the only real home that Triston knows. The evidence shows that Triston has numerous ties to Sidney and to his extended family in that community.

The original judgment provided each parent with a "right of first refusal" to provide childcare when the other parent required a daycare provider. The testimony during the June 2002 hearing provides persuasive evidence that Shae extensively exercised that right. Although the parties disputed the exact number of occasions, Shae clearly used these opportunities to maintain extensive contact with Triston above and beyond a normal visitation schedule.

(iii) Effect of Removal on Contact Between Triston and Shae

This factor focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship, and courts typically view this factor in light of the potential to establish and maintain a reasonable visitation schedule. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id.* In determining reasonableness, our considerations include the frequency and the total number of days of visitation, the distance traveled and expense incurred, and the custodial parent's willingness to comply with a modified visitation schedule. See *id.*

Jena and Shae agree that they have always worked well together to accomplish visitation and to accommodate their respective schedules. Jena expressed her intent to maintain the visitation schedule already in place even if she and Triston moved to Sterling by taking Triston to Sidney, by allowing Shae to pick Triston up in Sterling, or by meeting Shae halfway between the two communities. Shae testified that he believed the distance between Sterling and Sidney would reduce his time with Triston due to inclement weather, vehicle breakdowns, and lost opportunities to visit Triston on short notice or to watch him when daycare was unavailable. Jena testified that Triston is

accustomed to traveling between Sidney and Sterling daily and that transporting him for visitation therefore would not be a problem. However, the evidence persuades us that the move to Sterling would effectively nullify, for Shae, the "right of first refusal" for childcare. Because Shae has utilized that provision to exercise visitation far beyond a standard visitation schedule, implementing a standard visitation arrangement after the proposed move would significantly diminish Shae's opportunity for visitation.

While Jena has demonstrated her willingness to work with Shae in scheduling visitation, we conclude that moving Triston to Sterling would significantly diminish Shae's ability to maintain the relationship that the parties agreed to foster with the "right of first refusal."

(iv) Best Interests Conclusion

In light of the strong ties that Triston has to Shae and other extended family in Sidney and the extensive visitation contemplated by the parties through the "right of first refusal," which Shae has utilized, we cannot conclude that the trial court abused its discretion in denying Jena's motion to move Triston to Sterling. While we may not have viewed the evidence initially in precisely the same way as did the trial court, we cannot conclude that the result is untenable or that the decision deprives Jena of a just result.

2. CHILD SUPPORT

(a) Averaging Shae's Monthly Income

Jena assigns that the trial court erred in using $3,190.09 as the figure for Shae's monthly income, rather than $3,518.42, a figure based on Shae's 2002 tax return. Shae receives two paychecks each month. Shae testified that his March 15, 2003, pay stub reflects what his income would be if he worked in Sidney rather than out of town and took fewer overtime hours, which was his plan. According to that pay stub, Shae's adjusted gross income for that pay period was $1,472.35 for 82½ hours of work. Although the trial court did not specify how it arrived at $3,190.09 for Shae's monthly income, that figure can be derived by multiplying $1,472.35 by 26 (paychecks per year) and

dividing by 12 (months in a year). See Guidelines, paragraph D. Thus, the trial court accepted Shae's testimony regarding his income and future overtime as the status of his income at the time of trial. The trial court's monthly income figure of $3,190.09 is supported by the evidence, and we conclude that the court did not abuse its discretion in using that figure.

(b) Retirement Deductions

Jena assigns that the trial court used an incorrect figure in calculating Shae's mandatory retirement plan contribution. According to the trial court's child support worksheet, the trial court deducted $557.31 from Shae's monthly salary for his mandatory retirement plan contribution. Although the trial court did not explain how it calculated this number and we have been unable to replicate this exact figure with our calculations, it is apparent that the trial court deducted tier I and tier II railroad retirement contributions, union dues, and 401K contributions from Shae's monthly income, lumping all of these items under the deduction for "Mandatory Retirement."

Paragraph E(4) of the Guidelines provides for the deduction of "[i]ndividual contributions, in a minimum amount required by a mandatory retirement plan." Paragraph E(4) further provides: "Where no mandatory retirement plan exists, a deduction shall be allowed for a continuation of actual voluntary retirement contributions not to exceed 4 percent of the gross income from employment . . . ." Jena argues that Shae's tier II railroad retirement contributions are part of a mandatory retirement plan and that the trial court therefore erred in also allowing a deduction for Shae's 401K contributions because those contributions were voluntary. Shae conceded in his brief that the 401K contributions are voluntary. However, Shae maintains that the tier II amount represents a tax rather than a mandatory retirement contribution and that the 401K contributions thus are properly deductible.

[6] In *Wallers v. U.S.*, 847 F.2d 1279, 1280-81 (7th Cir. 1988), the U.S. Court of Appeals explained the history of the tier I and tier II railroad retirement programs as follows:

> In 1937, Congress bifurcated the federal old age insurance program between the social security system and the railroad retirement system. . . . Until 1974 railroad retirement benefits were funded through payroll taxes paid in equal

> amounts by employers and employees. The applicable payroll tax rate was consistently higher than the social security payroll tax rate. . . .
>
> In 1974, the railroad retirement system was divided into two programs. The Tier I program became the equivalent of social security. It taxes railroad employers and employees at the social security tax rate and distributes retirement benefits equal to those distributed by social security. Railroad retirees receive additional benefits under the Tier II program, which, from 1974 to 1981, was financed by payroll taxes paid solely by employers. *Since 1981, railroad employees have been required to pay a small percentage of their income to the Tier II program.*
>
> All railroad retirement and social security benefits were tax exempt until Congress passed the Railroad Retirement Solvency Act of 1983 (the "Act" or the "Solvency Act"), Pub.L. No. 98-76, 97 Stat. 411 (codified in scattered sections of 26 U.S.C., 42 U.S.C. and 45 U.S.C.), in an effort to raise what it determined was much-needed revenue for the railroad retirement program. One feature of the Act is the imposition of an income tax on railroad retirement benefits. Tier I benefits are taxed in the same manner as social security benefits. . . . Tier II benefits, however, are taxed as qualified private pensions. Except to the extent they represent the taxpayers' own contributions, all Tier II benefits are taxed.

(Emphasis supplied.) Thus, as the system is explained in *Wallers v. U.S., supra*, tier I railroad retirement contributions represent a railroad employee's equivalent to Social Security. We conclude that tier I railroad retirement contributions are deductible under paragraph E(2) of the Guidelines. See *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999) (payments of self-employment taxes by self-employed parent are deductible under paragraph E of Guidelines). While tier I railroad retirement contributions should have been deducted on a different line of the worksheet than the line employed by the trial court, that does not affect the bottom line.

[7] We further conclude that tier II railroad retirement contributions constitute mandatory retirement contributions and, as

such, are deductible under paragraph E(4) of the Guidelines. See, also, *Montgomery v. Bolton*, 349 Ark. 460, 79 S.W.3d 354 (2002) (because tier II contributions are automatic, involuntary, and nonrefundable, they are deducted from net income in calculating child support in order to accurately reflect railroad employee's disposable income).

Shae argues that the tier II deduction is a tax on railroad employees, as defined by the Internal Revenue Code, and that although such tax is automatically deducted, it does not constitute a mandatory retirement contribution. The Internal Revenue Code, I.R.C. § 3201 (Supp. I 2001), provides for the imposition of the "Tier 2 tax" on railroad employees as follows:

> **(1) In general**
>
> In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee.
>
> **(2) Applicable percentage**
>
> For purposes of paragraph (1), the term "applicable percentage" means—
>
> . . . 4.90 percent in the case of compensation received during 2002 or 2003[.]

Although the federal statute characterizes the tier II deduction as a "tax," that label does not necessarily dictate the proper classification of tier II deductions under the Guidelines. See *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003) (contributions may be "mandatory" under the Guidelines notwithstanding opposite characterization by federal regulations). Based on the explanation in *Wallers v. U.S.*, 847 F.2d 1279 (7th Cir. 1988), we conclude that in reality, mandatory tier II railroad retirement contributions function under the Guidelines as mandatory retirement contributions.

Shae concedes that unlike tier II railroad retirement contributions, his 401K contributions are not mandatory. Paragraph E(4) of the Guidelines authorizes a deduction for voluntary retirement contributions only "[w]here no mandatory retirement plan exists." Because tier II railroad retirement contributions function as a

"mandatory retirement plan" for railroad employees, it follows that in this case, no deduction may be allowed for voluntary retirement contributions. Therefore, under the requirements of paragraph E(4) of the Guidelines, the trial court erred in deducting Shae's 401K contribution from his income. Neither party assigns error under paragraph E(4) in the deduction of the union dues, and accordingly, we do not consider the propriety of including union dues as part of the mandatory retirement deduction.

Upon excluding the amount of Shae's monthly 401K contribution from the mandatory retirement deduction, we conclude that Shae's mandatory retirement deduction is $458.78. This results in Shae's monthly child support obligation being properly calculated as $506 rather than $489.

(c) Retroactive Application of Child Support

Jena filed her motion for modification of child support on September 11, 2002. On May 5, 2003, the trial court entered its order requiring an increase in child support from $350 per month to $489 per month commencing April 1, 2003. Jena argues that the trial court abused its discretion in not applying the modification of child support retroactively to the first day of the month following the filing date of the application for modification. She urges that such retroactive application would not be a hardship for Shae and would be in Triston's best interests.

[8,9] The main principle behind the Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). The initial determination regarding the retroactive application of the modification order is entrusted to the discretion of the trial court. *Id.* The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The best interests of the child are the paramount concern, and the hardship to the noncustodial parent may also be considered in determining the propriety of retroactive application. See *Moore v. Bauer*, 11 Neb. App. 572, 657 N.W.2d 25 (2003).

We determine that the facts in this case require that the modified support obligation become effective as of October 1, 2002, the first day of the month following the date of the filing of Jena's petition for modification. In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). Shae has been steadily employed by the railroad. The trial court did not explain or describe, nor can we find in our de novo review of the record, any equities that would support a decision not to apply the child support obligation retroactively. We find that the trial court abused its discretion in that regard and that the increase in Shae's child support obligation should be retroactive to October 1, 2002.

3. Childcare Expenses

Jena argues that in not ordering Shae to pay a portion of childcare expenses, the trial court deviated from paragraph N of the Guidelines. That paragraph was amended effective September 1, 2002. For the reader's convenience, we quote paragraph N by striking the language removed by the amendment and underlining the new language as follows:

> Child-care expenses are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines. Child-care expenses for the child for whom the support is being set, which are due to employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, ~~shall be divided between the parents in proportion to their parental contribution~~ shall be allocated to the obligor parent as determined by the court, but shall not exceed the proportion of the obligor's parental contribution . . . and shall be added to the basic support obligation computed under these guidelines.

This provision of the Guidelines applies to support ordered in paternity cases as well as for children born within a marriage relationship. See *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992).

The stipulation of the parties did not address childcare expenses, nor did the original order. Jena moved for a modification

of that order, requesting an order requiring Shae to pay a portion of childcare expenses. The trial court implicitly denied Jena's motion with regard to childcare expenses. See *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003) (silence of judgment, disposing of petition to modify, on issue of attorney fees is construed as denial of request for such fees).

[10,11] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Id.* In determining whether to modify an award with respect to childcare expenses, this court has compared the need for work-related childcare at the time of the original decree with the need for such childcare at the time of the modification hearing. See, *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000) (original decree did not mention childcare expenses, and trial court did not err in modifying decree to require contribution for childcare expenses by noncustodial parent where custodial parent had held jobs requiring childcare after original decree, did not require childcare at time of modification hearing, but testified that she may secure job necessitating childcare in future); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995) (mere fact that before original decree parties do not require childcare but anticipate future changes of employment and potential for childcare expenses to arise is not sufficient for holding that such expenses are reasonably contemplated).

When the original order was entered, Jena worked at Beverly Healthcare in Sidney. At that time, Jena required daycare for Triston and took Triston to a daycare provider in Sidney. Jena testified at the modification hearing that she worked in Sterling and that Triston had received childcare in Sterling since September 2002. The evidence shows that the need for work-related childcare was contemplated at the time of the original hearing, but the parties chose to omit any such relief at that time. Unless the change in the Guidelines, which change we discuss below, would

otherwise affect the analysis, Jena did not show a material change in circumstances with regard to childcare.

[12] We note that the amendment to paragraph N of the Guidelines became effective September 1, 2002, after the trial court entered the original order. Under certain circumstances, an amendment to the Guidelines can itself be considered a material change in circumstances warranting modification of a parent's child support obligation. See, *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991) (adoption of Guidelines constituted material change of circumstances warranting change in child support obligations, notwithstanding that such material change resulted from change of law rather than from actions of parties; and Guidelines must be used to calculate new support amount); *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991); *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000) (upward revision of Guidelines constitutes material change of circumstances that can warrant upward modification of parent's child support obligation, independent of changes in that parent's income); *Olmer v. Olmer*, 2 Neb. App. 178, 507 N.W.2d 677 (1993) (amendment of Guidelines might be considered material change in circumstances).

Insofar as these parties are concerned, both the former version and the current version of paragraph N of the Guidelines would operate in essentially the same way. The former version mandated allocation of such expenses by the party's percentage share of both parties' net income. The current version authorizes the court to determine the allocation, but limits a party's contribution to that same percentage share. The amendment did not change the rule concerning the circumstances in which such contributions are appropriate; rather, the amendment affected only the allocation of such expenses. Because the original order did not require Shae to contribute anything to childcare expenses, much less an amount in excess of his parental contribution, we conclude that the amendment to paragraph N of the Guidelines did not constitute a material change in circumstances. Jena did not prove a material change in circumstances, and the amendments to the Guidelines did not constitute a material change under these circumstances. We conclude that the trial court did not abuse its discretion in implicitly denying

Jena's request for modification of the order regarding childcare expenses.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the trial court as modified with respect to Shae's child support obligation and the retroactive application of that obligation.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V.
JONATHAN E. REHA, APPELLEE.
686 N.W.2d 80

Filed August 24, 2004. No. A-04-401.

1. **Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.
2. **Probable Cause: Warrantless Searches: Motor Vehicles: Controlled Substances.** An odor of burnt marijuana alone is sufficient probable cause for a warrantless search of a motor vehicle.
3. **Warrantless Searches: Arrests: Probable Cause.** A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.

Appeal from the District Court for Hamilton County: MICHAEL OWENS, Judge. Reversed and remanded for further proceedings.

Linda Caster Senff, Deputy Hamilton County Attorney, for appellant.

Susan M. Koenig, of Mayer, Burns, Ahlschwede & Koenig, for appellee.

CASSEL, Judge.

INTRODUCTION

The district court granted the motion of Jonathan E. Reha to suppress evidence seized during a search of his person, and the

State appeals. Lt. Chris Kolb of the Nebraska State Patrol, the officer who performed the search, had observed that the odor of burnt marijuana emanated from the vehicle in which Reha was a passenger and that both Reha and the driver held cigarette lighters; therefore, probable cause existed to arrest Reha. Because I conclude that the search was valid as an incident to arrest, I reverse, and remand for further proceedings.

BACKGROUND

On January 7, 2004, the State charged Reha by information with one count of possession of methamphetamine. Reha subsequently filed a motion to suppress all evidence seized during the search of his person, alleging that the officer lacked probable cause for the search, that the search exceeded the "perimeters" of a protective pat-down search, and that the search violated Reha's right to be free from unreasonable searches and seizures as guaranteed by the Nebraska and U.S. Constitutions.

Following a hearing on the motion, the trial court made specific findings of fact as follows:

> Kolb . . . testified on behalf of the State. Kolb stated that on December 2, 2003, at approximately 6:58 p.m., he was eastbound on U.S. Highway 34 in Hamilton County when he clocked an oncoming vehicle exceeding the speed limit. . . . Kolb testified that he obtained a radar clock of the vehicle and thereafter turned around to pursue it. The State established proper foundation for the traffic stop. After stopping the vehicle . . . Kolb contacted the driver first. Upon the driver rolling down his window, Kolb immediately detected the odor of burnt marijuana coming from inside the vehicle. He also testified that both the driver and the front seat passenger [Reha] had cigarette lighters. Kolb testified that the driver . . . had watery eyes and appeared to have impeded speech. Kolb asked the driver to exit the vehicle and accompany him to his patrol car. The driver complied with this request.
>
> Kolb asked if the driver had marijuana which he denied having. Kolb explained to the driver that he had smelled marijuana and was going to search the vehicle. The driver then pulled a baggie containing suspected marijuana from

his coat pocket. Kolb then searched the driver and found an additional quantity of marijuana in his shoe. Kolb again placed the driver in the patrol car and waited for backup so that he could search the vehicle itself.

Moments later, back-up officers arrived, and Kolb re-approached the vehicle and requested [Reha] to exit the passenger side. He did so, and Kolb then searched him, finding a quantity of methamphetamine in his sock. Kolb testified that he conducted the search of [Reha's] person because he thought he had probable cause to search the vehicle and all occupants due to the smell of marijuana in the vehicle. A subsequent search of the vehicle also resulted in the finding of a marijuana pipe in the right front passenger seat. Kolb testified that at the time of the search of [Reha], [Reha] was not under arrest, and that he was searching for drugs. It does not appear that this was a pat-down performed for officer safety.

The trial court entered an order sustaining Reha's motion to suppress and excluded the evidence seized from his person. The State appeals pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 2002), which provides for review by a single judge of this court.

ASSIGNMENTS OF ERROR

The State alleges that the trial court erred in (1) holding that there was no probable cause for the search of Reha's person and (2) suppressing the evidence found as a result of searching Reha's person.

STANDARD OF REVIEW

In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

ANALYSIS

On appeal, both parties accept the trial court's factual findings. Upon my review of the record, I cannot conclude that such

findings are clearly wrong. I next proceed to a de novo review of the probable cause determinations.

[1-3] "Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found." *State v. Shock*, 11 Neb. App. 451, 458, 653 N.W.2d 16, 24 (2002). Because of the odor of burnt marijuana emanating from the vehicle in this case, it is clear that Kolb had probable cause to search the vehicle. See *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981) (odor of burnt marijuana alone is sufficient probable cause for warrantless search of motor vehicle). However, the issue before this court is whether Kolb had probable cause to search Reha's person. "[A] search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search." *State v. Twohig*, 238 Neb. 92, 107, 469 N.W.2d 344, 354 (1991). Therefore, if Kolb had probable cause to arrest Reha before he initiated the search of Reha's person, he had probable cause to search Reha.

In *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), the defendant had been sitting in the front passenger's seat of a car driven by its owner and there was another passenger in the back seat. Subsequently to a routine traffic stop, the driver opened the glove compartment in front of the defendant to retrieve the vehicle's registration. The police officer saw a sum of rolled-up money in the glove compartment and asked the driver whether he could search the vehicle. The driver consented, and the occupants were removed from the vehicle. Pursuant to the search, the officer retrieved five glassine baggies of cocaine from behind a rear armrest, in addition to the rolled-up money. The officer questioned the three occupants about the ownership of the cocaine and told them that if no one admitted to ownership, he would arrest them all. None of the occupants offered information about the ownership of the cocaine or money, and they were arrested. At the police station, the defendant acknowledged that the cocaine was his.

During a pretrial suppression hearing, the *Pringle* defendant argued that his confession should be suppressed as the unlawful fruit of an illegal arrest because the police had lacked probable cause for his arrest at the time of the traffic stop. The case was ultimately appealed to the U.S. Supreme Court, which addressed whether the officer had had probable cause to believe that the defendant committed the crime of possession of illegal drugs:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe [the defendant] committed the crime of possession of cocaine, either solely or jointly.

540 U.S. at 372.

In this case, Kolb detected the odor of burnt marijuana immediately upon making contact with the occupants of the vehicle. He observed that both the driver and Reha, the front seat passenger, held cigarette lighters. Like the officer in *Pringle*, Kolb could reasonably infer from the situation that any one or all of the occupants of the vehicle, the driver and Reha in particular, had recently committed the crime of possessing a controlled substance. Therefore, on a de novo review, I conclude that Kolb had probable cause to arrest Reha, thereby supplying probable cause for the search of Reha's person.

Reha relies on *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948). In that case, an informant purchased counterfeit gasoline ration coupons from the driver of a vehicle in which the defendant was the front seat passenger. The police approached the vehicle and saw the informant, sitting in the back seat, holding two counterfeit gasoline ration coupons. The informant told the police that the driver had sold him the coupons. The police arrested all three occupants and searched them. They found counterfeit gasoline ration coupons on the defendant's person. The U.S. Supreme Court held that the defendant's mere presence in a vehicle in which criminal activity occurred, without more, did not constitute a forfeiture of his right to be free from a search of his person:

> Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an

> incidental right to search [the defendant]? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because "common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person."
>
> . . . .
>
> . . . We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

332 U.S. at 586-87.

The present case is distinguishable. In *Di Re*, there was nothing other than the defendant's presence in the vehicle that would indicate that he was involved in the illegal transaction. The informant singled out the driver, not the defendant, as the seller of the coupons. The Supreme Court in *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), distinguished *Di Re* on that basis. In the present case, Kolb found Reha in a vehicle where marijuana had recently been burned, holding a lighter in his hand. Although possessing a lighter, in itself, is not an illegal activity, taken in conjunction with the odor of burnt marijuana, it justified Kolb's reasonable belief that Reha had engaged in illegal activity. As in *Pringle* and unlike *Di Re*, no facts in the instant case eliminated Reha from the scope of suspicion. It is true that Kolb searched Reha after having found marijuana on the driver's person and after observing physical symptoms indicating that the driver had recently smoked marijuana. However, possession of marijuana by the driver did not reduce the probability that Reha also possessed marijuana, especially given the odor of burnt marijuana emitting from the vehicle and the lighter held by Reha. See *State v. Watts*, 209 Neb. at 374, 307 N.W.2d at 819 (noting in dicta, "[h]aving found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present").

In granting Reha's motion to suppress, the district court found the reasoning in *State v. Wallace*, 372 Md. 137, 812 A.2d 291 (2002), to be persuasive. In *Wallace*, the Maryland Court of

Appeals found that a canine scan alerting officers to contraband in a vehicle's interior compartment, without more, generally does not provide probable cause to search passengers in the vehicle. It stated that in such a situation, probable cause rested upon some link between a passenger and a crime. *Wallace*, as a Maryland case, is not controlling on this court. More importantly, however, as the district court in the present case acknowledged, the *Wallace* court significantly relied on *Pringle v. State*, 370 Md. 525, 805 A.2d 1016 (2002), which was later overturned by the U.S. Supreme Court in *Maryland v. Pringle, supra.* Further, the *Wallace* court noted that "there was no evidence of any odor of drugs emanating from the vehicle that would have been detectable to a passerby or even to a passenger, nor is there any evidence that any of the occupants prior to the search exhibited any suspicious behavior to the officers." *State v. Wallace*, 372 Md. at 159, 812 A.2d at 304. In the instant case, Kolb detected such an odor emanating from the vehicle at the outset and observed Reha in possession of a lighter.

Based on the U.S. Supreme Court's *Pringle* decision and upon a de novo review, I conclude that probable cause to arrest Reha existed and that the contemporaneous search was incidental to the subsequent valid arrest.

CONCLUSION

For the reasons set forth above, the district court's order granting Reha's motion to suppress is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DEETTA MADSON ET AL., APPELLANTS, V. TBT LTD. LIABILITY CO., A COLORADO LIMITED LIABILITY COMPANY, ET AL., APPELLEES.

686 N.W.2d 85

Filed August 31, 2004. No. A-02-1419.

1. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Reissue 1998) is an equity action.

2. **Equity: Appeal and Error.** In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Property: Quiet Title: Proof.** A party who seeks to have title in real estate quieted in him or her on the ground that it is accretion to land to which he or she has title has the burden of proving the accretion by a preponderance of the evidence.
4. **Pleadings: Waiver.** Admissions contained in pleadings, answers, and replies are judicial in nature and waive all controversy concerning the matter admitted.
5. **Waters: Boundaries: Words and Phrases.** Title to riparian land, that is, land with water flowing over it or along its border, runs to the thread, or center, of the contiguous stream.
6. ____: ____: ____. The thread of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. The thread of the stream is that portion of a waterway which would be the last to dry up.
7. **Waters: Boundaries.** Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.
8. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
9. **Adverse Possession: Proof.** The party claiming adverse possession must prove exclusive use for every purpose for which the land is adapted.
10. **Adverse Possession: Evidence.** Evidence of adverse possession must show the intention of the claimant to appropriate and use the property as his or her own to the exclusion of all others.
11. **Adverse Possession.** The law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, but it is sufficient if the land is used continuously for the purposes to which it may be adapted.
12. **Adverse Possession: Title.** In a claim for adverse possession, possession must be exclusive for the required 10-year period, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession.
13. **Adverse Possession.** Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party.
14. **Boundaries: Adverse Possession: Time.** As with adverse possession, the statutory period required for acquiescence is 10 years.
15. **Boundaries: Notice.** To claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary. It is insufficient for one party to merely establish a line and take possession up to that line.
16. **Boundaries.** For acquiescence to operate, the other party must assent, by words, conduct, or silence, to a line as the boundary.

17. ____. In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line.
18. ____. Constructing a fence that is not on the property line does not constitute acquiescence in the ownership of property by the adjoining landowner.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Reversed and remanded with directions.

Stephen D. Mossman and April D. Cover, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellee TBT Ltd. Liability Co.

CARLSON and MOORE, Judges, and BUCKLEY, District Judge, Retired.

BUCKLEY, District Judge, Retired.

INTRODUCTION

DeEtta Madson, Margaret B. Westerbuhr, and Delmer Westerbuhr (collectively Westerbuhrs) appeal the trial court's order quieting title to agricultural and recreational property in appellee TBT Ltd. Liability Co. (TBT) based on adverse possession of the property by TBT and its predecessors in interest and on acquiescence to a boundary line. Because we conclude that TBT has not established either the elements of adverse possession by a preponderance of the evidence or the elements of acquiescence to a boundary line, we reverse, and remand with directions to quiet title in Westerbuhrs.

BACKGROUND

Description and History of Disputed Property.

This case involves a dispute over approximately 227 acres of agricultural property (hereinafter the disputed property) located between a fence line to the north and the South Platte River to the south. Both parties own land in an area hereinafter referred to as "Section 19," and the disputed property is located in Section 19. It is undisputed that the main channel of the river formerly ran north of the fence line but that the main channel shifted to the south of the fence line sometime in the late 1960's or early 1970's. A

pond, dug in 1968, is located on the east side of the disputed property and is known as Kuskie's pond.

In 1965, Elmer C. Westerbuhr became record title owner of five lots in the northern portion of Section 19. Elmer began renting the property in 1944 and purchased it in 1965. Elmer died in 1980, and in 1982, his interest was deeded to his wife, Margaret, and to his two children, Delmer and DeEtta. Margaret later deeded her share of the property to the Margaret B. Westerbuhr Living Trust, of which she is trustee.

In 1958, Clifford E. Kuskie inherited from his father land in Section 19, south of Westerbuhrs' property. On November 20, 2001, Kuskie executed a quitclaim deed purporting to convey the disputed property to TBT, a limited liability company composed of Thomas B. Lyons and his two sons. On that same date, Kuskie also executed a warranty deed conveying to TBT the property in Section 19 located south of the river.

In December 2001, Lyons contacted Delmer after Lyons discovered that Delmer had given someone permission to hunt on the disputed property. They disagreed as to whether the boundary between the properties in Section 19 was at the fence line or at the river.

On January 15, 2002, pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1998), Westerbuhrs filed a petition in equity to establish the corners and boundaries of the disputed property. Westerbuhrs alleged that they were record title owners of the following property: "Lots 1, 2, 3, 4, and 5 and the North half of the Northwest Quarter (except railroad and Highway 30) of Section 19, Township 13 North, Range 40 West of the 6th P.M., in Keith County, Nebraska, including 227.15 acres of accretion land." They further alleged that 227.15 acres had been added to Lots 1, 2, 3, 4, and 5 through accretion or reliction; that the boundary of the accretive land was the thread, or center, of the South Platte River; that Westerbuhrs had paid all real estate taxes on the disputed property; that the quitclaim deed executed by Kuskie did not transfer a valid property interest to TBT; that Westerbuhrs did not acquiesce to the fence line as a boundary; and that neither TBT nor its predecessors had acquired adverse possession of the disputed property. Westerbuhrs prayed that the court establish the thread of the river as the boundary between

the properties and that title to the disputed property be quieted and confirmed in them.

TBT's answer admitted that the land lying south of the fence line included property of which Westerbuhrs were record title owners; admitted that the South Platte River, through the process of accretion or reliction, had added land to Lots 1, 2, 3, 4, and 5; alleged that the fence line located to the north of the disputed property had been used as the boundary between the parties' properties for more than 10 years and was an "open and notorious claim of ownership by TBT and [its] predecessor"; and alleged that all parties had acquiesced to the fence line as the boundary for more than 10 years. TBT prayed that the court establish the fence line as the boundary between TBT's property and Westerbuhrs' property.

Real Estate Taxes.

From 1993 until 2001, Westerbuhrs paid real estate taxes on the disputed property—227.09 accretion acres in 1993 and 1994, 227.1495 accretion acres in 1995, and 227.15 accretion acres from 1996 to 2001. Margaret testified that she would not have paid taxes on the disputed property if she had believed her family did not own it. Delmer testified that Kuskie never reported to him that Westerbuhrs were paying property taxes on property Kuskie claimed to own and that Kuskie did not tell Delmer that Kuskie was claiming the disputed property before Kuskie purported to sell it to TBT. Delmer testified that if he had considered the fence line to be the boundary, he would not have paid taxes on the disputed property.

The state assessor for Keith County testified that she had formerly been first the deputy county assessor and then the county assessor, both for Keith County. According to records of the Keith County assessor's office, the property assessed to Westerbuhrs is legally described as Lots 2, 3, 4, and 5, plus 227.15 acres of accretion ground, while the property assessed to Kuskie is legally described as all property south of the river.

Disputed Boundary.

Both parties and their witnesses testified as to the location of the boundary between the parties' properties. Essentially, Westerbuhrs and their witnesses testified that they had always

understood the boundary to be the thread of the main channel of the river, while TBT and its witnesses testified that the fence line was the boundary.

Margaret testified that she never agreed in writing that the fence line was the boundary, nor did she have a conversation with Kuskie about where the boundary was located or allow Kuskie to use the fence line as a boundary. Margaret testified that Kuskie never told her family that he owned the accretion ground south of the fence line. Delmer likewise testified that he never agreed with Kuskie in writing that the fence line was the boundary, nor did he allow Kuskie to use the fence line as a boundary.

Kuskie testified that he had considered the fence line to be the boundary between his property and Westerbuhrs' property ever since the fence was constructed in 1956. Kuskie testified that to his knowledge, his father did not have an agreement with the previous owner of Westerbuhrs' property about the fence line.

The fence on the north side of the disputed property is a three-wire barbed wire fence. It has both wood and steel posts, and there is no gate. There was undisputed testimony by almost every witness that it was easier to step over or climb through the fence than it was to cross the river.

Kuskie helped his father build the fence in 1956. Kuskie testified that he maintained the fence; that Morris Sherman, Kuskie's tenant, maintained it when Sherman was renting the land; and that Westerbuhrs probably also maintained the fence.

Delmer testified that when Elmer farmed the property in Section 19 north of the fence line, Elmer pastured cattle there in the summer and used it for calving in the winter. After Elmer's death, Delmer continued to pasture cattle north of the fence line. Delmer testified that he helped Elmer by fixing the fence annually when it was south of the north channel of the river; that he, with the help of employees, had continued maintaining the fence until trial; and that he considered maintaining the fence to be his responsibility. Delmer testified that he moved the western one-third of the fence farther north several times and that that portion is 100 yards north of its original position. Delmer testified that there used to be a small gate in the fence but that he removed it the third time he moved the fence because there was no reason to have it there. Delmer testified that he had never seen evidence of

anyone from the south side having repaired the fence and that he did not ask Kuskie to help repair the fence.

Use of Disputed Property.

Margaret testified that over the years, she had given people permission to hunt on the disputed property by filling out permit forms which she had had printed more than 10 years before trial.

John W. Evert started working for Elmer and Margaret on their farm in approximately 1968, when Evert was a young boy. Evert testified that in 1974, he started working for Delmer and worked for him until May 1983, and that he again worked for Delmer for an unspecified period of time until 1991. Evert testified that while working for Delmer, he had permission from Westerbuhrs to go on the disputed property to hunt ducks, "sink minnows," and pick grapes, currants, and asparagus, as well as for recreation. Evert stated that he was on the disputed property close to 100 times while he worked for Delmer. Evert testified that in approximately 1970 with Delmer's permission, he constructed a nonportable duckblind on the southwest corner of the disputed property, and that he had last used the duckblind in 2001. The duckblind was constructed with posts at each corner, connected by rails, with willows and branches covering it. Evert testified that he started using the duckblind during the 1970's. Evert testified that he did not use the duckblind in 1999 or 2000 but that he used it probably 15 times in 2001.

Evert testified that he and Kuskie's son had been good friends since high school and had hunted together on Kuskie's land "for years." Evert stated that he and Kuskie's son hunted south of the river and on Kuskie's pond, which is on the east side of the disputed property. Evert testified that he and Kuskie's son did not hunt on parts of the disputed property other than Kuskie's pond. Evert testified that he had been to Kuskie's pond hundreds of times and that he had not hunted there for over 10 years. Evert stated that Kuskie and his sons often used to hunt on Kuskie's pond in the 1970's, after the river channel had changed.

Evert testified that no one had ever asked him to leave the disputed property until the first week of December 2001. Evert was hunting at the duckblind with a coworker when Lyons came down the river channel and asked Evert if he knew on whose ground he

was hunting. Evert told Lyons that the ground belonged to Margaret. Lyons told Evert that Lyons had purchased the property and apparently had been misinformed. Evert continued hunting the property after the conversation. Evert testified that he did not tell Margaret about the conversation he had had with Lyons.

Robert Robinson testified that with permission from Delmer, Robinson had hunted geese and ducks on the disputed property since approximately 1993. He testified that he constructed a duckblind on the disputed property, approximately 50 yards south of the fence line and slightly west of center, and that he hunted from the duckblind 10 or 12 times in 2001. Robinson did not testify as to when the duckblind was placed on the disputed property. He stated that he and two or three others carried the duckblind over the fence from Westerbuhrs' pasture. He stated that the duckblind was visible from south of the river channel and that he hunted there without trying to hide his presence. Robinson testified that he had never hunted Kuskie's pond because he had an "agreement" with Kuskie that the pond was a refuge site.

Robinson testified that Kuskie's son did not confront Robinson while he was hunting on the river and ask him to leave. Robinson testified that the only time he spoke to Kuskie about moving a duckblind was regarding a duckblind Robinson had put north of the fence line. Robinson testified Kuskie told him that the location of Robinson's duckblind was interfering with Kuskie's hunting because the duckblind was directly north of Kuskie's goose pit, which was south of the river and directly south of Kuskie's pond, and that the geese would become confused if they heard shots from both Kuskie's goose pit and Robinson's duckblind. Robinson stated that he removed the duckblind.

Robinson testified that after seeing a "no hunting" sign 2 or 3 years prior to trial, he spoke to Delmer and to two game wardens, and that based on what they told Robinson, he continued to hunt on the disputed property.

Steve Westerbuhr, Delmer's son who was 27 years old at the time of trial, testified that he used the disputed property for hunting and recreation. He testified that he was not a "big hunter" and had hunted three or four times a year throughout his life. Steve stated that he had been on the disputed property 40 or more times with permission from his family, that he had been

going to the disputed property for as long as he could remember or approximately 20 years, and that he had last been on the disputed property 3 years prior to trial. He stated that he did not need permission from anyone else to be south of the fence line because it was his family's ground and that he never tried to hide his presence from anyone. Steve testified that no one had ever asked him to leave the disputed property. Steve stated that he never saw Kuskie or anyone else, other than members of Steve's family, on the disputed property, nor did he see evidence that anyone had been in that area. Steve testified that when he went to the river, he reached it by coming from the north and stepping over or climbing through the fence.

Delmer testified that he had given permission to others, including many relatives, Evert, and Robinson, to hunt on the disputed property and that his brother-in-law hunted on the disputed property almost every year. Delmer testified that he never sought permission from Kuskie or Lyons before allowing people to hunt on the disputed property because Delmer did not believe he needed such permission.

Before Delmer went to college in 1969 and after college when he farmed in Section 19, he had hunted with several others on the west end of the disputed property. He stated that he had hunted less frequently during the 10 years prior to trial than he had in the past. Delmer testified that 2 to 12 times a year, he "still" enjoys spending time south of the fence line to the river to relieve stress. Delmer did not specify how long he had been utilizing the disputed property to relieve stress, but he testified that his stress was caused by his job at the feedlot, where he has worked since December 1992. Delmer testified that he never tried to hide his presence on the disputed property and that he reached the property by stepping over or climbing through the fence.

Delmer testified that he was aware Sherman used to pasture cattle on Kuskie's property and had seen Sherman's cattle on the disputed property about three or four times but that Delmer did not contact Sherman about the matter. Delmer testified that he did not think he was giving up the disputed property by not calling Sherman about his cattle. Delmer testified that the pasture on the disputed property was not very valuable and that building a fence along the river channel to keep Sherman's cattle off the

disputed property would not have been worth the effort. Delmer stated that the disputed property was primarily valuable for hunting and recreation.

Delmer testified that before the river channel shifted to the south of the fence line, Kuskie used to hunt on the land north of the fence line and south of the channel, and that the remains of the duckblind Kuskie used were still visible. Kuskie testified that he never hunted north of the fence line.

Kuskie testified that he pastured cattle south of the fence line from the 1960's until 1981 or 1982 and that the cattle went on the disputed property. Kuskie testified that for about 15 to 20 years starting in 1980, he leased the land in Section 19 to Sherman for pasture. Sherman and Kuskie both testified that Sherman's cattle went on the disputed property. Kuskie testified that he had never seen Delmer, Margaret, or Elmer south of the fence and that Westerbuhrs never told him that they owned the disputed property.

Kuskie testified that during the 10 years preceding trial, he had given permission to others to hunt on the disputed property, but that when he had encountered people hunting the disputed property without his permission, he had asked them to leave. Kuskie stated that 2 or 3 years prior to trial, Robinson hunted on the disputed property without Kuskie's permission. Kuskie further stated that he asked Robinson who had given him permission to hunt the disputed property, that Robinson replied he was hunting on Westerbuhrs' property, that Kuskie then told Robinson the property was Kuskie's, and that Robinson left. Kuskie testified that 3 or 4 years before trial, Robinson telephoned him, and that as a result of the call, Kuskie confronted a man hunting in a duckblind on the disputed property and asked the man to leave. The man left the disputed property through the fence, which he had cut to accommodate a portable duckblind and which he did not repair.

Lyons testified that in 1997, he purchased from Kuskie property immediately to the east of the disputed property, and that Lyons was on that property every other week. He stated that from the time of that purchase until 2001 when he purchased property in Section 19 from Kuskie, he observed Kuskie patrolling Section

19 approximately 75 percent of the time but saw no other person. Lyons testified that during these observations, Kuskie was on disputed property about half of the time.

Lyons testified that he had been on the disputed property a total of 10 times before he purchased it, 5 times to retrieve ducks he had shot from his property to the east and 5 times to inspect the disputed property during the due diligence period allowed by the purchase agreement.

Lyons testified that since he purchased the western property from Kuskie in 2001, he had been on that property 15 times, and that he started hunting ducks on the property on December 2, 2001. Lyons testified that he had given permission to his sons and his colleague to be on the disputed property. He stated that since the purchase in 2001, he saw someone else hunting south of the fence line only once, and that that person was Evert. Lyons testified that he informed Evert that the disputed property had been deeded to Lyons.

Rodney E. Lanka, who had done construction work for Lyons, testified that he had never observed anyone other than Lyons or his associates on the disputed property, nor had he heard gunshots coming from that area. Lanka stated that he hunted in Section 19 occasionally with Lyons, Lyons' sons, and Lyons' friends, but that he had not hunted on the disputed property. Lanka testified that Lyons told him that if Lanka ever saw people on the disputed property, he was to "run them off," but that he had never had occasion to do that.

Jeffrey L. Pastore testified that he hunted with Lyons often and was with Lyons when he encountered Evert. Pastore testified that Evert was hunting from a duckblind which was visible from the south side of the river channel. He stated that he had been on the disputed property four times and had not encountered anyone other than Evert that one time.

Trial Court's Findings.

After viewing the disputed property, the trial court found that TBT had proved the elements of adverse possession and that Westerbuhrs had acquiesced to the fence line as the boundary. The court therefore quieted title to the disputed property in TBT.

ASSIGNMENTS OF ERROR

Westerbuhrs assign, condensed and restated, that the trial court erred (1) in failing to find that Westerbuhrs had established ownership of the disputed property through the theory of accretion, (2) in finding that TBT established the elements of adverse possession, and (3) in finding that Westerbuhrs acquiesced to the fence line as the boundary.

STANDARD OF REVIEW

[1,2] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Ownership Through Accretion or Reliction.

[3] On appeal, Westerbuhrs argue that they established ownership of the disputed property through the theory of accretion. A party who seeks to have title in real estate quieted in him or her on the ground that it is accretion to land to which he or she has title has the burden of proving the accretion by a preponderance of the evidence. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977).

[4] TBT admitted in its answer that the disputed property is composed of land to which the Westerbuhrs are record title owners, as well as land added by accretion or reliction to Westerbuhrs' land. Because admissions contained in pleadings, answers, and replies are judicial in nature and waive all controversy concerning the matter admitted, see *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 447 N.W.2d 20 (1989), we conclude that Westerbuhrs sustained their burden of proving accretion.

[5-7] Under Nebraska law, title to riparian land, that is, land with water flowing over it or along its border, runs to the thread,

or center, of the contiguous stream. See *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). See, also, *Saunders Cty. v. Metropolitan Utilities Dist.-A*, 11 Neb. App. 138, 645 N.W.2d 805 (2002). The thread of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Anderson v. Cumpston*, *supra*. The thread of the stream is that portion of a waterway which would be the last to dry up. *Id.* Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957).

Here, the county assessor has considered the main channel of the river to be the boundary since at least 1993, and the assessor's "legal description" of the land owned by TBT's predecessor is all land south of the river. Westerbuhrs and their witnesses testified that they had always considered the main channel to be the boundary and that they used the property immediately north of the main channel. Thus, there is evidence that the main channel of the river is the boundary between the Westerbuhrs' and TBT's properties, and under Nebraska law, the boundary follows any changes in the river channel and remains at the thread of the river. There can be no question that Westerbuhrs sustained their burden of proof with respect to where the boundary line should be, absent proof by TBT that the boundary is elsewhere due to adverse possession or acquiescence.

Adverse Possession.

[8] A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

[9] Clearly, regarding the agricultural purpose of pasturing cattle, Kuskie—TBT's predecessor in interest—or his tenant had exclusive use of the disputed property from the 1960's until the late 1990's because Westerbuhrs never pastured cattle on the disputed property or used it for any other agricultural purpose.

However, as Delmer and Lyons testified, the disputed property was also used and valued for recreation and hunting, and the party claiming adverse possession must prove exclusive use for every purpose for which the land is adapted. See *Hutson v. The Rush Creek Land and Livestock Co.*, 206 Neb. 658, 294 N.W.2d 374 (1980).

[10-13] Evidence of adverse possession must show the intention of the claimant to appropriate and use the property as his or her own to the exclusion of all others. *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003). The law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, but it is sufficient if the land is used continuously for the purposes to which it may be adapted. See *id.* However, possession must be exclusive for the required 10-year period, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession. See *id.* Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party. *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). See, also, *Nye v. Fire Group Partnership, supra* (summary judgment reversed because there was evidence that both parties used disputed property, constituting genuine issue of material fact with regard to exclusivity); *Wanha v. Long, supra* (elements of adverse possession established where both parties used disputed property, but adverse possessor used it for 10-year period during which other party did not use it); *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993) (exclusive possession not found where both parties used disputed property and discussed with one another their confusion over where boundary between their properties was); *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983) (where both parties used disputed property on various occasions, there was no evidence that party claiming adverse possession ever had exclusive possession).

There is evidence that TBT or Kuskie used the disputed property for hunting from the 1970's until 2001; however, there is also testimony that Westerbuhrs and their invitees used the disputed property for hunting and recreation from the late 1960's until 2001.

Delmer hunted on the disputed property between approximately 1968 and 2001. Margaret and Delmer permitted others to hunt there, including Delmer's brother-in-law, who hunted there almost annually. Delmer testified that he went to the disputed property 2 to 12 times a year to relieve stress, but he did not specify how many years he had done that.

From approximately 1970 until 2001, with Delmer's permission, Evert had a permanent duckblind on the west end of the disputed property. There is testimony that he used the duckblind at least in the 1970's and approximately 15 times during 2001. Evert testified that when he hunted with Kuskie's son, as he often did over the years, they hunted on Kuskie's pond, which was on the east end of the disputed property. Evert testified that with Westerbuhrs' permission while he was working for Delmer, which was from 1974 to 1983 and then again for an unspecified period of time until 1991, Evert went on the disputed property for hunting and recreation approximately 100 times. In 2001, Evert was confronted while on the disputed property by Lyons, who told Evert that Lyons had purchased the property, and Evert informed Lyons that the disputed property belonged to Westerbuhrs.

There is evidence that between approximately 1980 and 1998, Delmer's son, Steve, used the disputed property for hunting and recreation and was on the property 40 or more times during that period. Steve testified that he did not ask for permission to use the disputed property because the property belonged to his family.

Between approximately 1993 and 2001, Robinson hunted on the disputed property with permission from Delmer and used a portable duckblind there 10 or 12 times in 2001.

The trial court acknowledged that both parties used the disputed property for hunting, stating that "the evidence on the issue of hunting is evenly balanced, and does not favor either of the parties." The trial court also concluded that Westerbuhrs had not shown that they shared possession of the land with Kuskie because they did not communicate their use of the disputed property to Kuskie. We recognize that where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge observed the witnesses, viewed the property, and accepted one version of the

facts rather than another. See *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). However, in acknowledging that the evidence regarding hunting is evenly balanced between the parties, a finding with which we agree, the trial court invalidated its own conclusion that TBT had established exclusive possession of the disputed property. Moreover, it is irrelevant whether Westerbuhrs communicated their use of the disputed property to Kuskie. The fact Westerbuhrs used the property is the material point, and because of the timing of that use, neither TBT nor its predecessor had exclusive possession of the property for the required 10-year period. Therefore, on a de novo review, we conclude that the trial court erred in quieting and confirming title to the disputed property in TBT based on the theory of adverse possession.

Mutual Recognition and Acquiescence.

[14-17] Westerbuhrs assign that the trial court erred in finding that they had acquiesced to the fence line as the boundary. As with adverse possession, the statutory period required for acquiescence is 10 years. See, § 34-301; *Swanson v. Dalton*, 178 Neb. 55, 131 N.W.2d 704 (1964). To claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary. *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983). It is insufficient for one party to merely establish a line and take possession up to that line. See *Bender v. James*, 212 Neb. 77, 321 N.W.2d 436 (1982). For acquiescence to operate, the other party must assent, by words, conduct, or silence, to a line as the boundary. See *Spilinek v. Spilinek, supra.* " 'In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line.' " *Hausner v. Melia*, 212 Neb. 764, 771, 326 N.W.2d 31, 36 (1982), quoting 11 C.J.S. *Boundaries* § 79 (1938).

The record shows that Westerbuhrs did not assent, by their words or actions, to the fence line as the boundary. They and their witnesses testified that they understood the boundary between the two properties to be the river, not the fence line. Westerbuhrs had

no agreements or conversations with Kuskie about the fence line being the boundary between the properties. Westerbuhrs and their invitees used the property south of the fence line for hunting and recreation. From 1993 until 2001, Westerbuhrs paid real estate taxes on the property south of the fence line.

Delmer testified that he had seen Sherman's cattle grazing north of the river and south of the fence line but that he did not say anything to Sherman about it because he did not think that allowing Sherman's cattle to graze there constituted giving up the disputed property. Delmer also testified that Kuskie had a duckblind north of the fence line at one time.

[18] Westerbuhrs repaired the fence annually and moved portions of it, but considering that Westerbuhrs pastured cattle north of the fence line, it was practical for them to maintain the existing fence as a barrier for their cattle, regardless of where the boundary line was located. See *Foos v. Reuter*, 180 Neb. 301, 142 N.W.2d 552 (1966) (constructing fence that is not on property line does not constitute acquiescence in ownership of property by adjoining landowner), *overruled on other grounds, Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981).

TBT makes much of the fact that there was no gate in the fence or set of stairs over it. However, almost every witness testified that it was easier to step over or climb through the fence than it was to cross the river.

On our de novo review, we conclude that the trial court erred in finding that the Westerbuhrs acquiesced to the fence line as the boundary.

CONCLUSION

For the foregoing reasons, we find that Westerbuhrs established ownership of the disputed property and that TBT did not establish the elements of adverse possession or acquiescence. We therefore reverse the decision of the trial court and remand the cause with directions to quiet title to the disputed property in Westerbuhrs, establishing the boundary line at the thread of the South Platte River.

REVERSED AND REMANDED WITH DIRECTIONS.

ANTONIO FERNANDEZ BAUCOM, APPELLEE, V. DRIVERS MANAGEMENT, INC., APPELLANT.

686 N.W.2d 98

Filed August 31, 2004. No. A-03-1080.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Evidence.** Whether a medical report complies with Workers' Comp. Ct. R. of Proc. 10 (2000) goes to the admissibility of the report as evidence which would otherwise be inadmissible hearsay.
6. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
7. **Workers' Compensation: Evidence.** The only requirements for a medical report to be admissible under Workers' Comp. Ct. R. of Proc. 10 (2000) are that the report be a medical report and be signed.
8. ____: ____. Workers' Comp. Ct. R. of Proc. 10 (2000) states that when a report is a narration setting forth the history, diagnosis, findings, and conclusions of the physician and when the report is relevant to the case, the report must be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs.
9. ____: ____. The words "narrative," "history," "diagnosis," "findings," and "conclusions of the physician" are not elements that every medical report must contain in order to be admissible under Workers' Comp. Ct. R. of Proc. 10 (2000).
10. ____: ____. Workers' Comp. Ct. R. of Proc. 10 (2000) allows the compensation court to admit into evidence medical reports that would not normally be admissible in the trial courts of this state, providing that those reports are signed.
11. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John W. Iliff and Francie C. Riedmann, of Gross & Welch, P.C., for appellant.

Maureen A. Fitzgerald for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Drivers Management, Inc. (DMI), appeals from an order of the Nebraska Workers' Compensation Court awarding Antonio Fernandez Baucom benefits for an injury incurred on November 6, 2000. DMI argues that the trial court erred in admitting certain exhibits because the exhibits failed to comply with Workers' Comp. Ct. R. of Proc. 10 (2000). For the reasons stated below, we affirm.

II. BACKGROUND

In a work-related accident on November 6, 2000, Baucom incurred injuries to his left knee, head, and back. Baucom sought medical treatment and ultimately underwent surgery for a total knee replacement. On July 16, 2001, Baucom filed a petition in the Workers' Compensation Court seeking payment for medical expenses, temporary total disability, permanent partial disability, a waiting-time penalty, and attorney fees.

Trial was held on September 4, 2002. The trial court heard testimony from Baucom and admitted numerous exhibits into evidence, with several of those exhibits being admitted over the objections of DMI. On November 7, the trial court entered an order awarding Baucom temporary total disability benefits, permanent partial disability benefits, and medical expenses. Specifically, the trial court found that Baucom was injured in a work-related accident which caused Baucom to require a total knee replacement. The trial court also determined that Baucom's accident caused him to be temporarily totally disabled and permanently partially disabled.

DMI appealed the order of the trial court to a three-judge review panel of the Workers' Compensation Court. DMI argued that the trial court erred in finding causation and in awarding permanent partial disability benefits and medical expenses. The basis of DMI's arguments was that the court improperly admitted exhibits which did not comply with rule 10 and subsequently relied upon those exhibits in making its findings.

DMI also appealed the trial court's admission of exhibits 3 through 9. The review panel affirmed the trial court's admission of the exhibits for two reasons. First, the review panel found that DMI failed to preserve on appeal its objection that the exhibits failed to comply with rule 10. The review panel stated that DMI had objected to the exhibits "from its belief that Rule 10 of the Rules of Procedure of the Nebraska Workers' Compensation Court was not satisfied, thus rendering the exhibits irrelevant." The review panel then stated, "[I]t is clear that the exhibits were, in fact, relevant." The review panel noted that under rule 10, medical reports that do not comply with rule 10 are inadmissible as hearsay, not as irrelevant. The review panel then determined that DMI objected only on the ground of relevance, not hearsay, and that DMI thus failed to preserve on appeal the argument that the exhibits failed to comply with rule 10.

Second, the review panel affirmed the ruling of the trial court because the review panel found that the trial court did not err in admitting the exhibits. The review panel stated:

> To adopt [DMI's] narrow interpretation of Rule 10 would be to require that each and every scrap and piece of medical evidence submitted by a party be read without regard to any other medical evidence submitted. Each report, no matter the content of any companion records, would (under [DMI's] view) need to meet six specific requirements, i.e., "reports must be (1) signed and must (2) narrate (3) the history, (4) diagnosis, (5) findings, and (6) conclusions of the doctor. If any of those six elements is missing, the report does not meet the requirements of Rule 10."

The review panel then determined that the principles of Nebraska workers' compensation law require a more liberal interpretation of rule 10, which interpretation would permit the exhibits to be read in conjunction with each other when determining whether rule 10 has been complied with. In considering exhibits 3 through 9 in conjunction with each other, the review panel found that the exhibits met the requirements of rule 10.

DMI now appeals to this court.

III. ASSIGNMENTS OF ERROR

DMI asserts, restated and renumbered, that the trial court erred in (1) admitting into evidence certain medical reports in violation

of rule 10, (2) finding that Baucom proved medical causation for his surgery for a total knee replacement, (3) determining that Baucom sustained a 38-percent permanent partial disability, and (4) awarding Baucom medical expenses.

IV. ANALYSIS

1. Standard of Review

[1] 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 did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003) (citing *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), and *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002)).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Morris, supra* (citing *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001)). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* (citing *Frauendorfer, supra*).

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.* (citing *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002), and *Vega, supra*).

2. Rule 10 Medical Reports

DMI argues that the trial court erred in admitting Baucom's exhibits 3 through 9, because those exhibits did not comply with rule 10, thus making the exhibits inadmissible. DMI further argues that the three-judge review panel erred in affirming the ruling of the trial court on the basis that DMI failed to properly

preserve its objection to the admission of the exhibits. We find that DMI's arguments are without merit.

The review panel determined that DMI failed to preserve on appeal its argument that exhibits 3 through 9 were inadmissible because they did not comply with rule 10. The review panel stated that a medical report which does not comply with rule 10 is inadmissible as hearsay, but that DMI failed to object on the basis of hearsay. DMI argues that the review panel was incorrect. Though DMI does not mention this, the review panel also stated, "[E]ven if one were to disregard or otherwise overlook the failure of [DMI] to preserve a hearsay objection, [DMI's] appeal would be otherwise flawed." The review panel then determined that when all of the reports are read in conjunction with each other, the exhibits complied with the requirements of rule 10.

[5] We recognize the concern of the review panel regarding DMI's objection to exhibits 3 through 9. A reading of the bill of exceptions appears to reflect that DMI objected on the basis of relevance. When asked if DMI objected to the admission of exhibits 1 through 29, DMI stated: "Yes. To Exhibits 3 through 9 on the basis of relevance. Those are medical records. Those records are not rule ten reports and cannot be used to prove causation." DMI's objection could be interpreted to be that the reports are not relevant because they do not comply with rule 10. Such an argument would be incorrect, because whether the report complies with rule 10 goes to the admissibility of the report as evidence which would otherwise be inadmissible hearsay.

[6] An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993). See *Havlicek v. State*, 101 Neb. 782, 165 N.W. 251 (1917). DMI's apparent misunderstanding of rule 10 seems to have resulted in a specific objection on the ground of relevance, which would not preserve an objection on the ground of hearsay. However, if we interpret DMI's objection to be on the ground of relevance *and* that the reports were inadmissible because they did not comply with rule 10, implied from its statement that the exhibits "are not rule ten reports," DMI properly preserved its argument on appeal. Nonetheless, DMI's objections were essentially without merit.

DMI argues that rule 10 requires that in order to be admissible, a medical report must be signed and must narrate the history, diagnosis, findings, and conclusions of the physician that made the report. DMI further argues that Baucom's exhibits 3 through 9 failed to comply with rule 10 and are thus inadmissible. The review panel held that the reports, when read in conjunction with each other, satisfied rule 10 and were thus admissible. A reading of rule 10 reveals that DMI and the review panel are misconstruing the rule.

Rule 10 states in part:

> **A. Medical and Vocational Rehabilitation.** The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence; and accordingly, with respect to medical evidence on hearings before a single judge of said court, *written reports by a physician or surgeon duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence* in lieu of or in addition to the personal testimony of such physician or surgeon; with respect to evidence produced by vocational rehabilitation experts, physical therapists, and psychologists on hearings before a single judge of said court, written reports by a vocational rehabilitation expert, physical therapist, or psychologist duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such vocational rehabilitation expert, physical therapist, or psychologist. A sworn statement or deposition transcribed by a person authorized to take depositions is a signed, written report for purposes of this rule.
>
> *A signed narrative report by a physician* or surgeon, vocational rehabilitation expert, or psychologist *setting forth the history, diagnosis, findings and conclusions of the physician* or surgeon, vocational rehabilitation expert, or psychologist and which is relevant to the case *shall be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs.* The Nebraska Workers' Compensation Court recognizes that such narrative reports are used daily by the insurance

> industry, attorneys, physicians and surgeons and other practitioners, and by the court itself in decision making concerning injuries under the jurisdiction of the court.

(Emphasis supplied.)

[7-9] The only requirements for a medical report to be admissible under rule 10, as emphasized above, are that the report be a medical report and be signed. DMI's statement that rule 10 requires every medical report to also be narrative and include the history, diagnosis, findings, and conclusion of the physician is inaccurate. Rule 10 merely states that when a report *is* a narration setting forth the history, diagnosis, findings, and conclusions of the physician and when the report is relevant to the case, the report must be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs. This is clear because the court rule then specifically articulates why such reports must be considered as such, stating that such reports are used daily in making decisions concerning injuries. Clearly, the words "narrative," "history," "diagnosis," "findings," and "conclusions of the physician" are not elements that every report must have in order to be admissible under rule 10.

[10] DMI cites to *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998), for the premise that a report is properly excluded if the report does not comply with rule 10. We do not disagree with this premise. However, the report that was properly excluded in *Johnson* was excluded because it was not signed. *Johnson* does not stand for the proposition that rule 10 requires that in order to be admissible, a medical report must be signed, narrative, and include the history, diagnosis, findings, and conclusions of the physician. These are not requirements of rule 10. In fact, *Johnson* states, "[R]ule 10 allows the compensation court to admit into evidence medical reports that would not normally be admissible in the trial courts of this state, providing that those reports are signed." 254 Neb. at 190, 575 N.W.2d at 397.

All of these exhibits objected to by DMI contain physicians' signatures except exhibit 6. DMI does not argue that any of the exhibits are not medical reports. Accordingly, exhibits 3 through 5 and 7 through 9 were properly admitted into evidence by the trial court. It was error for the trial court to admit exhibit 6 under rule 10, because the exhibit does not contain a physician's

signature. However, admission of this exhibit was harmless error. At no time did the trial court expressly rely on exhibit 6. Furthermore, exhibit 6 is merely a description of the surgery Baucom underwent. The exhibit contains no information with regard to causation, the extent of Baucom's disability, or costs of medical treatment. The remaining exhibits in the record sufficiently establish causation, disability, and benefits owed, without the use of exhibit 6.

[11] The review panel affirmed the ruling of the trial court on the bases that DMI failed to preserve its objection to exhibits 3 through 9 and that the reports, when read in conjunction with each other, did comply with rule 10. We find that exhibits 3 through 5 and 7 through 9 each independently comply with rule 10. We further find that the trial court committed harmless error in admitting exhibit 6, which exhibit did not comply with rule 10. As such, the review panel reached the right result, albeit for the wrong reasons. Because a proper result will not be reversed merely because it was reached for the wrong reasons, we affirm. See *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001).

3. Award of Benefits

DMI next argues that the trial court erred in finding causation and in awarding medical expenses and permanent partial disability benefits. We first note that DMI does not argue that the court was clearly wrong in relying on Baucom's medical reports for any other reason other than that the reports were not admissible under rule 10.

With regard to causation, DMI argues that the trial court erred in finding causation, because the court relied upon a physician's statement found in exhibit 5, which exhibit DMI claims was inadmissible. Because we found that the trial court did not err in admitting exhibit 5, the trial court could rely on the statement to find that Baucom's work-related accident caused his knee injury which necessitated surgery for a total knee replacement. As such, the trial court was not clearly wrong in relying on exhibit 5.

Similarly, DMI argues that the trial court erred in determining that Baucom sustained a 38-percent permanent partial disability to his left leg and in awarding future medical expenses. Again,

DMI argues only that the basis of the trial court's decision was from an inadmissible medical report, exhibit 5. As stated above, the trial court did not err in admitting exhibit 5 and thus was not clearly wrong in relying on the exhibit to find that Baucom suffered a 38-percent permanent partial disability to his left leg and is entitled to future medical expenses.

Finally, DMI argues that the only admissible evidence in the record regarding Baucom's injury was exhibit 39, the medical report of DMI's expert, whose diagnosis obviously would entitle Baucom to a substantially smaller award. In light of our findings above, this argument is clearly without merit.

V. CONCLUSION

For the reasons stated above, we find that exhibits 3 through 5 and 7 through 9 were not admitted into evidence in violation of rule 10. We further find that while exhibit 6 did not comply with rule 10, admission of the exhibit was harmless error. Accordingly, we affirm the ruling of the trial court as affirmed by the review panel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAY E. BRUNA, APPELLANT.

686 N.W.2d 590

Filed September 7, 2004. No. A-03-544.

1. **Verdicts: Evidence: 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.
2. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal.
3. **Juror Qualifications: Parties: Appeal and Error.** Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
4. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.

5. **Pleadings: Evidence.** It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.
6. **Trial: Pleadings: Proof: Appeal and Error.** In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context within which questions were asked.
7. **Pretrial Procedure: Attorneys at Law: Conflict of Interest.** Where the problem is brought to the court's attention before trial, the trial court is given broad discretion in determining whether a conflict warranting disqualification of counsel exists.
8. **Attorneys at Law: Conflict of Interest.** Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.
9. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
10. **Criminal Law: Motions for Continuance: Appeal and Error.** There is no abuse of discretion by a court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof.
11. **Motions for Continuance: Appeal and Error.** Failure to comply with the provisions of Neb. Rev. Stat. § 25-1148 (Reissue 1995) is only a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.
12. **Public Officers and Employees: Prosecuting Attorneys.** The county attorney is the public prosecutor, and his or her office is quasi-judicial.
13. **Trial: Records.** Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see that the reporter accurately fulfills that duty.
14. **Rules of the Supreme Court: Records: Appeal and Error.** An appellant must present a record of his or her Neb. Ct. R. of Prac. 5A(2) (rev. 2000) request for a record of additional proceedings.
15. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
16. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
17. **Rules of Evidence: Expert Witnesses: Appeal and Error.** Determining whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb. Rev. Stat. § 27-702 (Reissue 1995) involves the discretion of the trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal absent an abuse of discretion.
18. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the state and federal Constitutions, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

19. **Appeal and Error.** Errors which are neither assigned nor argued will not be considered by an appellate court.
20. ____. 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.
21. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
22. **Appeal and Error: Parties.** Plain error applies when an appellate court discovers error on the record; it is not a broad assertion to be assigned by the parties on appeal.
23. **Appeal and Error.** A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
24. **Effectiveness of Counsel: Appeal and Error.** Allegations of ineffective assistance of counsel must be set forth in the assignments of error.
25. **Appeal and Error.** Alleged errors that are not both assigned and argued in the brief on appeal will not be considered by an appellate court.
26. **Directed Verdict: Appeal and Error.** Whether a trial court should have granted a motion for directed verdict at the close of the State's case is a question of law, regarding which an appellate court must reach a conclusion independent of the determination reached by the court below.
27. **Criminal Trials: Directed Verdict: Evidence.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
28. **Directed Verdict: Evidence.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law and a verdict may not be directed.
29. **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.
30. ____: ____. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unjustly deprive the defendant of a substantial right and a just result.
31. **Judges: Recusal: Sentences: Proof: Appeal and Error.** To determine whether a judge was biased against a defendant and therefore whether that judge should have recused himself or herself from imposing a sentence, the defendant must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Sentence vacated, and cause remanded for resentencing.

Lawrence G. Whelan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, Chief Judge, and SIEVERS and CASSEL, Judges.

PER CURIAM.

I. INTRODUCTION

Pursuant to a jury verdict, Jay E. Bruna was convicted in the district court for Sarpy County of first degree sexual assault on a child and sentenced to 15 to 50 years in prison. Bruna appeals, alleging that the trial court committed numerous prejudicial errors and that Bruna's trial counsel was ineffective in several respects. Although we conclude that these matters lack merit regarding the pretrial motions and trial proceedings, we find merit in the error assigned regarding the trial judge's sentencing comments.

II. BACKGROUND

The information asserted one charge of first degree sexual assault on a child, a Class II felony in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). It specifically alleged that between December 1, 2001, and May 20, 2002, Bruna, a person 19 years of age or older, subjected A.T., a person younger than 16 years of age, to sexual penetration. Bruna and the State each filed several motions before and during trial. We summarize the relevant motions and rulings in the analysis section of this opinion.

The court conducted a trial on March 3 to 7, 2003. Because the evidence regarding the elements of first degree sexual assault is relevant only to Bruna's motions for directed verdict, we summarize that evidence in the manner most favorable to the State. See *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

We first summarize the testimony of A.T., the victim, in detail. A.T. was born on January 27, 1990. During the 2001-02 school year, he was a sixth grader and often rode a schoolbus, driven by Bruna, home from school. A.T. described Bruna as his friend.

A.T. related events showing that Bruna took an unusual interest in A.T.:

During the 2001-02 school year, A.T. played a saxophone in the school band. He took private band lessons from the band teacher. Bruna attended these private lessons and "would just sit

there" during them. Bruna also attended A.T.'s band concerts. Bruna told A.T. and other children that if they practiced their instruments more, they could go to a hockey game. As a result of this incentive, A.T. attended a hockey game with Bruna, other boys, and the father of one of the other boys. Bruna told A.T. that Bruna played percussion instruments and the guitar. A.T. wanted to learn to play the guitar and asked Bruna to teach him. Bruna replied that he would give A.T. lessons at Bruna's house.

A.T. also played baseball on a team composed entirely of boys. Bruna attended almost all of A.T.'s baseball games, standing behind a dugout. A.T. did not see Bruna speaking to the parents at the games but admitted that it was possible that Bruna did so when A.T. was not watching.

A.T.'s school hosted a grandparents' tea between Thanksgiving and Christmas of 2001. A.T. had no grandparents in the area, and without any request, Bruna offered to attend. A.T. accepted the offer and sat with Bruna at the tea. If A.T. had not brought a guest, the tea's sponsor would have assigned a stranger as A.T.'s guest.

During his sixth grade year, A.T. obtained a haircut at a barbershop in Springfield. A.T. saw Bruna at the barbershop, watching A.T. and taking his picture. Bruna did not tell A.T. why Bruna took the photographs. A.T.'s mother accompanied A.T. to the haircut appointment, but A.T. did not know whether she spoke to Bruna.

On A.T.'s birthday in January 2002, Bruna gave him a greeting card which, although torn into pieces, was received in evidence.

In addition to driving the schoolbus, Bruna worked at a bar in Springfield. Bruna inquired whether A.T. wanted a job mowing the lawn at the bar, but Bruna did not tell A.T. how much Bruna intended to pay for this work.

Bruna told A.T. that he owned several cars, including "a Corvette, a Lincoln, and . . . two or three Broncos," and A.T. asked to see Bruna's cars. Bruna told him that he would bring a picture of a car the next day, but he never did.

A.T. explained the circumstances involving the events on the schoolbus:

During the second half (January to May) of the 2001-02 school year, A.T. rode the bus home two to three afternoons per

week; on the remaining schooldays, his parents, both of whom work, brought him home. At the beginning (September) of that school year, A.T. sat in the back of the bus, but Bruna later made A.T. and one of A.T.'s friends, B.T., sit in the front because, Bruna claimed, the two boys were "acting up." The two boys sat on the front seat across from Bruna. When A.T. rode the bus, Bruna would bring him food. Bruna did not give food to the other children, but he sometimes gave the other children candy. At some point during the school year, B.T. resumed sitting in the back of the bus, but A.T. continued to sit in the front. At times, rather than sitting on the front seat, A.T. would sit on the engine cover between the front seat and the driver's seat. When doing so, he faced Bruna, with his legs on the side of the cover closest to the driver's seat. A.T. sat on the engine cover almost every time he rode the bus between January and May. A.T. did not know how this practice began. While sitting in this location, A.T. assisted Bruna by opening the bus' door, using the control lever in front of the engine cover.

A.T. lived in a house just outside of Springfield's Meadow Oaks subdivision, where the backyard adjoined the premises of B.T.'s residence. Sometimes A.T. would get off the bus at B.T.'s residence, play there, and then walk home through A.T.'s backyard. B.T.'s residence was located on Meadow Ridge Drive, one-half mile from its intersection with Cornish Road.

At a point after Christmas 2001 and also after the hockey game mentioned above, Bruna began stopping the bus on Cornish Road near Meadow Ridge Drive while he and A.T. were alone on the bus. The first time Bruna stopped the bus there, they talked while Bruna sat in the driver's seat and A.T. sat across from him in the front seat. The next time A.T. rode the bus, Bruna did not stop on Cornish Road. On the next occasion when Bruna and A.T. were alone on the bus and Bruna stopped it on Cornish Road, Bruna did so at the same location and told A.T. to go to the back of the bus. A.T. went three-quarters of the way toward the back of the bus and sat on a seat, and Bruna kneeled on one knee in the aisle. Bruna touched A.T.'s penis with Bruna's hands through A.T.'s clothes. Bruna threatened that if A.T. told anyone what had happened, Bruna would hurt him. Bruna then drove away from the area.

Bruna returned to the same area on another occasion when alone with A.T. on A.T.'s way home from school. Bruna again told A.T. to go to the back of the bus. A.T. again went three-quarters of the way to the back of the bus and sat in a seat, and Bruna again kneeled on one knee in the aisle. Bruna told A.T. to pull down his pants, and A.T. complied. Bruna touched A.T.'s penis with Bruna's hands, and, A.T. later testified, "stuff came out of [A.T.'s] penis" and landed on the floor. Bruna again threatened A.T. that if A.T. told anyone, Bruna would hurt him.

On another occasion, Bruna again parked the bus on Cornish Road. Following similar directions by Bruna, A.T. again went to a seat toward the back of the bus, with Bruna kneeling on one knee in the aisle, and at Bruna's direction, A.T. pulled down his pants. Again, Bruna began touching A.T.'s penis with Bruna's hands. Once again, A.T. later related, "stuff came out of [A.T.'s] penis," this time landing on a towel that Bruna had placed on the floor. Bruna then placed his hands on A.T.'s hands and started rubbing Bruna's penis from the outside of Bruna's clothes. Again, Bruna threatened A.T. that Bruna would hurt him if he told anyone. Bruna then took A.T. home.

The next time Bruna parked the bus on Cornish Road, the same general events transpired. Toward the back of the bus, Bruna told A.T. to pull down his pants. After A.T. pulled down his pants, Bruna put A.T.'s penis in Bruna's mouth. Bruna placed a blue paper towel he had brought with him on the floor (such paper towels being kept at the front of the bus). Emissions from A.T.'s penis landed on the towel. Bruna then put Bruna's penis in A.T.'s mouth while they both kneeled in the aisle. Bruna ejaculated into the towel on the floor. Again, Bruna followed the acts with the same threat of harm upon any disclosure. Bruna then drove A.T. home. A.T. believed Bruna "could" hurt him.

After this incident, A.T. asked his parents to drive him home from school, which they generally did thereafter. On a later occasion, however, A.T. again rode the bus. Bruna inquired about his absence. While he was alone with A.T., Bruna again parked the bus on Cornish Road near Meadow Ridge Drive and followed the same general process. At Bruna's direction, A.T. pulled down his pants, and Bruna put A.T.'s penis in Bruna's mouth. "[S]perm" came out of A.T.'s penis and landed on a blue

paper towel (again of the type kept at the front of the bus) on the seat. Bruna then put his penis in A.T.'s mouth while A.T. was in the seat and Bruna, facing the rear of the bus, was in the aisle. Bruna ejaculated onto the towel, which he had moved to the floor. Again, Bruna threatened to hurt A.T. if he told anyone. A.T. was scared of Bruna, as he later testified, and after this incident, he again asked for rides from his parents. For some period of time, they did take A.T. home from school.

Once while A.T. was parked alone with Bruna on the bus, but before Bruna had begun touching him, a man had stopped and asked whether they were having trouble. At that time, A.T. was sitting in the front seat across from Bruna.

On another occasion while A.T. was parked alone with Bruna on Cornish Road, they observed a policeman on a nearby hill. At that point, Bruna "turned around and went back." Bruna told A.T. the next day that the policeman had stopped and talked to Bruna after Bruna had taken A.T. home. He said that the policeman had asked him why he was on Cornish Road and that he had responded that he and A.T. were turning around. After seeing the policeman, Bruna no longer parked the bus on Cornish Road with A.T.

At trial, A.T. explained that he did not tell anyone about what had happened with Bruna on the bus because he thought Bruna would hurt him. On direct examination, A.T. testified that at a sleepover, he told two other boys what had happened with Bruna on the bus. But, on cross-examination, A.T. admitted telling one of the boys that nothing had happened. On redirect examination, A.T. explained that he did so because he thought that if he told the other boy what had happened, the other boy would not like him.

On the last day of school, the school principal asked A.T. what had happened on the bus and A.T. told the principal that nothing had happened. At trial, A.T. explained that he did so because he was embarrassed. After school that day, Bruna approached A.T. at a city park and asked him whether anyone had asked questions. A.T. told Bruna that the principal had asked questions about the bus. Bruna did not respond. The following day, A.T. and his parents met with Deputy Rick Wheeler of the Sarpy County sheriff's office, who was the school resource officer. Wheeler asked A.T. what had happened on the bus. A.T. told

him that nothing had happened, because he was embarrassed to talk about what had happened in front of his parents and because he felt he had done something wrong. Wheeler escorted A.T.'s parents out of the room and returned alone. A.T. then told Wheeler about what had happened on the bus.

We now summarize the testimony of other witnesses:

A.T.'s mother testified that at the meeting with Wheeler, A.T. sat slumped in his chair with his head down. After A.T. had talked to Wheeler alone, he appeared very upset and "looked even worse than before"; he was completely slumped down in his chair with his head down, crying. A.T. would not talk during the 10-minute ride home. When A.T. and his parents arrived at home, A.T. immediately went to his room, shut the door, and got into bed. He did not leave his room any time that evening and did not eat supper. When A.T.'s mother checked on him, he had the covers pulled over his head. A.T.'s mother had never seen A.T. put the covers over his head as part of his normal bedtime routine. During the days that followed, A.T. was very withdrawn, did not want to talk, and would not talk to friends. A day or two after the interview with Wheeler, A.T.'s mother was emptying the wastebasket in A.T.'s bedroom and discovered the previously mentioned torn greeting card. A.T.'s mother taped the card, which had not been in the wastebasket the week before, back together. When she emptied the wastebasket in the bathroom A.T. shared with his brother, A.T.'s mother discovered that A.T. had thrown away three or four of his toothbrushes. A.T.'s withdrawn behavior prompted her to contact a counselor.

Another student who rode the bus testified that he saw A.T. and B.T. receiving Mexican food and submarine sandwiches from Bruna while the other children received only candy. A.T. received such food almost every day. A.T. usually opened the bus' door on the afternoon route from where he sat on top of the engine cover. This student claimed to have seen, toward the end of the 2001-02 school year, A.T. sitting on Bruna's lap in the back of the bus while another busdriver operated the bus.

B.T. testified that he and A.T. were friends and neighbors and that they both rode the bus. B.T.'s residence was the last stop on the afternoon bus route before A.T. got off the bus. B.T. and his sister would get off the bus, leaving A.T. as the only student

remaining. He testified that Bruna prevented A.T. from leaving the bus with B.T. by grabbing A.T.'s arm in horseplay fashion. A.T. would attempt to get off at B.T.'s residence approximately three times a week. After Christmas 2001, B.T. noticed a change in the bus route. After getting off the bus, B.T. could see the bus go down Meadow Ridge Drive and turn onto Cornish Road, sit on Cornish Road for up to 15 minutes, and then return to B.T.'s residence, where A.T. would exit the bus.

B.T.'s mother testified that during the spring of 2002, she observed the bus drop B.T. and his sister off, proceed on Meadow Ridge Drive toward Cornish Road, and then return 10 or 15 minutes later, at which time A.T. would get off the bus.

Bonnie Robinson testified that she had lived at her current house on Meadow Ridge Drive in Springfield for 3 years and in the area for more than 20 years. She described the area as rural, with only a couple of houses other than her own. Robinson testified that Meadow Oaks, a subdivision containing approximately 60 to 80 houses, was located approximately one-half mile from her house and that her house was situated approximately 1,100 feet from the intersection of Meadow Ridge Drive and Cornish Road, a low-traffic intersection controlled by a stop sign on Meadow Ridge Drive. During the 2001-02 school year, Robinson frequently observed a schoolbus pass by her house between 3 and 4:30 p.m., going north on Meadow Ridge Drive. She would see it stop at the stop sign, turn west onto Cornish Road, and then stop and remain parked. Robinson first observed such events during the winter of the 2001-02 school year. From then on, Robinson saw the bus stop in this manner almost daily. On these occasions, the bus would remain parked for 10 to 15 minutes. She would then observe the bus back up and depart from the area, proceeding south on Meadow Ridge Drive. Robinson could not see who was inside the bus. In the more than 20 years she had lived near that intersection, the 2001-02 school year was the only time she observed the schoolbus stop, turn, and then proceed south on Meadow Ridge Drive. One day, Robinson told her friend and neighbor, Shirley Riha, about these observations while, from Robinson's porch, they watched the bus going through the stopping routine.

Riha testified that she lived just east of the Meadow Oaks subdivision. On the day Robinson told her about the bus' stopping routine, Riha saw a man driving the bus and decided to follow it. Riha followed the bus to the top of a hill, and a little boy left the bus at a residence. Another boy was in the yard. Approximately a month later, on April 25, 2002, Riha again observed the bus at Cornish Road and Meadow Ridge Drive as she drove past. At that time, Riha did not see anyone in the driver's seat or in the passenger area. Approximately 10 or 15 minutes later, when Riha was at Robinson's residence, she saw the bus pass by with the door open. She saw a man driving, the same man she had observed driving the bus a month before. Riha then contacted law enforcement regarding her observations.

Sonja Mitchell, a resident of the Meadow Oaks subdivision, testified that she travels on Cornish Road every day on her way to and from work, arriving home between 4 and 4:05 p.m. Mitchell testified that she seldom passes or meets a car on Cornish Road. She observed a bus parked on Cornish Road near Meadow Ridge Drive nearly every day, starting in December 2001 and continuing until May 2002. Mitchell never saw anyone in or outside the bus, and she admitted that she did not look for anyone in the driver's seat. On two or three occasions, the bus was backing up as she came over a hill, such that she drove ahead of it after she turned south onto Meadow Ridge Drive. Each day, she backed into her driveway and exited her vehicle to check her mail. On occasion, the bus would pass while Mitchell checked her mail, and as it did one day, from 12 to 15 feet away, Mitchell observed Bruna driving the bus with a little boy on board who appeared to be either on Bruna's lap or sitting very close to him. Mitchell observed this two to four times between February and May 2002.

Scott Daly, a resident of the Meadow Oaks subdivision, testified that he uses Cornish Road to travel to and from work, traveling on it every other day, and that Cornish Road traverses rolling hills. Daly noticed a change in the morning route of the bus at issue after Christmas 2001. At that time, the bus began turning east onto Cornish Road instead of making a U-turn upon reaching Cornish Road. Daly had a child who rode the bus to school in the morning, and Daly several times observed two

young boys open the door while standing by the door mechanism near Bruna. One of those boys had dark hair and glasses. On April 11, 2002, between 4 and 4:10 p.m., Daly observed the bus parked near the intersection of Cornish Road and Meadow Ridge Drive as Daly drove westbound on Cornish Road. Daly stopped on the left side of the bus. He saw Bruna sitting in the driver's seat and a boy approximately 10 or 11 years old with brown hair and glasses sitting in the seat behind the bus' door, across the aisle from Bruna. He saw no other people inside the bus and did not recall whether the bus' engine was running. Daly rolled down his window and asked Bruna whether he needed help, and Bruna responded, " 'Nope, missed the turn.' " Daly proceeded westbound on Cornish Road at about 5 m.p.h. and continued to watch the bus in his mirror as he pulled away. He did not feel that Bruna had missed the turn; he had an "odd feeling" and was waiting for the bus to move. About 20 or 30 seconds after Daly left the bus, it backed up and proceeded down the road.

Wheeler testified that as the school resource officer, he was responsible for anything that occurred within the district's school system. On May 17, 2002, Wheeler received information from the school superintendent regarding suspicious activity involving a bus near the intersection of Meadow Ridge Drive and Cornish Road. That day, Wheeler and the superintendent went to the area in an unmarked car and stayed for about an hour, but observed no suspicious activity.

On the afternoon of May 20, 2002, Wheeler returned to the area alone in a marked car and observed the same intersection and the Meadow Oaks subdivision from a hill on Cornish Road. Wheeler saw the bus at issue dropping off students in the Meadow Oaks subdivision. The bus then proceeded to the intersection of Meadow Ridge Drive and Cornish Road, stopped, parked on Cornish Road, and stayed there for exactly 6 minutes. Wheeler could not see inside the bus. Wheeler observed the bus back up and go south on Meadow Ridge Drive, back to the Meadow Oaks subdivision. Wheeler followed the bus and saw it stop in the subdivision at B.T.'s residence. A boy exited the bus. The bus proceeded through the subdivision, and Wheeler initiated a traffic stop. Bruna appeared to be the only person on the bus, and he told Wheeler that he had been cleaning the bus

while stopped on Cornish Road and that A.T. was the child who had exited the bus.

Another deputy with the Sarpy County sheriff's office testified that she investigated the present case and arrested Bruna. At the time of the arrest, she obtained identifying information about Bruna and determined his birthday to be September 8, 1969.

The jury found Bruna guilty of first degree sexual assault on a child under § 28-319, and the trial court sentenced him to 15 to 50 years' imprisonment in the custody of the Nebraska Department of Correctional Services and ordered him to pay costs. We summarize and discuss the trial judge's additional comments below.

III. ASSIGNMENTS OF ERROR

On appeal, Bruna alleges, consolidated and restated, that the trial court erred in (1) excluding a videotape interview between Bruna and law enforcement officers; (2) allowing the public defender's office to withdraw; (3) overruling Bruna's motion for continuance; (4) denying Bruna's motion to appoint a special prosecutor; (5) limiting voir dire regarding pretrial publicity; (6) allowing the State's expert to testify as to the veracity of A.T., the behavior of sex abuse victims, and the behavior of sexual offenders; (7) not allowing a demonstration on the schoolbus; (8) overruling Bruna's motion for directed verdict; (9) refusing to recuse the trial judge from sentencing; and (10) imposing an excessive sentence.

Bruna also assigns that his trial counsel was ineffective (1) for failing to raise the proper objections during the State's expert's testimony and (2) for failing to elicit expert testimony before offering certain exhibits.

Bruna further claims that he was prejudiced by the court reporter's failure to record certain bench conferences.

IV. STANDARD OF REVIEW

[1] 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. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[2] A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of

discretion, a ruling on a motion for continuance will not be disturbed on appeal. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

[3] Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[4] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

V. ANALYSIS

1. Exclusion of Videotape

Prior to trial, the State filed a motion in limine requesting that the court prohibit Bruna from introducing evidence regarding an interview of Bruna conducted on May 23, 2002, at the Sarpy County Law Enforcement Center, including any videotape thereof, because the videotape thereof which the State had reviewed contained references to a polygraph test, evidence of which is inadmissible, and because the videotape was inadmissible as self-serving hearsay. Following a hearing, the trial court granted the motion.

On appeal, Bruna assigns that the trial court erred in granting the motion, arguing that the videotape only incidentally mentioned a polygraph test and that by excluding a videotape which contained prior consistent statements, the trial court chilled Bruna's right to testify in his own defense. However, Bruna did not make an offer of proof at trial on this matter.

[5,6] It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003) (citing *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995)). In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an

offer of proof outside the presence of the jury unless the evidence is apparent from the context within which questions were asked. See *id.* (citing *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), *overruled on other grounds, Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000)). Because Bruna failed to make an offer of proof regarding the videotape, he failed to preserve that claim.

2. Withdrawal of Public Defender

On December 30, 2002, the Sarpy County public defender's office, having been appointed prior to trial to represent Bruna, moved for an order allowing it to withdraw as Bruna's counsel because of a conflict of interest. On December 31, the trial court denied the motion. At a January 28, 2003, hearing, the public defender's office orally renewed its motion to withdraw. Bruna's counsel, Patrick Boylan, a deputy Sarpy County public defender, argued that the public defender's office had a conflict of interest in representing Bruna because A.T.'s mother was a court reporter for a Sarpy County Juvenile Court judge and another attorney employed full time by the public defender's office was before that court weekly or daily. Boylan stated that he himself had known A.T.'s mother for 15 years and had seen her regularly as she recorded depositions at his former private practice and as she worked for the Douglas County District Court while Boylan worked for the Douglas County public defender's office. At the hearing, Bruna stated, "I would prefer to have someone appointed from outside the public defender's office." On February 3, the trial court excused the public defender's office from representing Bruna and appointed another attorney at the county's expense. Trial commenced on March 3. On appeal, Bruna assigns that the trial court erred in allowing the public defender's office to withdraw as his counsel.

[7] In determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001) (citing *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). The U.S. Supreme Court has

also acknowledged an independent interest of the courts in conducting criminal trials within the ethical standards of the legal profession and which appear fair to all who observe them. See *id.* The Nebraska Supreme Court has recognized that counsel may be disqualified to avoid potential errors, and where the problem is brought to the court's attention before trial, the trial court is given broad discretion in determining whether a conflict warranting disqualification of counsel exists. See *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987) (court-appointed counsel disqualified because of potential conflict of interest).

[8,9] In this case, Bruna's counsel presented evidence of a long-standing professional connection between attorneys of the public defender's office, including himself, and A.T.'s mother. It is possible that such a connection would have given rise to an actual conflict of interest, or at the very least, the appearance of impropriety. Based on these facts, we conclude that the trial court did not abuse its broad discretion in allowing the public defender's office to withdraw as Bruna's counsel.

Bruna relies on the proposition that

> [o]nce counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se . . . (2) appointed counsel is incompetent, in which case new counsel is to be appointed . . . or (3) the accused chooses to retain private counsel . . . .

(Citations omitted.) *State v. Sack*, 239 Neb. 690, 697-98, 477 N.W.2d 921, 926-27 (1991). Bruna argues that none of these conditions set forth in *Sack* were satisfied. However, as illustrated by *State v. El-Tabech, supra*, appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel. Moreover, Bruna expressly acquiesced in the public defender's office's request to withdraw. A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). This assignment of error lacks merit.

3. Motion to Continue

On February 19, 2003, Bruna filed a written motion for continuance. He alleged that a continuance was warranted under Neb. Rev. Stat. § 29-1206 (Reissue 1995) to give him adequate time to consult with his new counsel, retain the services of a defense psychologist, and prepare for trial to ensure effective assistance of counsel. At a hearing on February 21, Bruna's counsel argued the same general grounds alleged in the written motion, and the trial court denied Bruna's motion. After denying the motion, the trial court confirmed that counsel had been furnished with a copy of the proceedings at Bruna's first trial on this matter, which had been declared a mistrial. At the same hearing, the trial court granted Bruna leave to retain an expert witness at the county's expense.

[10] Bruna alleges that the trial court abused its discretion in denying his motion to continue. A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). There is no abuse of discretion by a court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

Section 29-1206 provides:

> Applications for continuances shall be made in accordance with [Neb. Rev. Stat. §] 25-1148 [(Reissue 1995)], but in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.

Motions for continuance are governed by Neb. Rev. Stat. § 25-1148 (Reissue 1995), which provides:

> Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or

> affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked. . . . Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application.

[11] We note that Bruna's written motion for continuance was not accompanied by an affidavit as required by § 25-1148. However, the failure to comply with the provisions of § 25-1148 is only a factor to be considered in determining whether a trial court abused its discretion in denying a continuance. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

In *State v. Boyce*, 194 Neb. 538, 233 N.W.2d 912 (1975), counsel was appointed to represent the defendant slightly less than 1 month prior to trial. The defendant moved for a continuance " 'so that defendant's counsel can effectively prepare a defense.' " *Id.* at 539, 233 N.W.2d at 913. The Nebraska Supreme Court noted that there was no showing that any witnesses were unavailable or had not been interviewed, nor any showing that the defense would be prejudiced in any specific way. There was only the general complaint that time to prepare was short. The court concluded that the defendant had not made a satisfactory showing of good cause in support of his motion for continuance and that the trial court therefore did not abuse its discretion in denying the motion.

Similarly, Bruna's counsel requested a continuance for the general purposes of consulting with Bruna, retaining an expert, and preparing for trial. We cannot say the trial court abused its discretion in finding no good cause in support of Bruna's motion. Furthermore, Bruna's counsel had access to the record from Bruna's first trial on the matter and received leave to retain an expert at the county's expense. The record reflects that Bruna's counsel extensively cross-examined the State's witnesses and called witnesses to testify in Bruna's behalf. Based on the record, we cannot conclude that Bruna was prejudiced by the trial court's denial of his motion to continue. We conclude that the trial court did not abuse its discretion in denying Bruna's motion.

Bruna argues that in allowing the public defender's office to withdraw and appointing new counsel, the trial court is partially responsible for his counsel's lack of preparation. See *State v. Santos, supra.* However, as we concluded above, the record does not show a lack of preparedness on the part of Bruna's counsel or prejudice to Bruna, and the trial court did not abuse its discretion in refusing to grant a continuance.

4. Special Prosecutor

On February 25, 2003, Bruna filed a motion for appointment of a special prosecutor, citing for support A.T.'s mother's employment as a court reporter for the Sarpy County Juvenile Court. He further alleged, with reference to an attached affidavit by Boylan, that "the Sarpy County legal community is relatively small and close-knit" and that Boylan withdrew from his appointment as Bruna's counsel because of "his belief that . . . knowledge of [A.T.'s mother] amounted to a conflict of interest" in representing Bruna.

At a hearing on the motion, Bruna's counsel argued:

> I believe that the county attorney's office does practice in areas in which [its employees] would come into contact with the interested parties in this case and, as a safety mechanism, to ensure that [Bruna] is granted a fair trial and is provided all reasonable opportunity to seek a resolution to this case, that it would be a good idea for this Court to order that a special prosecutor be appointed.

The trial court denied Bruna's motion. On appeal, Bruna assigns that the trial court erred in denying his motion, arguing that the reasoning supporting the withdrawal of the public defender's office called for the appointment of a special prosecutor.

[12] In *State v. Boyce*, 194 Neb. 538, 233 N.W.2d 912 (1975), the defendant was convicted of taking away, holding, or imprisoning a police officer against his will for the purpose of compelling the performance of an act by the officer, in violation of the kidnapping statute. The defendant moved for the appointment of a special prosecutor, and his motion was denied. On appeal, the Nebraska Supreme Court noted:

> "The county attorney is the public prosecutor, and his office is quasi judicial. In the discharge of the functions of

> that office he is called upon to exercise a sound discretion to distinguish between the guilty and the innocent, and to refrain from prosecuting those persons whose guilt is so doubtful that in his judgment justice will not be subserved by prosecutions, and there should not be anything in the way of private interest to possibly sway that judgment or to tempt him to depart from a disinterested and conscientious discharge of his duty."

Id. at 540, 233 N.W.2d at 913. The court affirmed and held that although the prosecutor would have been justified in disqualifying himself, he was not disqualified as a matter of law.

Unlike the public defender's office, which named specific persons, places, and time intervals in arguing in support of its motion to withdraw as counsel, Bruna failed to adduce specific evidence of a connection between A.T.'s mother and the county attorney's office; nor did he show that the county attorney had a "private interest" in the proceedings. We therefore conclude that the trial court did not err in denying Bruna's motion for the appointment of a special prosecutor.

5. Recording of Bench Conferences

Prior to trial, the trial court made a docket entry granting Bruna's motion to record certain trial proceedings, including bench conferences. During trial, the court conducted eight bench conferences. Of those, the court reporter recorded the content of one, which was a conference initiated by the court. The remaining seven were not recorded and were designated "off the record" by the court reporter. Two were had "in low tones," and the other five were conducted "outside the hearing of the jury." Of the seven off-the-record conferences, two were initiated by the court, four were initiated by Bruna's counsel, and one was initiated by the State's attorney.

The record does show that three court reporters were involved in the recording of these proceedings, as the reporters' certificate shows the specific portions of the proceedings taken by each reporter. Bruna's request for recording appears in the proceedings taken by the first reporter. The record does not show any communication by the court or the first reporter to the subsequent reporters of the court's order to record the additional portions of the proceedings.

[13] We take this opportunity to remind trial courts that upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings, that it is the duty of the court reporter to make such a record, and that it is the obligation of the trial court to see that the reporter accurately fulfills that duty. *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

On appeal, Bruna argues that he was prejudiced by the court reporter's failure to record bench conferences as ordered. He asserts that had the conferences been recorded as ordered, he would have been able to prove that the court was biased against him, and that the irregularity violated his right to due process and warrants a new trial.

[14] Neb. Ct. R. of Prac. 5A (rev. 2000) provides:

> (1) The official court reporter shall in all instances make a verbatim record of the evidence offered at [a] trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
>
> (2) Upon the request of the court or of any party, either through counsel or pro se, the official court reporter shall make a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding, including, but not limited to, any pretrial matters; the voir dire examination; opening statements; arguments, including arguments on objections; any motion, comment, or statement made by the court in the presence and hearing of a panel of potential jurors or the trial jury; and any objection to the court's proposed instructions or to instructions tendered by any party, together with the court's rulings thereon, and any posttrial proceeding.

Under this rule, in the absence of a request for the recording of additional proceedings pursuant to rule 5A(2), rule 5A(1) controls and requires only that the record contain the mandatory items listed in rule 5A(1). An appellant must present a record of his or her rule 5A(2) request for a record of additional proceedings. See *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002) (it is incumbent on party

appealing to present record which supports errors assigned, and absent such record, decision of lower court will be affirmed).

In this case, the record before us does not contain a motion by Bruna requesting a record beyond that required by rule 5A(1). We can infer the existence of a rule 5A(2) motion only from the trial court's reference at a hearing on February 28, 2003: "THE COURT: . . . The first motion I have is to record the voir dire, testimony, bench conferences, and closing arguments of counsel. That's granted, unless counsel waive that. So that's granted." The court's ruling suggests that the motion requested recording of such additional matters *unless waived by counsel.*

In *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990), the district court initially stated that it would require all proceedings to be recorded in accordance with the defendant's request. However, it later refused to allow the reporting of bench conferences, stating that objections should be made in open court so that they could be reported. On appeal, the defendant asserted that had the district court allowed the record he requested, on preparing for appellate review, he might have been alerted to the existence of errors which occurred at bench conferences or during other off-the-record discussions. The Nebraska Supreme Court noted that after the district court's later ruling mentioned above, it was incumbent upon the defendant to object in open court to any off-the-record discussions, further stating:

> While it is true that a party is entitled to have reported any comments made by a trial judge . . . it is, in the final analysis, in the absence of any prejudicial comment's being made in the presence of the jury, the correctness and effect of any questioned ruling which controls the disposition of an appeal. . . . Here, there is no claim the trial judge made any prejudicial comment in the presence of the jury, and the record is otherwise adequate to address the effect of the rulings [the defendant] questions. Thus, he has shown no prejudice by the district court's failure to provide him with the record he requested.

Id. at 391, 461 N.W.2d at 539. The court concluded that without a showing of prejudice, an omission from a bill of exceptions does not vitiate a defendant's conviction. *Id.*

Here, like the defendant in *State v. Bradley, supra*, Bruna does not allege that the trial judge made prejudicial comments in the presence of the jury; and here, the record reflects that the bench conferences were not heard by the jury, being conducted either in low tones or outside the hearing of the jury. By not objecting to the unrecorded bench conferences, Bruna waived the recording of such conferences. As explained in *Bradley*, trial rulings speak for themselves, and the record herein is sufficient to assess the correctness of the rulings which were the subject of those bench conferences. Bruna implies that we should infer bias in sentencing from the content of unrecorded bench conferences on trial rulings. However, our analysis below of the judge's comments at sentencing dispenses with this issue, and we need not address it further.

6. Voir Dire of Prospective Jurors

Prior to beginning voir dire of the prospective jurors, the trial judge stated:

> The Court will do voir dire. And I'll tell you when I begin the Court's voir dire, I will tell [the jurors] that there's been a lot of publicity about this case, that if they've heard or seen something about this case and have formed an opinion that they cannot lay aside, I want them to raise their hands. I'll give them a little chance to think about that. In other words, it's not the publicity, it's that they formed an opinion. And once I've done that, I'm going to tell both counsel that's it, you're not going further into any examination about pretrial publicity. I find that both sides have contributed to that from what I've seen. But if [the opinions] are there and [the jurors] can't lay [them] aside, I'll excuse [the jurors].

Neither party raised any objection to this procedure. When the prospective jurors were seated, the trial judge stated:

> There's been much publicity about this case. The evidence will show that [Bruna] was a school bus driver during the time alleged and that [A.T.] was a student who was a passenger on the school bus. You may have read something in the newspaper or heard something in the news or from other sources. I would ask you to reflect now if you have done so and would ask you to reflect if you have

> formed an opinion as to the guilt or innocence of [Bruna] at this time, to search your mind and ask yourself that question. If you've already formed an opinion that you cannot lay aside, then I want to know that. It's not that you heard or read about it, but it's that you already formed an opinion.
>
> I'll instruct you later that before you decide a case you must only decide it based on the evidence presented during the trial and your common sense that you have. In other words, the only evidence you would have is that which is presented in this open court.
>
> Reflecting on that, have any of you — and I would ask you to raise your hand — formed an opinion now as a result of that publicity as to the guilt or innocence of [Bruna]? If so, please raise your hand. Seeing none, I will continue with the Court's examination.

Neither party requested any further opportunity to examine the prospective jurors following the court-conducted voir dire and the ensuing initial voir dire by both parties.

[15] On appeal, Bruna assigns that the trial court erred in conducting limited voir dire regarding pretrial publicity. He argues that the en masse voir dire conducted by the trial court afforded him "no way of judging[,] at the time a prospective juror was drawn, whether the prospective juror was aware of prejudicial information about the case," brief for appellant at 26, and precluded intelligent use of his peremptory challenges. Bruna also assigns that the trial court erred in conducting an en masse voir dire with respect to pretrial publicity because it denied him the opportunity to support his pretrial motion to change venue. However, Bruna failed to object to the voir dire procedure outlined by the court or to request additional opportunity for voir dire after the court's and parties' initial inquiry, and "[i]t is a well-settled principle that one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error." *State v. Bjorklund*, 258 Neb. 432, 468, 604 N.W.2d 169, 204 (2000) (error waived where defendant failed to object to prosecutor's questions at voir dire). See, also, *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967) (ordinarily, if party makes no challenge for cause and accepts jurors, party waives any objection to their selection as

jurors). We therefore decline to address these assignments of error, as they were not preserved for appeal. We further note that "[g]enerally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby." *State v. Harrold*, 256 Neb. 829, 861, 593 N.W.2d 299, 321 (1999) (citing *Yount v. Seager, supra*).

7. Expert Testimony

Bruna assigns that the trial court erred in allowing Dr. Theodore J. DeLaet, the psychologist called by the State, to testify regarding the veracity of A.T., the behaviors exhibited by victims of sexual abuse, and the behaviors of sexual offenders.

Prior to trial, pursuant to *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the State moved for a hearing to evaluate expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and requested an order declaring the expert testimony to be offered at trial admissible. The trial court granted the hearing and found that DeLaet could testify on the characteristics of an adult sexual abuser of a child, the characteristics of a child sexually abused by an adult, and the area of children's false claims of sexual abuse by an adult. The trial court found that these areas of expertise had been subject to peer review and generally accepted in the psychological community.

At trial, DeLaet, a psychologist licensed to practice in Nebraska since 1986, testified that his practice includes treating children and adolescents who have been sexually abused, as well as perpetrators of sexual abuse. Over the years, DeLaet had seen well over 100 but fewer than 500 children believed to be victims of sexual abuse. He had assessed or treated approximately 100 sexual offenders. The court received DeLaet's curriculum vitae outlining DeLaet's extensive education and experience in the area of psychology.

DeLaet testified that in evaluating the veracity of a claim of sexual abuse, a psychologist must look at all available information. Specific factors for consideration include whether the allegation is specific or vague; loss of self-esteem; changes in

emotions; frequency of nightmares or flashbacks; hostility, depression, or withdrawn behavior; how the allegations came to light; physical signs and symptoms; and outside information relevant to the accuser's truthfulness. Evaluating these factors is not an exact science; the existence of one symptom does not indicate whether abuse actually happened, and the presence of these factors could be consistent with innocent behavior. After considering all the available information, a psychologist conducts a process of deductive reasoning. If a child denies to peers or adults that sexual abuse has occurred, it does not necessarily indicate that claims of sexual abuse are false; the child may feel that a person asking about sexual abuse is not entitled to the information and may deal with the situation by saying nothing, saying something different happened, or saying nothing happened. DeLaet testified at some length, without objection, about the types of behavior and emotional changes that a victim of sexual abuse may exhibit.

Later, Bruna's counsel made his only substantive objections to DeLaet's testimony:

> [The State's attorney, to DeLaet:] Now, in addition to these items that you have identified you would consider in the assessment, how would you — what does your training, your education, your experience tell you about how the child who is believed to be a victim would interact with peers, parents or other adults?
>
> [Bruna's counsel]: Objection, Your Honor: Relevance.
>
> THE COURT: Overruled.
>
> [DeLaet]: As mentioned earlier, it's not uncommon that the child's behavior changes, so [the child] might become — most often what we tend to see is that the child will tend to become less social, more withdrawn from others. Another common set of behaviors that is noted is when other people approach the child to disclose about what happened to him or her, that creates —
>
> [Bruna's counsel]: Objection, Your Honor: Relevance.
>
> THE COURT: Overruled.
>
> [DeLaet]: — the child then has a conflict about what do I say or do I say anything? And if so, do I tell 'em what happened or do I tell 'em something different to get 'em to

> go away? So in those circumstances, we always look for changes in social interactions.

DeLaet testified that the manner in which an initial disclosure of sexual abuse was made is important to investigating a claim. If the individual who conducted the initial investigation told the child that he or she thought the child was lying, DeLaet would be concerned that the child was coerced into claiming something happened when in fact nothing happened, especially if the individual conducting the investigation were someone the child had been taught to trust and respect. Children may make false accusations if they are intimidated or scared, and most children have been trained to be respectful to authority figures, which training could cause a child to say what he or she thinks the authority figure wants to hear. Children could fashion their answers to escape an uncomfortable situation, and a child who is asked numerous times about sexual abuse and denies it could answer in the affirmative based on previous reactions to the denials. A child might make false accusations to avoid being punished for lying, and a child might continue to make false accusations out of fear of retracting the initial allegation.

DeLaet acknowledged that emotional and behavioral changes in a child could stem from the child's being coerced into making a false accusation. When a child asserts to peers that sexual abuse did not occur, it may be because the child is not comfortable talking about it, but it could also be because no sexual abuse occurred. Signs of shame could be present when a child feels compelled not to tell the truth about whether abuse took place. DeLaet would look at the consistency of the child's story in determining the veracity of a claim of sexual abuse, as variations in the story could indicate a false claim.

DeLaet testified that there is a predictable pattern of behavior exhibited by an adult who perpetrates sexual abuse upon a child. The perpetrator identifies a potential victim days, weeks, months, or years in advance of the sexual abuse. The perpetrator's intent may not have been sexual initially, but it may end up that way. Usually, a trust building or friendship building period ensues, wherein the perpetrator leads the child to trust him or her through seemingly normal activities. At some point, either gradually or in a specific instance, the perpetrator crosses

the line from friendship to sexual abuse. The breach of trust may cause the child to become conflicted about trusting the perpetrator and trusting himself or herself, creating trauma. To prevent discovery of the abuse, the perpetrator will usually use threats of violence or shame the child into keeping the abuse a secret.

(a) Relevance of Expert Testimony

[16] Although Bruna assigns that DeLaet's testimony constituted improper "vouching" testimony and otherwise improper testimony about the behaviors of sexual abusers, we address only the relevance of DeLaet's testimony, because Bruna's counsel did not raise other grounds by objection; a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[17] Neb. Rev. Stat. § 27-702 (Reissue 1995) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Determining whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with § 27-702 involves the discretion of the trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal absent an abuse of discretion. See, *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003); *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

In *State v. Roenfeldt, supra*, the Nebraska Supreme Court approved the use of expert testimony concerning the profile of a child abuse victim, specifically such a victim's feelings, symptoms, and behaviors. The Nebraska Supreme Court explained that the profile evidence was relevant and admissible under § 27-702 because " '[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,' and 'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.' " 241 Neb. at 39, 486 N.W.2d at 204. In light of § 27-702 and

Roenfeldt, we conclude that DeLaet's testimony regarding the behaviors of victims of sexual abuse was relevant and that the trial court did not err in allowing it over Bruna's objections. We also conclude that the trial court did not abuse its discretion in allowing DeLaet's testimony regarding the behaviors of sexual offenders, because it also was relevant for aiding the jurors in understanding the dynamics of a sexually abusive relationship.

Bruna alleges that DeLaet's testimony was irrelevant because it was not preceded by evidence that A.T. exhibited, exclusively during the periods of time when the alleged abuse occurred, the behaviors of sexual abuse victims about which DeLaet testified. However, whether A.T. exhibited those general behaviors during the time period when the abuse occurred goes not to the admissibility of DeLaet's testimony, but, rather, to the weight to be given the evidence, which is the province of the fact finder, not this court. See *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

(b) Ineffective Assistance of Counsel

[18] Bruna asserts that he received ineffective assistance of counsel because his counsel did not raise the proper objections to DeLaet's testimony. To sustain a claim of ineffective assistance of counsel as a violation of the state and federal Constitutions, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

As we stated above, DeLaet's testimony was relevant and admissible because it assisted the jury in understanding the nature of a sexually abusive relationship, a topic with which most laypeople are unfamiliar. See *State v. Roenfeldt, supra.*

Bruna relies on *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993), to argue that DeLaet's testimony constituted improper " 'vouching' " testimony to which his counsel failed to object. Brief for appellant at 16. In that case, a testifying psychologist had examined and interviewed a child alleging sexual abuse

by the defendant and expressed the opinion that the child's allegations had been validated by her behaviors. We concluded that an expert witness may not give such testimony, because such testimony expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated.

Although the State's questions in this case were couched in terms of the veracity of a claim of sexual abuse, DeLaet merely described characteristics generally observed in perpetrators and victims of sexual abuse. DeLaet did not interview or examine A.T.; nor did he express an opinion, directly or indirectly, about A.T.'s veracity or credibility. He did not comment upon the weight to be given certain factors. Because DeLaet's testimony did not offer such an opinion or make such comment, we conclude that Bruna's reliance on *State v. Doan, supra*, is misplaced.

Bruna contends that his trial counsel was deficient in failing to make foundational objections to DeLaet's testimony concerning the behaviors of sexual offenders and their victims and the evaluation of the veracity of a victim's claims. At trial, the State established DeLaet's credentials and experience as a psychologist licensed to practice in Nebraska. DeLaet testified that over the years, he had treated hundreds of children and adolescents who had been sexually abused, as well as approximately 100 perpetrators of sexual abuse. Based on these facts, we conclude that the State laid sufficient foundation for DeLaet to testify as an expert under § 27-702 and that Bruna's trial counsel was not deficient in not objecting to DeLaet's testimony on foundational grounds.

Bruna argues that his trial counsel was deficient in not objecting to DeLaet's sexual offender testimony on grounds of prejudice. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." § 27-403. As noted above, DeLaet testified only in general terms about the behaviors of sexual offenders and their victims and about evaluating the veracity of claims of abuse. He did not specifically refer to Bruna or A.T. or express an opinion concerning the credibility of either, and his testimony clearly was intended only to assist the jurors in understanding a topic with which they likely were not familiar. Therefore, we conclude that

Bruna's counsel was not deficient in failing to object to DeLaet's testimony based on prejudice.

(c) Plain Error

[19-22] Bruna argues but does not assign that although his counsel did not object to the portions of DeLaet's testimony about which Bruna complains, the trial court committed plain error in allowing DeLaet's testimony.

> Errors which are neither assigned nor argued will not be considered by an appellate court. . . . 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. . . . Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

(Citations omitted.) *State v. Paul*, 256 Neb. 669, 677, 592 N.W.2d 148, 155 (1999). "Plain error applies when an appellate court discovers error on the record; it is not a broad assertion to be assigned by the parties on appeal." *State v. Egger*, 8 Neb. App. 740, 751, 601 N.W.2d 785, 795 (1999). We find no plain error in this regard.

8. Schoolbus Demonstration

Prior to trial, Bruna moved to have the bus brought for observation by the jury. At a hearing on the motion, Bruna's counsel argued:

> [A]lthough according to the affidavit the bus may not be in the same condition as it was at the time of the incident, in that it's been cleaned, it's been washed and whatnot, the bus will still be in the same condition as it relates to the dimensions, the width of the aisle, the width of the seats, the condition of the front of the bus where the motor hub comes out. And I believe in order for the jury to get a grasp and an accurate depiction of the incident involving this bus, the best way to allow the jury to see that is to bring the bus itself and not rely on a photograph.

The trial court granted Bruna's motion and stated, "They can park it out back here and they can run through it without discussion." The State's attorney asked the court whether the jury merely would inspect the bus, or whether questioning of witnesses would occur on the bus. The trial court clarified that the jurors would "just walk through and walk back." At trial, the trial court told the jury, "[I]f the bus is going to be out back, you can wait and go through the bus without talking or having anyone talk to you."

[23] On appeal, Bruna argues that the trial court erred in not allowing Bruna to demonstrate that "the size of the bus would have precluded . . . Bruna from being in the positions that were attributed to him by A.T." Brief for appellant at 41. However, Bruna's counsel did not request such a demonstration, and when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). We therefore decline to address this assignment further in this appeal.

[24,25] Bruna argues but does not assign that his trial counsel was ineffective in "failing to make a proper record regarding the method by which the jurors were instructed to view the bus." Brief for appellant at 43. Allegations of ineffective assistance of counsel must be set forth in the assignments of error. *State v. Gerstner*, 244 Neb. 508, 507 N.W.2d 490 (1993). Alleged errors that are not both assigned and argued in the brief on appeal will not be considered by an appellate court. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

9. Motion for Directed Verdict

[26-28] Bruna contends that the trial court erred in overruling his motions for directed verdict at the close of the State's case and at the close of trial. Whether a trial court should have granted a motion for directed verdict at the close of the State's case is a question of law, regarding which an appellate court must reach a conclusion independent of the determination reached by the court below. See *State v. Johnson*, 9 Neb. App. 140, 609 N.W.2d 48 (2000). In a criminal case, a court can direct a verdict only when

there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law and a verdict may not be directed. *Id.*

Under § 28-319(1), "[a]ny person who subjects another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." For the purpose of this offense, sexual penetration includes fellatio, which is oral stimulation of the penis. Neb. Rev. Stat. § 28-318(6) (Reissue 1995). The State charged Bruna with violating § 28-319(1)(c) between December 1, 2001, and May 20, 2002, at or near Meadow Ridge Drive and Cornish Road in Sarpy County. The State's case established that A.T. was born on January 27, 1990, and that Bruna was born on September 8, 1969. A.T. testified in detail that between Christmas 2001 and the end of his sixth grade year in 2002, Bruna had repeatedly subjected him to oral sex in a schoolbus parked on Cornish Road near Meadow Ridge Drive. Several witnesses corroborated A.T.'s testimony that Bruna routinely parked the bus at that location after school. The State presented evidence supporting every element of its case against Bruna, and we conclude that the trial court did not err in overruling Bruna's motions for directed verdict.

10. DNA Evidence and Ineffective Assistance of Counsel

Bruna assigns that his trial counsel was ineffective in "failing to elicit expert testimony prior to offering exhibits."

A criminalist for the Nebraska State Patrol crime laboratory testified, on direct examination by Bruna's counsel, that he examines items of evidence collected by law enforcement agencies for the presence of body fluids and does DNA testing if necessary. He conducted analyses in the present case, and his report was received in evidence. It reflects that the crime laboratory received several items, including a pair of green shorts, from the Sarpy

County sheriff's office. At no time during trial did Bruna's counsel present evidence showing how or where the Sarpy County sheriff's office obtained the green shorts. The report reflects that the criminalist found evidence of semen on the green shorts. Upon examination by Bruna's counsel, the criminalist testified that he knew of no test that could discern whether the semen found on the shorts was the result of a nocturnal emission.

A DNA analyst with the Nebraska State Patrol crime laboratory testified, on direct examination by Bruna's counsel, that her duty is to examine items of evidence for the presence of blood, other body fluid, and hair; to perform a DNA analysis on any found; and to compile a report. She testified that she "performed the DNA analysis" in the present case. Her report, which was received in evidence, states that she found evidence of semen on a pair of green shorts, that "Bruna can be included as a source of the DNA [on] the green shorts," and that "[A.T.] can be excluded as [a] source of the DNA on the green shorts." She also testified that in examining items for the presence of DNA, she is not able to determine whether any DNA evidence found resulted from a nocturnal emission.

Bruna specifically argues that before offering the DNA analyst's report in evidence, his counsel should have elicited testimony explaining to the jury that the green shorts belonged to Bruna. He contends, "As the record now stands, it is impossible to decipher who wore the shorts and whose DNA was found to be on those shorts. The impression left on the jury was that the shorts belonged to [A.T] and that . . . Bruna's DNA was found to be on those shorts." Brief for appellant at 44.

As set forth above, to sustain a claim of ineffective assistance of counsel as a violation of the state and federal Constitutions, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

No evidence was presented as to the ownership of the green shorts. The evidence showed only that Bruna's semen had been

identified on a pair of green shorts provided to the crime laboratory by the Sarpy County sheriff's office and that there was no way to determine whether the semen was from a nocturnal emission. Contrary to Bruna's argument, we cannot see how this evidence would leave the jury with the impression that the green shorts belonged to A.T. Bruna did not demonstrate a reasonable probability that but for such performance by his counsel, the outcome of his trial would have been different. Even if Bruna's counsel had established Bruna as the owner of the shorts, there was ample evidence of Bruna's guilt, namely A.T.'s account of the sexual abuse perpetrated by Bruna. Therefore, we conclude that this assignment of error is without merit.

11. Statements at Sentencing

After his conviction but before sentencing, Bruna filed a motion requesting that the trial judge recuse himself. There is no copy of that motion in the transcript, but the trial judge referred to the motion before sentencing Bruna and overruled it. Bruna asserts that the trial judge abused his discretion in failing to recuse himself from sentencing Bruna. Although Bruna's counsel discussed at oral argument an earlier motion to recuse, Bruna's assignment of error, read in context, clearly addresses only the later motion to recuse.

[29,30] In regard to the motion to recuse made after conviction and prior to sentencing, Bruna's brief on appeal focuses on statements made by the trial judge before pronouncing the sentence. The judge began with the following:

> Okay. I probably would be better off not saying anything and simply imposing a sentence. The last time I sentenced a person that could be labeled as a "pedophile" I quoted from an author — a learned man — that happened to be a contributor to the Bible. The case was reversed and resentenced by another judge to probation. If people would continue to read that author, they would find that it's not a message of condemnation, but of hope.

The judge commended A.T. on his bravery in testifying and then continued:

> I had a life experience involving a friend when I was in the sixth grade. A man came to Bellevue as a teacher . . . .

> He organized basketball teams for young persons after school. He was always hugging and kissing the young people and we thought he was a great guy. One night he had one of the young people stay overnight at his house. He did a terrible thing. The young person reported this to his parents, the man left town without a trial. That young person grew up to be a football player, was selected as a Class B All State player, but even the mention of this man's name would bring him to tears.

We are asked to determine whether these comments demonstrate that the trial judge based Bruna's sentence on personal bias, thereby committing an abuse of discretion. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unjustly deprive the defendant of a substantial right and a just result. See *id.*

[31] In *State v. Pattno, supra*, the Nebraska Supreme Court vacated the male defendant's sentence for sexual assault on a male child after the trial judge read a lengthy excerpt from the Bible that addressed homosexuality in a negative light. The trial judge in the present case was the same trial judge making the statements in *Pattno*. The *Pattno* court determined that the reasonable person test adopted in *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), constituted the proper standard by which to determine whether a judge was biased against a defendant and therefore whether that judge should have recused himself from imposing a sentence. In such a case, the defendant "must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown." *State v. Pattno*, 254 Neb. at 740, 579 N.W.2d at 508. The *Pattno* court found that the trial judge had "interjected his own religious views immediately prior to sentencing" and concluded that "a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge." 254 Neb. at 743, 579 N.W.2d at 509. The court stated:

> Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice. . . . However, courts are well advised to rely upon the statutory guidelines for imposing sentences. Reliance upon irrelevant material, such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced.
>
> The problem is that during [the defendant's] sentencing, the trial judge read a biblical scripture and then stated that he had considered the circumstances and the "nature . . . of the defendant" in reaching the sentence of not less than 20 months' nor more than 5 years' imprisonment. A reasonable person who heard the judge's comments could have questioned the judge's impartiality.

(Citations omitted.) *Id.* at 742, 579 N.W.2d at 509.

Bruna speculates in his brief that the trial judge was, himself, the "friend" to whom he alluded prior to sentencing and that as a victim of sexual abuse himself, the trial judge could not be deemed impartial by a reasonable person. There is simply no evidence in the record to support Bruna's conjectures about the identity of the friend to whom the trial judge referred, and Bruna's argument in this regard is without merit. Bruna further argues that even if the trial judge had not been a victim of sexual abuse, his comments were not relevant to Bruna's sentencing and strongly suggested a judicial bias. If considered alone, the comments regarding the childhood experience of the judge's friend might be viewed merely as a reflection of the potential harm caused to a victim by this type of crime. Neb. Rev. Stat. § 29-2260 (Reissue 1995) prescribes some of the factors to be considered upon sentencing, including whether the crime "caused [or] threatened serious harm," § 29-2260(3)(a). However, the reference to the childhood friend must be viewed in light of the other sentencing comments, which were more troublesome.

The trial judge expressly referred to "[t]he last time [he] sentenced a person that could be labeled as a 'pedophile.'" The judge expressly identified the source of a quotation he had recited at that prior sentencing as the Bible. The judge expressly

acknowledged that the sentencing in that prior case was vacated on appeal. These comments unmistakably identify the subject matter of *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), which included an extensive quotation from the Bible. The judge's comment then characterizes the Biblical message from the prior case as one of hope rather than condemnation, at least implicitly suggesting that the Nebraska Supreme Court in *Pattno* had misinterpreted the quotation and the judge's motive and purpose in reading from the Bible at the prior sentencing.

We put aside the issue of whether it is inappropriate for a trial judge to publicly criticize the Supreme Court's decision reviewing the judge's actions in a prior case. In light of *Pattno*, which authority the judge raised by his own comments clearly referring to that prior case's sentencing phase, the judge has again inserted his own religious views in a sentencing proceeding. The *Pattno* analysis contemplates application of an objective test by a reasonable person knowing all of the facts. A reasonable person knowing all of the facts would be aware of the Supreme Court's decision in *Pattno* and the circumstances surrounding its disposition, and to such a person objectively taking into account the judge's referring to that prior case, his implicitly criticizing the appellate review of the prior decision, and his arguing for characterization of the Biblical quotation as "a message [not] of condemnation, but of hope," the insertion of personal religious views becomes explicit and unmistakable.

We are not stating that reference to the Bible may never be made in a sentencing proceeding. But, as the Supreme Court strongly advised in *Pattno*, courts are well advised to rely upon the statutory guidelines for imposing sentences. The danger of confusion and the suggestion of injection of personal religious views generally counsel against such Biblical references.

Here, considered in the context of the reference to *Pattno*, the reference to personal religious views is, again, unmistakable. In this case, as in *Pattno*, a reasonable person could conclude that the trial judge based the sentence upon personal bias or prejudice, thereby depriving the defendant of due process and abusing the judge's discretion.

12. Excessive Sentence

Bruna assigns as error that the court imposed an excessive sentence. Because the matter must be remanded for resentencing by a different judge, we need not address this claim.

VI. CONCLUSION

For the foregoing reasons, we conclude that Bruna's assigned errors regarding pretrial motions and the trial proceedings are without merit. Because of the trial court's sentencing comments, we vacate the sentence and remand the cause with directions that Bruna be resentenced by a different judge.

Sentence vacated, and cause remanded for resentencing.

State of Nebraska, appellee, v. Curtis R. Mulinix, appellant.

687 N.W.2d 1

Filed September 14, 2004. No. A-03-466.

1. **Convictions: Evidence: 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.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.
4. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
6. ____. A statute, rule, or regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.

7. **Witnesses: Testimony: Juries.** An inconsistent or contradictory statement by a witness who is not a party opponent is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony.
8. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Robert L. Wolf, Deputy Hall County Public Defender, for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

INBODY, MOORE, and CASSEL, Judges.

INBODY, Judge.

I. INTRODUCTION

After a jury trial in Hall County, Nebraska, Curtis R. Mulinix was convicted on one count of driving with a revoked operator's license from previous driving under the influence (DUI) convictions, one count of driving without a valid registration, and one count of possessing an open alcoholic container in a vehicle. Mulinix appeals from his convictions and sentences, alleging that insufficient evidence existed to sustain any of the convictions and that his sentences were excessive. For the reasons set forth herein, we affirm.

II. STATEMENT OF FACTS

On May 14, 2002, Mulinix was charged by information with one count of driving with a revoked operator's license from previous DUI convictions, a Class IV felony; one count of driving without a valid registration, a Class III misdemeanor; and one count of possessing an open alcoholic container in a vehicle, a traffic infraction.

A jury trial was held February 11, 2003. The State's only witness was Grand Island police officer James Colgan. Officer Colgan testified that he had been employed as a police officer for 7 years, that he had trained at the Nebraska Law Enforcement Training Center, and that he had attended numerous other training sessions. Officer Colgan said that on March 5, 2002, he was

working at approximately 4:10 in the afternoon when he responded to a call in reference to a theft from a vehicle. Officer Colgan testified that he observed a vehicle matching the description of the suspect vehicle, initiated a stop of the vehicle, contacted the vehicle's driver and passengers, and asked them for identification. He stated that the driver was unable to provide identification, but that by speaking with the driver, Officer Colgan learned that the driver was Mulinix.

Officer Colgan testified that he then conducted an investigation into Mulinix's driving privileges and found out that Mulinix's "license was suspended in the State of Nebraska." Officer Colgan stated that because Mulinix was unable to provide registration for the vehicle he was driving, he was issued a citation, and that Mulinix was then placed under arrest "for driving during suspension and an open container which was found in the vehicle." Officer Colgan testified that an open container was "located in between the front two seats of the vehicle adjacent to the driver's-side right rear corner [and that i]t was a container of alcohol, beer." Officer Colgan noted that the container was "partially empty" and that all of the events he described during his testimony occurred in Hall County.

On cross-examination, Officer Colgan admitted that Mulinix had provided "a registration as well as a bill of sale [for the vehicle], which was beyond the 30-day scope." Officer Colgan noted that he had seized the registration produced by Mulinix but that he did not have it with him at the trial. Officer Colgan also admitted that while he remembered that the open container was "labeled as a container of alcohol or beer," he could not recall the brand of beer. He testified that he thought it was beer because

> the odor of an alcoholic beverage that I associate with beer came from the can, and when I dumped it out, the consistency of the liquid within the container also appeared to be an alcoholic beverage, beer, and as it hit the pavement along the curb, it foamed in a manner consistent with beer.

He also stated that he retained the can until it could be photographed, at which time the can was thrown away. However, he did not bring the photograph of the container with him to the trial. Finally, Officer Colgan testified that he was familiar with what beer looked and smelled like and that while nonalcoholic beer

looks and foams like beer, he did not believe it smelled the same as beer containing alcohol.

After Officer Colgan's testimony was completed, the State offered exhibit 2, which included a journal entry from the Hall County Court filed September 20, 1991. The journal entry indicated that on June 24, 1991, Mulinix pled guilty to his third DUI offense, and that he was sentenced for that offense on August 23. The journal entry also indicated that Mulinix's operator's license was "suspended" for 15 years and that Mulinix was "ordered not to drive in the State of Nebraska for [a] like period." Mulinix then moved for a mistrial, but the motion was overruled. Mulinix also asked the trial court for directed verdicts on all three counts against him, but the trial court overruled this motion as well. The defense presented no evidence, and after the jury was instructed, the case was submitted to the jury for deliberations.

After deliberating, the jury found Mulinix guilty of one count of driving with a revoked operator's license from previous DUI convictions, one count of driving without a valid registration, and one count of possessing an open alcoholic container in a vehicle. At a hearing held on March 27, 2003, the district court sentenced Mulinix to 1 to 2 years' imprisonment on his conviction of driving with a revoked operator's license from previous DUI convictions. Mulinix was further ordered to pay a $100 fine for his conviction of driving without a valid registration, a $50 fine for his conviction of possessing an open alcoholic container in a vehicle, and the applicable court costs. The trial court gave Mulinix credit for 13 days served. Mulinix has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Mulinix alleges, restated, that there was insufficient evidence to support his convictions and that the sentences imposed upon him were excessive.

IV. STANDARD OF REVIEW

[1] 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. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[3] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[4] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

V. ANALYSIS

1. Insufficient Evidence

Mulinix first alleges that there was insufficient evidence presented at trial to support each of his convictions. When assessing allegations of insufficient evidence on appeal,

> 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. . . .
>
> When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(Citations omitted.) *State v. Jackson*, 264 Neb. at 426-27, 648 N.W.2d at 289. Since the evidence needed to support each conviction is different, we will assess the sufficiency of the evidence for each conviction in turn.

(a) Driving With Revoked License

Mulinix first asserts that there was insufficient evidence to support his conviction of driving with a revoked operator's license from previous DUI convictions. In order to convict Mulinix of that crime, the State needed to prove beyond a reasonable doubt that Mulinix operated a motor vehicle on the highways or streets of Hall County during the time his operator's license was revoked pursuant to Neb. Rev. Stat. § 60-6,196(2)(c) or (d) (Cum. Supp. 2002). Mulinix concedes that he was driving the vehicle stopped by Officer Colgan on March 5, 2002. However, Mulinix's argument that there was insufficient evidence to sustain his conviction of driving with a revoked operator's license from previous DUI convictions stems from his allegation that he was driving under only suspension, not revocation.

To prove that Mulinix was driving under revocation, the State presented exhibit 2 at trial, which appears to be a journal entry from the county court for Hall County. The journal entry, filed on September 20, 1991, provides that Mulinix pled guilty to his third DUI offense on June 24 and was sentenced on August 23. The journal entry further provides check boxes for the trial judge to mark, which boxes provide for the options of revoking, suspending, or impounding a defendant's operator's license. Exhibit 2 shows that the trial judge checked "suspended" and wrote "15 y[ea]rs" in a space left blank for purposes of inserting the length of license revocation or suspension. Another court form attached to the journal entry again states that Mulinix's operator's license was "suspended 15 y[ea]rs." Mulinix asserts that this proves

> it is clear from the record that the Hall County Court chose to suspend, not revoke, [Mulinix's] operator's license for fifteen years. . . . Therefore, the State failed to prove that the license had been revoked for fifteen years, and thus the second element of this offense was not proved beyond a reasonable doubt.

Brief for appellant at 7.

A review of the record shows that exhibit 2 indicates that on March 5, 2002, when Mulinix was stopped by Officer Colgan, Mulinix was subject to the Hall County Court's September 20, 1991, order directing him "not to drive in the State of Nebraska for [15 years]." Specifically, Mulinix pled guilty to his third DUI

offense. At the time Mulinix was cited for driving under revocation, third-offense DUI was codified at § 60-6,196, but at the time of Mulinix's third DUI offense, it was codified at Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990), which provided in part:

> [T]he court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period.

Thus, the plain language of § 39-669.07 required that upon being convicted of a third DUI offense, one's operator's license *shall be revoked* for 15 years.

[5,6] It is true that the trial court, in its journal entry dealing with Mulinix's 1991 conviction, indicated that Mulinix's operator's license was suspended, not revoked, for 15 years following the conviction. However, the trial court's indication on the journal entry was invalid because the controlling statute, § 39-669.07, required that any person convicted of DUI, third offense, shall have his or her operator's license "revoked" for 15 years. The trial court did not have the discretion to merely suspend Mulinix's operator's license. "[W]hen statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Woods*, 255 Neb. 755, 763-64, 587 N.W.2d 122, 128 (1998). "A statute, rule, or regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous." *Id.* at 764, 587 N.W.2d at 128. Further, the trial court's journal entry complied with the purpose of § 39-669.07 in that it ordered Mulinix not to drive a motor vehicle in Nebraska for 15 years. Thus, regardless of the trial court's clerical error, Mulinix's operator's license was revoked for 15 years after he was convicted of his third DUI offense.

Further, the Nebraska Supreme Court has previously indicated that in situations such as the one at bar, substitution of "revocation" with "suspension" has no prejudicial effect. In the instant case, the county court's 1991 order was meant to prohibit Mulinix from operating a motor vehicle in the State of Nebraska for 15 years, regardless of whether it referred to the prohibition as a

"revocation" or as a "suspension." In discussing a similar situation to the one encountered by Mulinix, the Nebraska Supreme Court found that " '[w]hile law enforcement should use [the] terms [revocation and suspension] accurately, there is no indication that the defendant was prejudiced in any way. Further, the two terms function similarly here.' " *State v. Jost*, 219 Neb. 162, 167, 361 N.W.2d 526, 530 (1985).

Mulinix admits that he was driving the vehicle pulled over by Officer Colgan on March 5, 2002. The record suggests that on June 24, 1991, Mulinix pled guilty to his third DUI offense, for which he was sentenced on August 23. Pursuant to § 39-669.07, Mulinix's operator's license was revoked for 15 years following his conviction of DUI, third offense. Viewing the evidence in the light most favorable to the prosecution, we determine Officer Colgan's testimony and exhibit 2 provide sufficient evidence to sustain Mulinix's conviction of driving with a revoked operator's license from previous DUI convictions. Thus, this assignment of error is without merit.

(b) No Valid Registration

Mulinix next asserts that there was insufficient evidence presented to support his conviction of driving without a valid registration. Neb. Rev. Stat. § 60-325 (Reissue 1998) provides in part: "No person shall operate, drive, or park a motor vehicle . . . on the public highways unless such vehicle at all times carries in or upon it, subject to inspection by any peace officer, the registration certificate furnished for it." Mulinix concedes that "he operated or drove a motor vehicle in Hall County, Nebraska, on or about March 5, 2002." Brief for appellant at 8. However, he alleges that "[i]t is clear from Officer Colgan's testimony that [Mulinix] did produce a registration certificate for the vehicle, that he did submit that certificate to Officer Colgan for his inspection, and that Officer Colgan took the certificate and kept it." *Id.* Thus, Mulinix claims that the State did not prove beyond a reasonable doubt that he committed the offense of driving without a valid registration.

[7] At trial, Officer Colgan testified that he asked Mulinix to produce registration for the vehicle Mulinix was driving, but that Mulinix was unable to produce such registration. Officer Colgan

also testified that Mulinix was "cited for no proof of registration." On cross-examination, Officer Colgan did say that Mulinix provided "a registration as well as a bill of sale [for the vehicle], which was beyond the 30-day scope." Although Officer Colgan's testimony appears to conflict in this regard, the jury clearly chose to accept Officer Colgan's testimony on direct examination that Mulinix was unable to provide a valid registration for the vehicle he was driving. "[A]n inconsistent or contradictory statement by a witness who is not a party opponent is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony." *State v. Osborn*, 241 Neb. 424, 431, 490 N.W.2d 160, 166 (1992). "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." *State v. Jackson*, 264 Neb. 420, 426, 648 N.W.2d 282, 289 (2002). Looking at the evidence in the light most favorable to the State, Officer Colgan's testimony was sufficient to show that Mulinix was unable to produce a valid registration certificate for the vehicle he was driving. Accordingly, this assignment of error is without merit.

(c) Possession of Open Alcoholic Container in Vehicle

Mulinix also alleges that insufficient evidence was produced to support his conviction of possessing an open alcoholic container in a vehicle. Neb. Rev. Stat. § 60-6,211.08(2) (Cum. Supp. 2002) provides the elements of possession of an open alcoholic container in a vehicle, stating: "It is unlawful for any person in the passenger area of a motor vehicle to possess an open alcoholic beverage container while the motor vehicle is located in a public parking area or on any highway in this state." Mulinix asserts that "the State failed to prove the essential elements of the identification of the container and possession of the container beyond a reasonable doubt." Brief for appellant at 9.

At trial, Officer Colgan testified that an open container was "located in between the front two seats of the vehicle adjacent to the driver's-side right rear corner [and that i]t was a container of alcohol, beer." The officer also testified that the container was "partially empty." On cross-examination, Officer Colgan said that

the container was "labeled as a container of alcohol or beer. I do not recall the brand of beer." When asked why he believed it was a container of alcohol, he testified:

> [T]he odor of an alcoholic beverage that I associate with beer came from the can, and when I dumped it out, the consistency of the liquid within the container also appeared to be an alcoholic beverage, beer, and as it hit the pavement along the curb, it foamed in a manner consistent with beer.

Officer Colgan testified that the container was photographed and thrown away and that he did not have the container or the photograph with him.

Mulinix appears to argue that the State's evidence failed to prove that the container held an alcoholic beverage. However, Officer Colgan testified that he was familiar with what beer is, looks like, and smells like. He further testified that he has observed nonalcoholic beers and that while they look and foam like beer, he did not recall nonalcoholic beer having "the alcoholic tinge to the odor" as does beer containing alcohol. Officer Colgan's testimony was that the container found in the passenger area of the vehicle driven by Mulinix contained an alcoholic beverage, and the jury was free to give weight to the fact that Officer Colgan was an experienced police officer who was familiar with the look and odor of beer. Thus, viewed in the light most favorable to the State, Officer Colgan's testimony was sufficient to sustain Mulinix's conviction of possessing an open alcoholic container in a vehicle. As a result, this assignment of error is without merit.

2. Excessive Sentences

Mulinix next alleges that the district court abused its discretion when it imposed excessive sentences upon him. The district court imposed upon Mulinix a sentence of 1 to 2 years' imprisonment for his conviction of driving with a revoked operator's license from previous DUI convictions. The court further ordered him to pay a $100 fine for his conviction on one count of driving without a valid registration and a $50 fine for his conviction on one count of possessing an open alcoholic container in a vehicle.

Driving with a revoked operator's license from previous DUI convictions is a Class IV felony, which is punishable by a

maximum of 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002) and § 60-6,196(6). Driving without a valid registration is a Class III misdemeanor, which is punishable by a maximum of 3 months' imprisonment, a $500 fine, or both. See Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 2000) and 60-348 (Reissue 1998). Possessing an open alcoholic container in a vehicle is a traffic infraction which is punishable by a maximum of a $100 fine. See Neb. Rev. Stat. § 29-436 (Reissue 1995).

[8] "Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion." *State v. Hurbenca*, 266 Neb. 853, 865, 669 N.W.2d 668, 677 (2003). "A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition." *State v. Smith*, 266 Neb. 707, 712, 668 N.W.2d 482, 486 (2003).

Mulinix argues that he was

> deprived of a just result by being sentenced to imprisonment for one to two years [for driving with a revoked operator's license from previous DUI convictions] and to the payment of fines [for driving without a valid registration and for possessing an open alcoholic container in a vehicle] when a sentence of probation would have served any and all penal needs.

Brief for appellant at 10. Mulinix further alleges that the district court "erred by not properly weighing [Mulinix's] background, the complete lack of violence in the commission of the offenses of which he was convicted, and [his] rehabilitative needs." *Id.* at 11.

In sentencing Mulinix, the district court considered the presentence investigation as well as the comments of the State, Mulinix's attorney, and Mulinix himself. The court found that Mulinix was not an appropriate candidate for probation. While Mulinix did not participate in the presentence investigation, the record and the presentence investigation indicate that Mulinix has an extensive criminal history and that he has been unsuccessful with probation in the past. Each of Mulinix's sentences is on the low end of the sentencing guidelines. We are unable to say that the district court abused its discretion when it sentenced

Mulinix. Thus, this assignment of error is without merit, and the district court's sentencing of Mulinix is affirmed.

VI. CONCLUSION

We find that sufficient evidence was presented at trial to support each of Mulinix's convictions and that the district court did not abuse its discretion when it imposed its sentences upon Mulinix. Accordingly, the judgment of the district court is affirmed in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL T. KUTA, APPELLANT.
686 N.W.2d 374

Filed September 14, 2004. No. A-03-1275.

1. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
2. **Evidence: Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Corroboration: Witnesses: Testimony.** Corroboration is sufficient, for the purpose of Neb. Rev. Stat. § 28-1439.01 (Reissue 1995), if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
4. **Criminal Law: Corroboration: Testimony.** The testimony of a cooperating individual need not be corroborated on every element of a crime.
5. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Kirk E. Naylor, Jr., and Kevin Oursland for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

INBODY, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Following a bench trial, the district court adjudged Daniel T. Kuta guilty and sentenced Kuta on two convictions of delivery of a controlled substance. Because we find that the State corroborated the testimony of the cooperating individual and presented sufficient evidence, we affirm.

BACKGROUND

Thomas Hayes, an investigator with the Nebraska State Patrol, obtained cooperation from Lindsay Wegner after Hayes acquired evidence that Wegner had sold marijuana. To avoid prosecution, Wegner agreed to assist in making purchases of illegal drugs from two individuals, one of whom was Kuta. Wegner claimed to have previously been acquainted with Kuta.

On August 13, 2002, Wegner told Hayes that Kuta had notified her he had drugs available and that Wegner and Kuta had agreed to meet at Kuta's apartment in David City the following day. On August 14, Wegner met Hayes at the David City airport, where Hayes gave Wegner $120 to purchase controlled substances from Kuta. Prior to Wegner's going to Kuta's apartment, Glayda Scofield, a secretary with the David City Police Department, performed a search of Wegner's body and clothing for controlled substances. Scofield was not a police officer and had no formal training in conducting such searches, but she had previously performed searches of other female persons under the direction of law enforcement officers. Scofield understood that methamphetamine typically was distributed in small, rock-like portions. Scofield took Wegner into a private room and patted down

Wegner's outer clothing before having Wegner remove her outer clothing and then patting Wegner down around her bra and crotch regions. Scofield also checked Wegner's hair and feet and behind Wegner's ears. Scofield found no controlled substances.

Hayes and Stephen Sunday, the police chief of David City, searched Wegner's vehicle. They equipped Wegner with a wireless transmitter, which was placed in her pocket, prior to the meeting with Kuta. Sunday had previously verified Kuta's occupancy of the apartment by checking the city's utility records and by talking to Kuta's landlord.

Wegner then drove her vehicle to Kuta's apartment in David City. Hayes and Sunday followed in a separate vehicle, maintaining visual contact with Wegner. Kuta met Wegner in the parking lot of Kuta's apartment building. Hayes previously knew Kuta and was familiar with his vehicle from previous intelligence. Sunday had known Kuta since December 2000. Hayes and Sunday observed Wegner make contact with Kuta and observed as they walked up to the entrance to Kuta's apartment. Kuta and Wegner entered the apartment together. Hayes and Sunday lost visual contact with Wegner and Kuta at that point but monitored their conversation via Wegner's transmitter. At trial, Wegner testified that no one other than she and Kuta was present in the apartment. Hayes and Sunday testified that they recognized the voices of Kuta and Wegner transmitted by the wireless device and that they heard no other voices except as discussed below.

Wegner testified that after she and Kuta entered the apartment, she gave Kuta $120 in exchange for a quantity of methamphetamine. No law enforcement officers were present in the apartment at the time of the transaction. After Hayes and Sunday had heard conversation indicating that the transaction had been made, a former wife of Kuta's approached the apartment from the outside. She went to the door of the apartment and, remaining outside under Hayes' and Sunday's visual surveillance, briefly quarreled verbally with Kuta and then left the premises. Wegner then left the apartment and, followed by Hayes and Sunday, who again maintained constant visual contact with her, drove back to the David City airport, where she delivered the methamphetamine to Hayes. Wegner and her vehicle were again searched. No other controlled substances were found.

A similar transaction was arranged on August 22, 2002, after Kuta and Wegner spoke on the telephone. On this occasion, Wegner arranged to purchase an ounce of marijuana for $120. Again, Wegner informed Hayes and met with Hayes and Sunday prior to going to Kuta's apartment. Wegner and her vehicle were searched prior to the transaction. On that occasion, Patricia Lostroh, the director of the "Butler/Polk County Victim Assistance Unit," performed the pat-down search of Wegner. Although Lostroh was not a police officer, she had previously assisted law enforcement officers in searching female individuals as part of her employment. Lostroh's training to conduct searches came from the local police department and state troopers who had instructed Lostroh on the occasions on which she had assisted them.

Lostroh searched Wegner in a private area of the police department office in David City. Lostroh directed Wegner to take off her shoes, and she inspected Wegner's feet. Lostroh then felt up and down Wegner's legs, first on the outside and then on the inside, between Wegner's legs. Lostroh then felt around Wegner's waistband and inside of the waistband and felt under Wegner's shirt and inside of her bra. Lostroh also felt around Wegner's neck and hair. Lostroh told Wegner to open her mouth, and Lostroh looked in Wegner's mouth. Lostroh touched all of the areas Wegner's jeans covered, including her crotch and pockets, pressing hard enough on Wegner's jeans that she would have felt any concealed substances. Lostroh did the same thing "on top," checking "her back, her front, her breasts, the whole bit." No controlled substances were found. Hayes and Sunday again searched Wegner's vehicle before the transaction. Wegner was again equipped with a wireless transmitter and given $120 with which to make the arranged purchase.

Wegner then drove directly to Kuta's apartment, observed by Hayes and Sunday. Once Wegner arrived at Kuta's apartment, Kuta met Wegner at the doorway and Wegner joined Kuta inside. At this point, Hayes and Sunday lost visual contact with Kuta and Wegner but maintained audio surveillance via the wireless transmitter. They recognized the only voices as those of Kuta and Wegner. Wegner gave Kuta the $120, and Kuta briefly left the apartment and shortly returned with the marijuana, which Kuta then gave to Wegner. Hayes and Sunday had watched Kuta leave

through the door to the apartment and start down the steps, losing sight of Kuta at that point until he returned to the stairway shortly thereafter and reentered the apartment. Wegner then returned to her car and proceeded to drive to meet Hayes, Sunday, and Lostroh.

While in the process of exiting the parking lot, Wegner spoke briefly with another woman as both sat in their respective vehicles. Wegner was not close enough to hand anything to or receive anything from the other woman and did not exchange anything with her.

Upon meeting Hayes, Wegner turned over the marijuana. Lostroh again searched Wegner's person, and Hayes and Sunday searched Wegner's automobile. Again, no contraband was found.

The State filed an information charging Kuta with two counts of delivery of a controlled substance. Counts I and II alleged the events of August 14 and 22, 2002, respectively. Kuta pled not guilty and subsequently waived a jury trial. The court conducted a bench trial on September 25, 2003. After deliberation at the conclusion of the trial, the district court adjudged Kuta guilty on both counts. Prior to sentencing, the court conducted an enhancement hearing upon the State's allegation that Kuta was a habitual criminal. The court found that the State had proved that Kuta was a habitual criminal. The court then proceeded to conduct a sentencing hearing and sentenced Kuta on each conviction. Kuta timely appeals.

ASSIGNMENTS OF ERROR

Kuta claims that the trial court erred (1) in finding the corroboration required by Neb. Rev. Stat. § 28-1439.01 (Reissue 1995) and (2) in finding there to be sufficient evidence to convict Kuta.

STANDARD OF REVIEW

[1,2] While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in

evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

ANALYSIS

Corroboration.

[3,4] Kuta asserts that the trial court erred in determining that the testimony of Wegner, the cooperating witness, was corroborated as to material facts and circumstances. Section 28-1439.01 states: "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual." The State concedes that Wegner was a cooperating individual. Kuta asserts that the State must provide corroboration as to the principal fact in issue: whether Kuta sold Wegner methamphetamine on August 14 and marijuana on August 22, 2002. However, as Kuta's brief acknowledges, the Nebraska Supreme Court has held that corroboration is sufficient, for the purpose of § 28-1439.01, if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Goodro*, 251 Neb. 311, 556 N.W.2d 630 (1996) (citing *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995)). The testimony of a cooperating individual need not be corroborated on every element of a crime. *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991).

Kuta argues that the facts of *Jimenez* are similar to those established in the instant case. However, the State responds, and we agree, that there is substantially more corroboration in the present case than in *Jimenez*. Here, the evidence shows that Hayes and Sunday independently verified where Kuta lived, that both officers knew Kuta, that they visually observed Kuta before and after the August 14, 2002, event, that they visually observed Kuta before the August 22 event, that they identified Kuta's and Wegner's voices as the only voices heard while they were monitoring the audio transmissions during the transactions, that they observed Kuta leave and return during the second transaction, and that their observations verified and supported Wegner's statements regarding what had occurred.

Kuta acknowledges that in *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001), the Nebraska Supreme Court recognized that corroboration may be supplied by observation that a meeting between the subject and a cooperating individual actually took place, coupled with searches of the cooperating individual both before and within a reasonable time after a drug purchase took place. Kuta argues that because Scofield and Lostroh did not conduct body cavity searches of Wegner, the searches that they performed failed to meet the requirements for corroboration. While the Nebraska appellate courts have not directly described the scope of search required, other states have rejected similar contentions.

In *Hawkins v. State*, 626 N.E.2d 436 (Ind. 1993), the Indiana Supreme Court rejected the defendant's contention that because the police failed to perform a body cavity search of the informant prior to the controlled buy, the police officer who testified lacked sufficient personal knowledge that the informant did not possess any drugs before entering the house where the buy occurred. Similarly, in *State v. Johnson*, 665 So. 2d 1237 (La. App. 1995), the Louisiana Court of Appeal rejected the defendant's contention that a strip search of the confidential informant was required and found that where the evidence showed the police officer patted the informant down, turned his pockets inside out, took his shoes off, and patted down his socks, the search was sufficient to determine whether the informant had drugs, weapons, or money. This court agrees that such cases stand for the proposition that only a reasonable search is required. The extent of the searches conducted by Scofield and Lostroh described above was reasonable under the circumstances and sufficient to determine that Wegner had no drugs, weapons, or money.

Kuta further argues that searches of a cooperating individual by "untrained citizen[s]" such as Scofield and Lostroh are not sufficient to meet the requirements for corroboration. Brief for appellant at 12. Citing *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001); *State v. Goodro*, 251 Neb. 311, 556 N.W.2d 630 (1996); *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991); and *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988), he asserts that Nebraska's appellate courts have recognized the adequacy of searches for the purpose of corroboration only when

police officers conducted the searches of the cooperating individuals. Kuta cites cases wherein police officers performed the searches, but neither those cases nor any other Nebraska cases set forth a requirement that police officers be the ones to search the cooperating individual in order to meet the requirements for corroboration. Nebraska courts have long acknowledged the validity of searches by citizens acting as the agents of law enforcement, as long as those searches fall within the parameters of the U.S. and Nebraska Constitutions. See, e.g., *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989). In this case, both Scofield and Lostroh were provided with some training by local law enforcement officials. They searched Wegner in their capacity as agents of law enforcement. The sufficiency of their searches constituted questions of fact. We cannot say that the trial court was clearly wrong in relying upon their searches.

We conclude that the searches performed by Scofield and Lostroh, considered together with the other circumstances presented by the evidence, were valid to establish corroboration. Hence, we conclude that the State presented sufficient evidence to corroborate the testimony of Wegner and that this assignment of error lacks merit.

Sufficiency of Evidence.

[5,6] Kuta also assigns that the trial court erred in determining that the evidence was sufficient to establish Kuta's guilt beyond a reasonable doubt. Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

Kuta's argument on this issue is intertwined with his contention, which we have already rejected, that the State failed to adduce evidence to corroborate the testimony of Wegner. The testimony of Hayes and Sunday clearly establishes that Kuta was present with Wegner during the controlled buys. While Hayes and Sunday were not physically present when the specific transactions occurred, they were listening to the conversations transmitted by the wireless device Wegner carried. On both occasions, Hayes and Sunday identified the voices transmitted by the wireless device as those of Kuta and Wegner. Although Kuta's former wife approached the residence during the August 14, 2002, events and was heard over the transmitter, Sunday testified that she did not enter the apartment and never left Sunday's sight. Viewed most favorably to the State, the testimony of Wegner and the other corroborating evidence are sufficient to support the convictions.

CONCLUSION

Because the evidence adduced by the State sufficiently corroborates the testimony of Wegner and is sufficient to support the convictions, we affirm the judgment of the district court.

AFFIRMED.

PHOUMY KAM, APPELLEE, V. IBP, INC., APPELLANT.
686 N.W.2d 631

Filed September 21, 2004. No. A-03-481.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers'

compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.

4. **Workers' Compensation.** Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.
5. ____. An employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1998) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
6. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1998), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
7. **Workers' Compensation.** If an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity.
8. ____. Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.
9. ____. When dealing with temporary partial disability, one cannot be earning wages at a similar job with the same employer and at the same time have suffered a 100-percent loss of earning capacity.

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

Bruce M. Smith for appellant.

Rod Rehm and Todd Bennett, of Rehm & Bennett Law Firm, for appellee.

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

IBP, inc., appeals from the Workers' Compensation Court review panel's affirmance of the workers' compensation trial court's award to Phoumy Kam of temporary partial disability and temporary total disability benefits for an injury she incurred while employed by IBP. For the reasons set forth herein, we affirm in part, and in part reverse and remand for a correct award.

STATEMENT OF FACTS

Kam was born in 1945, and she emigrated from Laos to the United States when she was 35. In 1991, she began working for IBP at its plant in Lexington, Nebraska. On January 13, 1998, Kam was performing a job that required her to pick up meat from a conveyor belt and place it on another conveyor belt. At one point, when she was throwing a piece of meat onto the second conveyor belt, she heard a "pop" and felt a sharp pain in her right arm. At the time of the injury, Kam's average weekly wage was $369.59 for temporary indemnity purposes and $372 for permanent indemnity purposes. Kam notified her supervisor of the injury and was taken to see a nurse; however, Kam did not consult a physician until she saw Dr. Mark Jones on March 3. She was further examined by Dr. W. Michael Walsh, who recommended surgery on her right shoulder. Surgery was performed on her right shoulder and biceps area on July 2. This surgery did not alleviate the pain in Kam's shoulder.

As a result of this pain, and the operation, Kam's duties at IBP were restricted. On July 16, 1998, Dr. Walsh allowed Kam to return to work in a "runner" position, in which she was not to use her right arm. At a recheck appointment on August 13, Dr. Walsh did not change these restrictions. At Kam's next recheck appointment, on September 24, Dr. Walsh commented that her recovery was progressing more slowly than expected and noted that she should "work in an environment that's not as cold to see if this would decrease her symptoms at work." Dr. Walsh again evaluated Kam's restrictions on November 19 and noted that she "[n]eed[ed] to limit weight and positions in which she use[d]" her right arm and that she was not to lift anything over 10 pounds or use her arms above shoulder height.

On December 23, 1998, Kam was examined by Dr. Ian Crabb, who began to care for Kam when Dr. Walsh stopped seeing patients in Lexington. Dr. Crabb noted that Kam was working "doing finger meats[,] which is her regular job," and put her on a 6-hour workday limit. On January 21, 1999, Dr. Crabb again examined Kam and noted that she had "tremendous pain of the right shoulder and neck radiating down the arm." At that point, Dr. Crabb planned a manipulation under anesthesia to alleviate Kam's shoulder pain, as well as a surgical procedure to address carpal

tunnel symptoms she had developed. Dr. Crabb performed the manipulation and surgery on February 3. On April 1, Dr. Crabb approved Kam to "return . . . to her job via [a] work hardening program." On May 27, Dr. Crabb again evaluated Kam and removed all work restrictions, finding her to be at maximum medical improvement.

Dr. Crabb saw Kam again on June 17, 1999, noting that she remained in "quite severe pain"; however, at that time, Dr. Crabb felt that additional surgery would not help Kam's condition. In July, Dr. Crabb notified IBP that Kam had sustained permanent disability of 15 percent in her right upper extremity. Kam was again examined by Dr. Crabb on October 28. Dr. Crabb noted that Kam had "continued decreased [range of motion] and pain in the shoulder," but he again believed that surgery would not be beneficial. In response to an inquiry by IBP on May 3, 2000, Dr. Crabb noted that the amount of work Kam did with her right arm "exacerbat[ed] her chronic pain" and that "although she can use the right arm, the frequency should be decreased." On May 4, Dr. Crabb examined Kam for a "final follow-up of her right shoulder pain" and found that she had continued pain and decreased range of motion; further, Dr. Crabb noted that he would "go ahead and write for a permanent restriction for the right arm with no repetitive use."

At trial, Kam testified that her arm did not feel any better after the surgery on her shoulder in July 1998; in fact, she said that her condition was worsened by the surgery. Kam indicated that when she returned to IBP after the surgery, she had new work restrictions. She was given a delivery job for 6 weeks and a box labeling job for 2 weeks. Thereafter, she was told to perform the above-mentioned "finger meat" job, despite the fact that she complained that she was still in severe pain. After Kam complained that the "finger meat" job caused her too much pain, her position was changed to picking up fat off of a conveyor belt.

Kam further testified that she continued to see a doctor after her first surgery. After a week off from work following her surgery for carpal tunnel syndrome in February 1999, at which time her shoulder was also worked on again, she returned to IBP and was placed on a "pick trim" job, which involved picking up shank meat off of a conveyor belt. Kam testified that the "pick trim" job

was harder for her to perform because the pieces of meat were bigger and because she had "to use one hand and a lot of times the belt would stop." She said that she performed this job or the job picking up fat off of a conveyor belt until she quit on September 2, 2000. Kam also indicated that her shoulder felt no better after her 1999 surgery, that her pain was so severe that she could not bear it anymore, and that the pain caused her to "sit around the house and cry." She indicated that she had to take pain pills three times a day due to the pain in her shoulder and that she had not worked since leaving IBP because she did not think she could handle it.

On cross-examination, Kam testified that she could no longer lift her right arm over her head due to pain in her shoulder. She further testified that she had asked the nurse at IBP for icepacks, ice bags, or pain killers, but that these requests were denied. She again said that her shoulder had not gotten any better after either surgery and reported that she still suffered pain and stiffness in her right arm. She indicated that she did not believe she could work anymore and that "any job is out of the question."

Margaret Fagot, the medical case manager at IBP in Lexington, testified next. She indicated that Dr. Crabb had approved the "pick trim" job for Kam and that the position was one that accommodated Kam's restrictions. Fagot further testified that Dr. Crabb had approved the "finger meat" job for Kam, but that Kam said she could not perform that job because it caused her too much pain. On cross-examination, Fagot agreed that Kam had appeared to be "giving an effort" in performing her duties and that Kam, according to a "Claim Comments" document, had resigned from IBP due to the pain she encountered while working.

After all evidence was adduced, the Workers' Compensation Court entered its decision. The court found that Kam was temporarily partially disabled from March 3 through July 1, 1998 (17⅔ weeks); was temporarily totally disabled from July 2 through 16, 1998 (2⅐ weeks); and was temporarily partially disabled from July 17, 1998, through February 2, 1999 (28⅚ weeks). Her total period of temporary partial disability was thus found to be 46 weeks. The court further found:

> With the actual restrictions of Dr. Walsh, and the testimony and history given by [Kam] with respect to her ability

> to work . . . at best, [Kam] should have remained in the "runner position" . . . prior to November 19, 1998. This becomes important when the extent of [Kam's] loss of earning power for this period of temporary partial disability is discussed below at paragraph V.

The court also found:

> [Kam] testified in a believable and credible manner that one of her supervisors had told her that her injury was not as severe and she could do normal work. She testified that for 6 weeks she delivered orders to the kill floor (the "runner position"), then for two weeks she labeled boxes, mainly using her left hand. . . . Within two months (by September 2, 1998) of her shoulder surgery, [Kam] was doing the finger meats job, even though Dr. Walsh had not released her to do so. It was this environment which was cold, and which was essentially restricted from [Kam's] release to return to work, as of September 24, 1998. As a result, prior to November 20, 1998, the only position suitable for [Kam] to work was the "runners [sic] position."

The court explained its finding that Kam was temporarily partially disabled from November 20, 1998, through February 2, 1999, by noting that she had significant lifting restrictions and that she "was never able to progress to working an 8 hour day." Further, the court found that because Kam was temporarily partially disabled with extremely significant restrictions during this timeframe, she "had a 100 percent loss of earning power." The court explained,

> after reviewing all the evidence for the periods of time for which [Kam] was temporarily partially disabled, that pursuant to Cords v. City of Lincoln, 249 Neb. 748, 545 N.W.2d 112 (1996); and, Sidel v. Travelers Ins. Co., 205 Neb.541, 288 N.W.2d 482 (1980), [Kam] had a 100 percent loss of earning power. At the most, [Kam] had the physical ability to hold a part time, or odd lot position. This results in her entitlement to $246.39 per week for 46 weeks for temporary partial disability.

The court further found that Kam was temporarily totally disabled from February 3 through May 27, 1999 (16⅔ weeks). Thus, the court found that the total time she was temporarily totally

disabled was 18$^{3}/_{7}$ weeks. The court then held that Kam reached maximum medical improvement on May 28, 1999, and that she "sustained a permanent partial disability to her right upper extremity of 11 percent."

Both Kam and IBP filed applications for review on August 13, 2002. The Workers' Compensation Court review panel noted that IBP's "primary argument . . . addressed the award of a 100 percent loss of earning power during periods of temporary partial disability when [Kam] returned to work in accommodated positions and worked six hours per day and sometimes full time." In addressing this argument, the review panel found:

> We generally agree with [IBP's] argument that an award of 100 percent loss of earning during a period of temporary partial disability provides a disincentive for employers to accommodate injured employees in light duty employment. We further acknowledge that an employee who returns to part time light duty work and receives a 100 percent loss of earning power during the period of temporary partial disability may receive a windfall. Conversely, a non English speaking employee, with few transferable job skills, physical restrictions, whether temporary or permanent, and living in Lexington, Nebraska has very real employment issues and may well be a temporary odd lot employee as defined by our jurisprudence. If an injured employee with permanent impairment and restrictions, working part time[,] may be an odd lot employee entitled to permanent total disability, we see no logical reason why the same standards may not be applied to an injured employee with temporary partial disability.

Accordingly, the review panel affirmed the award of the trial court in its entirety.

IBP has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, IBP alleges that the Workers' Compensation Court was clearly wrong in its determination of the periods of Kam's temporary partial disability and that the court erred in awarding Kam a 100-percent loss of earning power during periods of temporary partial disability.

STANDARD OF REVIEW

[1] 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. *Mabile v. Drivers Mgmt., Inc.*, 11 Neb. App. 765, 660 N.W.2d 537 (2003).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Brummer v. Vickers, Inc.*, 11 Neb. App. 691, 659 N.W.2d 838 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

[3] If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Noordam v. Vickers, Inc.*, 11 Neb. App. 739, 659 N.W.2d 856 (2003). Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Id.*

ANALYSIS

Periods of Temporary Partial Disability.

[4] IBP first alleges that the trial court was clearly wrong in determining Kam's periods of temporary partial disability. "Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact." *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 440, 610 N.W.2d 398, 406 (2000). As noted above, "[u]pon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong." *Brummer*, 11 Neb. App. at 697, 659 N.W.2d at 844.

The trial court first found that Kam was temporarily partially disabled from March 3 through July 1, 1998, for a total of 17⅔ weeks. March 3 was the first time Kam sought medical treatment

for her shoulder injury; July 1 was the day before Kam's first surgery. After examining her on March 3, Dr. Jones did allow Kam to return to work, but with the restriction that she was not to use her right arm. It appears from the record that the trial court strongly considered this fact in determining that Kam continued to be temporarily partially disabled after she returned to work.

The court next found that Kam was temporarily partially disabled from July 17, 1998, through February 2, 1999, for a total of 28$^{5}/_{7}$ weeks. July 17, 1998, was the first day that Kam was released to return to work after her first surgery, and February 2, 1999, was the day before Kam's second surgery. The record shows that on July 16, 1998, Dr. Walsh wrote a release for Kam to return to work the next day in what he referred to as a "runner" position, without the use of her right arm. The trial court further found that

> [w]ithin two months (by September 2, 1998) of her shoulder surgery, [Kam] was doing the finger meats job, even though Dr. Walsh had not released her to do so. It was this environment which was cold, and which was essentially restricted from [Kam's] release to return to work, as of September 24, 1998. As a result, prior to November 20, 1998, the only position suitable for [Kam] to work was the "runners [sic] position."
>
> From November 20, 1998, through February 2, 1999, [Kam] remained temporarily partially disabled, with very significant lifting restrictions. . . . Prior to February 3, 1999, when [Kam] once again became temporarily totally disabled, [Kam] was never able to progress to working an 8 hour day.

Accordingly, the trial court found that Kam was temporarily partially disabled during this timeframe, due at least in part to her "extremely significant restrictions."

[5,6] Neb. Rev. Stat. § 48-121(2) (Reissue 1998) provides for compensation for those with "disability partial in character." The Nebraska Supreme Court has explained that

> [a]n employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a

> physician's evaluation and assessment of the employee's loss of bodily function. . . . Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

(Citation omitted.) *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 199, 655 N.W.2d 692, 701 (2003).

IBP argues that the trial court erred by finding that Kam was temporarily partially disabled from March 3 through July 1, 1998, because "[t]here is no indication in the record that Kam worked anything less than fulltime during this period or that she received reduced wages." Brief for appellant at 8. However, the trial court did not make such a determination when finding that Kam was temporarily partially disabled at that time. The court noted that Kam was unable to use her right arm, and this restriction could be sufficient to diminish her earning capacity, as defined by our jurisprudence. Thus, as we are unable to say that the trial court was clearly wrong in its determination that Kam was temporarily partially disabled from March 3 through July 1, 1998, we affirm the review panel's affirmance of this portion of the trial court's decision.

IBP also alleges that the trial court erred in finding Kam to be temporarily partially disabled from July 17, 1998, through February 2, 1999. Again, the record is factually sufficient to indicate that Kam's earning power was diminished during this time, as a result of her physical restrictions. Thus, we are unable to say that the trial court was clearly wrong when it determined that Kam was temporarily partially disabled during the timeframe in question. Accordingly, we affirm the review panel's affirmance of the trial court's finding that Kam was temporarily partially disabled from July 17, 1998, through February 2, 1999.

Award of 100-Percent Loss of Earning Power.

[7] IBP next alleges that the trial court erred when it awarded Kam a 100-percent loss of earning power during her periods of temporary partial disability. As stated earlier:

> Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

Zavala, 265 Neb. at 199, 655 N.W.2d at 701. Further, "[i]f an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 471, 461 N.W.2d 565, 574 (1990).

The trial court found, in assessing the proper amount of Kam's loss of earning power:

> It is this Court's determination, after reviewing all the evidence for the periods of time for which [Kam] was temporarily partially disabled, that pursuant to Cords v. City of Lincoln, 249 Neb. 748, 545 N.W.2d 112 (1996); and, Sidel v. Travelers Ins. Co., 205 Neb.541, 288 N.W.2d 482 (1980), [Kam] had a 100 percent loss of earning power. At the most, [Kam] had the physical ability to hold a part time, or odd lot position. This results in her entitlement to $246.39 per week for 46 weeks for temporary partial disability.

"A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court." *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 247, 639 N.W.2d 125, 136 (2002). Thus, we will not reverse the review panel's affirmance of the trial court's determination unless it is clearly wrong.

The trial court appears to determine based on *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996), and *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980), that Kam suffered a 100-percent loss of earning power. However, a closer reading of those two cases indicates that they do not require, or even support, the result reached by the trial court. In *Cords*, the Nebraska Supreme Court affirmed a finding that a 60-year-old man who had been permanently disabled on the job

and who had limited education and work experience had suffered a 10-percent loss of earning capacity. In *Sidel*, a 41-year-old man was permanently disabled while working; the Nebraska Supreme Court upheld an award from the Workers' Compensation Court finding that he had suffered a 20-percent loss of earning capacity. In contrast to the instant case, in both *Sidel* and *Cords*, the worker had suffered permanent disabilities. More importantly, in neither case did the Workers' Compensation Court find that the worker had suffered a 100-percent loss of earning power.

Recently, in *Frauendorfer, supra*, the Nebraska Supreme Court dealt with the issue of temporary partial disability. Much like Kam in the instant case, the worker in *Frauendorfer* worked fewer hours after his injury than he was able to prior to his injury; he also earned a reduced wage, unlike Kam. The Supreme Court "defined temporary disability as the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident." *Id.* at 245, 639 N.W.2d at 134-35. After noting that the worker was able to work fewer hours and earned a lower hourly wage after his injury than prior thereto, the Supreme Court affirmed the trial court's finding that the employee had a 30-percent temporary partial disability; the trial court made this finding in reliance on a report that the employee "would have a 30-percent loss of earning capacity if he were restricted to an 8-hour shift" with his employer. *Id.* at 246, 639 N.W.2d at 135.

Kam suggests that the reasoning in *Frauendorfer* supports her contention that the trial court did not err when it found that she had lost 100 percent of her earning capacity. We do not believe this to be true. Unlike the trial court in *Frauendorfer*, the trial court in the instant case found that Kam, although working for a wage similar to what she earned preinjury, albeit for fewer hours, lost 100 percent of her earning capacity. Logic dictates that this is simply not possible. During all times that the trial court found Kam to be temporarily partially disabled, she continued to work at IBP. No evidence in the record indicates that she received a lower hourly wage after her injury than she did prior to her injury, although there is evidence that she was unable to work as many hours postinjury as she did preinjury.

[8] Kam also suggests that the instant case is similar to *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). In *Schlup*, the Nebraska Supreme Court noted that " '[u]nder the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.' " 239 Neb. at 865, 479 N.W.2d at 448 (quoting 2 Arthur Larson, The Law of Workmen's Compensation § 57.51(a) (1989)). The Supreme Court found that "[a]lthough [the plaintiff] might be physically able to perform some of the requirements of the jobs listed by [the rehabilitation counselor], the compensation court could properly find that her lack of mental abilities, coupled with her physical limitations, did render her unemployable." *Id.* The difference between *Schlup* and the instant case is that the plaintiff in *Schlup* was totally and permanently disabled, whereas Kam's disability was temporary and partial. We find no cases applying the odd-lot doctrine to temporary disability, and we decline to so apply the doctrine in the instant case.

[9] We acknowledge that wages and earning capacity are not the same thing; however, we find as a matter of law that when dealing with temporary partial disability, one cannot be earning wages at a similar job with the same employer and at the same time have suffered a 100-percent loss of earning capacity. This seems even more clear when one considers the proposition that "[i]f an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 471, 461 N.W.2d 565, 574 (1990). Further, "partial disability" is defined as "[a] worker's inability to perform all the duties that he or she could do before an accident, even though the worker can still engage in some gainful activity on the job." Black's Law Dictionary 474 (7th ed. 1999). Reason does not allow one to reconcile a 100-percent loss of earning capacity with an ability to "engage in some gainful activity on the job," which ability Kam clearly had,

since she kept working for IBP at the same hourly wage, albeit in a different position, as she had preinjury.

This is not to say that Kam did not suffer any loss of earning capacity. Rather, we hold that the Workers' Compensation Court erred when it found, in determining the amount of her benefits while she was temporarily partially disabled, that she had lost 100 percent of her earning capacity. Accordingly, we reverse the review panel's affirmance of the compensation court's decision on this issue and remand the cause for a correct award of temporary partial disability, which in this case is essentially a mathematical calculation of wages, earned by Kam while she was temporarily partially disabled, as a percentage of her preinjury earnings.

CONCLUSION

We find that the trial court was not clearly wrong when it found that Kam was temporarily partially disabled from March 3 through July 1, 1998, and from July 17, 1998, through February 2, 1999. Further, we find that the trial court erred when it found that Kam had a 100-percent loss of earning power during these periods of temporary partial disability. Thus, we affirm in part and in part reverse. The cause is remanded to the Workers' Compensation Court review panel for further remand to the trial court for a correct award of temporary partial disability.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SARA A. KAY, APPELLANT AND CROSS-APPELLEE, V. DANIEL P. LUDWIG, APPELLEE AND CROSS-APPELLANT.

686 N.W.2d 619

Filed September 21, 2004. No. A-03-1232.

1. **Child Custody: Appeal and Error.** An appellate court reviews child custody determinations de novo on the record. Such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of discretion.
2. **Evidence: Appeal and Error.** Where credible 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. **Child Custody.** Neb. Rev. Stat. § 42-364(5) (Reissue 1998) clearly gives the trial court the authority to order joint custody even where one of the parents refuses to consent, if the court holds a hearing and specifically finds that joint custody is in the child's best interests.
4. **Divorce: Child Custody: Public Policy.** It is sound public policy to keep children together when a marriage is dissolved, but the ultimate test remains the best interests of the children.

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

John W. Ballew, Jr., of Ballew, Schneider & Covalt, P.C., L.L.O., for appellant.

Glen Th. Parks and Peter C. Wegman, of Rembolt, Ludtke & Berger, L.L.P., for appellee.

INBODY, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Sara A. Kay appeals and Daniel P. Ludwig cross-appeals from the child custody provisions of the decree dissolving their marriage, which provisions granted the parties joint legal custody and awarded physical custody to Sara. Because we conclude that Neb. Rev. Stat. § 42-364 (Reissue 1998), which incorporates the 1993 amendment pertinent hereto, authorizes joint custody without parental agreement and that the district court did not abuse its discretion in the custody determinations, we affirm.

BACKGROUND

The parties married on July 29, 1995. One child, Matthew Wallace Ludwig, was born to the parties on November 10, 1999. Sara filed her petition for dissolution on August 22, 2002, and Daniel moved out of the marital home in September. Daniel filed an answer and counterclaim on September 26. The court conducted a trial on July 21 and 22, 2003. On July 24, the court received additional evidence consisting of a trial deposition and heard closing arguments. By a decree entered October 1, the court dissolved the parties' marriage. The court found that both parties were fit and proper persons to have care, custody, and control of Matthew and that despite the failure of the parties to agree on the

matter, the best interests of Matthew required that the parties share joint legal custody, with Sara being granted primary physical custody. Attachments to the decree set forth Daniel's parenting time in addition to the parties' parenting responsibilities and requirements for cooperation.

Because the assignments on appeal concern only child custody determinations, we now summarize the evidence pertaining to those issues only.

Employment.

At the time of trial, Sara had worked for 2 years as executive director of the American Institute of Architects, her "dream job." Sara was not planning to change her employment. Sara normally worked from 9 a.m. to 5 or 5:30 p.m. and considered her schedule to be "[v]ery flexible." Matthew usually attended daycare while Sara worked. Sara usually traveled for her job approximately four times a year.

Daniel graduated from the University of Nebraska-Lincoln in 1990 with a bachelor of science degree in natural resources and a minor in biology. In 1997, he obtained from the University of Nebraska-Lincoln a master of science degree in forestry, fisheries and wildlife, and water resources planning and management, earning a 3.8 grade point average on a 4.0 scale. In 2001, he obtained from Doane College in Lincoln a master of arts degree in administration, earning a 3.9 grade point average on a 4.0 scale. Daniel testified that he had obtained his master's degrees during the time he was having mental health issues.

Sara asserted in an affidavit that Daniel had been unemployed for 18 months at one point during the marriage. According to Daniel, during those 18 months he held a series of part-time jobs while obtaining his second master's degree. Daniel testified that he did business development for a consulting firm, worked as an interim career specialist, reorganized the University of Nebraska Environmental Resources Center, and applied for grants for that organization.

Daniel testified that at the time of trial, he was employed by Resource Management Associates, his own consulting firm. He provided consulting services regarding natural resources management at Army National Guard training sites in Nebraska and

managed the natural resources on 6,000 acres located approximately 40 to 45 minutes from his residence. He typically left for work at 7 a.m. and arrived home shortly after 5 p.m., and he carried a cellular telephone with him at all times. His employment was flexible enough to work around any issues that arose with daycare and sick children. At the time of trial, Daniel had not obtained a new contract for the next fiscal year, but he was anticipating obtaining a contract shortly after the trial. Daniel planned to remain in the Lincoln area to be near Matthew and Dillon Ludwig, Daniel's then 10-year-old son from a previous marriage.

Relationship With Each Parent.

Daniel testified that he and Matthew had a very close relationship and that they had grown closer during the year preceding trial, despite not having seen each other as frequently. Daniel described Matthew as a wonderful little boy with lots of energy, humor, and charisma, who is pleasant to be around. Daniel testified that he and Daniel do many things together, such as playing at the playground, going to the library, swimming, playing ball, playing computer games, hunting mushrooms, reading, and fishing. They had gone to the county fair, to the zoo, to museums, to see the Harlem Globetrotters, and on a train ride. Daniel had attended activities at Matthew's daycare center, such as the school picnic, the Fourth of July parade, and the Christmas program, and Daniel had also participated in parent-teacher conferences. Sara acknowledged that Daniel and Matthew have a good and positive relationship.

Sara testified that she and Matthew had shared a "very close bond." When they were at home, Matthew frequently followed Sara around the house. Sara described Matthew as a very happy child who loves trains, cars, trucks, reading, going to the library, and writing his name. They had gone together to the children's museum, the zoo, and the library.

Environment Offered by Each Parent.

Matthew had resided in the same house since his birth. Sara described the house as comfortable and fairly large, with four bedrooms, four bathrooms, and a fenced yard. The house was surrounded by "wonderful neighbors" and was located across

the street from an elementary school. Sara related that Matthew had friends in the neighborhood. She admitted that the house was larger than necessary, but she maintained that she planned to stay in the house because she believes consistency is important for Matthew.

Sara had traveled occasionally for her job and had hired babysitters to stay with Matthew at Sara's house during her absences.

Daniel testified that his apartment was located 4 miles from Sara's house. The apartment had two bedrooms, one for Daniel and one with bunk beds shared by Matthew and Dillon. Although Daniel attached some importance for a 3½-year-old child to live in a house rather than an apartment, he denied that it was a matter of great importance. Daniel asserted that Matthew had no friends his own age in Sara's neighborhood.

Other Relationships.

Daniel testified that for roughly the first 3 years of Matthew's life, Matthew lived with Daniel, Sara, and Dillon. Daniel characterized the relationship between Matthew and Dillon as close and still developing as the boys got older. Matthew and Dillon played together, read books together, and swam together. Matthew also attended Dillon's sporting events. Daniel believed that it is in Matthew's best interests to foster the close relationship between Matthew and Dillon in order to enable the boys to relate better in the future. Daniel described Dillon as an important role model for Matthew. According to Daniel, the separation had been difficult for both Matthew and Dillon; Matthew asked where Dillon was and Dillon asked the same about Matthew.

Sara agreed that Matthew and Dillon had a positive relationship but claimed that they had separate interests and did not play together very much. Sara denied trying to distance Matthew from Dillon after the separation and claimed that on occasion, she had invited Dillon to her house to play with Matthew.

Dionne Marie Mason, Dillon's mother and Daniel's former wife, testified that Dillon cared very much for Matthew and often talked about him. Dillon often shared details about Matthew and sometimes spoke to Matthew on the telephone. Mason claimed that being separated from Matthew had been difficult for Dillon.

Sara admitted that she had been dating a man who lives in San Francisco, California. Sara had seen him several times after her

separation from Daniel. Sara testified that if she received custody of Matthew, she would not apply to relocate to San Francisco with Matthew. Sara testified that her relationship with this man is in its infancy, that her job and family are in Nebraska, and that she is established with commitments in Nebraska. Sara asserted that Matthew, rather than her relationship with this man, is her top priority. Sara had introduced the man to Matthew as her "friend." She defended having introduced him to Matthew a few weeks after Daniel had moved out, and she denied worrying about Matthew's becoming confused. On two occasions, the man had stayed overnight in the basement of Sara's house. Sara admitted that in hindsight, to avoid confusion on Matthew's part, she should not have allowed the man to stay at her house.

Daniel testified that he has a female friend who lives in the same apartment complex. He denied any romantic involvement but admitted that the woman had been at his apartment approximately 40 times while Matthew had also been present.

Attitude and Cooperation.

Sara denied trying to distance Matthew from Daniel after the separation. Sara testified that she has never degraded Daniel in front of Matthew or shared with Matthew the difficulties that have occurred between herself and Daniel. She claimed that Matthew has always been available for visitation and that Daniel received extra time with Matthew at Christmas and in the spring preceding trial. Sara recognized the importance of Matthew's seeing Daniel and intended to foster that relationship. She hoped to maintain a friendly relationship with Daniel after the divorce and expressed a willingness to surpass court-mandated visitation. Sara testified that depending on the situation, she would agree to give Daniel additional parenting time if Daniel consistently complied with his medication and exhibited more rational behavior. Sara stated that the communication between herself and Daniel had been nearly nonexistent and that they have had a number of confrontations since the separation.

Sara admitted that she had stated in a deposition that enhancing the relationship between Matthew and Daniel was not her responsibility. At trial, Sara qualified that testimony by stating that when Daniel and Matthew are together, enhancing the relationship is Daniel's responsibility.

Mason, Daniel's previous wife and Dillon's mother, testified that she and Daniel communicate often—varying from several times a day to once or twice a week—to coordinate schedules and accommodate parenting time for each other. She stated that Daniel had been very flexible and very cooperative. Mason believed that their mutual cooperation and flexibility had made things easier for Dillon, that Dillon and Daniel had a strong relationship, and that they adored each other.

Daniel testified that he and Mason use a detailed schedule to maintain consistency for Dillon in each of their homes. He related that he and Mason speak at least a couple of times each week to coordinate their schedules with respect to Dillon. Daniel described his relationship with Mason as flexible, accommodating, and cooperative, and he believed that Dillon appreciated this relationship. Daniel asserted that his relationship with Mason demonstrated that he can and would develop a similar relationship with Sara, but he expressed concern that the same flexibility, cooperation, and accommodation would not occur if Sara was awarded custody of Matthew. Daniel stated that if he had custody of Matthew, Matthew would see Sara often. Daniel expressed the intention to act fairly and to provide liberal visitation.

Daniel testified that in November 2002, Sara left on a trip and obtained a babysitter to watch Matthew. Daniel was disappointed and upset that Sara had not asked him to watch Matthew. After Sara returned, Daniel told her that he wanted to watch Matthew when she was gone rather than having a babysitter come into Sara's house. According to Daniel, Sara responded that she felt it was her responsibility to provide Matthew's daycare. Later, Sara took other trips, and each time, Daniel had similar conversations with her. Daniel testified that he had communicated with Sara about the matter approximately a dozen times. Sara had continued to employ babysitters when she was gone, and Daniel testified that this caused him to believe she would not be flexible or cooperate in the future.

Sara admitted that Daniel had spoken to her in general terms about wanting to watch Matthew when she went out of town. Sara felt it had been important for Matthew to remain at home on these occasions. She claimed that Matthew had spent about one-half of

those times with Daniel because the trips had coincided with Daniel's visitations.

At the time of trial, Sara planned to go to Florida with Matthew and the man from San Francisco whom she was dating. Sara also planned to take a trip to Connecticut with Matthew and her sister during the summer following trial.

Sara testified that she had informed Daniel that she and Matthew would be taking two short out-of-state trips. Sara claimed that she had informed Daniel where they would be going, but had not disclosed the other persons with whom they would be traveling or the purposes of the trips. Sara described that she was frightened by Daniel's inquiries about purposes, fellow travelers, and destinations, and she characterized the questions as harassment and as "berating" and "belittling" her. Sara testified that she would be comfortable with Daniel's traveling out-of-state with Matthew without providing her with similar information. She testified that she considers Daniel's time with Matthew "his time" and "none of [her] business." However, Sara denied being comfortable with Daniel's parenting skills.

Daniel testified that Sara identified the city in Florida to which she and Matthew were going to travel but that she refused to provide additional information. Daniel had asked for the same information regarding the trip to Connecticut, and again Sara had declined to disclose it. According to Daniel, Sara told him that she would not disclose the information about her trips because it was none of Daniel's business and because their lives were separate. Daniel had eventually obtained information about the trips through Sara's attorney. Daniel testified that if he were leaving the state with Matthew, he would provide Sara with an itinerary, a telephone number where he could be reached, and the names of other travelers.

Mental Health Issues and Stability.

The parties presented conflicting testimony regarding the extent of Daniel's experiences with depression, the depression's effects upon him during the experiences, his conduct in "self-medicating," and his ability to function as a husband and parent during those times. In the spring of 2002, Daniel had consulted Dr. Robert Arias, a neuropsychologist. Arias initially met with

Daniel on two occasions; diagnosed him with an attention deficit disorder, an anxiety disorder, a recurrent major depressive disorder, and a dysthymic disorder; and developed a treatment plan consisting of psychotherapy. Daniel had attended psychotherapy, first on a weekly basis for 6 or 7 months and later on an every-other-week schedule. Daniel's mood and anxiety level had greatly improved since he started treatment with Arias; Daniel had been feeling freer, happier, and more positive about life. Daniel testified that none of his conditions impaired his ability to parent. Daniel had also been diagnosed with sleep apnea, a condition which causes him to awaken over 200 times a night, but he had decided that after the trial, he would have surgery to correct the condition.

Arias opined that individuals with Daniel's attention deficit disorder can be good parents and that although the disorder might cause Daniel frustrations in disorganized situations, Arias did not think the disorder would impair Daniel's ability to perform a parent's responsibilities. Arias stated that none of Daniel's other disorders or conditions would significantly adversely affect his ability to parent. Arias denied seeing any symptoms of a major depressive disorder in Daniel since July 2002. Daniel had attended his therapy sessions regularly and had put thought and effort into those sessions. Arias noted significant progress in Daniel's mood and anxiety. Arias did not see anything in Daniel that would indicate he would be dangerous or violent.

Mason testified she believes that Daniel is a good parent and that Dillon is safe when he is with Daniel. Mason opined that Daniel is a rational and functioning person who is not dangerous.

Sara had experienced some physical problems and some minor anxiety, but she denied any continuing experience with those issues.

The court received the deposition of a psychotherapist who testified regarding her contacts with Sara prior to the marriage, with both Sara and Daniel after the marriage, and with Sara only most recently.

Janice Kuhn, a psychotherapist and psychiatric nurse practitioner, stated in a deposition that she first saw Sara on July 23, 2002. Sara had spoken to Kuhn about difficulties in her marriage, and Kuhn had diagnosed Sara with some mild insomnia and a

mild level of dysthymia. Although Kuhn had recommended mild antidepressant therapy, Sara opted not to take antidepressants because her depression was situational. Kuhn opined that Sara did "beautifully" without the antidepressants. Kuhn had never been concerned about Sara's ability to effectively perform her parental responsibilities.

Sara testified that she was frightened of Daniel because of his behavior. Daniel testified that he had never physically threatened or harmed Matthew. In Sara's testimony and affidavit, she recounted occasions upon which Daniel had become enraged, used profane language, and verbally harassed her in front of the children. She also made allegations of Daniel's slamming a door, throwing a telephone, throwing the kitchen table and chairs, pushing Sara's shoulder against a sliding glass door, using abusive and profane language toward Sara's sister, and scattering wedding programs around the house. Sara further testified that Daniel had made her feel threatened on several occasions, made menacing telephone calls, left a menacing message, and threatened suicide twice.

Daniel admitted becoming upset with Sara, raising his voice, using profane language, slamming the door, and throwing a telephone, but he denied the occurrence or contested the accuracy of Sara's testimony regarding other events. Daniel denied ever threatening suicide. He admitted becoming angry or upset when Sara "nagged" him. Daniel specifically denied making some of the menacing comments over the telephone and in messages, but he neither admitted nor denied some of Sara's allegations in that regard.

Capacity to Provide Physical Care.

Since Matthew's birth, Sara had been his primary caretaker. Before Sara and Daniel separated, Dillon had lived with them every other week until he started kindergarten; thereafter, he lived with them on a full-time basis. Sara had acted as Dillon's primary caretaker while he was in her house.

Sara testified that on January 9, 2003, when she was out of town, Matthew spent the night with Daniel. The next day Daniel took Matthew to daycare on a cold day without a hat, a coat, or mittens. Matthew therefore had not been able to go out for recess.

On January 26, Sara met with Daniel to pick Matthew up after visitation, and Matthew, who had been recovering from a bronchial inflammation, was in Daniel's vehicle without a hat, coat, or mittens.

After the separation, Sara occasionally left Matthew with a babysitter when she left town. She claimed that Daniel could not handle the boys when she and Daniel had resided together. Sara testified that during the marriage, when she was out of town, Daniel's mother, who died before the trial, had taken care of the boys on all but one occasion. In an affidavit, Sara alleged that while she was out of town in May 2002, she called home and Daniel told her "he could not handle the issues in his life and as a result his mother was there helping him with the children." Daniel denied telling Sara during the telephone conversation that he could not handle the issues in his life, although he admitted he may have stated that his life was difficult at that time.

Daniel testified that for 4½ years, he and Dillon's mother had shared the custody of Dillon during the school year, each parent having him every other week, and they had split the summers with regard to custody. For approximately 1 year before Daniel married Sara, he had cared for Dillon alone pursuant to this arrangement, and Daniel believed it had worked well for Dillon. Daniel testified that generally, he had been responsible for Dillon's medical and dental appointments.

Daniel testified that Sara had not done 100 percent of any of the childcare duties. He asserted that he had been significantly involved in Matthew's daily care since his birth, but Daniel admitted that Sara probably had done more of the day-to-day duties such as changing diapers and bathing. He claimed that when Sara traveled for work, he cared for Matthew. Daniel testified that although his mother had sometimes helped him with Matthew, Daniel had not required her help.

Daniel admitted that while he was unemployed, some days a babysitter had come into the house to watch Matthew. Sara testified that she had hired a babysitter during those periods because Daniel had told her he was looking for employment.

Daniel admitted that one evening while the trial was pending, he had forgotten to pick Matthew up at daycare and the daycare center had called Sara's house. Daniel had been counseling with

his attorney at the time, in a room without a watch or a clock, and he lost track of time.

Sara testified that at the time of trial, Daniel was delinquent on child support payments by 2 months.

Health, Welfare, Social Behavior, and Educational Needs.

Matthew had attended the same daycare center since he was 9 months old, and Sara characterized that daycare center as "[e]xcellent." Sara and the daycare's personnel believed Matthew had exhibited advanced intelligence. The parties agreed that Matthew seemed to be adjusting to the separation and divorce reasonably well, considering the situation.

Daniel testified that since the separation, he had encountered some disciplinary issues with Matthew. Before the separation, Daniel had been primarily responsible for disciplining Matthew. Daniel had learned of some discipline issues Matthew was having at daycare and opined that Matthew was "testing boundaries." After having twice discussed Matthew's discipline problems with the director of the daycare center, Sara claimed that she was not concerned about the issue.

Daniel testified that he believes he, rather than Sara, would be a better custodial parent for Matthew because Matthew, as a boy, needs a male influence in his life and because as a man, Daniel is better able to meet Matthew's developmental needs. Daniel believes that discipline is important, especially in divorce situations, and that a father generally does a better job of disciplining than a mother does.

Sara testified that she does not believe that joint custody is in her and Daniel's best interests. Sara testified that she should have legal and physical custody of Matthew because she is stable, loving, patient, caring, and employed. She also claimed that she and Matthew have a strong bond and that Matthew is her first priority. Sara asserted that Daniel should not have sole custody of Matthew because during the marriage, he did not actively attend to either Matthew or Dillon, but, rather, Daniel "laid around." Sara expressed concern for Daniel's emotional stability and suggested that his anger, depression, and other conditions would affect his parenting abilities.

ASSIGNMENTS OF ERROR

On appeal, Sara assigns that the trial court erred in awarding the parties joint legal custody of Matthew. On cross-appeal, Daniel assigns that the district court erred in granting Sara primary physical custody of Matthew.

STANDARD OF REVIEW

[1,2] An appellate court reviews child custody determinations de novo on the record. Such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of discretion. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). Where credible 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. *Id.*

ANALYSIS

Authority to Impose Joint Legal Custody.

Both parties acknowledge that in *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), the Nebraska Supreme Court recognized that joint custody is composed of two elements—legal custody and physical custody. The Supreme Court noted that joint legal custody has been generally defined as joint authority and responsibility for making major decisions regarding the child's welfare and that in contrast, joint physical custody has been described as joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant periods of time. The Supreme Court stated its agreement with an approach treating an arrangement as joint physical custody if the trial evidence so establishes, regardless of how prior decrees or court orders have characterized the arrangement.

Section 42-364(5) allows a trial court to order shared or joint custody, stating:

> After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, each parent shall have equal rights to

> make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

In *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991), the Nebraska Supreme Court determined that two requirements must be satisfied before a court may grant joint custody of a child: (1) The parents must agree to the arrangement, and (2) a hearing must be held to determine that such serves the best interests of the child. In 1993, after the decision in *Hildebrand*, the Legislature amended § 42-364. As a result of the 1993 amendment, a trial court may impose joint custody, even where the parties do not agree, if the trial court first conducts a hearing and specifically finds that joint custody is in the best interests of the minor child. See 1993 Neb. Laws, L.B. 629.

In *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000), this court reversed an order awarding the parties joint legal custody, with primary physical custody to remain with the father. In *Dormann*, we noted that the parties did not agree to the joint custody arrangement, nor did the district court make a specific finding that joint custody was in the best interests of the minor child. We also stated that joint custody is not favored by the courts of this state and will be reserved only for the rarest of cases. *Id.* (citing *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987)).

Daniel argues that in codifying the public policy of this state, the Legislature lowered the standards for joint custody, shedding doubt on whether joint custody is still so disfavored and limited to rare cases. Daniel further argues that the Nebraska Supreme Court cases cited by Sara all involved joint physical custody as well as joint legal custody. See, *Wilson v. Wilson, supra*; *Korf v. Korf*, 221 Neb. 484, 387 N.W.2d 173 (1985); *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

[3] We agree that currently, § 42-364(5) clearly gives the trial court the authority to order joint custody even where one of the parents refuses to consent, if the court holds a hearing and specifically finds that joint custody is in the child's best interests. We also recognize the longstanding rule that joint custody is not

favored by the courts of this state and will be reserved for only the rarest of cases. *Wilson v. Wilson, supra*; *Dormann v. Dormann, supra.*

Under the previous version of the statute, joint custody was so disfavored that even with the agreement of both parties, the court was assigned the duty to conduct a hearing to determine if joint custody was in the child's best interests. Under the new version, joint custody remains disfavored to the extent that if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding. The statutory change was effected by 1993 Neb. Laws, L.B. 629, an amendment enacted by the same legislative action which adopted the Parenting Act, Neb. Rev. Stat. §§ 43-2901 to 43-2919 (Reissue 1998). The preamble of the Parenting Act provides:

> The Legislature finds it is in the best interests of a minor child to maintain, to the greatest extent possible, the ongoing involvement of both parents in the life of the minor child. The Legislature further finds that parents should maintain continued communications to make as many joint decisions in performing such parenting functions as are necessary for the care and healthy development of the minor child.
>
> In any proceeding between parents . . . involving a minor child, the best interests of the minor child shall be the standard by which the court adjudicates and establishes the individual parental responsibilities. The state presumes the critical importance of the parent-child relationship and the child-parent relationship in the welfare and development of the minor child and that the relationship between the minor child and both parents should be fostered unless otherwise inconsistent with the best interests of the minor child. The best interests of the minor child are served by a parenting arrangement which best serves a minor child's emotional growth, health, stability, and physical care.
>
> The Legislature further finds that the best interests of the minor child are ordinarily addressed when both parents remain active and involved in parenting. It is the policy of this state to assure the right of children, when it is in their best interests, to have frequent and continuing contact with parents who have shown the ability to act in the best interests

> of the children and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation.

§ 43-2902. The preamble does not read as though the Legislature disfavors joint custody, if such will be in the child's best interests. By enacting the Parenting Act, the Legislature was attempting to adjust the then-current law, and the act clearly evidences an attempt to foster participation of both parents of a separated family in raising their children. The trial court has the authority to make a determination of joint custody if it follows the provisions of § 42-364(5). In the instant case, the trial court conducted the required hearing and made the required finding.

Review of Joint Legal Custody for Abuse of Discretion.

The question therefore becomes whether the trial court's determination that joint legal custody was in the best interests of Matthew constituted an abuse of discretion.

We have already summarized the evidence presented to the trial court on this issue, much of which evidence was in conflict. We recall that the trial court's decree in the instant case imposed only joint legal custody, while assigning sole physical custody to Sara. The testimony of the mental health professionals supports Daniel's ability to effectively perform parental responsibilities, at least to the extent of participating in major decisions.

The marital strife recounted primarily through Sara's testimony stands in stark contrast with Daniel's successful performance of a joint custody arrangement concerning Matthew's half brother, Dillon. The trial court had a better opportunity than this court to observe the witnesses and to resolve conflicts in the testimony. The trial court evidently determined that Daniel's performance in the custodial relationship regarding Dillon provided a better prediction of Daniel's ability to cooperate with Sara and make joint decisions in Matthew's best interests than did the specific incidents of questionable behavior during the marital breakdown.

Further, we share the concern that if given sole legal custody along with her primary physical custody, Sara would not assume responsibility to foster the relationship between Matthew and Daniel in the manner contemplated by the Parenting Act. By granting both parties joint legal custody, under the particular

circumstances present in the instant case, we best implement the goal expressed by the Legislature that parents share in the rights and responsibilities of raising their child after divorce.

We conclude that the trial court did not abuse its discretion in granting joint legal custody of Matthew to the parties.

Physical Custody.

Daniel cross-appeals, asserting that he should have been granted primary physical custody of Matthew. He makes three arguments to support this contention.

[4] Daniel contends that Matthew should not be separated from his half brother, Dillon. While Nebraska cases have recognized that it is sound public policy to keep siblings together when a marriage is dissolved, see *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991), such cases recognize that the ultimate test remains the best interests of the children. The evidence persuades us that Sara will continue to foster a close and loving relationship between Matthew and Dillon. Further, the evidence demonstrates that during the marriage, Sara fulfilled the primary caretaking responsibilities and provided the great majority of the day-to-day care of both children when they resided in the marital home. Furthermore, the behavioral issues concerning Daniel, while not sufficient to preclude joint participation in major decisions, support the trial court's determination regarding physical custody.

Daniel again argues that Sara will not assume responsibility to foster a relationship between Matthew and Daniel. While consideration of this factor alone might weigh in favor of Daniel, the other factors properly considered by the trial court support granting Sara physical custody of Matthew.

Finally, Daniel argues that there is a strong likelihood that Sara would desire to relocate to San Francisco. The matter of removing Matthew from Nebraska is not presented in the instant case, and Daniel's argument in this regard clearly constitutes mere speculation. The evidence supports the trial court's determination to grant Sara physical custody of Matthew, and we find no abuse of discretion in that decision.

CONCLUSION

Because we find that the trial court followed the applicable statute and made the necessary finding and that the court's decree

awarding the parties joint legal custody of Matthew and granting Sara sole physical custody of Matthew was not an abuse of discretion, we affirm.

AFFIRMED.

J & H SWINE, INC., A NEBRASKA CORPORATION, APPELLANT, V. HARTINGTON CONCRETE, INC., A NEBRASKA CORPORATION, APPELLEE.

687 N.W.2d 9

Filed September 28, 2004. No. A-03-010.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Jurisdiction: Final Orders: Dismissal and Nonsuit: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Judgments: Final Orders: Notice: Time: Appeal and Error.** The plain language of Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) provides for the relation forward of a notice of appeal or docket fee only when filed or deposited "after the announcement of a decision or final order," but before "entry of the judgment" pursuant to Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).
6. ____: ____: ____: ____: ____. Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment.
7. **Final Orders: Notice: Time: Costs: Appeal and Error.** A notice of appeal filed before the trial court announced a "decision or final order" within the meaning of Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) in final determination of an issue of costs cannot relate forward.
8. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
9. **Costs: Attorney Fees.** Nebraska case law generally treats attorney fees, where recoverable, as an element of court costs.
10. **Judgments: Final Orders: Costs: Appeal and Error.** The failure of a trial court to rule on a motion for costs in its judgment leaves a portion of the judgment

unresolved, and consequently, an order entering such judgment is not final for the purpose of appeal.

11. **Notice: Jurisdiction: Dismissal and Nonsuit: Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.

Appeal from the District Court for Cedar County: MAURICE REDMOND, Judge. Appeal dismissed.

David A. Domina, James F. Cann, and Claudia L. Stringfield, of Domina Law, P.C., for appellant.

Michael C. Cox and John M. Lingelbach, of Koley Jessen, P.C., L.L.O., for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

J & H Swine, Inc., brought a breach of contract action against Hartington Concrete, Inc., involving the construction of a livestock waste structure. Following a jury trial, the jury returned a verdict in favor of Hartington Concrete and the trial court entered judgment on the verdict. J & H Swine appeals.

BACKGROUND

J & H Swine brought a breach of contract action against Hartington Concrete alleging that Hartington Concrete breached an agreement with J & H Swine for the construction of a concrete livestock waste structure for J & H Swine to use in its swine producing business. Hartington Concrete completed construction of the structure in October 1997, upon which completion J & H Swine paid Hartington Concrete the full purchase price as agreed, and J & H Swine put the structure to use. In June 1999, two of the structure's concrete wall panels collapsed and fell into the waste contained in the structure. J & H Swine alleged that the design and construction of the structure were defective, and it sought $47,658 in general damages and $113,966.99 in special damages.

In its answer, Hartington Concrete generally denied J & H Swine's allegations and alleged several affirmative defenses including that there was no privity of contract between Hartington Concrete and J & H Swine, that the plans and specifications for the structure were provided by J & H Swine and Hartington Concrete constructed the structure in accordance with those plans, and that the two concrete panels collapsed because J & H Swine failed to properly backfill and grade around the structure.

A jury trial was held in the district court for Cedar County. The jury was asked to determine whether there was a contract between Hartington Concrete and J & H Swine for the construction of the waste structure and, if there was, whether Hartington Concrete breached such contract. On December 5, 2002, the jury rendered a general verdict in favor of Hartington Concrete. On December 19, Hartington Concrete filed a motion for costs incurred in the matter totaling $2,892.19, pursuant to Neb. Rev. Stat. § 25-1710 (Reissue 1995). Section 25-1710 states that costs shall be allowed to a defendant upon a judgment in its favor in actions for the recovery of money. On December 23, the trial court entered judgment on the jury verdict. On January 6, 2003, J & H Swine filed its notice of appeal. On March 24, the trial court entered an amended judgment ordering again that judgment was entered on the jury verdict in favor of Hartington Concrete and against J & H Swine and further ordering that Hartington Concrete's motion for costs was sustained in part and that judgment on the motion was entered for the total amount of $2,558.12.

ASSIGNMENTS OF ERROR

J & H Swine assigns that the trial court erred in giving jury instructions Nos. 2, 11, and 12, because they were not warranted by the evidence.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

ANALYSIS

[2-4] We first turn to the question of whether we lack appellate jurisdiction. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Application of SID No. 384, supra*; *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

In the instant case, the jury rendered its verdict in favor of Hartington Concrete on December 5, 2002, and Hartington Concrete filed its motion for costs on December 19. On December 23, the trial court entered judgment on the jury verdict but did not rule on the motion for costs. On January 6, 2003, J & H Swine filed its notice of appeal, while the motion for costs was pending. On March 24, the trial court entered the amended judgment ordering again that judgment was entered on the jury verdict and further ordering that judgment was entered on Hartington Concrete's motion for costs. J & H Swine did not appeal from the March 24 amended judgment.

[5-7] J & H Swine argues that we have jurisdiction because its notice of appeal filed on January 6, 2003, should be treated as having been filed on March 24. J & H Swine relies on Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002), which provides that

> [a] notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

The plain language of § 25-1912(2) provides for the relation forward of a notice of appeal or docket fee only when filed or deposited "after the announcement of a decision or final order," but before "entry of the judgment" pursuant to Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). *In re Guardianship & Conservatorship of Woltemath, supra.* Section 25-1912(2) was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. *In re Guardianship & Conservatorship of Woltemath, supra.* In *In re Guardianship & Conservatorship of Woltemath*, the Nebraska Supreme Court recently held that § 25-1912(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment. Based on that holding, we conclude that the trial court's December 23, 2002, judgment, from which J & H Swine appealed, did not announce a "decision or final order" within the meaning of § 25-1912(2). The notice of appeal was filed before the issue of costs was finally determined and cannot relate forward. Thus, J & H Swine's argument is without merit.

[8] As just stated, J & H Swine filed its notice of appeal after the trial court entered judgment on the jury verdict, but before the trial court ruled on Hartington Concrete's motion for costs. An award of costs in a judgment is considered a part of the judgment. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002); *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999). The Nebraska Supreme Court first made this determination clear in *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970), where the issue on appeal was whether an award of costs could be retaxed by the district court after appeal. The appellant claimed that costs taxed in the district court were part of the judgment of that court and that after the term in which the judgment was entered, they could not be vacated or modified except in the manner authorized by statute. In deciding the issue, the Nebraska Supreme Court overruled any contradictory case law and made it clear that an award of costs was to be considered part of a judgment.

[9] In *Salkin v. Jacobsen, supra*, the Nebraska Supreme Court noted that a party seeking statutorily authorized attorney fees, for

services rendered in a trial court, must make a request for such fees prior to a judgment in the cause. It held that this is so because a statutory award of attorney fees, if deemed appropriate, may be made a part of the judgment or final order. See *id.* The Supreme Court further held that when a motion for attorney fees is made prior to the judgment, the judgment will not become final and appealable until the court has ruled upon that motion. *Id.* (citing *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000), and *In re Application of SID No. 384, supra*). Although *Salkin* involved attorney fees, it is persuasive authority in the present case in that our case law generally treats attorney fees, where recoverable, as an element of court costs. See, *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003); *Salkin v. Jacobsen, supra.* See, also, *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994) (attorney fees are costs awarded to prevailing parties).

[10] In the case at bar, Hartington Concrete filed its motion for costs prior to the trial court's entering judgment on the verdict, and its motion had not been ruled upon at the time J & H Swine filed its notice of appeal. Once Hartington Concrete filed the motion in question, it placed at issue an award of costs. The failure of the trial court to rule on Hartington Concrete's motion for costs in its December 23, 2002, judgment left a portion of the judgment unresolved, and consequently, the order from which J & H Swine appealed was not final. Because the order from which J & H Swine appealed was not final and appealable, we dismiss the present appeal for lack of jurisdiction. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004) (when appellate court is without jurisdiction to act, appeal must be dismissed).

[11] We further note that J & H Swine's notice of appeal did not deprive the trial court of jurisdiction to enter a final judgment. J & H Swine's notice of appeal was a notice of appeal from a nonappealable order. A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. *Id.*; *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

Thus, when the trial court entered its amended judgment on March 24, 2003, it entered a final order from which J & H Swine could appeal. However, J & H Swine failed to do so.

CONCLUSION

The judgment from which J & H Swine appealed was not final and appealable, and thus, we lack appellate jurisdiction and the appeal must be dismissed.

APPEAL DISMISSED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF LESLIE E. BOWMAN, A FORMERLY PROTECTED AND INCAPACITATED PERSON, DECEASED.
WILLIAM KRATVILLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF LESLIE E. BOWMAN, DECEASED, APPELLEE, V. THERESE M. ROSSE, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF LESLIE E. BOWMAN, A FORMERLY PROTECTED AND INCAPACITATED PERSON, APPELLANT.
686 N.W.2d 642

Filed September 28, 2004. No. A-03-1207.

1. **Final Orders: Intent: Appeal and Error.** Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance, and what the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.
2. **Final Orders: Jurisdiction.** There is no procedure authorizing a court to "interpret" or "clarify" its prior final orders.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Reversed and remanded with directions to dismiss.

Jay L. Welch and Michelle D. Epstein, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Michael B. Kratville for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Therese M. Rosse, individually and as guardian and conservator of Leslie E. Bowman, a formerly protected and incapacitated person now deceased, appeals from an order of the county court for Douglas County. In its order, the county court granted motions filed by William Kratville, intervenor and personal representative of Bowman's estate, in which motions Kratville sought a clarification of a prior order of the county court. Because we find that the county court was without authority to enter an order "clarifying" its prior order, the county court's order must be reversed and the case remanded with directions to dismiss.

II. BACKGROUND

On September 18, 2001, Rosse filed a petition for her appointment as guardian and conservator for Bowman. On October 25, the county court appointed Rosse as guardian and conservator for Bowman.

On April 23, 2002, Bowman died. On May 8, Rosse filed a motion for approval of her final accounting, in which motion she requested payment of guardian and conservator fees and attorney fees. On May 21, the county court rendered an order approving the final accounting for the period of October 25, 2001, through May 6, 2002, and awarding Rosse guardian and conservator fees and attorney fees. On September 6, Rosse was discharged as guardian and conservator.

Kratville is the personal representative in separate county court estate proceedings for Bowman's estate. On July 17, 2003, Kratville filed two motions, seeking to intervene in the previously closed guardianship and conservatorship proceedings and to have the county court therein "clarify" whether the May 21, 2002, order approving the final accounting and payment of fees to Rosse was intended to compensate Rosse for services she performed on Bowman's behalf prior to being appointed guardian and conservator or to compensate her only for services she performed after being so appointed. Kratville specifically indicated that the county court judge presiding over the estate proceeding, Lyn V. White, had requested that Kratville seek a clarification

from the county court judge who had presided over the guardianship and conservatorship proceedings, Thomas G. McQuade.

On September 26, 2003, the county court entered an order granting Kratville's motions. The court specifically indicated that "[t]he court is of the understanding that it is always proper to correct errors where such errors exist *or to resolve any misunderstandings*." (Emphasis supplied.) The court further indicated that at the time of the hearing on Rosse's May 8, 2002, motion for approval of her final accounting, the court received an exhibit which detailed Rosse's time spent on Bowman's behalf between March 1996 and April 21, 2002, which included a significant period of time prior to Rosse's appointment as guardian and conservator. Finally, the court specifically noted that when awarding Rosse fees in the May 21, 2002, order, the court took "the totality" of the exhibit into account in determining the amount of fees to award Rosse. This appeal followed.

III. ASSIGNMENT OF ERROR

Rosse's sole assignment of error is that the county court was without authority to entertain Kratville's motions.

IV. ANALYSIS

Rosse argues that the county court was without authority to entertain Kratville's motions to intervene and to "clarify" the court's prior order. We agree and specifically find that the county court was without authority to enter any order clarifying the language or intention of the May 21, 2002, order, from which no appeal was ever taken.

1. Jurisdiction of Appellate Court

We first address the question of whether we have jurisdiction to hear this appeal. Kratville argues on appeal that we lack jurisdiction because the September 26, 2003, order entered by the county court was not a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 1995). Although we agree that we do not have jurisdiction to review the merits or substance of the county court's order, we specifically find that we do have jurisdiction to determine whether the county court had jurisdiction to enter the order, which is the primary question raised by Rosse's appeal.

In *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996), the Nebraska Supreme Court addressed the question of whether it had jurisdiction to hear an appeal from an order entered by a lower court when the lower court was without authority to enter the order. In *Currie*, the lower court had entered an order at a time when a previous appealable order had been appealed and the lower court had been divested of jurisdiction over the case. The Supreme Court held that in that circumstance, although an extrajurisdictional act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *Id.*

The present case is factually comparable to *Currie*. In the present case, the question raised on appeal is whether the lower court had jurisdiction to enter the order being appealed from. As noted above, although we do not have jurisdiction to address the merits of the order entered, we do have jurisdiction to determine whether the lower court had jurisdiction to enter the order in the first instance.

2. Jurisdiction of Lower Court

Having concluded that we have jurisdiction to resolve the issue raised in Rosse's appeal, namely whether the county court had authority or jurisdiction to enter the order clarifying its previous order, we next consider whether the county court could properly enter an order clarifying its prior order. We conclude that established Nebraska law prohibits an order such as the one entered on September 26, 2003, by the county court in this case.

At the hearing on Kratville's motions, the county court specifically indicated:

> I certainly think the Court has the right to reopen its files at any time in order to correct any mistakes that were made or to clarify any orders that were issued. Certainly not to change any orders that were issued and I'm not intending to do that at all. I thought it was fairly clear with the order and the exhibit and what was happening.

We specifically disagree and disapprove of the county court's position that it can "certainly . . . reopen its files at any time . . . to clarify any orders that were issued." Although neither party cites this court to the applicable authority, there is longstanding precedent from the Nebraska Supreme Court indicating that trial courts are without authority to reopen their files and enter orders "interpreting" or "clarifying" prior orders after the time for a proper appeal has passed.

[1] In *Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986), the Nebraska Supreme Court specifically noted that "neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance" and that "[w]hat the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant." To allow a court to "reopen" its files and enter an order "clarifying" what was intended or meant by the language used in a prior order would run afoul of the sanctity of the principles underlying finality in litigation. See *Neujahr v. Neujahr, supra*. To allow the procedure utilized in the present case would allow the meaning of the county court's May 21, 2002, order to be altered by way of "clarifications" at the whim of anyone seeking to later "reopen" the case, and such alteration is specifically not authorized.

Kratville argues on appeal that Rosse's position that the county court lacked authority to entertain his motions is an "absurdity." Brief for appellee at 3. Kratville asks, "Why would [Kratville] lack the capacity to intervene for the limited purpose of asking Judge McQuade what he meant? If not [Kratville], then whom [sic]?" *Id.* The answers to Kratville's questions are that he lacks the capacity to intervene for the purpose of asking the county court what was meant because the county court's order had long since become final and because the county court is not allowed to later enter an order "interpreting" or "clarifying" what was meant and that nobody has the capacity to ask the county court to do so. In light of the Nebraska Supreme Court's teaching on this issue, Rosse's position is far from absurd and is, in fact, the only legally supportable position.

Additionally, we are not persuaded by Kratville's argument that Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2002) provides

authority for the action taken by the county court in this case. Section 25-2001(3), which section is the result of legislative amendments enacted in 2000, provides authority for trial courts to use an order nunc pro tunc to correct "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission." We find the order of the county court appealed in this case to be significantly different from an order nunc pro tunc to correct a clerical error, inasmuch as the effect of the order appealed in this case is to potentially effect a substantive change in the prior order, not to remedy a mere clerical error. We do not think the present situation is contemplated by the plain language of § 25-2001(3).

[2] In this case, as in *Neujahr v. Neujahr, supra*, the judgment had long since become final prior to the motions to intervene and "clarify" the judgment. *Neujahr* leaves no doubt that the rule in Nebraska is that there is no procedure authorizing a court to "interpret" or "clarify" its prior final orders, and this court must thus find that the county court lacked subject matter jurisdiction to entertain Kratville's motions. Further, although we are mindful of Neb. Ct. R. of Prac. 2E(4) (rev. 2000), we note that this court has previously reached the same result on comparable facts, in a decision that was not designated for permanent publication. See *Kremer v. Kremer*, No. A-91-326, 1993 WL 80602 (Neb. App. Mar. 23, 1993) (not designated for permanent publication). Since the county court was without authority to clarify its prior order, the order of September 26, 2003, must be reversed and the case remanded with directions to dismiss. See *id.*

V. CONCLUSION

The county court was without authority to clarify its prior order. The county court's order of September 26, 2003, must be reversed and the case remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLANT, V. MICHAEL L. ROBINSON, APPELLEE.

687 N.W.2d 15

Filed September 28, 2004. No. A-03-1451.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
3. **Constitutional Law: Speedy Trial.** In determining whether a defendant's constitutional right to a speedy trial has been violated, the court applies a balancing test in which it approaches each case on an ad hoc basis.
4. ____: ____. The four factors of the balancing test for determining whether the constitutional right to a speedy trial has been violated are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.
5. ____: ____. None of the four factors of the constitutional speedy trial balancing test, standing alone, is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.
6. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of such right exist independently of each other.
7. **Speedy Trial.** Every person indicted or informed against shall be brought to trial within 6 months.
8. **Speedy Trial: Waiver.** A defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried.
9. **Speedy Trial: Waiver: Revocation.** When a defendant has waived speedy trial rights, the time from which to determine delay begins anew once the defendant terminates the waiver and reasserts his speedy trial rights.
10. **Constitutional Law: Speedy Trial: Statutes: Waiver.** A defendant cannot have the federal constitutional speedy trial clock running during a period when he has expressly waived his state statutory right.
11. **Constitutional Law: Speedy Trial.** Absent extraordinary circumstances, a defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial.
12. **Speedy Trial: Appeal and Error.** While a motion to discharge on speedy trial grounds is pending, including in the appellate courts, the speedy trial count is stopped.
13. **Speedy Trial: Presumptions.** In a speedy trial analysis, the length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.

14. **Speedy Trial.** In a speedy trial analysis, a deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.
15. **Trial: Courts: Prosecuting Attorneys.** The primary burden to ensure that cases are brought to trial lies with the courts and the prosecutors.
16. **Speedy Trial: Proof.** Failure to assert the right to a speedy trial will make it difficult for a defendant to prove that he was denied a speedy trial.
17. **Speedy Trial.** In a speedy trial analysis, prejudice should be looked at with particularity and should be assessed in the light of the three interests the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.
18. **Speedy Trial: Proof.** In a speedy trial analysis, anxiety or concern by itself does not establish prejudice where the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances.
19. **Attorneys at Law: Stipulations.** The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded with directions.

Stuart J. Dornan, Douglas County Attorney, James M. Masteller, and Casey J. Symonds, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, Brenda J. Leuck, and Kristin Mohrman, Senior Certified Law Student, for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

The State appeals the decision of the district court for Douglas County which granted Michael L. Robinson's motion for absolute discharge based on a violation of his constitutional right to a speedy trial.

FACTUAL AND PROCEDURAL BACKGROUND

On February 12, 2002, the State filed a complaint in the county court for Douglas County alleging that Robinson had committed first degree assault on or about February 11. A preliminary hearing was held, and Robinson was bound over for trial in the district court for Douglas County. On March 26, the

State, by and through a deputy Douglas County Attorney, filed the information charging him in the district court. On August 8, Robinson appeared with counsel before the district court and waived his statutory right to a speedy trial under the speedy trial act, Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1995).

According to the parties' briefs and the trial court's order, on September 9, 2003, a pretrial conference was held, setting trial for November 3. On September 15, Robinson filed a motion to discharge alleging that his constitutional right to a speedy trial had been violated. Following a hearing on the motion to discharge, the trial court sustained the motion and dismissed the information, finding that Robinson's constitutional right to a speedy trial had been violated. The State appeals.

ASSIGNMENT OF ERROR

The State alleges that the trial court erred in sustaining Robinson's motion to discharge and dismissing the State's information on the ground that Robinson's constitutional right to a speedy trial was violated.

STANDARD OF REVIEW

[1] Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

ANALYSIS

[2-5] "The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other." *State v. Feldhacker*, 267 Neb. 145, 156-57, 672 N.W.2d 627, 636 (2004). In determining whether a defendant's constitutional right to a speedy trial has been violated, the court applies a balancing test in which it approaches each case on an ad hoc basis. See *Feldhacker, supra*. In *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the U.S. Supreme Court established the following four factors for a balancing test for determination of whether the constitutional right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the

delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *Feldhacker, supra*. We analyze each factor in turn.

Length of Delay.

[6,7] Although the constitutional right to a speedy trial and the statutory implementation of such right exist independently of each other, § 29-1207 provides a useful standard for assessing whether the length of the delay is unreasonable under the Constitutions, both state and federal. See *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on other grounds, Feldhacker, supra*. Section 29-1207(1) provides that every person indicted or informed against shall be brought to trial within 6 months. Here, the State filed the information on March 26, 2002, charging Robinson with first degree assault. On March 27, Robinson filed a motion for discovery. On July 24, the court entered an order on the State's motion to set a pretrial conference, scheduling the conference for August 8. The information in the record does not contain the date of the actual pretrial conference. The parties' briefs and the trial court's November 21, 2003, order suggest that the pretrial conference did not occur until September 9, 2003.

On August 8, 2002, Robinson appeared before the Douglas County District Court and waived his statutory right to a speedy trial. During the hearing, the court informed Robinson that "everyone who has an Information filed against them in the District Court of Douglas County, Nebraska, or for that matter, anywhere else in the State of Nebraska, has a right to have their case tried within six months of the date that that Information is filed in district court." The court then found that Robinson "underst[ood] his rights under the Speedy Trial Act and that he freely, voluntarily, and intelligently waive[d] his rights under the Act." Robinson's motion to discharge, solely premised on constitutional speedy trial rights rather than statutory grounds, was filed September 15, 2003. According to a praecipe for subpoena found

in our record, trial was set for November 3. However, because the trial court sustained the motion to discharge, trial never occurred.

[8,9] In determining the length of the delay for speedy trial purposes, we first address whether Robinson's waiver of his statutory speedy trial right had any effect on his constitutional speedy trial right. The Nebraska Supreme Court in *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), began by analyzing the statutory speedy trial issues, finding that the defendant had knowingly waived his statutory right and later revoked that waiver. The *Andersen* court held that "a defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried" and that the time from which to determine delay begins anew once the defendant terminates the waiver and reasserts his speedy trial rights. 232 Neb. at 195, 440 N.W.2d at 211. However, in its opinion's separate analysis of the defendant's constitutional speedy trial right, the *Andersen* court found that "any delay in bringing [the defendant] to trial was occasioned by the defendant's waiver of his right to a speedy trial for strategic reasons. After [he] revoked his waiver, the case proceeded to trial in a normal manner and without unreasonable delay." 232 Neb. at 196, 440 N.W.2d at 211. Thus, the *Andersen* court evaluated the *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), factor as to length of delay by using the defendant's waiver of his statutory right to a speedy trial, albeit not directly holding that the time during which a waiver of the statutory right is operating is also time during which the constitutional right to a speedy trial cannot be said to be running or delayed. Nonetheless, as a practical matter, we see the impact of the *Andersen* court's analysis as the suggestion that during the time when the defendant's waiver was effective, he did not want a speedy trial and therefore could not be denied any constitutional right to such a trial.

[10,11] In *State v. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999), we held directly and explicitly what the *Andersen* court had only suggested by implication. In *Alcaraz*, we said that a defendant could not claim a constitutional speedy trial violation while his waiver of his statutory speedy trial right was in effect. In *Alcaraz*, the information was filed on July 1, 1996, and on

December 10, the defendant waived his statutory right to a speedy trial. We found that the defendant's waiver of his statutory speedy trial right was also effective to toll the time for the delay of his constitutional speedy trial right because "there must be consistency between state and federal rights." *Id.* at 220, 590 N.W.2d 418. Thus, we said, a defendant "cannot have the federal [constitutional] speedy trial clock running during a period when he has expressly waived his state statutory right." *Id.* Upon reflection, we perhaps should have said that while the two rights exist independently, there has to be a relationship between the two when the *Barker* balancing test is considered. Our rationale in *Alcaraz*, 8 Neb. App. at 221, 590 N.W.2d at 419, was that absent extraordinary circumstances, a "defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial." We believe this conclusion to be a logical application of the U.S. Supreme Court's statement in *Barker*, 407 U.S. at 532: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

On December 8, 1997, the defendant in *Alcaraz* refused to join with his codefendants in a motion for continuance, and we considered this to have been an assertion of speedy trial rights under the third *Barker* factor and a termination of the defendant's prior waiver for the purpose of assessing his federal constitutional right to a speedy trial. Therefore, because the defendant "actively asserted" his right to a speedy trial and "revoked" his waiver, we measured, for the purpose of his federal constitutional speedy trial right, the length of the delay from December 8, 1997—his reassertion of rights—to the scheduled trial date of July 27, 1998. In the instant case, there is no revocation or reassertion following the earlier waiver of the speedy trial right in the manner as directed by the Nebraska Supreme Court's decision in *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). Moreover, there is no "reassertion" of the federal right as we found in *Alcaraz*.

The Ohio Supreme Court in *State v. O'Brien*, 34 Ohio St. 3d 7, 516 N.E.2d 218 (1987), addressed whether a criminal defendant's written waiver of his right to a speedy trial, as provided in an Ohio state statute, constituted a waiver of speedy trial rights

as guaranteed by the U.S. and Ohio Constitutions. The defendant in *O'Brien* filed a written waiver with the trial court acknowledging that by filing a motion for continuance, he was waiving his statutory right to a speedy trial, and that thus, he expressly waived such right. After he waived his statutory right, unlike the defendant in *Alcaraz, supra*, the *O'Brien* defendant did not object to any continuances sought by the prosecution. Nearly 7 months later, the *O'Brien* defendant filed a motion to dismiss, alleging that he had been deprived of his constitutional right to a speedy trial. The trial court denied such motion, and the defendant appealed.

The *O'Brien* court found that the state statute setting a time limit within which a defendant may be tried was enacted by the Ohio Legislature in order to prescribe reasonable speedy trial periods consistent with the constitutional speedy trial provisions. Thus, the court found that the statutory speedy trial provisions and the constitutional guarantees of a speedy trial "are coextensive." *Id.* at 9, 516 N.E.2d at 220. The Ohio court stated that the constitutional right to a speedy trial may be knowingly and voluntarily waived and that such waiver remains effective until there is a reassertion of the right. The court held:

> [F]ollowing an express written waiver of unlimited duration by an accused of his speedy trial rights the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection to any further continuances and makes a demand for trial, following which the state must bring him to trial within a reasonable time.

Id. at 9, 516 N.E.2d at 221.

[12] Here, Robinson waived his statutory right to a speedy trial on August 8, 2002. However, unlike the defendants in *State v. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999), and *Andersen, supra*, Robinson never "reasserted" his right to a speedy trial or "revoked" or "terminated" his waiver except to the extent that filing his motion to discharge on September 15, 2003, can be so categorized. And, the law is clear that while a motion to discharge on speedy trial grounds is pending, including in the appellate courts, the speedy trial count is stopped. See, *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on*

other grounds, *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002). Thus, after Robinson's waiver, there was no "delay" present in the case, whether for statutory or constitutional purposes, from August 8, 2002, when he filed that waiver, until September 15, 2003, when he filed his motion to discharge. Consequently, the length-of-delay factor clearly favors the State when Robinson's waiver is deemed to apply to the constitutional right to speedy trial. However, recognizing that support for applying the waiver of state statutory speedy trial rights to the constitutional right is skimpy at best in the reported cases, we continue our analysis under the test set out in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)—even though the rather schizophrenic notion that a defendant can waive speedy trial under a state statute (i.e., "I don't want a speedy trial") and at the same time desire a speedy trial for constitutional purposes is troubling.

[13] In *Barker*, the Court said: "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530. The length of the delay in the instant case, ignoring the waiver for discussion purposes, is from March 26, 2002, to September 15, 2003—approximately 2 weeks short of 18 months. Only in *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), has the Nebraska Supreme Court found the length of the delay to be so short as to make it unnecessary to inquire into the other three factors of the *Barker* balancing test. In *Kula, supra*, the length of the delay at issue was only 49 days, and in *Palmer, supra*, it was 17 weeks. While the *Barker* Court expressly rejected the "fixed-time" approach to the calculus of determining constitutional speedy trial issues, 407 U.S. at 529, we find, when we ignore the effect of Robinson's waiver, that we must analyze and balance all four *Barker* factors in the instant case because the delay at issue is in the range where courts have typically found the length of the delay to be presumptively prejudicial. In *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686,

120 L. Ed. 2d 520 (1992), the Court noted that "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." See, also, 4 Wayne R. LaFave et al., Criminal Procedure § 18.2(b) (2d ed. 1999) (citing cases wherein delays of 5, 6 to 7, and 8 months have been found to trigger need to employ balancing of all four *Barker* factors).

Reason for Delay.

The trial court found that the reason for the delay was the failure of the State to bring the case to trial, which failure it characterized as negligence, citing *DeLoach v. State*, 722 So. 2d 512 (Miss. 1998), for the proposition that upon a finding that a delay was presumptively prejudicial, the burden shifts to the prosecution to produce evidence justifying the delay which persuades the court of the legitimacy of its reasons. The trial court then found that the record contained no evidence to justify the delay other than the fact that Robinson waived his statutory right to a speedy trial. As an example, we found in *State v. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999), that the pregnancy of a deputy county attorney could be a good and sufficient reason for at least part of the delay.

[14] The U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), stated that different weights are afforded to different reasons for delay. The *Barker* Court said, "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." 407 U.S. at 531. However, the Court found that a more neutral reason such as negligence or overcrowded courts should be weighted less heavily but still must be considered.

In the present case, at the hearing on the motion to discharge, the State's counsel explained, "The reason for the delay, it wasn't — we don't have a good reason, but we don't have a real bad reason. We weren't delaying it to prejudice [Robinson]. We were just sitting on it or not doing anything." Further, the State conceded that the delay factor "should weigh against the State, but I don't think heavily."

[15] The primary burden to ensure that cases are brought to trial lies with the courts and the prosecutors. See *Barker, supra*. See, also, *State v. Blackson*, 256 Neb. 104, 588 N.W.2d 827

(1999). Therefore, because the State admittedly was negligent in prosecuting this case, this factor favors Robinson.

Assertion of Right.

[16] There is some responsibility upon a defendant to assert his right to a speedy trial, but this is not to say that a defendant has a duty to bring himself to trial or to demand a trial. *Barker, supra.* The only action which Robinson took that could be seen as an assertion of his right to a speedy trial was to file his motion to discharge nearly 18 months after the information was filed. See *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (filing of motion to dismiss may be assertion of rights). However, by filing his statutory waiver, Robinson not only was failing to assert such right, but was indicating to the court that he did not want a speedy trial. Thus, the record shows no action taken by Robinson that may be construed as an assertion of his speedy trial right until the filing of the motion to discharge, which was not filed until after a delay had already occurred. The *Barker* Court stated, "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 532. Therefore, we find that this factor weighs in favor of the State.

The trial court did not discuss or consider this factor in its application of the *Barker* test. Failure to do so was clearly wrong and particularly so in light of the fact that Robinson had waived his statutory speedy trial right—which fact at the very least emphasizes the importance of analyzing this factor to arrive at the correct result.

Prejudice to Defendant.

[17] Prejudice should be looked at with particularity and should be assessed in the light of the three interests the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The last of these is the most serious. *Id.*

[18] First, because Robinson was not incarcerated while awaiting trial, there is no prejudice on that account. Second, some

degree of anxiety and concern exists in every criminal case. *Morris v. Wyrick*, 516 F.2d 1387 (8th Cir. 1975); *State v. Olmsted*, 968 P.2d 1154 (Mont. 1998). However, anxiety or concern by itself does not establish prejudice where the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances. *Id.* And, here there is no evidence that Robinson was particularly disturbed or distressed by the pending charge.

[19] Finally, there is nothing in the record showing that Robinson's defense was impaired by the delay. The trial court stated in its order that "a police report was given to the defense counsel regarding an exculpatory eyewitness on September 26, 2003. The report was prepared on February 15, 2002, which was approximately 19 months later" (we assume "later" should read "earlier"). However, we find nothing in the record to support that finding, and we conclude that such finding by the trial court was clearly erroneous. Our reason is that the basis for this finding was merely argument by Robinson's counsel at the hearing on the motion. The referenced report was not offered as evidence; nor was any witness called to testify to such fact. We have found that " '[t]he unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts.' " *Schroeder v. Barnes*, 5 Neb. App. 811, 813, 565 N.W.2d 749, 750 (1997). Therefore, to the extent that the court found actual prejudice, that finding was clearly erroneous, as the record has no support for the finding. Accordingly, the record fails to support any prejudice to Robinson from the delay, and this factor favors the State.

RESOLUTION

Because the trial court failed to consider one of the four factors set forth in *Barker, supra*, assertion of the right to a speedy trial, and because it wrongfully used matters not of record in making a finding that Robinson was prejudiced by the delay, without which finding there is no evidence of prejudice, we find that the trial court's decision was clearly wrong. Of the four *Barker* factors, the length of the delay and the reason for the delay (when we ignore Robinson's waiver) favor Robinson. The other two factors, assertion of the right and prejudice to the defendant, strongly favor the

State. When the four factors are balanced, it is clear that there was no denial of Robinson's constitutional right to a speedy trial.

CONCLUSION

We find that there has been no violation of Robinson's constitutional right to a speedy trial under the federal or state Constitutions. Therefore, we find that the trial court clearly erred in sustaining Robinson's motion to discharge, and we reverse, and remand with directions to reinstate the charge against Robinson.

REVERSED AND REMANDED WITH DIRECTIONS.

IN-LINE SUSPENSION, INC., AND GARY DETWEILER, APPELLEES AND CROSS-APPELLANTS, V. WEINBERG & WEINBERG, P.C., AND MAYNARD H. WEINBERG, APPELLANTS AND CROSS-APPELLEES.

687 N.W.2d 418

Filed October 5, 2004. No. A-02-1057.

1. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.
2. **Limitations of Actions: Appeal and Error.** While the question of which statute of limitations applies in a particular case should be decided as a matter of law, the point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly erroneous.
3. **Limitations of Actions: Malpractice.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
4. **Contracts.** In the absence of fraud, one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, 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.
7. **Pretrial Procedure: Expert Witnesses.** In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request

for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance.

8. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for a new trial.

Francie C. Reidmann and Thomas A. Grennan, of Gross & Welch, P.C., for appellants.

Terry C. Dougherty and Kara E. Mickle, of Woods & Aitken, L.L.P., for appellees.

INBODY, CARLSON, and MOORE, Judges.

INBODY, Judge.

I. INTRODUCTION

In-Line Suspension, Inc. (In-Line), and Gary Detweiler filed a professional negligence action against Weinberg & Weinberg, P.C. (the law firm), and Maynard H. Weinberg for alleged malpractice in revising In-Line's employee pension plan. Following a trial, the jury found in favor of In-Line and Detweiler and awarded damages in the amount of $46,293.33. The law firm and Weinberg have appealed the verdict on several grounds.

II. STATEMENT OF FACTS

Detweiler is the president of In-Line, a business specializing in brake work, installation of shocks, performing alignments, and repairing and rebuilding suspension systems of cars, trucks, motor homes, and trailers. In-Line is a Nebraska subchapter S corporation, and Detweiler and his wife are the sole stockholders of In-Line.

In-Line employs between 8 and 11 employees. The employees can be separated into two groups, salaried employees and sales personnel who receive commissions based on the amount of their sales. As a general rule, the commissioned employees receive

larger amounts of income than the salaried employees. In the mid-1980's, Detweiler decided to create a pension and profit-sharing plan as a benefit for In-Line's long-term salaried employees in appreciation for their hard work and loyalty. Detweiler approached his personal investment advisor, Rob Nixon, who was then a stockbroker, about creating such a pension and profit-sharing plan. Nixon recommended Weinberg to draft the pension plan documents. Weinberg is an attorney licensed to practice law in Nebraska and Iowa and at all times pertinent hereto practiced with the law firm, specializing in employee retirement law.

In 1986, Detweiler contacted Weinberg by telephone and retained him to draft an individually designed pension and profit-sharing plan. Weinberg drafted the initial 69-page plan and a 12-page adoption agreement for In-Line and mailed those documents to Detweiler for execution. Under the initial plan drafted by Weinberg, the plan was available to all employees except commissioned employees. On October 13, Detweiler and his wife signed the plan and adoption agreement as trustees and officers of In-Line, with the plan and adoption agreement being retroactively effective to July 1, 1986. The Internal Revenue Service approved the plan on or about April 7, 1987.

In 1990, Nixon felt that In-Line needed to include one commissioned employee as a salaried individual to make the plan qualify for that year. Although Detweiler was uncomfortable with it, he did follow Nixon's suggestion. Weinberg amended the plan accordingly to state:

> The Plan is extended by the company to:
>
> . . . All employees of the company, excluding all commissioned employees. [As of July 1, 1989, Doug Fulton is considered salaried, as are all commission people. This is a test program. They may revert to commission status. Currently, only one former commission salesperson is in the plan—Doug Fulton.]

Weinberg sent the 1990 amendment to In-Line, and it was signed by both Detweiler and his wife as trustees and officers of the corporation. In 1991, employee Doug Fulton, named in the amendment, went back to being considered a commissioned employee.

In 1994, Nixon ceased serving as In-Line's pension plan administrator and In-Line transferred the plan's administration duties to Vanee Jones. At that time, Detweiler provided to Jones what he understood to be a copy of the current In-Line plan documents. As the plan's administrator, Jones was responsible for calculating the plan contributions that should be made each year for each employee. These contributions were made each year through 1998, for all qualified personnel, pursuant to the terms of the plan as Detweiler understood them.

On May 20, 1997, Weinberg forwarded to In-Line, for signed approval, an amended plan consisting of 101 pages and an adoption agreement consisting of 24 pages. When Weinberg did not receive the signed documents in return, he sent a followup letter on June 18 advising Detweiler, "If you did not receive the plan revisions or there are changes or deletions, please contact us immediately. If you have any questions, please feel free to call."

Shortly after receiving the June 18, 1997, letter, both Detweiler and his wife signed the documents as trustees and officers of In-Line and returned the originals to Weinberg. The amended adoption agreement as signed by the Detweilers, which provided for extension of the plan to all employees without exception, became effective on July 1.

In the early part of 2000, Jones inquired as to whether an updated plan existed, at which time Detweiler provided her with a copy of the 1997 plan and adoption agreement from his files. Shortly thereafter, Jones informed Detweiler that the 1997 plan and adoption agreement included commissioned employees and that In-Line had been excluding commissioned employees in its pension contribution.

As a result of In-Line's failure to comply with the 1997 plan changes, In-Line was required to make contributions for 1997 and 1998 for its commissioned employees plus pay fees assessed by the Internal Revenue Service and interest on the delayed contributions. In-Line also incurred legal fees for redrafting of the plan to exclude commissioned employees. Also, the decision was made not to make a contribution in 1999 for any of In-Line's employees, including Detweiler, in order to avoid an additional year's contribution for the commissioned salespeople.

On November 21, 2000, Detweiler and In-Line filed a professional negligence action against Weinberg and the law firm for alleged malpractice in drafting revisions to In-Line's plan in that the revisions drafted by Weinberg brought coverage under the plan to commissioned employees who had not previously been covered and for whom Detweiler did not intend to make pension contributions. The petition further alleged that said revisions were not legally required and that Weinberg failed to adequately warn or advise Detweiler of the effect of the revisions, to wit, that In-Line would be required to make pension contributions for employees for whom Detweiler did not intend to make such contributions.

Detweiler and In-Line sought total special damages of $55,458 consisting of damages of $38,833 for the pension contributions for employees brought into the plan by the revisions, $10,125 for loss of value to Detweiler and In-Line in the amount that would have been contributed to the plan in 1999, and $6,500 in costs and fees, including incurred and anticipated legal and accounting fees and fees paid to the Internal Revenue Service to investigate or revise the plan to correct the problems created by the revisions.

Weinberg and the law firm answered the petition, generally denying the allegations, including that of a violation of the standard of care, and further alleging that Detweiler and In-Line's claims were barred by the statute of limitations and that Detweiler and In-Line's own negligence was the proximate cause of any loss or damage suffered. Weinberg and the law firm then filed an amended answer which reiterated the allegation that Detweiler and In-Line's injuries and damages, if any, were proximately caused by the conduct of third parties over whom Weinberg and the law firm exercised no control or right of control.

On February 1, 2001, the district court filed a progression order which provided, in pertinent part:

> 7. **Expert Witnesses.** At least 90 days prior to November 30, 2001, any party who intends to call an expert as a witness in the case shall disclose the expert to all opposing parties. Any expert who is to be called solely to respond to the testimony of an expert witness of an opposing party must be

> disclosed to all opposing parties at least 60 days prior to November 30, 2001. The disclosures required in this paragraph shall identify the proposed expert, including, without limitation, the name, address, phone number, curriculum vitae and a listing of all publications authored by the expert which contain any discussion of concepts the expert will use in expressing his or her opinions in this case. The disclosure shall further contain a complete statement of the opinion to be rendered and the basis therefor.

On August 28, 2001, pursuant to the progression order, Weinberg and the law firm designated Stuart M. Lewis as an expert witness and attached to the designation document the following items: Lewis' curriculum vitae, a list of publications authored by Lewis, and a report authored by Lewis setting forth the opinions to be rendered by Lewis and the basis for such opinions. In the report, Lewis concluded that "Weinberg fully complied with the standard of care applicable in this circumstance to a lawyer on matters involving pension plans."

On September 13, 2001, Weinberg and the law firm filed a motion for summary judgment which was denied by the court on October 22. Trial in this matter was held on May 28 through 31, 2002. Detweiler testified that he never spoke to Weinberg about the possibility of altering the plan's scope of coverage and did not discover that the plan had been amended to include commissioned employees until February or March 2000, when Jones brought the revision to his attention.

Also as part of their case in chief, Detweiler and In-Line called Greg Renz, an employee benefits attorney, to testify as an expert witness. Renz testified that based on Detweiler's description of the communications between himself and Weinberg surrounding the 1997 revisions to the plan, his opinion was that Weinberg breached the standard of care for attorneys both in drafting the plan documents to include commissioned employees when this was against Detweiler's wishes and in failing to alert Detweiler of this change in one of the basic plan provisions.

At the close of Detweiler and In-Line's case in chief, Weinberg and the law firm moved for a directed verdict in part upon the bases that Detweiler and In-Line's damages were solely

and proximately caused by their own negligence and that the statute of limitations had run. This motion was denied, and Weinberg and the law firm presented their evidence.

Weinberg testified that in 1997, he recommended a standardized plan to include all employees, in order for In-Line to avoid potential federal violations dealing with highly compensated employees. According to Weinberg, Detweiler agreed with that recommendation. Further, according to Weinberg, prior to the 1997 amendment, In-Line never advised him that it was reverting to treating commissioned salespeople as anything other than salaried employees.

In Weinberg and the law firm's case in chief, Lewis was called to testify as an expert witness. Lewis is an attorney who concentrates on both tax work and employee benefits work. On the basis that Lewis' reports did not address the issue of what constituted the applicable standard of care, Detweiler and In-Line's counsel objected to any testimony by Lewis regarding the applicable standard of care and whether Weinberg met that standard. The court sustained the objection, stating, "I do not view that these reports address [the] standard of care that [was] required of . . . Weinberg." Further, the court stated, with regard to exhibit 181, the report in which Lewis concluded that Weinberg did meet the standard of care, "I don't see that it addresses what the standard of care is. It addresses what happened and it addresses conclusions that [Lewis] has drawn from what he has been informed, but it does not address what is the standard of care in this situation."

In response, Weinberg and the law firm's counsel offered Lewis' deposition, which contained the following questions by Detweiler and In-Line's counsel and answers by Lewis:

> Q I would assume, and correct me if I'm wrong, that you would be of the opinion that if a practitioner were going to change a plan from a nonprototype plan to a standardized prototype plan . . . you would want that practitioner to advise his or her client of that fact, correct?
>
> A I think that would be the best course of conduct. Yes.
>
> Q Would you expect such a pension practitioner operating within the applicable standard of care to so advise his or her client?

A Typically. There might be exceptions. If, keeping in mind that the person that's presented with a document that they should be reading, especially if they are going to be a fiduciary of the document, I think there is a certain duty on the person executing the document to be aware of what's in the document. And so to some degree just giving him a document is giving him notice of a change. But the best course of conduct would be to specifically bring it to their attention.

. . . .

Q . . . If you are changing someone from an individually designed plan to a standardized prototype plan, you would provide that plan owner with notice of that change, correct?

A Certainly.

Q You would do that by some method other than simply presenting them with the document and saying go read it; wouldn't you?

A Typically yes.

Q Have there been instances when that was all you provided them was just say here's the plan as I want to do it. Go read it?

A It's a matter of degree and issue in the sense that there are — whenever you redo a document there are a multiple [sic] of changes. Some are very subtle, some are more dramatic. I certainly would make an effort to give them some notification separate from the document of the more dramatic changes but I wouldn't necessarily try to tell them each and every change in the document. I would rely on the client. What I typically do is I provide them with the document, and then I offer to meet with them, and go through the document line by line if they want to review every change in the document, or if they have questions about it and so forth. But I would bring to their attention major changes, yes.

Q But would you classify going from excluding particular classifications of employees into inputting them to be a major change?

A Typically yes.

Q If you are going through the trouble of writing someone a letter outlining changes that you had made to their plan and one of those changes was that now whereas certain

categories of employees were excluded they are now going to be included. Wouldn't you include that in this written letter that you would give to your client?

A If the letter is intended to be comprehensive, yes. I mean, if I'd had an extensive discussion or I had felt the matter had been already covered, it's possible that I wouldn't raise it in the letter.

Other questioning of Lewis by Detweiler and In-Line's counsel dealt with the standard of care:

Q . . . What would you have done if you had requested data, whether it be census data and employee biographical information, whatever, from In-Line . . . and it had not been provided and therefore you did not have the information you needed to assess the plan's ability to meet minimum coverage requirements. What would you have done?

A I'm not sure what I would have done, but I think what . . . Weinberg did was certainly reasonable to provide a document that will qualify. They still had the option of saying we don't want to do that. . . .

Q Well you are going to testify as an expert witness and I guess what I want to know is whether or not you will be opining about whether it was or was not reasonable for . . . Weinberg to do what he did when he did not receive, as he alleges, the requested information. Will you be opining on that?

A If asked, I will opine that I think that was a reasonable course of conduct.

Q To provide a standardized prototype plan?

A Yes.

Q In that situation, we talked earlier about the fact of whether or not you would point out the change that was being made. I assume if your response to not getting data was to provide a standardize[d] prototype plan, if anything that makes it more important to point out the changes in the plan, correct?

A I agree that . . . the advisable course of conduct would be to point out the major changes.

> Q Would you expect a practitioner operating within the applicable standard of care to so advise their client in that circumstance?
>
> A As I answered I think earlier on, generally, yes. I mean you have to look at it in the context of the situation but I think generally yes. I mean the person does have the plan document which raises the point itself but the best course of conduct would be to point it out specifically. So make sure the client was aware of it.

Detweiler and In-Line's counsel further questioned Lewis:

> Q Do you have any opinions as to whether or not . . . Weinberg's communication with his clients met the applicable standard of care in this particular situation?
>
> A Based on the pleadings and the assumptions that we've already talked about, my opinion is that it did meet the applicable standard of care.

The district court maintained its ruling, stating:

> I will refer to the progression order that was entered in this case on February 8th of 2001, paragraph 7, it says: "The disclosure shall further contain a complete statement of the opinion to be rendered and the basis therefor."
>
> And in my view the contents of [the exhibit 181] report do not include any opinion on this by [Lewis] as to what the standard of care ought to be in this circumstance.

Weinberg and the law firm's counsel made an offer of proof that if allowed to testify, Lewis would testify that "Weinberg totally complied with the standard of care applicable in the circumstances to a lawyer on matters involving qualified retirement plans."

At the close of all of the evidence, Weinberg and the law firm renewed the motion for a directed verdict, which was again denied by the court. During the jury instruction conference, Detweiler and In-Line requested that the jury be instructed that one element of the damages to be considered was the additional federal and state income tax that In-Line was required to pay for the taxable year 1999 because there was no pension plan contribution made to the account in 1999.

On May 31, 2002, the jury returned a verdict for Detweiler and In-Line, awarding damages of $46,293.33. In so doing, the jury necessarily found against Weinberg and the law firm on their claim that Detweiler and In-Line's claims were barred by the applicable statute of limitations.

On June 10, 2002, Weinberg and the law firm filed a motion for remittitur and judgment notwithstanding the verdict or, in the alternative, for new trial. On August 14, the district court denied this motion in its entirety. Weinberg and the law firm have timely appealed to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Weinberg and the law firm's assignments of error, consolidated and restated, are as follows: The trial court erred in (1) overruling their motion for summary judgment, (2) failing to find that Detweiler and In-Line's petition was barred by the statute of limitations as a matter of law, (3) excluding Lewis' expert testimony regarding the applicable standard of care, and (4) failing to grant their motion for directed verdict or their motion for judgment notwithstanding the verdict on the basis that Detweiler's failure to read the adoption agreement or seek interpretation of it was the proximate cause of Detweiler and In-Line's damages. Weinberg and the law firm further contend that the damages awarded by the jury do not reflect tax consequences and are therefore excessive and that consequently, the district court erred in overruling Weinberg and the law firm's motion for remittitur or for new trial on this basis.

On cross-appeal, Detweiler and In-Line contend that the district court erred in failing to give a requested jury instruction regarding In-Line's additional federal and state income tax liability for 1999.

IV. ANALYSIS

1. Appeal

(a) Denial of Motion for Summary Judgment

[1] Weinberg and the law firm's first assignment of error is that the district court erred in denying their motion for summary judgment. This issue is not properly before this court because " '[t]he denial of a summary judgment motion is neither appealable nor

reviewable.' " *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 208, 655 N.W.2d 855, 862 (2003) (quoting *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000)). Therefore, we decline to consider this assigned error.

(b) Statute of Limitations

Weinberg and the law firm's next assigned error is that the trial court erred in failing to find as a matter of law that Detweiler and In-Line's petition was barred by the statute of limitations.

Neb. Rev. Stat. § 25-222 (Reissue 1995) provides, in pertinent part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

[2,3] While the question of which statute of limitations applies in a particular case should be decided as a matter of law, "[t]he point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly erroneous." *McGinley v. McGinley*, 7 Neb. App. 410, 412-13, 583 N.W.2d 77, 79 (1998). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

In the instant case, the district court determined as a matter of law that the professional negligence statute of limitations applied. Since the action was not filed by Detweiler and In-Line within the 2-year statute of limitations period, the question then becomes whether the discovery exception is applicable. Weinberg and the law firm argue that the discovery exception is

not applicable, because the change in the plan that constitutes the alleged act of professional negligence could have been discovered during the 2-year statute of limitations period if Detweiler had read the documents provided to him.

[4] A similar situation was considered by the Nebraska Supreme Court in *Interholzinger v. Estate of Dent*, 214 Neb 264, 333 N.W.2d 895 (1983), wherein the court discussed the issue of whether the discovery exception to the statute of limitations applies where a client signs an instrument without reading it. The court set forth the boilerplate law that "in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument." *Id.* at 271, 333 N.W.2d at 899. Thus, the court charged one plaintiff with knowledge of a document listing property for sale which he signed, regardless of whether he read the document. However, the court determined that it was inappropriate to grant summary judgment based on the discovery rule where there was a question of fact concerning a different plaintiff's inability to read the document. Compare *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985) (discovery exception not applied in legal malpractice case where husband knew from date when property settlement agreement was signed that he was named as owner of undivided one-half interest in certain real estate as tenant in common and "discovery" allegedly occurred when ex-wife as other tenant in common filed partition action).

The instant case differs from *Interholzinger v. Estate of Dent, supra*, and *Smith v. Ganz, supra*, because there is no evidence that Detweiler was unable to read the plan documents. However, since the instant case involves complex legal documents, we consider whether complexity may be considered in whether the general rule should be applied.

In *Medtech. Corp v. Indiana Ins. Co.*, 555 N.E.2d 844 (Ind. App. 1990), the Indiana Court of Appeals held that while an insured generally has a duty to become familiar with the contents of an insurance policy, an insured's reasonable reliance upon an agent's representations which contradict the terms of the policy may circumvent the insured's obligation to read the policy. The court reasoned that given the complexity of insurance documents,

an insured should not be held to have read the terms of an insurance policy at least when an insurance agent has made representations as to the contents of the policy which conflict with the express terms of the policy. Since the court concluded that it could not determine as a matter of law that an insured's reliance upon such representations was unreasonable, it accordingly held that whether such reliance is reasonable is a question of fact.

In the instant case, there is no question that the documents involved were complex. Further, although Detweiler and In-Line claim that Weinberg did not inform Detweiler of changes in the plan, Weinberg testified that he did have conversations with Detweiler regarding adding commissioned employees to the plan and that Detweiler approved the changes to the plan. Thus, the instant case presented a factual question which the district court properly left for the jury to decide. Consequently, the trial court did not err in refusing to decide the statute of limitations issue as a matter of law.

(c) Expert Testimony Regarding Standard of Care

Next, Weinberg and the law firm contend that the trial court erred in excluding testimony from Lewis regarding the applicable standard of care and that the court should have granted their motion for a new trial on the basis of this wrongly excluded evidence.

[5,6] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, 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. *Perry Lumber Co. v. Durable Servs., supra.*

At trial, Detweiler and In-Line's counsel objected to any testimony by Lewis regarding whether Weinberg met the standard of care for attorneys in the circumstances herein, on the basis that Lewis' reports did not address the issue of what constituted that

standard. The court sustained the objection because the court likewise did not view the reports as addressing what constituted the standard of care required of Weinberg. In response, Weinberg and the law firm's counsel offered Lewis' deposition, but the court maintained its ruling because the earlier progression order had required a complete statement of the opinion to be rendered and the basis of that opinion but the court found that Lewis' report did not include any opinion as to what the standard of care ought to have been.

[7] We believe that this situation is best analyzed within the framework of a discovery violation.

> In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance.

Norquay v. Union Pacific Railroad, 225 Neb. 527, 540, 407 N.W.2d 146, 155 (1987). Accord *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993).

In the instant case, there was no element of surprise. Lewis' report stated his opinion that Weinberg met the standard of care, and Detweiler and In-Line's counsel questioned Lewis during the deposition regarding the standard of care. Further, the importance of the standard of care in this case is highlighted by Detweiler and In-Line's counsel's statements during closing argument:

> Standard of care. The evidence in this case is unrebutted that . . . Weinberg, if you believe . . . Detweiler's factual basis . . . did not meet the standard of care. And there is specific testimony from . . . Renz on that. [Weinberg] changed [the plan documents] without getting [Detweiler's] permission, he changed them when that change was not required by the law and he failed to give [Detweiler] warning of that.

[8] The exclusion of Lewis' testimony regarding the standard of care deprived Weinberg and the law firm of a substantial

right, and thus, it follows that the trial court erred in overruling their motion for a new trial. "A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred." *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 957, 653 N.W.2d 813, 818 (2002). Consequently, the trial court's decision must be reversed and this matter remanded for a new trial.

(d) Other Issues Raised by Weinberg and the Law Firm

[9] Weinberg and the law firm also assigned as error that the district court erred in failing to grant the motion for directed verdict or the motion for judgment notwithstanding the verdict. Weinberg and the law firm also claim that the district court erred in overruling the motion for remittitur or for new trial, because the damages awarded by the jury do not reflect tax consequences and are excessive. Having found that we must reverse and remand, we need not address these issues. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

2. Cross-Appeal

On cross-appeal, Detweiler and In-Line contend that the district court erred in failing to give a requested instruction regarding In-Line's additional federal and state income tax liability for 1999 which was incurred because no pension plan contribution was made to the account in 1999. Having found that we must reverse and remand, and since we do not know what evidence will be presented upon retrial, we do not address this issue. See *Kelly v. Kelly, supra* (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

V. CONCLUSION

Having found that the district court erred in excluding Lewis' expert testimony regarding the standard of care, we must reverse the court's decision and remand the cause for a new trial.

Reversed and remanded for a new trial.

STATE OF NEBRASKA, APPELLEE, V. CRAIG A. SCHULTE, APPELLANT.

687 N.W.2d 411

Filed October 5, 2004. No. A-03-1235.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Constitutional Law: Pleas: Proof: Waiver.** A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him or her, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
4. **Prior Convictions: Pleas: Drunk Driving.** For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002), the record must show that the defendant entered the guilty plea to the charge.

Appeal from the District Court for Cedar County, MAURICE REDMOND, Judge, on appeal thereto from the County Court for Cedar County, PAUL R. ROBINSON, Judge. Judgment of District Court affirmed.

Scott A. Gray, of Jewell, Collins, DeLay & Gray, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

INBODY, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Craig A. Schulte appeals from an order of the district court for Cedar County, Nebraska, which affirmed his Cedar County Court conviction for third-offense operating a motor vehicle while under the influence of alcoholic liquor (DUI), resisting arrest, no proof of financial responsibility, and a stop sign violation. On appeal, Schulte raises issues relating to the enhancement of his DUI conviction to third offense. For the reasons set forth herein, we affirm.

BACKGROUND

Pursuant to an amended complaint filed January 9, 2003, Schulte was charged with the following four counts: (1) third-offense DUI, a Class W misdemeanor, in violation of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002); (2) resisting arrest, a Class I misdemeanor, in violation of Neb. Rev. Stat. § 28-904 (Cum. Supp. 2002); (3) no proof of financial responsibility, a Class II misdemeanor, in violation of Neb. Rev. Stat. § 60-321 (Reissue 1998); and (4) failure to stop at a stop sign, a traffic infraction, in violation of Neb. Rev. Stat. § 60-6,148 (Reissue 1998).

On January 15, 2003, as part of a plea agreement, Schulte pled guilty to all four counts of the amended complaint, although he reserved the right to object to the prior DUI convictions proffered by the State at the enhancement stage of the proceedings. After the prosecutor recited the factual basis for Schulte's plea, with which facts Schulte agreed, the court found that there was a sufficient factual basis and that Schulte entered his plea of guilty to each count knowingly, freely, intelligently, and voluntarily. The court then conducted an enhancement hearing.

During the enhancement hearing, the State offered exhibit 1, a certified copy of documents related to Schulte's 1998 conviction for DUI in Cedar County, which exhibit was received by the court without objection. Exhibit 1 shows that Schulte was represented by counsel at the time of the 1998 plea and sentencing. The State also offered exhibit 2, a certified copy of documents related to Schulte's 1996 conviction for DUI in Yankton County, South Dakota. Exhibit 2 shows that although Schulte was represented by an attorney during the South Dakota proceeding,

Schulte did not appear personally to plead guilty to the DUI charge. Rather, the guilty plea was entered by Schulte's attorney, through use of a power of attorney as permitted under South Dakota law. See S.D. Codified Laws § 23A-7-5 (Michie 1998) (allowing attorney to enter plea for defendant charged with misdemeanor, which may be accepted by court after court's inquiry into whether attorney has advised defendant of his or her rights as per S.D. Codified Laws § 23A-7-4 (Michie 1998)).

Exhibit 2 contains a copy of the information charging Schulte, the power of attorney statement from Schulte's attorney, and the judgment of conviction. The power of attorney document shows that Schulte's attorney appeared before the court on Schulte's behalf and upon his authorization to enter a guilty plea to the DUI charge. The power of attorney document also reveals that Schulte's attorney had advised Schulte of and determined that Schulte understood the following: (1) the nature of the charge and the possible penalties; (2) that he had a right to be represented by counsel at every stage of the proceedings and that an attorney would be appointed to represent Schulte if necessary; (3) that he had the right to plead not guilty or to persist in such a plea if it had already been made and that he had the right to assistance of counsel, the right to confront and cross-examine witnesses, the right against self-incrimination, and the right to compulsory process; (4) that he had the right to a speedy public trial; and (5) that if he pled guilty or nolo contendere, there would not be a further trial, and that by entering such pleas, he would waive the right to a trial, the right to confront and cross-examine witnesses, and the right against self-incrimination. The power of attorney document also set forth the factual basis for Schulte's plea. The judgment of conviction document shows that Schulte's attorney appeared at the arraignment, that the court advised Schulte of all constitutional and statutory rights pertaining to the charge (presumably indirectly by way of the power of attorney document, because Schulte himself was not present), and that Schulte, by way of power of attorney, pled guilty to the DUI charge. The South Dakota court determined that Schulte had been "regularly held to answer for [his] offense"; that the plea was voluntary, knowing, and intelligent; that competent counsel represented Schulte; and that a factual basis existed for the plea.

Schulte objected on two bases to the use of exhibit 2 to enhance his present DUI conviction to third offense. First, Schulte objected to the use of exhibit 2 because exhibit 2 does not show that Schulte appeared personally in front of the South Dakota court. Schulte's counsel argued, relying on *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983), that Nebraska law requires the court to have a personal dialog with a defendant who enters a guilty plea to ensure that the plea was entered knowingly and understandingly. Second, Schulte argued that the record contained in exhibit 2 regarding his South Dakota conviction did not make it clear that the South Dakota conviction would have been a violation of Nebraska law, as required by § 60-6,196(3)(c). Schulte has not pursued that argument on appeal. The county court took the matter under advisement and subsequently received exhibit 2 into evidence for enhancement purposes.

Following a sentencing hearing, the county court entered an order on February 27, 2003. The court enhanced Schulte's DUI conviction to third offense. For that conviction, the court ordered Schulte to pay a fine of $600, sentenced Schulte to serve 90 days in the county jail, ordered the loss of Schulte's driver's license for 15 years, and ordered the suspension of all plates and registration on vehicles owned by Schulte for a period of 8 months. For Schulte's resisting arrest conviction, the court sentenced him to 30 days in the county jail, to be served consecutively to the jail time served on the DUI conviction. The court ordered Schulte to pay a $150 fine for his conviction of no proof of financial responsibility and ordered him to pay a $50 fine for his conviction on the stop sign infraction. The court also ordered Schulte to pay costs.

Schulte appealed to the district court for Cedar County from the county court's determination to enhance his DUI conviction to third offense based on the prior South Dakota plea-based conviction. The district court noted that Schulte was represented by counsel at all stages of the South Dakota proceeding, that Schulte elected not to appear personally but appeared through his counsel, and that Schulte's counsel certified to the South Dakota court that all rights were given to Schulte in accordance with South Dakota law. The district court found *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), to be dispositive of the instant appeal and concluded that based on its reading of *Louthan*, the only

challenge a defendant can make to a prior plea-based conviction offered for purposes of enhancement is the lack of an attorney and no waiver of counsel on the record. The court found that because Schulte was represented in the South Dakota case by counsel at all stages of the proceedings, that conviction could not be collaterally attacked. The district court affirmed the county court's decision to use the South Dakota conviction to enhance Schulte's DUI conviction to third offense. Schulte subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Schulte asserts that the district court erred in affirming the county court's decision to use his prior South Dakota DUI conviction to enhance his latest DUI conviction to third offense.

STANDARD OF REVIEW

[1] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

ANALYSIS

Schulte asserts that the district court erred in affirming the county court's decision to use his prior South Dakota DUI conviction to enhance his latest DUI conviction to third offense. Schulte argues that the South Dakota conviction is invalid for enhancement purposes because he was not personally present to enter his plea and because there was no direct dialog between the South Dakota court and him to show that he entered his plea knowingly and understandingly. In support of this assertion, Schulte relies on *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983), and *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). Before examining Schulte's assertions regarding these

two cases, which we find to be distinguishable from the present case, we first set forth the requirements for a valid guilty plea.

[3] A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him or her, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

In *State v. Luther, supra*, the defendant, following nolo contendere pleas, was sentenced on two counts of third degree sexual assault. On appeal, the defendant asserted that the district court had erred in finding that he knowingly and voluntarily waived his rights at the time of the pleas. The record shows that the defendant appeared with his counsel before the county court for arraignment, that the court advised the defendant of his constitutional rights, that the defendant stated he understood his rights, and that the defendant pled not guilty. On the date of the scheduled trial, the court was informed that a plea bargain had been reached in which the defendant would plead nolo contendere to the charges and the State would recommend a fine and probation and would not file other criminal charges. The State recited a "sketchy" factual basis for the charges, and the defendant's counsel entered nolo contendere pleas to each count. *Id.* at 477, 329 N.W.2d at 570. The defendant's counsel indicated, upon

the court's inquiry, that the pleas were made willingly and understandingly and that the defendant understood that he was subject to the same provisions as those that flow from a guilty plea. The record did not show any conversations directly between the judge and the defendant, who was present.

The Nebraska Supreme Court in *Luther* noted that before accepting a guilty plea, the judge is expected to examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. The *Luther* court concluded that because the record failed to show that the county judge examined the defendant in the required manner at the time the pleas were entered on his behalf, it could not find that the pleas were entered knowingly and understandingly by the defendant. The *Luther* court reversed the district court's affirmance of the county court's sentences and remanded the matter for further proceedings.

In *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987), the defendant appealed his convictions and sentences on one count of attempted possession of a controlled substance and one count of DUI, to which counts he entered guilty pleas. The DUI conviction was enhanced to third offense. At the enhancement hearing, the State offered evidence of two alleged prior DUI convictions. The defendant did not object on foundation to these exhibits, but he did challenge the validity of one of the prior convictions. The defendant argued that the 1982 conviction was not valid for enhancement purposes because his guilty plea in that proceeding was not knowingly, voluntarily, and intelligently entered. The exhibit containing the documents relevant to the 1982 conviction showed that the defendant was present with his attorney at a hearing and was informed of his rights, that a not guilty plea was entered, and that the matter was set for trial. When the 1982 matter came on for trial, the defendant was represented by his attorney. An in-chambers hearing was held during which the defendant's attorney withdrew the not guilty plea and entered a guilty plea. The defendant testified at the enhancement hearing in the case at issue in his appeal that he never entered a plea in the 1982 proceedings. However, the trial court accepted the 1982 conviction for enhancement purposes and sentenced the defendant for a third-offense DUI conviction.

[4] On appeal, the Nebraska Supreme Court in *Slezak* determined that the enhancement of the defendant's sentence was improper. The *Slezak* court noted that the record did not show that the defendant entered any plea to the 1982 charge, did not state that he was present when the plea was made, showed that his counsel entered for him a plea of guilty to the charge, and did not show whether the defendant was informed by the trial court as to the plea. The court noted that there were no allegations before it that the defendant's attorney was acting on the defendant's directions or that he ratified the plea made by his attorney, and thus, the court did not consider such questions. The court adhered to its prior rulings that the State's burden in proving a valid prior conviction for enhancement purposes is only to show that the defendant had counsel or knowingly and voluntarily waived counsel at the time of such conviction. *State v. Slezak, supra*. The court added that for a prior conviction based on a plea of guilty to be used for enhancement purposes in a DUI action, the record must show that the defendant entered the guilty plea to the charge. *Id.* The *Slezak* court reversed the defendant's DUI conviction and remanded the cause for further proceedings.

In the present case, we find, as did the district court, that *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), is applicable. The *Louthan* court set forth a detailed and complex analysis of the evolution of jurisprudence concerning challenges to plea-based convictions and their use in enhancement proceedings, which we do not repeat here. We do note, however, that in *Louthan*, the Nebraska Supreme Court overruled a number of its prior cases to the extent that those cases held that a prior conviction sought to be used for enhancement in a DUI prosecution could be collaterally attacked in a separate proceeding.

The *Louthan* court held that the only statutory procedure for challenging a prior DUI conviction offered for purposes of enhancement is that set forth in § 60-6,196(3). The Nebraska Supreme Court has construed this statutory language as permitting only a "first-tier challenge," or one based upon denial of Sixth Amendment rights. *State v. Louthan*, 257 Neb. at 186, 595 N.W.2d at 925. See *State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000) (noting that first-tier challenges are those that can be asserted by general objection in enhancement proceeding and

limited to challenge based upon denial of Sixth Amendment right to counsel). The court went on to state that there is no procedure in Nebraska for asserting second-tier challenges to prior plea-based DUI convictions and that thus, unless such a procedure is constitutionally mandated, it is unauthorized and therefore unavailable under Nebraska criminal procedure. *State v. Louthan, supra.* See *State v. Kuehn, supra* (second-tier challenge based on *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), addresses any or all of panoply of rights). See, also, *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989) (second-tier challenge cannot be made by general objection during enhancement proceeding because such objection constitutes collateral attack on prior conviction). *Oliver* was overruled by *State v. Louthan, supra*, to the extent that *Oliver* suggests that a prior DUI conviction used for enhancement can be collaterally attacked in a separate proceeding as opposed to on direct appeal. The *Louthan* court noted that a person who is convicted on the basis of a guilty plea has a right to appeal on the ground that the plea was not knowing and voluntary. Finally, the *Louthan* court concluded that the due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based DUI conviction and the procedure set forth in § 60-6,196(3), which permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel.

In the present case, Schulte argues that to allow enhancement based on the South Dakota conviction would be a violation of Nebraska public policy in that the South Dakota procedure allows entry of a guilty plea by a defendant's attorney without the defendant's presence and without direct colloquy between the defendant and the trial judge. Schulte essentially argues that the record of his plea in the South Dakota conviction is insufficient to show that Schulte's plea was entered voluntarily, knowingly, and intelligently, and with an understanding of the consequences of such a plea. It is true that the principles set forth in *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983), and *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987), the cases relied on by Schulte, are valid Nebraska law. However, the arguments

raised by Schulte based on these two cases are akin to the second-tier challenges prohibited by *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), as impermissible collateral attacks. As such, we need not address them further in the present appeal. If Schulte had wanted to raise a second-tier challenge to the South Dakota proceedings, or to challenge the constitutionality of the South Dakota statute allowing a defendant's attorney to enter guilty pleas in misdemeanor cases on a defendant's behalf by means of power of attorney, the time to do so was during the South Dakota proceedings followed by such direct appeal as Schulte then saw fit to bring. Schulte's due process rights were satisfied by the availability of such procedure, and to challenge the validity of the South Dakota conviction during the present enhancement proceeding on grounds other than Sixth Amendment grounds is to make an impermissible collateral attack on the South Dakota conviction.

In sum, the record shows that for purposes of the present enhancement, the requirements for a valid guilty plea in South Dakota were met. The record clearly shows that Schulte was represented by counsel at the time of the South Dakota plea and that his attorney was authorized by Schulte to enter a guilty plea on his behalf. Schulte has no basis to raise a first-tier challenge to the South Dakota conviction, and the time has passed for the second-tier challenge Schulte attempts to raise in the present appeal. We find that the district court did not err in affirming the county court's decision to use the South Dakota conviction to enhance Schulte's present Nebraska DUI conviction to third offense.

CONCLUSION

The district court did not err in affirming the county court's decision to use the South Dakota conviction to enhance Schulte's present Nebraska DUI conviction to third offense.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. TIMMERMAN, APPELLANT.

687 N.W.2d 24

Filed October 5, 2004. No. A-03-1238.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Indictments and Informations: Time.** The statutory 6-month speedy trial period begins to run upon the filing of the information in district court. The time during which an underlying complaint is pending in county court before the defendant is bound over to district court is not counted.
4. **Speedy Trial.** The final trial date under Neb. Rev. Stat. § 29-1207 (Reissue 1995) is determined 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.
5. ____. The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel shall be excluded in computing the time for trial.
6. **Speedy Trial: Appeal and Error.** The time during which an appeal is pending before an appellate court is excluded from speedy trial calculations.
7. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
8. **Speedy Trial: Complaints: Time.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Kevin K. Knake and Jerry J. Fogarty, Deputy Hall County Public Defenders, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

INBODY, MOORE, and CASSEL, Judges.

INBODY, Judge.

INTRODUCTION

Steven L. Timmerman appeals the decision of the Hall County District Court denying his motion for discharge based upon the

alleged violation of his statutory right to a speedy trial. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On February 3, 2003, a complaint was filed in the Hall County Court charging Timmerman with one felony count of driving under the influence of alcohol and three misdemeanor counts: driving during suspension, refusal to submit to a chemical test, and refusal to submit to a preliminary breath test. On April 4, an information was filed in the Hall County District Court charging Timmerman with these same offenses.

A pretrial conference was scheduled for August 7, 2003. On that date, Timmerman moved to continue the pretrial conference. The district court granted the motion and continued the pretrial conference to September 11.

On August 27, 2003, Timmerman filed a motion to suppress, which was denied on September 17. On October 1, Timmerman filed a motion for discharge on statutory speedy trial grounds, which was denied by the court on October 16. Timmerman has timely appealed to this court.

ASSIGNMENT OF ERROR

Timmerman's sole assigned error is that the district court erred in denying his motion for discharge.

STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

Statutory Right to Speedy Trial.

On appeal, Timmerman contends that the district court erred in denying his motion for discharge based upon the alleged violation of his statutory right to a speedy trial. He claims that the time the

complaint was pending in county court should be tacked on for purposes of the speedy trial calculation. We note that Timmerman has not alleged that his constitutional right to a speedy trial has been violated, and thus, we will not address that issue.

Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person charged for any offense shall be brought to trial within 6 months of the date the information is filed. Section 29-1207 also provides for certain periods of time that are excludable in computing the 6-month limitation, such as the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, and the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. Neb. Rev. Stat. § 29-1208 (Reissue 1995) provides: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

The Nebraska Supreme Court in *State v. Boslau*, 258 Neb. 39, 43, 601 N.W.2d 769, 772-73 (1999), although analyzing the speedy trial act in relation to direct informations filed initially in district court, set forth the procedure and application of the speedy trial act in cases similar to the case at bar as follows:

> Ordinarily, when an individual is charged with the commission of a felony . . . a complaint is filed in county court. See, generally, Neb. Rev. Stat. § 29-110 (Reissue 1995). Thereafter, a preliminary hearing is held to determine if probable cause exists to charge the defendant with the commission of the crime or crimes as alleged in the complaint. Neb. Rev. Stat. § 29-504 (Reissue 1995). If probable cause is found, the defendant is bound over to the district court, where he or she is held unless bail is set and posted. Neb. Rev. Stat. § 29-506 (Reissue 1995). Once the defendant is bound over to district court, the State files an information with the district court, setting forth the charge or charges against the defendant. Under the foregoing scenario, pursuant to § 29-1207, the statutory 6-month speedy trial period begins to run upon the filing of the information in district

> court which is subsequent to the preliminary hearing. [Neb. Rev. Stat.] § 29-1607 [(Reissue 1995)].

In *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002), this court considered an argument similar to the one raised by Timmerman. In *Hutton*, the defendant, who had been charged with felony shoplifting, alleged that the time that an earlier complaint charging her with misdemeanor shoplifting was pending in county court should be tacked on in calculating the 6-month speedy trial period. We rejected that argument, noting:

> While the previous complaints in this action all alleged the same crime, theft by shoplifting, as that alleged in the information, it does not follow that the time during which the amended complaint was pending should be tacked onto the speedy trial period as argued by [the defendant]. The plain language of § 29-1207 makes it clear that the 6-month period begins to run upon the filing of the information in district court. The time when an underlying complaint is pending in county court before the defendant is bound over to district court is not counted.

State v. Hutton, 11 Neb. App. at 291, 648 N.W.2d at 327.

[3] In sum, Nebraska case law and the plain language of § 29-1207 make it clear that the 6-month speedy trial period begins to run upon the filing of the information in district court. See *State v. Hutton, supra*. The time during which an underlying complaint is pending in county court before the defendant is bound over to district court is not counted. See, *State v. Boslau, supra*; *State v. Hutton, supra*.

[4] The final trial date under § 29-1207 is determined 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).

In the instant case, the information was filed in the Hall County District Court on April 4, 2003. Therefore, absent periods of exclusion, Timmerman's trial must have commenced by October 3. However, there are excludable time periods which must be considered in this case.

[5] Timmerman filed a motion to suppress on August 27, 2003, which motion was not ruled on until September 17. Further, on

August 7, 2003, Timmerman requested a continuance of a pretrial conference, which continuance was granted, and the matter was continued until September 11. The period of delay resulting from a continuance of a pretrial conference at a defendant's request is excludable from speedy trial calculations. See *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002) (delay of 6 days due to defendant's request for continuance of pretrial conference was excludable from statutory speedy trial period, even though purpose of defendant's request was to respond to motions filed by State). Thus, the time period from the day after the filing of the first pretrial motion to the date that the motion to suppress was denied (August 8 to September 17), consisting of 41 days, is excludable in the speedy trial calculations.

[6] Furthermore, Timmerman filed his motion for discharge on October 1, 2003. Thus, the period of time from October 2 until October 16, when the court ruled on the motion, is also excluded from calculations. Thus, an additional 15 days is excludable. Additionally, the time during which an appeal is pending before an appellate court is excluded from speedy trial calculations. See *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003). Thus, the time during which Timmerman's appeal has been pending before this court is excluded.

In sum, when the court ruled on Timmerman's motion for discharge, 2 days remained on the speedy trial clock, plus there is an additional 56 (41+15) days of excludable time. Thus, under the Nebraska speedy trial act, there are 58 days remaining in which to bring Timmerman to trial, beginning when the district court takes action on the mandate.

Application to Misdemeanor Offenses.

Timmerman also contends that the statutory speedy trial time has run on the misdemeanor offenses because the time from the filing of the complaint in county court must be tacked onto the time that the case was pending in district court.

[7,8] Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint. *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002). In cases commenced *and tried in county court*, the

6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. *Id.*

In the instant case, although the misdemeanors were originally charged in the county court, it is clear that the State intended that the misdemeanors be tried not in the county court, but in the district court along with the felony. Thus, the time that the complaint was pending in the county court is not tacked on for speedy trial purposes.

Furthermore, we note that Neb. Rev. Stat. § 29-2002(1) (Reissue 1995) provides:

> Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Since the misdemeanors charged in the instant case (driving during suspension, refusal to submit to a chemical test, and refusal to submit to a preliminary breath test) were based on the same transaction as the felony charge (driving under the influence of alcohol), these counts were properly charged in the same information. Where misdemeanor counts are filed with a felony count in a complaint in county court and then the felony count is filed with those same misdemeanor counts in an information in district court, it is evidence of the State's intent to try the charges together. Additionally, we note that trying these counts together conserves judicial resources, because the alleged offenses arose out of the same transaction. However, we do note that factual scenarios which differ from those in the instant case could produce a different result.

CONCLUSION

Having found that Timmerman's statutory right to a speedy trial has not been violated on either the felony charge or the misdemeanor charges, we affirm the decision of the district court denying Timmerman's motion for discharge.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT A. BROWN, APPELLANT.

687 N.W.2d 203

Filed October 5, 2004. No. A-04-838.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
2. **Final Orders.** Final orders must be signed by the judge as well as file stamped and dated by the clerk.
3. **Judgments: Records: Notice: Fees: Appeal and Error.** A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.
4. **Judgments: Jurisdiction: Records: Notice: Appeal and Error.** The effect of Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) when the judgment is defective is that the appellate court potentially has jurisdiction because the judgment can be made final by rendition by the judge or entry by the clerk of the court, whichever is lacking, long after the notice of appeal is filed.
5. **Jurisdiction: Appeal and Error.** It is the power and the duty of an appellate court to determine whether it has jurisdiction.
6. **Courts: Jurisdiction: Appeal and Error.** When the district court acts as an intermediate court of appeals, it has a duty to examine jurisdiction.

Appeal from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Appeal dismissed, and cause remanded for further proceedings.

James E. Troia for appellant.

No appearance for appellee.

SIEVERS, INBODY, and CASSEL, Judges.

SIEVERS, Judge.

We write a published opinion in this case to discuss the matter of "springing jurisdiction." Our hope is that our opinion will provide guidance for the bench and bar, eliminate unnecessary procedural delays for litigants, and make the work of the appellate courts somewhat simpler. While the instant case is a criminal case, our discussion is equally applicable in civil litigation.

DISCUSSION

[1] We begin with the general proposition that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

[2] Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002) sets forth two ministerial requirements for a final judgment. The first, found at § 25-1301(2), is rendition of the judgment, defined as the act of the court or a judge thereof "in making and signing a written notation of the relief granted or denied in an action." The second ministerial step for a final judgment is found in § 25-1301(3), which provides that "entry" of a "final order occurs when the clerk of the court places the file stamp and date upon the judgment." In short, final orders must be signed by the judge as well as file stamped and dated by the clerk.

Since the foregoing statute became effective in August 1999, we have dealt with many appeals containing nonfinal orders because they were missing the signature of the judge or the file stamp and date of the clerk of the court, or both.

[3] Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002) has for several years included a provision at subsection (2) that

> [a] notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

This is substantially in accord with prior case law holding that where a notice of appeal is filed after a decision is announced but before the judgment is rendered, the notice of appeal is effective when judgment is actually rendered in accordance with the announced decision. See, *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979), *overruled on other grounds, Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

[4] "Announcement" can come orally from the bench, from trial docket notes, file-stamped but unsigned journal entries, or signed journal entries which are not file stamped. This list is not

all inclusive. Section 25-1912(2) creates what we shall call "potential jurisdiction" and "springing jurisdiction." To explain, these jurisdictional situations occur when the order of the trial court which is intended to finally dispose of the matter is announced but not rendered, i.e., lacking the judge's signature, or not entered, i.e., not file stamped and dated by the clerk, or deficient in both regards, but nonetheless a party files a notice of appeal. The effect of § 25-1912(2) when the judgment is defective is that the appellate court "potentially" has jurisdiction because the judgment can be made final by "rendition" by the judge or "entry" by the clerk of the court, whichever is lacking, long after the notice of appeal is filed. In such instance, the premature notice of appeal is treated as filed after the proper rendition and entry of the judgment, decree, or final order. See § 25-1912(2). In that instance, the notice of appeal becomes effective when the defect is cured. Thus, our "potential" jurisdiction over the appeal "springs" into full jurisdiction by virtue of the provisions of § 25-1912(2). The effective date of the notice of appeal in these cases, regardless of when such notice is filed, is thus the date the order appealed from becomes final, meaning the date the defect is cured.

The instant appeal illustrates the problem but reveals that when it occurs when the district court acts as an intermediate court of appeal, the appeal cannot be saved by § 25-1912(2). The statutory law concerning appeals from county court to district court is essentially the same. See Neb. Rev. Stat. § 25-2729(5) (Cum. Supp. 2002). The factual background of the instant case is unimportant for our purposes. Procedurally, the county judge sentenced the defendant, Scott A. Brown, on February 12, 2004, to a term of 180 days' imprisonment. The judge's sentencing order was signed on that date, but it was not entered by the clerk. On February 12, Brown filed his notice of appeal to the district court for Douglas County. That appeal was heard in the district court, and an order of affirmance was signed by the district judge on July 6 and file stamped by the clerk on July 7, which would make it a final order—except for the fact that the district court did not have jurisdiction.

Brown then filed his notice of appeal to this court on July 13, 2004. On August 11, following our normal internal jurisdictional

review of new appeals, we entered an order to show cause requiring Brown to file a supplemental transcript containing a file-stamped copy of the county court's order which had been appealed to the district court, so that we could determine whether the district court had jurisdiction. In response to our show cause order, Brown filed a supplemental transcript which shows that the clerk of the county court file stamped the county judge's sentencing order on August 17, after we issued our show cause order. Consequently, when the district court reviewed the county court's action and rendered its order of affirmance on July 6 (as noted above, the order was entered by the clerk on July 7), it was without jurisdiction because the county court's sentencing order was not final until August 17.

In *Collection Bureau of Grand Island v. Fry*, 9 Neb. App. 277, 610 N.W.2d 442 (2000), we said that if the trial court lacks jurisdiction, so does the appellate court. Nonetheless, we held that we have the authority to direct a trial court which was lacking jurisdiction to vacate a judgment it entered without jurisdiction. *Id.*

RESOLUTION

Therefore, in the instant case, we hereby direct the district court for Douglas County to vacate its order of affirmance entered July 7, 2004, as such order was entered at a time when the district court lacked jurisdiction because the county court clerk had not entered the judgment of February 12 so as to make it final and appealable. Because the district court lacked jurisdiction to enter its order of July 7, we do not have jurisdiction over an appeal from such order and we must dismiss the appeal.

The cause is remanded to the district court for vacation of its order of July 7, 2004, and for further proceedings, bearing in mind that the notice of appeal from the county court to the district court is deemed effective August 17—the date the clerk of the county court file stamped the sentencing order. The same rules concerning "springing jurisdiction" under § 25-1912(2) apply to a district court sitting as an intermediate appellate court. See § 25-2729(5). In other words, at the time of its July 7 order, the district court had only potential jurisdiction which "sprang" into existence on August 17—meaning that its July 7 order was entered without jurisdiction.

[5,6] It is well known that it is the power and the duty of an appellate court to determine whether it has jurisdiction. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). Reference has been made in earlier decisions of this court to our practice of early examination of cases for jurisdictional defects. By publication of this opinion, our hope is to emphasize the importance of proper rendition and entry of judgments by trial judges and clerks of court, respectively, so that appellate jurisdiction can be perfected in a timely and proper fashion without using the fallback provision of "springing jurisdiction" found in § 25-1912(2), because as here, such provision will not always save the appeal. When the district court acts as an intermediate court of appeals, it likewise has a duty to examine jurisdiction.

While the "springing jurisdiction" provisions of § 25-1912(2) ultimately serve to save the appeal in some circumstances, no one benefits from the extra work and delay occasioned by improper rendition and entry of what are intended as final judgments. The requirements for rendition and entry of judgments under § 25-1301 have been with us since August 28, 1999, and adherence to the requirements found therein should now be a matter of routine.

APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

DOUGLAS LOUIS, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

687 N.W.2d 438

Filed October 12, 2004. No. A-03-868.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.

4. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Due Process: Statutes: Administrative Law.** Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations.
6. **Waiver: Statutes: Constitutional Law.** A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, but, having once done so, he cannot subsequently invoke its protection.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Reversed and remanded with direction.

Jon Bruning, Attorney General, Delores N. Coe-Barbee, and Linda L. Willard for appellant.

No appearance for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The Nebraska Department of Correctional Services (DCS) appeals the order of the district court for Johnson County, Nebraska, which reversed a judgment of discipline imposed on prison inmate Douglas Louis for his refusal to submit to a search. Because we conclude that after Louis had made a valid waiver of the right to a hearing, due process did not require that Louis be allowed to revoke that waiver, we reverse, and remand with direction.

BACKGROUND

On January 21, 2003, a DCS caseworker observed Louis walk into the housing unit with a paper sack. At that time, Louis was on room restriction, a disciplinary measure that imposed restrictions on certain privileges, including purchases from the prison's canteen. The caseworker asked Louis what was in the sack, and Louis replied, " 'That's none of your [expletive] business.' " The caseworker gave Louis a direct order to reveal the contents of the sack, and Louis again refused to comply. The caseworker ordered a "shakedown," or search, and Louis proceeded to his cell and

slammed the door. Another prison employee was called to hold Louis, and the sack was confiscated and its contents determined to be articles unauthorized for inmates on room restriction.

On January 21, 2003, the caseworker filed a misconduct report against Louis, alleging seven violations, including refusal to submit to a search, disruption, and possessing or receiving unauthorized articles.

On January 25, 2003, Louis had a hearing before an investigative officer. At that hearing, Louis signed a form entitled "Inmate Waiver—Disciplinary Committee" and bearing the identification number for the January 21 incident. The form instructs the inmate to initial the rights he or she is waiving with regard to a disciplinary hearing before the prison's disciplinary committee. Although Louis signed the form, he did not initial any of the rights listed on the form. A disciplinary hearing was scheduled for February 3.

On January 26, 2003, Louis sent to the disciplinary committee a request for witnesses, which request the disciplinary committee received on January 29.

On January 29, 2003, Louis signed another disciplinary committee hearing waiver form bearing the identification number for the January 21 incident. This time, Louis indicated by his initials that he waived his "right to [his] appearance before the [disciplinary committee]." The form indicated that such waiver also constituted a waiver of the right to a representative, the right to have the reporting employee present at the hearing, the right to request witnesses, the right to receive 24 hours' notice of the charges, and the right to receive 24 hours' notice of the hearing. That same day, Louis sent the disciplinary committee a request for representation at the upcoming hearing, and the disciplinary committee received the request on February 3.

On January 30, 2003, Louis sent the disciplinary committee a notice that he had not intended to sign the waiver of his right to appear at the hearing regarding the events of January 21, that he had believed that the waiver form he signed applied to other misconduct reports, and that he wanted to appear at the hearing. The disciplinary committee received the notice on January 31. The record contains no evidence of other pending misconduct reports for Louis.

On February 3, 2003, the disciplinary committee conducted a disciplinary hearing. Louis did not attend the hearing, and the committee did not discuss his notice that he had not intended to sign the waiver form and wanted to appear. Various reports regarding the incident were read into the record, and the sack and its contents were submitted into evidence.

The disciplinary committee found Louis guilty of refusing to submit to a search, disruption, and possessing and receiving unauthorized articles; the other violations were dismissed. The disciplinary committee assessed Louis 30 days' disciplinary segregation for refusing to submit to the search and 7 days' room restriction for each of the other offenses.

Louis timely filed an appeal, alleging that some of the charges were not supported by competent evidence, that he was told the waiver form he signed on January 29, 2003, was not for the January 21 incident, that the waiver form did not contain the identification number for the incident, and that after he signed the waiver form, he informed DCS that he wanted to appear. The DCS Appeals Board affirmed the disciplinary committee's findings as to the refusal to submit to a search and disruption offenses, and it reversed the disciplinary committee's findings as to the possession and receipt of unauthorized articles offense.

Louis appealed to the district court, assigning that he was "denied his due process hearing on the violations regarding his misconduct report." The district court reversed the appeals board's decision as to Louis' refusal to submit to a search. The court found that although Louis had voluntarily, knowingly, and intelligently signed the waiver form, he had effected a valid revocation of his waiver and should have been afforded his appearance at the disciplinary hearing and his right to present evidence in his defense. The district court noted:

> I know of no department regulation or statute that prohibits an inmate from withdrawing or revoking his/her waiver of appearance and right to present a defense, as long as it is received by [DCS] reasonably in advance of the hearing, and [DCS] has not been prejudiced by it.

DCS now appeals to this court.

ASSIGNMENT OF ERROR

DCS assigns that the district court erred in finding that the exclusion of Louis from his disciplinary hearing was a due process violation.

STANDARD OF REVIEW

[1-4] An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. See Neb. Rev. Stat. § 84-918 (Reissue 1999). A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Piska v. Nebraska Dept. of Soc. Servs.*, 252 Neb. 589, 567 N.W.2d 544 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997). 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. *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001). An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

Protected Liberty Interest.

Generally, in such cases, before examining the procedures alleged to have been required by due process in the disciplinary proceedings, we first determine whether due process attached to those proceedings. That is, we would consider whether the disciplinary segregation imposed in this case infringed or implicated a liberty interest. If there is a constitutionally protected liberty interest at stake, then at a minimum, the disciplinary proceedings must comply with constitutionally adequate due process standards. See *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

In *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), the U.S. Supreme Court considered whether disciplinary segregation implicated a liberty interest. In that case, an inmate challenged the imposition of 30 days' disciplinary segregation for misconduct. The Court in *Sandin* determined that a state-created liberty interest could arise only when a prison's action imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. The Court considered the following factors: (1) the amount of time the inmate spent in disciplinary segregation, (2) whether the conditions of his confinement in disciplinary segregation were significantly more restrictive than those imposed upon other inmates in similar confinement, and (3) whether the state's action would affect the duration of the inmate's sentence.

The record before us contains the following information from the Nebraska Administrative Code, regarding the conditions to which inmates in disciplinary segregation and solitary confinement are subjected:

> 014 Disciplinary Segregation. Disciplinary segregation is the status of confinement in a cell or other control unit facility separated from general population members insofar as practicable, as a result of a hearing on charges of misconduct pursuant to this Rule. Inmates housed in disciplinary segregation will have significantly fewer privileges than those housed in administrative detention.

68 Neb. Admin. Code, ch. 6, § 014 (2000).

The record affords us scant information on the conditions of disciplinary segregation. DCS neglected to argue, and thus we cannot consider, whether disciplinary segregation implicated a liberty interest. See *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003) (in order to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error). However, assuming, without deciding, that the disciplinary segregation imposed in the instant case does implicate a liberty interest, we consider whether Louis' due process rights were violated.

Refusal to Allow Withdrawal of Waiver.

The district court made the factual finding that Louis signed the waiver form voluntarily, knowingly, and intelligently. Evidence in

the record supports that conclusion, and we find no error on the record with regard to it. See *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001). Having concluded that Louis' waiver was valid, we consider whether DCS deprived him of due process in not recognizing his withdrawal or revocation of such waiver.

[5] Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant does not apply; instead, there must be a mutual accommodation between the institutional needs and objectives and the provisions of the Constitution. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). "Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations." *Claypool v. Nebraska Dept. of Corr. Servs., ante* p. 87, 92, 667 N.W.2d 267, 273 (2003).

[6] By purporting to revoke the waiver, Louis sought to reactivate the due process rights he had waived. However, "'"[a] party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, [but], having once done so, he cannot subsequently invoke its protection."'" *Alabama Cartage Co. v. International Brotherhood, etc.*, 250 Ala. 372, 376, 34 So. 2d 576, 579 (1948), quoting *City of Birmingham v. Wills*, 178 Ala. 198, 59 So. 173 (1912). See, also, *Shapiro v. Leslie Fay Corp.*, 138 N.Y.S.2d 606 (N.Y. Sup. 1954); *Selzer v. Baker*, 295 N.Y. 145, 65 N.E.2d 752 (1946); *DeWitt v. State, ex rel.*, 108 Ohio St. 513, 141 N.E. 551 (1923). Once Louis validly waived his right to be present at a hearing and the other associated rights, the disciplinary committee was not required to allow Louis to withdraw that waiver. To hold otherwise would compromise the institutional needs and objectives of DCS by clouding inmate waivers with uncertainty and wreaking havoc with the scheduling and conduct of disciplinary hearings. Therefore, we conclude that the district court erred in determining that Louis was entitled to revoke his waiver of rights and that the court consequently erred in finding that Louis was deprived of procedural due process.

CONCLUSION

For the foregoing reasons, we reverse the decision of the district court and remand the cause with direction to affirm the order of the appeals board.

REVERSED AND REMANDED WITH DIRECTION.

[By order of the court, *Lucas v. Anderson Ford*, 12 Neb. App. 951, 687 N.W.2d 430 (2004), withdrawn. See *Lucas v. Anderson Ford*, 13 Neb. App. 133, 689 N.W.2d 354 (2004). (Pages 952-61 omitted.)]

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