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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 22, 1995 and MAY 9, 1996

IN THE

Supreme Court of Nebraska

VOLUME CCXLIX

PEGGY POLACEK

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

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DAVID J. LANPHIER, Associate Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice

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DURING THE PERIOD OF THESE REPORTS

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LINDSEY MILLER-LERMAN, Chief Judge[2]
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge[3]
RICHARD D. SIEVERS, Associate Judge[4]
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JOSEPH C. STEELE . . . . . State Court Administrator

[1]Until December 31, 1995
[2]Appointed January 1, 1996
[3]Until December 31, 1995
[4]As of January 1, 1996

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
		William B. Rist	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	James A. Buckley	Omaha
		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk Saunders, Seward, and York	Robert R. Steinke	Columbus
		John C. Whitehead	Columbus
		Alan G. Gless	Wahoo

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman Darvid D. Quist Maurice Redmond	Fremont Blair Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel Ronald D. Olberding	Ainsworth Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Spraque Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe John D. Knapp Brian Silverman	Chadron Gering Kimball Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		John V. Hendry	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
Fifth	Boone, Butler, Colfax, Dodge Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary R. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F.A. Gossett III	Blair
		Patrick G. Rogers	Dakota City
		Paul R. Robinson	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn	Neligh
		Philip R. Riley	Creighton
		Richard W. Krepela	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
		Jack Robert Ott	Hastings
		Daniel Bryan, Jr.	Geneva
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C.G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Paul E. LeClair	Omaha
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Joseph S. Ramirez	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-95-748: **State v. Johnson.** Affirmed. Per Curiam.
No. S-95-927: **State v. Carroll.** Affirmed. Wright, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-94-112: **Hicks v. Johnson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-94-242: **Nebraska Nutrients, Inc. v. Shepherd.** Appeal dismissed as premature for lack of final order.

No. S-94-254: **Spidell v. Keyser, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-94-373: **Woltemath v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-401: **Hicks v. Johnson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-94-475: **Houghton v. Gamma International Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-94-514: **Norwest Bank Nebraska v. Kuhn.** Appeal dismissed. See Rule 7A(2).

No. S-94-732: **Larsen v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-748: **State on behalf of Erdman v. Herbert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-1094: **State v. Williams.** Conviction vacated, and cause remanded with direction that it be dismissed.

No. S-95-390: **Nebraska Research & Dev. Auth. v. Prairie Sys.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-95-704: **State v. Russell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-95-781: **State v. Felker.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-96-017: **State v. Harrington.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-96-178: **State ex rel. Brummett v. Thorson.** No cause having been shown, case dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-33-950043: **State ex rel. Waite v. Kortum**. Petition of relator for further review overruled on December 21, 1995.

No. S-93-233: **Motor Club Ins. Assn. v. Bartunek**, 3 Neb. App. 292 (1995). Petition for further review dismissed on February 28, 1996, as having been improvidently granted. See S-93-233, *Motor Club Ins. Assn. v. Bartunek*, vol. 248, List of Cases on Petition for Further Review.

No. S-93-739: **World Radio Labs. v. Coopers & Lybrand**, 4 Neb. App. 34, 264 (1995). Petition of appellant for further review sustained on February 28, 1996.

No. S-93-739: **World Radio Labs. v. Coopers & Lybrand**, 4 Neb. App. 34, 264 (1995). Petition of appellee for further review sustained on February 28, 1996.

No. A-93-987: **Mercer v. Conrad**, 95 NCA No. 41. Petition of appellant for further review overruled on February 22, 1996.

No. A-93-1059: **Swiercek v. McDaniel**, 95 NCA No. 43. Petition of appellant for further review overruled on January 31, 1996.

No. A-94-063: **State v. Shelby**, 95 NCA No. 40. Petition of appellant for further review overruled on March 29, 1996.

No. A-94-134: **Stidhem v. Stidhem**, 95 NCA No. 45. Petition of appellee for further review overruled on March 13, 1996.

No. A-94-185: **Irfan v. Irfan**, 95 NCA No. 49. Petition of appellee for further review overruled on February 14, 1996.

No. S-94-222: **Priest v. Priest**, 96 NCA No. 4. Petition of appellee for further review sustained on March 28, 1996.

No. A-94-249: **Raymond v. Harper**, 95 NCA No. 45. Petition of appellee for further review overruled on January 4, 1996.

No. A-94-268: **Aksarben Nsg. Ctrs. v. Department of Soc. Servs.**, 95 NCA No. 46. Petition of appellant for further review overruled on January 31, 1996.

No. S-94-270: **D.K. Buskirk & Sons v. State**, 96 NCA No. 6. Petition of appellee for further review sustained on March 19, 1996.

No. A-94-370: **State v. Davis**, 95 NCA No. 41. Petition of appellant for further review overruled on January 22, 1996.

No. A-94-377: **Irwin v. Irwin**, 95 NCA No. 43. Petitions of appellant for further review overruled on December 28, 1995.

No. A-94-395: **Wambold v. Wambold**, 95 NCA No. 43. Petition of appellant for further review overruled on December 21, 1995.

No. S-94-506: **Village of Winside v. Jackson**. Petition of appellant for further review sustained on April 17, 1996.

No. A-94-610: **Kabourek v. Village of Brainard**, 96 NCA No. 7. Petition of appellee for further review overruled on March 28, 1996.

No. A-94-645: **McGurk v. Abramson**, 95 NCA No. 45. Petition of appellant for further review overruled on January 4, 1996.

No. A-94-655: **State v. Nichols**, 96 NCA No. 2. Petition of appellant for further review overruled on February 14, 1996.

No. A-94-681: **Volesky v. Caspers Constr. Co.** Petition of appellant for further review overruled on April 24, 1996.

No. S-94-688: **Hand v. Starr**, 96 NCA No. 2. Petition of appellant for further review sustained on February 22, 1996.

No. S-94-689: **Amsberry Trucking Co. v. Starr**. Petition of appellant for further review sustained on February 22, 1996.

No. S-94-698: **First Nat. Bank of York v. Critel**, 95 NCA No. 51. Petition of appellant for further review sustained on March 13, 1996.

No. A-94-701: **Knight v. Hays**, 4 Neb. App. 388 (1996). Petition of appellant for further review overruled on March 28, 1996.

No. S-94-787: **Bluff's Vision Clinic v. Krzyzanowski**, 4 Neb. App. 380 (1996). Petition of appellee for further review sustained on March 28, 1996.

No. A-94-802: **Remmen v. Zweiback**, 96 NCA No. 7. Petition of appellant for further review overruled on March 28, 1996.

No. S-94-833: **State v. Newman**, 4 Neb. App. 265 (1996). Petition of appellant for further review sustained on February 22, 1996.

No. S-94-861: **Harrison v. Seagroves**, 95 NCA No. 51. Petition of appellant for further review sustained on February 14, 1996.

No. A-94-902: **State v. Charles**, 4 Neb. App. 211 (1995). Petition of appellant for further review overruled on February 14, 1996.

No. A-94-973: **State v. McWilliams**, 95 NCA No. 42. Petition of appellant for further review overruled on January 22, 1996.

Nos. A-94-985, A-94-1044: **In re Interest of Kayla F.**, 95 NCA No. 38. Petition of appellant for further review overruled on December 21, 1995.

No. A-94-1036: **State v. Clark**, 95 NCA No. 50. Petition of appellant for further review overruled on January 26, 1996.

No. A-94-1054: **In re Interest of Jared P.**, 95 NCA No. 30. Petition of appellant for further review overruled on December 21, 1995.

No. A-94-1068: **State v. Tlamka**, 95 NCA No. 49. Petitions of appellant for further review overruled on March 28, 1996.

No. S-94-1069: **Kuebler v. Abramson**, 4 Neb. App. 420 (1996). Petition of appellee for further review sustained on April 24, 1996.

No. S-94-1070: **Kapperman v. Kapperman**, 95 NCA No. 28. By stipulation of the parties, petition of appellant for further review dismissed on February 6, 1996, as moot.

No. A-94-1102: **State v. Waldmann**, 96 NCA No. 4. Petition of appellant for further review overruled on April 10, 1996.

No. A-94-1129: **State v. Reed**, 95 NCA No. 40. Petition of appellee for further review overruled on January 22, 1996.

No. A-94-1140: **State v. Krutsinger**, 95 NCA No. 38. Petition of appellant for further review overruled on February 14, 1996.

No. A-94-1147: **State v. Owen**. Petition of appellant for further review overruled on February 14, 1996.

No. A-94-1179: **State v. Griffith**, 95 NCA No. 44. Petition of appellant for further review overruled on December 28, 1995.

No. S-94-1197: **State v. Morris**, 4 Neb. App. 250 (1995). Petition of appellant for further review sustained on March 28, 1996.

Nos. S-94-1212, S-94-1214 through S-94-1222: **In re Interest of Brandy M. et al.**, 4 Neb. App. 115 (1995). Petition of appellee for further review sustained on December 28, 1995.

No. A-94-1234: **State v. Lewchuk**, 4 Neb. App. 165 (1995). Petition of appellee for further review overruled on March 13, 1996.

No. S-94-1243: **State v. Bowers**, 95 NCA No. 50. Petition of appellant for further review sustained on February 14, 1996.

No. A-95-017: **State v. Fischer**, 95 NCA No. 39. Petition of appellee for further review overruled on December 21, 1995.

No. S-95-019: **State v. Martinez**, 4 Neb. App. 192 (1995). Petition of appellant for further review sustained on February 14, 1996.

No. S-95-019: **State v. Martinez**, 4 Neb. App. 192 (1995). Petition of appellee for further review sustained on February 14, 1996.

No. A-95-048: **In re Interest of Alan L., Jr., & Nickalus L.**, 95 NCA No. 44. Petition of appellant Alan L. for further review overruled on December 21, 1995.

No. A-95-048: **In re Interest of Alan L., Jr., & Nickalus L.**, 95 NCA No. 44. Petition of appellant Denise L. for further review overruled on December 21, 1995.

No. A-95-051: **Volk v. Volk**, 95 NCA No. 42. Petition of appellee for further review overruled on January 4, 1996.

No. A-95-052: **In re Interest of Jared P.**, 95 NCA No. 30. Petition of appellant for further review overruled on December 21, 1995.

No. A-95-114: **Forrest v. Gateway Mobile & Modular Homes**. Petition of appellant for further review overruled on January 31, 1996.

No. A-95-155: **State v. Turner**, 96 NCA No. 8. Petition of appellee for further review overruled on April 10, 1996.

No. A-95-162: **State v. McGurk**, 95 NCA No. 45. Petition of appellee for further review overruled on January 4, 1996.

No. A-95-167: **Whitaker v. Whitaker**. Petition of appellee for further review overruled on December 21, 1995.

No. A-95-198: **State v. Hatcliff**, 95 NCA No. 45. Petition of appellant for further review overruled on January 4, 1996.

No. S-95-201: **Berggren v. Grand Island Accessories**, 95 NCA No. 45. Petition of appellee for further review sustained on January 4, 1996.

No. A-95-209: **Monahan v. United States Check Book Co.**, 4 Neb. App. 227 (1995). Petition of appellant for further review overruled on January 31, 1996.

No. A-95-213: **Heger v. A-Help, Inc.**, 95 NCA No. 44. Petition of appellant for further review overruled on March 28, 1996.

No. A-95-217: **State v. Williams**, 95 NCA No. 43. Petition of appellant for further review overruled on March 13, 1996.

No. A-95-222: **State v. Johnson**, 95 NCA No. 45. Petition of appellant for further review overruled on January 4, 1996.

No. A-95-227: **State v. Hatfield**. Petition of appellant for further review overruled on February 22, 1996.

No. S-95-284: **State v. Orduna**, 95 NCA No. 50. Petition of appellant for further review sustained on February 14, 1996.

No. A-95-335: **State v. Lenczowski**, 95 NCA No. 51. Petition of appellant for further review overruled on February 14, 1996.

No. A-95-336: **State v. Frieson**, 96 NCA No. 9. Petition of appellant for further review overruled on April 24, 1996.

No. A-95-343: **Rodriguez v. Millard Processing Servs.**, 95 NCA No. 48. Petition of appellant for further review overruled on February 14, 1996.

No. A-95-348: **State v. Solomon**. Petition of appellant for further review overruled on January 31, 1996.

No. A-95-358: **State v. Valdez**, 96 NCA No. 7. Petition of appellant for further review overruled on April 17, 1996.

Nos. A-95-365, A-95-366: **State v. Freeman**, 96 NCA No. 9. Petition of appellant for further review overruled on April 17, 1996.

No. A-95-367: **State v. Sullivan**, 95 NCA No. 49. Petition of appellant for further review overruled on March 19, 1996.

No. A-95-375: **Curtice v. Baldwin Filters Co.**, 4 Neb. App. 351 (1996). Petition of appellant for further review overruled on April 10, 1996.

No. A-95-383: **In re Interest of Dickson**. Petition of appellant for further review overruled on January 22, 1996.

No. A-95-393: **State v. Homan**. Petition of appellant for further review overruled on December 21, 1995.

No. A-95-394: **State v. Mead**, 96 NCA No. 4. Petition of appellant for further refview overruled on March 13, 1996.

No. A-95-412: **State v. Coffey**, 95 NCA No. 49. Petition of appellant for further review overruled on February 14, 1996.

No. A-95-419: **State v. Beeder**, 96 NCA No. 9. Petition of appellant for further review overruled on March 28, 1996.

No. A-95-446: **State v. Cornell**, 96 NCA No. 2. Petition of appellant for further review overruled on February 14, 1996.

No. A-95-454: **State v. Thirtle**. Petition of appellant for further review overruled on January 4, 1996.

No. A-95-480: **State v. Lechleitner**. Petition of appellant for further review overruled on January 22, 1996.

No. A-95-505: **State v. Ballard**, 96 NCA No. 4. Petition of appellant for further review overruled on March 28, 1996.

No. A-95-559: **State v. Booth**. Petition of appellant for further review overruled on March 28, 1996.

No. A-95-565: **In re Interest of Angelaura P.**, 96 NCA No. 6. Petition of appellant for further review overruled on March 28, 1996.

No. A-95-579: **State v. Anderson**. Petition of appellant for further review overruled on January 22, 1996.

No. A-95-593: **State v. Watkins**, 4 Neb. App. 356 (1996). Petition of appellee for further review overruled on March 19, 1996.

No. A-95-605: **State v. Hawes**, 96 NCA No. 11. Petition of appellant for further review overruled on April 17, 1996.

No. A-95-642: **State v. Taylor**, 96 NCA No. 9. Petition of appellant for further review overruled on April 17, 1996.

No. A-95-718: **State v. Johnson**. Petition of appellant for further review overruled on April 17, 1996.

No. A-95-732: **State v. Schlund**. Petition of appellant for further review overruled on April 17, 1996.

No. S-95-748: **State v. Johnson**. Petition of appellant for further review sustained on December 21, 1995.

No. A-95-763: **Williams v. Williams**. Petition of appellant for further review dismissed on January 12, 1996, for lack of jurisdiction.

No. A-95-763: **Williams v. Williams**. Petition of appellant for further review overruled on December 29, 1995.

No. A-95-855: **State v. Wagner**. Petition of appellant for further review overruled on January 22, 1996.

No. A-95-880: **Plaza Dental Group v. Weber**. Petition of appellant for further review overruled on February 14, 1996.

No. A-95-938: **Rieker v. Rieker**. Petition of appellant for further review overruled on December 21, 1995.

No. A-95-955: **Omni Corporate Park v. Douglas Cty. Bd. of Equal.** Petition of appellee for further review overruled on April 24, 1996.

No. A-95-1036: **State v. Mix**. Petition of appellant for further review overruled on April 24, 1996.

No. A-95-1052: **State v. Carfield**. Petition of appellant for further review overruled on April 10, 1996.

No. A-95-1089: **Prince v. Prince**. Petition of appellant for further review overruled on January 31, 1996.

No. S-95-1258: **In re Interest of Reichert**. Petition of appellant for further review sustained on March 13, 1996.

No. A-95-1298: **Wagner v. Hansen**. Petition of appellant for further review overruled on March 13, 1996.

No. A-95-1372: **Jeffrey Lake Dev. v. Central Neb. Pub. Power & Irr.** Petition of appellant for further review overruled on April 24, 1996.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. LARRY L. LEGRAND, APELLANT.

541 N.W.2d 380

Filed December 22, 1995. Nos. S-93-1086, S-93-1087.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Appeal and Error.** When the trial court sits as the finder of fact, its findings will not be disturbed on appeal unless clearly wrong.
3. **Constitutional Law: Courts.** All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay. The foregoing constitutional provision is self-executing and controlling, paramount and mandatory upon all courts of this state.
4. **Constitutional Law.** When a constitution gives a general power or enjoins a duty, it also gives, by implication, every power necessary for the exercise of the one or the performance of the other.
5. **Courts.** The courts of Nebraska, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not.
6. **Judgments: Due Process.** A judgment issued from a proceeding that violates a citizen's right to due process is void.
7. **Judgments.** A void judgment may be set aside at any time and in any proceeding.
8. **Judgments: Jurisdiction: Collateral Attack.** A proceeding to vacate and set aside a judgment for the reason that it is void must be brought in the court in which the judgment was rendered.
9. **Judgments: Jurisdiction.** A judgment is a matter of record, and can only be changed, set aside or modified, by the court whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment.
10. **Prior Convictions: Collateral Attack: Right to Counsel: Appeal and Error.** Objections to the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment, and must be raised either by a direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside the prior conviction.

11. **Constitutional Law: Due Process: States.** States are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution.
12. **Constitutional Law.** Once a defendant is informed of his constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right.
13. **Courts.** The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, F.A. GOSSETT III, Judge. Judgment of Court of Appeals affirmed.

Robert Wm. Chapin, Jr., for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and GERRARD, JJ.

FAHRNBRUCH, J.

In these two "separate proceeding" cases, Larry L. LeGrand asked the Dodge County Court to invalidate two of LeGrand's earlier convictions for driving while under the influence of alcohol (DUI). LeGrand did so to avoid those convictions being used to enhance the sentence in a third DUI charge pending against him in Lancaster County.

In each of his petitions, LeGrand claimed that the trial records in each of the two challenged convictions did not affirmatively show that he entered his guilty plea freely, voluntarily, knowingly, and intelligently.

The Dodge County Court denied the prayers of LeGrand's petitions. LeGrand appealed, and the district court for Dodge County affirmed the denial. Upon appeal, the Nebraska Court of Appeals affirmed the district court's order, claiming that under the holdings in *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), a separate proceeding to collaterally attack prior state convictions

is not constitutionally mandated. *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995).

The Nebraska Court of Appeals erred in determining that separate proceedings to collaterally attack previous convictions, though repeatedly upheld by this court, were not available to LeGrand.

Based on the merits, we affirm the judgment of the district court for Dodge County because LeGrand freely, voluntarily, knowingly, and intelligently pled guilty in each of his two prior convictions. The trial court was not clearly wrong in holding as it did in each case.

ASSIGNMENTS OF ERROR

LeGrand assigns as error that (1) the Nebraska Court of Appeals erred in applying the U.S. Supreme Court's decisions in *Custis v. U.S.*, *supra*, and *Nichols v. U.S.*, *supra*, to overrule this court's holdings in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), and *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989); (2) the Nebraska Court of Appeals' decision conflicts with this court's holdings in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); and (3) the Nebraska Court of Appeals' conclusion of law is contrary to the plain language of Neb. Rev. Stat. § 39-669.07(3) (Cum. Supp. 1992).

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

When the trial court sits as the finder of fact, its findings will not be disturbed on appeal unless clearly wrong. See *State v. Wilson*, 238 Neb. 217, 469 N.W.2d 749 (1991).

FACTS

The State sought to use two earlier Dodge County DUI convictions against LeGrand to increase a pending DUI charge to third-offense DUI in Lancaster County.

In response, LeGrand sought separate proceedings in Dodge County Court to invalidate the two earlier DUI convictions. LeGrand alleged that the prior convictions were invalid because

the trial records failed to affirmatively establish that his guilty pleas had been freely, voluntarily, knowingly, and intelligently entered as required by *State v. Tweedy, supra*.

In the first previous conviction, the record reflects that on August 11, 1987, LeGrand, with counsel present, was arraigned in Dodge County Court on a charge of DUI. The record further reflects that LeGrand was advised of the penalties for the offense; informed of his privilege against self-incrimination; apprised of his rights to confront witnesses, to trial by jury, to counsel, and to due process with proper notice and a fair and impartial hearing; and informed that if he pled guilty he forfeited his presumption of innocence and relieved the State of its burden to prove beyond a reasonable doubt each element of the crime charged and waived all defenses. LeGrand pled not guilty.

On September 18, 1987, LeGrand appeared with counsel before a different judge in the Dodge County Court to be rearraigned and change his plea. At the rearraignment, the record is silent as to whether LeGrand waived his privilege against self-incrimination, his right to confront witnesses, his right to a trial by jury, his right to counsel, and his right to due process with proper notice and a fair and impartial hearing. The record is also silent as to whether the court advised LeGrand that if he pled guilty he forfeited his presumption of innocence and relieved the State of its burden to prove beyond a reasonable doubt each element of the crime charged.

> However, the county court, through a checklist, did state that defendant advised the Court that he/she understood the nature of the charge(s), the possible penalties that might be imposed, and all rights available to him by law, and that this plea to the charge(s) was entered fully voluntary [sic], knowingly, and intelligently, with full understanding of the consequences.

LeGrand entered a plea of guilty which was accepted by the court, and LeGrand was sentenced on October 13, 1987. LeGrand did not appeal his conviction.

LeGrand's second earlier DUI conviction stems from an October 12, 1990, arrest in Dodge County. In regard to the October 12 arrest, LeGrand appeared with counsel at an

arraignment in Dodge County Court on November 6. The record reflects that LeGrand was advised of the penalties for the offense; informed of his privilege against self-incrimination; apprised of his rights to confront witnesses, to a trial by jury, to counsel, and to due process with proper notice and a fair and impartial hearing; and informed that if he pled guilty he forfeited his presumption of innocence and relieved the State of its burden to prove beyond a reasonable doubt each element of the crime charged and waived all defenses. LeGrand pled not guilty.

On February 19, 1991, LeGrand appeared before the same judge in Dodge County Court to be rearraigned and to change his plea. The record reflects that LeGrand was advised of all his rights just as he had been at the previous arraignment. The record further reflects that LeGrand waived all of those rights. LeGrand freely, voluntarily, knowingly, and intelligently pled guilty. LeGrand was sentenced on March 26. LeGrand did not appeal this conviction.

The trial court denied LeGrand's petitions to invalidate the two prior DUI convictions. LeGrand appealed to the district court for Dodge County, which affirmed the order of the trial court. LeGrand then appealed to the Nebraska Court of Appeals.

The Nebraska Court of Appeals affirmed the district court decision without reaching the merits of LeGrand's constitutional claim. The Nebraska Court of Appeals noted that this court allowed separate proceedings to attack DUI enhancement proceedings based on U.S. Supreme Court holdings in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). The Nebraska Court of Appeals also noted that the U.S. Supreme Court overruled the *Baldasar v. Illinois* decision in its opinion in *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). The Nebraska Court of Appeals stated that under *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S., supra*, a state need not provide separate proceedings in order to comport with federal constitutional law. The Nebraska Court of Appeals held that it is impermissible to

attack the validity of a prior conviction in an enhancement proceeding on any grounds, with one exception: Challenges to prior plea-based convictions offered for enhancement purposes are allowed when based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered, when the defendant was sentenced to imprisonment for any period of time as a result of the pleas. *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995). LeGrand petitioned this court for further review of the cases, and we granted the petition. The cases were consolidated for the proceedings in this court.

ANALYSIS

Subject Matter Jurisdiction

Initially, we address the State's argument that the Dodge County Court lacked subject matter jurisdiction to hear LeGrand's petition for separate proceedings.

The State relies on Neb. Rev. Stat. § 24-517 (Cum. Supp. 1994) to argue that Dodge County Court lacks subject matter jurisdiction to modify its own judgments.

The State's argument runs afoul of Neb. Const. art. I, § 13, which provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." The foregoing constitutional provision is self-executing and controlling, paramount and mandatory upon all courts of this state. *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952). When a constitution gives a general power or enjoins a duty, it also gives, by implication, every power necessary for the exercise of the one or the performance of the other. *Burnham v. Bennison*, 121 Neb. 291, 236 N.W. 745 (1931).

The courts of Nebraska, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not. *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

This holds particularly true in the case of a void judgment. A judgment issued from a proceeding that violates a citizen's

right to due process is void. *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990); *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975); *In re Application of Maher, North v. Dorrance*, 144 Neb. 484, 13 N.W.2d 653 (1944); *In re Betts*, 36 Neb. 282, 54 N.W. 524 (1893).

A void judgment may be set aside at any time and in any proceeding. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *State v. Ewert, supra*; *Ehlers v. Grove*, 147 Neb. 704, 24 N.W.2d 866 (1946); *Hayes County v. Wileman*, 82 Neb. 669, 118 N.W. 478 (1908).

Therefore, because LeGrand challenged an allegedly void judgment, the Dodge County Court did have subject matter jurisdiction, as contemplated by Neb. Const. art. I, § 13, to hear his petitions for separate proceedings.

VENUE

LeGrand filed his separate proceeding petitions in Dodge County Court, where the contested prior convictions were rendered. The State argues that LeGrand should have filed his petitions in Lancaster County where he was charged with his third DUI conviction.

Although we have not previously addressed where separate proceedings should be filed, this court has held that a proceeding to vacate and set aside a judgment for the reason that it is void must be brought in the court in which the judgment was rendered. *Rasmussen v. Rasmussen*, 131 Neb. 724, 269 N.W. 818 (1936). The challenge of the previous judgment must be brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other courts of coordinate jurisdiction. A judgment is a matter of record and can only be changed, set aside, or modified by the court by whose authority the record is made or by the direction of a court of higher jurisdiction in proceedings to review the judgment. If this were not so, chaos would result. *State ex rel. Long v. Westover*, 107 Neb. 593, 186 N.W. 998 (1922).

Accordingly, LeGrand correctly filed his petitions for separate proceedings in Dodge County Court.

SEPARATE PROCEEDINGS AND *CUSTIS V. U.S.*

LeGrand argues that the Nebraska Court of Appeals erred in interpreting the U.S. Supreme Court's decisions in *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), as authority to invalidate "separate proceedings" in Nebraska.

A defendant cannot collaterally attack a prior conviction in an enhancement proceeding. *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Therefore, objections to the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment, and must be raised either by a direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside the prior conviction. *Id.* See, also, *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992).

The Nebraska Court of Appeals was correct when it stated that we followed U.S. Supreme Court precedent in recognizing the right to collaterally attack prior convictions through a separate proceeding. See *State v. Wiltshire, supra* (following *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980)). State courts are bound by the decisions of the U.S. Supreme Court when they establish a citizen's due process rights under the federal constitution. U.S. Const. art. VI. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

However, states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution. See *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

Accordingly, the Nebraska Court of Appeals erred in presuming that this court would automatically apply to Nebraska a U.S. Supreme Court holding that restricts where federal defendants subject to federal recidivist statutes may challenge earlier convictions used for federal sentence enhancement.

Moreover, *Custis v. U.S.*, *supra*, and *Nichols v. U.S.*, *supra*, do not suggest that Nebraska's separate proceedings are no longer valid. In *Custis v. U.S.*, the Court addressed whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance the defendant's sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (1994). The Court held that, based upon the language of the statute, Congress did not intend to permit collateral attacks on prior convictions under § 924(e). In *Nichols v. U.S.*, the Court overruled its holding in *Baldasar v. Illinois, supra*, and held that an uncounseled misdemeanor conviction, where no prison term was imposed, is valid when used to enhance punishment at a subsequent conviction.

Thus, there exists no federal mandate to overrule separate state proceedings to collaterally attack prior state convictions on grounds other than right to counsel or waiver of counsel. A constitutionally invalid conviction used for sentence enhancement works a second constitutional violation on the defendant by allowing an invalid conviction to serve as a predicate for a recidivist conviction. Without separate proceedings, a defendant in a state case, who is not in custody, has no other forum to challenge a constitutionally infirm judgment sought to be used for sentence enhancement. With this in mind, we reaffirm our holdings in *State v. Oliver, supra*, and *State v. Wiltshire, supra*, that separate proceedings are a valid means to collaterally attack allegedly constitutionally invalid prior convictions used for sentence enhancement.

VALIDITY OF LEGRAND'S PRIOR CONVICTIONS

LeGrand alleges that the records of his two prior convictions for DUI do not affirmatively show that his guilty pleas were entered freely, voluntarily, knowingly, and intelligently.

In order to support a finding that a plea of guilty or nolo contendere has been entered freely, voluntarily, knowingly, and intelligently, 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. 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. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). See *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

As to LeGrand's 1987 conviction, the record reflects that the county court apprised LeGrand of all of his rights set out in *State v. Irish, supra*, during the arraignment at which LeGrand pled not guilty. At the subsequent rearraignment at which LeGrand changed his plea to guilty, the record is silent as to whether LeGrand waived his privilege against self-incrimination and his rights to confront witnesses, to trial by jury, to counsel, to due process with proper notice, and to a fair and impartial hearing. The court, through a checklist, did state that LeGrand understood the nature of the charge, the possible penalties that might be imposed, and all rights available to him by law, and that his plea was entered voluntarily, knowingly, and intelligently, with full understanding of the consequences.

That the record is silent regarding certain rights in the rearraignment is irrelevant because those rights were explained to LeGrand in his prior arraignment. Once a defendant is informed of his constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). LeGrand understood all the rights that he stood to lose by pleading guilty. With that in mind, he chose to change his plea from not guilty to guilty. The court, upon LeGrand's change of plea, made certain that LeGrand understood the nature of the charge, the possible penalties that might be imposed, and all rights available to him by law.

LeGrand's 1987 conviction is far removed from the facts in *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991), in which we held that when a record is silent as to a defendant's opportunity for counsel, the court may not presume such rights were respected. *Id.* In *State v. Nowicki*, the record was silent as to the defendant's right to counsel at the arraignment and trial.

Not until sentencing did the court inform the defendant of his right to counsel. Obviously, one cannot presume that the defendant understands rights prior to being advised of those rights. In the case at bar, the record reflects that LeGrand understood his rights prior to pleading guilty in 1987.

As to the 1991 prior conviction, the record reflects that at LeGrand's arraignment, at which he pled not guilty, LeGrand was advised of all of his rights set out in *State v. Irish, supra*. When LeGrand changed his plea to guilty, the court again covered all of the *State v. Irish* requirements.

LeGrand's argument that he did not sign the checklist which verifies that he entered a constitutional guilty plea is immaterial. A checklist, authenticated by the signature or initials of the judge, which indicates that all constitutional requirements have been met, becomes a part of the record and may affirmatively establish an intelligent and knowing guilty plea. *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

Since we have already stated that separate proceedings under *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), and *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), are available to defendants and have not been vitiated by any federal court holdings, we do not need to address LeGrand's final assigned error in which he contends that the Legislature, through § 39-669.07(3), intended to create separate proceedings to allow collateral attacks of prior convictions.

CONCLUSION

The Nebraska Court of Appeals erred in reversing our holdings in *State v. Oliver, supra*, and *State v. Wiltshire, supra*. The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court. Second, the Nebraska Court of Appeals' reliance on U.S. Supreme Court holdings was misplaced because *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), does not impact this state's laws regarding the right of state defendants to collaterally attack prior state convictions being used for enhancement purposes.

We affirm the denial of LeGrand's petitions to invalidate the prior convictions, because the record reflects that LeGrand did

freely, voluntarily, knowingly, and intelligently plead guilty in each of his two prior convictions.

AFFIRMED.

CONNOLLY, J., not participating.

WRIGHT, J., concurring.

I concur in the result of the majority's opinion, which denied LeGrand's petition to invalidate his prior convictions. I would not adhere to a decision that would permit a defendant to stall sentence enhancement proceedings by a collateral attack of the prior convictions used for sentence enhancement on the basis that such convictions were not freely, voluntarily, knowingly, and intelligently made. In my opinion, enhancement proceedings should continue independent of any separate proceeding that the defendant brings. The enhancement proceedings should not be placed in limbo for years, pending resolution of such a separate proceeding.

In *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), the Court granted certiorari to determine whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (1994). The Court held that the defendant had no such right to collaterally attack prior convictions, except convictions obtained in violation of the right to counsel. On the basis of *Custis*, I would not permit a defendant to collaterally attack prior convictions in order to stall an enhancement proceeding.

FRANCES BLACKBIRD, PERSONAL REPRESENTATIVE OF THE ESTATE OF CLAUDE R. BLACKBIRD, DECEASED, APPELLANT, V. SDB INVESTMENTS ET AL., APPELLEES.

541 N.W.2d 25

Filed December 22, 1995. No. S-94-002.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
3. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
6. ____: ____. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded.
7. **Licensee: Words and Phrases.** A licensee is defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.
8. ____: ____. A social guest is a licensee.
9. **Licensee: Negligence.** An owner or occupant of a premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him as a licensee of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is required to exercise ordinary care.
10. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences.
11. ____: ____: ____. To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to

imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

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

D.C. Bradford, of Bradford, Coenen & Welsh, for appellant.

Terry K. Gutierrez, of Schmid, Mooney & Frederick, P.C., for appellees SDB Investments and Beals Realty.

Alan M. Thelen, Assistant Omaha City Attorney, for appellee City of Omaha.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Frances Blackbird, mother of, and personal representative of the estate of, Claude R. Blackbird, brought this wrongful death action against the defendants, SDB Investments, Beals Realty, and the City of Omaha, alleging their negligence caused her son's death. The district court for Douglas County sustained the defendants' motions for summary judgment. Under the authority granted to us by Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we remove the appeal to this court. We affirm the district court's finding that there was no genuine issue of material fact as to any issue raised by the plaintiff. We therefore affirm.

ASSIGNMENT OF ERROR

The plaintiff alleges the district court erred in granting summary judgment because material facts exist in the record requiring that the issues of negligence and causation be submitted to the finders of fact.

SCOPE OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from

those facts and that the moving party is entitled to judgment as a matter of law. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995); *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law. *Poppleton v. Village Realty Co., supra*; *Krohn v. Gardner, supra*; *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995). After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Krohn v. Gardner, supra*; *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995); *Keefe v. Glasford's Enter., supra*.

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Poppleton v. Village Realty Co., supra*; *Krohn v. Gardner, supra*; *Walpus v. Milwaukee Elec. Tool Corp., supra*.

BACKGROUND

On April 4, 1991, Blackbird fell to his death from a second-floor balcony of the Hamilton Terrace Apartments located at 210 South 24th Street in Omaha, Nebraska. The plaintiff brought this action against SDB Investments, the owner of the property; Beals Realty, the manager of the property; and the City of Omaha for the wrongful death of her son.

The record contains the deposition testimony of only one eyewitness to the accident—Alvin Norman. He testified that at approximately 8:30 a.m., on April 4, 1991, Blackbird, Norman, and others went to visit one Chris Romero, who lived at the Hamilton Terrace Apartments. Upon arrival, the group joined other friends in drinking beer on the second-floor

balcony along the north side of the apartment building.

Immediately prior to the accident, while standing on the second-floor balcony, Norman and Blackbird engaged in a "spitting contest." They were spitting toward the apartment building into a shaft between the building and the south edge of the north balcony. Between the balcony and the shaft was a pair of iron railings, affixed to the side of the building, one above the other. The height of the topmost rail was almost 5 feet 6 inches.

At one time during the spitting contest, Blackbird, a 300-pound man, put both hands on the top rail of the upper railing and put his right foot on the top rail of the lower railing. He leaned back, extended his arms, gathered spit in his mouth, and then jerked himself forward, taking his left foot off the ground and putting all of his weight upon his right foot on the lower railing, so that he could lean over the top rail to spit. When he came forward, the lower railing broke off from the side of the building, he flipped over the upper railing, and he fell approximately 24 feet onto a concrete stairwell, causing his death.

Prior to Blackbird's death, city inspectors discovered numerous code violations in the apartment building and were in the process of condemning the building pursuant to chapter 43 of the Omaha Municipal Code. However, the iron railings over which Blackbird fell were not cited as a code violation and were not a focus of the condemnation proceedings. A condemnation hearing was set by the City of Omaha for December 19, 1990, but was continued until a later date on three separate occasions. The latest continuance was granted March 28, 1991, just 7 days before Blackbird's death. As a result, no hearing was ever conducted.

It is undisputed that the defendants did not repair the property or vacate the premises prior to Blackbird's death. In her third amended petition, the plaintiff alleged that Blackbird fell over a "wooden guard railing . . . on the north side of the balcony." The petition further alleged that a proximate cause of the injury and death to Blackbird consisted of one or more of the following acts of negligence by each of the defendants: "(a) In failing to take the necessary action to cause the repair of said

dangerous condition; (b) By failing to properly and adequately warn Mr. Blackbird of said dangerous condition."

The district court for Douglas County granted the defendants' motions for summary judgment finding that the plaintiff failed to raise a genuine issue of material fact as to any issue. The plaintiff appeals.

ANALYSIS

Defects in Pleadings

The plaintiff alleges that the trial court erred in granting summary judgment because material facts exist in the record requiring that the issues of negligence and causation be submitted to the finders of fact. As stated, in her third amended petition, the plaintiff alleged incorrectly, albeit before any meaningful discovery, that Blackbird fell over a wooden guardrail on the north side of the balcony. However, the evidence shows that Blackbird fell over an iron railing on the south side of the north balcony.

An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). However, any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

Although the allegations contained in the plaintiff's petition incorrectly focus on a wooden guardrail, the theory of the case advanced on summary judgment focused on the iron railings Blackbird actually fell over. The defendants presented deposition testimony on the condition of the iron railings. As a result, this defect in the pleadings will not be considered because it did not affect any substantial rights of the defendants.

Failure to Repair Said Dangerous Condition

The plaintiff alleged in her petition that the defendants were negligent in failing to take the necessary action to cause the repair of said dangerous condition. However, the defendants put on evidence that the iron railings over which Blackbird fell were

not defective and did not present a dangerous condition. The evidence presented showed that the iron railings were never the subject of any code violation citations by the City of Omaha. In fact, a condemnation inspector, Gary Bengtson, examined the iron railings in October 1990, prior to the accident. He found no problems with the iron railings, found "no damage done to them," and found that they were "tight" and "in place." Ken Taylor, then supervisor of code and condemnation for the City of Omaha planning department, noted that all of the iron railings were attached to the building and did not recall any iron railings missing. Norman testified that prior to the accident he felt the top railing and it was secure.

Thus, the defendants met their burden of producing sufficient evidence that the iron railings were not defective by demonstrating that, if the evidence remains uncontroverted, they are entitled to a judgment as a matter of law. As a result, the burden then shifted to the plaintiff to present evidence showing an issue of material fact which would prevent summary judgment for the defendants. See, *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995); *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995); *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995).

In the instant case, the plaintiff failed to present any evidence of negligence by the defendants that led to Blackbird's death. The only evidence presented by the plaintiff was that the railing came off when Blackbird jerked forward on it. There was no evidence that there was any defect in the iron railing or in the way the iron railing was fastened to the building, that the City of Omaha conducted any improper inspections, that the inspection should have been conducted differently, or that the defendants failed to meet any recognized standards. Thus, no issue of material fact was presented which would have prevented summary judgment. As a result, we find the trial court did not err in granting summary judgment as to the plaintiff's allegation that the defendants were negligent in failing to repair the railings.

Failure to Warn of Said Dangerous Condition

The plaintiff next alleged that the defendants were negligent

in failing to properly and adequately warn Blackbird of said dangerous condition. A licensee is defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991); *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966). A social guest is a licensee. *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988). Although the third amended petition does not allege that Blackbird was a licensee, the deposition testimony indicates that he was a licensee.

In *Guenther v. Allgire*, 228 Neb. at 428–29, 422 N.W.2d at 785, this court stated:

> The duty of [an owner or occupant of a premises is] only to refrain from injuring . . . a licensee by willful or wanton negligence or designed injury, or to warn him as a licensee of a hidden danger or peril *known* to the owner but unknown or unobservable by the licensee, who is required to exercise ordinary care. [Citation omitted.] In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. [Citation omitted.]
>
> To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

(Emphasis in original.) See, also, *Wiles v. Metzger, supra*.

In the instant case, we find that no duty to warn arose. The evidence shows that there was no genuine issue of material fact as to any defects in the iron railings, and thus, the defendants could not have known of any hidden peril or danger associated

with the iron railings. As a result, we conclude the trial court did not err in granting summary judgment for the defendants on the plaintiff's allegation of negligent failure to warn.

CONCLUSION

Even when considering the evidence in a light most favorable to the plaintiff, we find there was no genuine issue of material fact as to any issue raised by the plaintiff. Accordingly, we affirm the district court's decision granting the defendants' motions for summary judgment.

AFFIRMED.

TERRY A. TALLE, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT AND CROSS-APPELLEE.

541 N.W.2d 30

Filed December 22, 1995. No. S-94-548.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads the affirmative defense of assumption of the risk in a negligence action, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury.
3. **Negligence: Evidence: Trial.** Before the issue of assumption of the risk may be submitted to the jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed herself or himself to the danger which proximately caused the plaintiff's damage.
4. **Negligence.** Except where the plaintiff expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless the plaintiff then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.
5. ____. The standard to be applied in determining whether a plaintiff has assumed

the risk of injury is a subjective one based upon the particular facts and circumstances of the event; in this regard, it differs from contributory negligence, in which an objective standard is applied.

6. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
7. **Damages.** While consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages.
8. **Trial: Evidence: Appeal and Error.** Although the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

Appeal from the District Court for Frontier County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Don Stenberg, Attorney General, and Royce N. Harper for appellant.

Steven D. Burns, of Burns & Associates, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

This is a tort claims action brought under the provisions of Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994) in which the plaintiff-appellee and cross-appellant, Terry A. Talle, alleges she was damaged as the proximate result of the negligent placement of a minor boy in foster care with her by the defendant-appellant and cross-appellee, Nebraska Department of Social Services. The district court entered a partial summary judgment in favor of Talle on the issue of liability, and following trial thereafter awarded her the sum of $142,600 in damages. The department thereupon appealed to the Nebraska Court of Appeals, and we, on our own motion, in order to regulate the caseloads of the two courts, transferred the appeal to this court. The assignments of error argued in the department's brief are

that the district court (1) wrongly found there to be no genuine issue of material fact concerning whether Talle assumed the risk, (2) incorrectly awarded Talle hedonic damages, and (3) erroneously considered certain damages evidence. Talle cross-appealed, assigning as error, in essence, the claimed inadequacy of the damages awarded. For the reasons hereinafter set forth, we affirm the partial summary judgment on the issue of liability, reverse the district court's award of damages, and remand the cause for further proceedings on that issue. Our rationale in so ruling makes consideration of the cross-appeal unnecessary.

In October 1989, Christy Johnson Strawder, a department caseworker, contacted Talle about the possibility of assuming foster care responsibility for Ronald Heinen, then a 13-year-old boy. Talle expressed an interest, and Strawder informed her as to Heinen's age, that he used hearing aids, and that he was at the time hospitalized for a tonsillectomy. When Talle visited Heinen in the hospital, no one informed her that in addition to the tonsillectomy, Heinen was also admitted for evaluation concerning his suicidal and homicidal threats. In fact, Heinen had exhibited a history of self-mutilation, uncontrollable anger, emotional abuse, physical abuse, sexual abuse, lying, stealing, and suicidal and homicidal tendencies.

In November 1989, Talle and her husband agreed to act as foster parents for Heinen on the bases of having had him spend a night in their home and Talle's conversations with Strawder. Accordingly, Talle and Strawder signed a department "Child Placement Agreement" on November 8, 1989, in which the department agreed to "share with the foster care facility prior to placement and during placement, information known about the child's life situation as appropriate and necessary, including basic medical history of the child, immunizations and current health problems." The agreement also provided that upon 2 weeks' notice, except in the case of an emergency, Talle could have the department remove Heinen from her care.

According to Talle, at no time prior to or after the placement of Heinen in the Talle home did the department inform Talle of Heinen's violent behavior or any of the professional observations and opinions concerning it. In January 1990,

Heinen began to physically and verbally assault Talle. His assaultive behavior toward Talle continued and grew progressively worse over the following few months. Talle called Strawder after many of the assaults, and occasionally, the police were called. In response, Strawder advised Talle to consult with Heinen's treating psychotherapist. At times Talle consulted with the psychotherapist after Heinen would abuse her. In response, the psychotherapist gave Talle some general guidance on how to control Heinen's behavior, but no specifics.

Strawder offered no additional training to Talle to enable her to handle Heinen's violent behavior. Instead, each time Talle contacted Strawder about Heinen's assaultive behavior, Strawder encouraged Talle to "hang in there" because Heinen was simply going through a stage that could be remedied with a stable family's love and care. Strawder recommended that the Talles complete guardianship proceedings to demonstrate their commitment to Heinen, stating that this could remedy the violence.

In the summer of 1990, the Talles acquired guardianship of Heinen. Heinen continued physically abusing Talle through October 1990, when she barred Heinen from her home as the result of learning that he had sexually assaulted her neighbor's daughters. As a consequence of her experiences with Heinen and the department, Talle suffers from depression and posttraumatic stress syndrome.

In directing our attention to the department's assumption of the risk claim, we note at the outset that summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995). With that in mind, we next recall that

> [w]hen a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be

> submitted to the jury. . . .
>
> . . . " ' "Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. . . . '[E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm *arising from the defendant's conduct* unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.' . . ." ' "

(Emphasis in original.) *Winslow v. Hammer*, 247 Neb. 418, 427-28, 527 N.W.2d 631, 637 (1995) (quoting, in part, *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992)).

The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. In this regard, it differs from contributory negligence, in which an objective standard is applied. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

> " 'Assumption of risk rests in contract or in the principle expressed by the ancient maxim, "*volenti non fit injuria*," whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct.' . . ."

Cassio v. Creighton University, 233 Neb. 160, 173, 446 N.W.2d 704, 713 (1989).

We also remind ourselves that in reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences

deducible from the evidence. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995); *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995); *Oliver v. Clark, supra*. Even when viewed in this light, the evidence shows as a matter of law that Talle did not assume the risk of injury.

There are no facts which can show that Talle knew of or understood the danger, and therefore, the department failed to meet its burden in having its assumption of the risk defense submitted to the trier of fact as a question of fact. Indeed, the evidence shows that Talle did not know or understand the risk. Not only did the department fail to inform Talle of Heinen's violent propensities, the department lied by telling Talle that Heinen had never acted violently before. In addition, the department encouraged Talle to continue her efforts, as Heinen's conduct was merely a stage he was going through. The department also encouraged Talle to increase her commitment to Heinen by becoming his legal guardian. Thus, the department actively prevented Talle from fully understanding the danger she was experiencing.

That being so, we consider next the matter of hedonic damages, which we have previously defined in this context as "the damages arising from loss of the enjoyment of life, as measured separately from the economic productive value that an injured person would have had." *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 661, 538 N.W.2d 732, 739 (1995). Therein, this court held that "while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages." *Id.* at 664, 538 N.W.2d at 741. Consequently, the district court erred in awarding Talle hedonic damages as a separate category of nonpecuniary damages.

The department's final claim is that the district court erred in receiving the testimony of Stan Smith, an economist who established a formula for calculating the value of lost enjoyment of life. Smith is the same economist whose testimony on the value of lost enjoyment of life was held inadmissible in *Anderson/Couvillon*. In that case, we held that the three models

on which Smith bases his formula for calculating the value of lost enjoyment of life were flawed in one way or another and that his testimony failed to satisfy Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989). As his testimony and the models on which he bases his formula were substantially the same in this case as they were in *Anderson/Couvillon*, the district court erred in admitting his testimony.

Although the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., supra.* The record in this case shows that the district court specifically relied on Smith's testimony in awarding Talle damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WHITE, C.J., concurring in part, and in part dissenting.

I concur in that part of the majority opinion affirming the sustaining of the motion for summary judgment as to the liability of the Nebraska Department of Social Services. I dissent, however, from the determination to remand on the issue of damages. See *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995) (White, C.J., dissenting in part).

LANPHIER and GERRARD, JJ., join in this concurrence and dissent.

CAPORALE, J., dissenting in part.

While I agree with the majority opinion regarding the issue of damages and the evidence relating to it, I dissent from that portion of the opinion pertaining to the issue of liability.

The majority correctly observes that in reviewing the district court's summary judgment holding the Nebraska Department of Social Services liable to Terry A. Talle, the evidence must be

viewed in a light most favorable to the department, and that the department must be given the benefit of all reasonable inferences deducible from the evidence. Viewed in this light, the evidence is that Talle encountered ever more violent physical and verbal abuse from her ward, Ronald Heinen, from January until October 1990, when Heinen was forced to leave the Talles' home.

Thus, for 10 months, Talle knew that Heinen's behavior presented an escalating threat to her health. She obviously knew as well that he was under psychiatric care because she took him to his psychotherapist and consulted with the psychotherapist about his abusive behavior. Nonetheless, rather than exercise her contractual option to put Heinen out of her home, she continued to act as his foster parent and later on as his guardian. And when she did have Heinen removed, she did so not because of his actions toward her, but because of his assaults on others. Surely the law can expect that at some point, one, as a matter of fact, becomes responsible for one's own well-being!

While I cannot, and do not, condone governmental lying, no matter how pervasive it may have become, neither can I condone, as a matter of law, Talle's actions in maintaining the status quo in her own household for so protracted a period of time, regardless of how much the department entreated her to do so. I submit that although the evidence need not necessarily have led a fact finder to determine that Talle had assumed the risk of her injuries, the evidence would certainly support such a factual finding if such were made. However, that is not for this court to decide. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994).

Because a question of fact exists as to whether Talle assumed the risk of her injuries, the granting of summary judgment on the issue of liability was erroneous.

CONNOLLY, J., joins in this dissent.

GORDON M. BECKER, APPELLANT, V. NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION ET AL., APPELLEES.

541 N.W.2d 36

Filed December 22, 1995. No. S-94-666.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
2. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
3. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
4. **Jurisdiction: Waiver.** While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties.
5. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
6. **Administrative Law: Service of Process.** Under Neb. Rev. Stat. § 25-510.02 (Reissue 1989), service on a state or political subdivision, to be effective, may be done in one of four ways: (1) by leaving summons at the Attorney General's office with the Attorney General, (2) by leaving summons at the Attorney General's office with a deputy attorney general, (3) by leaving summons at the Attorney General's office with someone designated in writing by the Attorney General to receive summons, or (4) by sending summons by certified mail addressed to the Attorney General's office. All other forms of service in actions against the State of Nebraska or any of its political subdivisions are ineffectual.
7. **Administrative Law: Service of Process: Words and Phrases.** Neb. Rev. Stat. § 25-510.02 (Reissue 1989) provides that the plain meaning of the phrase "may be served," when viewed in the context of the service statutes, modifies the method of acceptable service, not the entity to be served.
8. **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.
9. **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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
10. ____: ____: ____. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.

11. **Administrative Law: Service of Process.** When Neb. Rev. Stat. § 25-510.02 (Reissue 1989) applies, in order to institute judicial review under the Administrative Procedure Act, service must be had on the Attorney General.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed.

Gordon M. Becker, pro se.

Don Stenberg, Attorney General, and Linda L. Willard for appellee Nebraska Accountability and Disclosure Commission.

John C. Wiltse for appellees Allen et al.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Gordon M. Becker sought judicial review in Lancaster County District Court under the Administrative Procedure Act of a settlement agreement between the Nebraska Accountability and Disclosure Commission (Commission) and the University of Nebraska Board of Regents (Regents). The Lancaster County District Court dismissed Becker's petition for lack of jurisdiction, the Nebraska Court of Appeals summarily affirmed the dismissal, and we granted further review.

SCOPE OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995); *K N Energy, Inc. v. Cities of Broken Bow et al.*, 248 Neb. 112, 532 N.W.2d 32 (1995).

Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

FACTS

Becker filed a number of complaints with the Commission in January and March 1993. On November 5, 1993, the Commission found "probable cause" that certain regents had used funds under their control to pay for travel and food expenses for their spouses in connection with the 1993 Orange Bowl, in violation of Neb. Rev. Stat. § 49-14,101(4) (Reissue 1993). The Commission also found "probable cause" that certain regents had failed to disclose gifts on financial disclosure statements in connection with the 1992 Coca-Cola Bowl in Japan, in violation of Neb. Rev. Stat. § 49-1496(2)(e) (Reissue 1988).

On March 11, 1994, the Commission approved a settlement agreement in which the Regents agreed that they would not use public funds to pay the expenses of their spouses to attend postseason bowl games. The Regents also agreed to disclose the name of the corporate sponsor who paid their travel expenses to the Coca-Cola Bowl in Japan. In return, the Commission agreed that it would cease further prosecution of the matters in connection with the 1993 Orange Bowl and the Coca-Cola Bowl in 1992, that no civil penalties would be assessed, and that no reimbursements would be required. The agreement was signed by the University of Nebraska's general counsel, Richard Wood, and by the executive director of the Commission.

Becker filed an "Appeal of Decision of Nebraska Accountability and Disclosure Commission" on March 31, 1994, naming as defendants the Commission, the individual regents, and Wood. A summons was sent by certified mail directly to each defendant. No summons was sent to the Attorney General.

The Regents and Wood filed a demurrer asserting that Becker was not a party to the proceedings and that his petition failed to state facts sufficient to constitute a cause of action. The Commission filed a special appearance asserting that the district court lacked personal jurisdiction. In an order dated June 13, 1994, the district court found that since service of summons was not made on the Attorney General pursuant to Neb. Rev. Stat. § 25-510.02 (Reissue 1989) within 30 days after the filing of the petition, the district court was without jurisdiction in the matter.

In addition, the court found that Becker was not a person "aggrieved" pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994) and that he had no standing to seek judicial review of the action of the Commission. The district court sustained the Commission's special appearance and the demurrer of the Regents and dismissed Becker's petition. The Court of Appeals summarily affirmed.

ASSIGNMENTS OF ERROR

Summarized and restated, Becker asserts in his petition for further review that the Court of Appeals erred in granting summary affirmance and in dismissing the appeal for lack of jurisdiction because of improper service.

ANALYSIS

We first address whether the district court had personal jurisdiction over the Commission, the Regents, and Wood. When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995); *K N Energy, Inc. v. Cities of Broken Bow et al.*, 248 Neb. 112, 532 N.W.2d 32 (1995).

Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties. *Id.* One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Id.*

Under § 25-510.02, service on a state or political subdivision, to be effective, may be done in one of four ways:

> (1) by leaving summons at the Attorney General's office with the Attorney General, (2) by leaving summons at the

> Attorney General's office with a deputy attorney general, (3) by leaving summons at the Attorney General's office with someone designated in writing by the Attorney General to receive summons, or (4) by sending summons by certified mail addressed to the Attorney General's office. All other forms of service in actions against the State of Nebraska or any of its political subdivisions are ineffectual.

Twiss v. Trautwein, 247 Neb. 535, 537, 529 N.W.2d 24, 26 (1995). "[T]he plain meaning of the phrase 'may be served,' when viewed in the context of the service statutes, modifies the method of acceptable service, not the entity to be served." *Id.*

On May 3, 1994, the Commission filed a special appearance "objecting to the jurisdiction of this Court over its person, showing to the Court that there has been no proper service of process upon it." The transcript in this case contains no praecipe for summons upon the Attorney General. The summons itself indicates that service was to be made upon the Commission. The petition was mailed to the Commission by certified mail, but no summons was served upon the Attorney General in any manner, as required by § 25-510.02. The record discloses a copy of the petition was mailed to the Attorney General by letter from the Commission dated April 5, 1994. The service upon the Commission in this case was ineffectual. See *Twiss v. Trautwein, supra*. The Court of Appeals correctly affirmed the district court's order that the district court lacked subject matter jurisdiction over the Commission.

Personal jurisdiction as to the Regents and Wood is controlled by *Glass v. Nebraska Dept. of Motor Vehicles, supra*. The Regents and Wood filed a demurrer stating that Becker was not a party, and therefore not entitled to maintain this action, and that the petition did not state facts sufficient to constitute a cause of action. The filing of the demurrer by the Regents and Wood invoked the power of the court on an issue other than personal jurisdiction and, consequently, conferred on the court personal jurisdiction. Therefore, the district court had personal jurisdiction over the Regents and Wood. See *id.*

The remaining issue is whether the district court had subject matter jurisdiction. "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." *Id.* at 504, 536 N.W.2d at 346. Section 84-917(1) provides in relevant part: "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act." Section 84-917(2)(a) states:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. *All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.* If the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of the petition. The court, in its discretion, may permit other interested persons to intervene.

(Emphasis supplied.) In discerning the meaning of a statute, we 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, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

Neb. Rev. Stat. § 49-14,123 (Reissue 1993) provides in part: "In addition to any other duties prescribed by law, the

commission shall . . . (11) Act as the primary civil and criminal enforcement agency for violations of the Nebraska Political Accountability and Disclosure Act and the rules or regulations promulgated thereunder . . . ." It is apparent from § 49-14,123 that the Commission's role in this matter is more than acting as a neutral factfinding body described in § 84-917. Therefore, the Commission is required to be a party to the proceedings for review.

"Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action." § 84-917(2)(a). When § 25-510.02 applies, in order to institute judicial review under the Administrative Procedure Act, service must be had on the Attorney General. The Commission, as a state agency, must be served in compliance with § 25-510.02. See, *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995); *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995). Becker did not serve the summons on the Commission as required by § 25-510.02. Having failed to properly make the Commission a party of record, Becker did not comply with the requirements of § 84-917(2)(a) by making the Commission a party. The district court did not acquire subject matter jurisdiction under the Administrative Procedure Act.

We do not reach the issues of whether the demurrer should have been sustained by the district court or whether Becker was a person aggrieved by the decision of the Commission. Where the court from which the appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

CONCLUSION

We affirm the decision of the Court of Appeals granting summary affirmance for lack of jurisdiction.

AFFIRMED.

WHITE, C.J., participating on briefs.

BRYAN SURRATT, APPELLANT AND CROSS-APPELLEE, V. WATTS TRUCKING AND AETNA CASUALTY INSURANCE CO., ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES AND CROSS-APPELLANTS.

541 N.W.2d 41

Filed December 22, 1995. No. S-95-441.

1. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 1993) precludes an appellate court from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court.
2. **Attorney Fees.** In general, an attorney fee may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of such.
3. **Attorney Fees: Words and Phrases.** As used in Neb. Rev. Stat. § 25-824(2) (Reissue 1989), "frivolous" means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.
4. **Actions.** Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

In undertaking this appeal from the award of the Nebraska Workers' Compensation Court to the Nebraska Court of Appeals, the plaintiff-appellant and cross-appellee, the employee Bryan Surratt, claimed, in summary, that the compensation court's award against the defendants-appellees and cross-appellants, the employer Watts Trucking and its compensation insurance carrier, Aetna Casualty Insurance Co., was inadequate. More specifically, Surratt asserted that by misevaluating the evidence, the compensation court erroneously denied him permanent disability benefits. Watts and Aetna

claimed that as Surratt's appeal is frivolous, they are entitled to the award of an attorney fee as a sanction against Surratt, and cross-appealed, asserting that in view of its rules relating to the disclosure of evidence, the compensation court erred in certain of its evidentiary rulings. In reply, Surratt asserted that the compensation court rules upon which Watts relies are unconstitutional. Surratt thereafter successfully petitioned to bypass the Court of Appeals, as a consequence of which this court considers the appeal and cross-appeal in the first instance. We affirm the award of the compensation court.

Surratt was involved in an accident arising out of and in the course of his employment as a refuse hauler for Watts when, on October 8, 1993, the truck he was driving struck a barrel. Surratt did not recall feeling the impact, nor did he feel any pain immediately upon impact. However, upon getting out of the truck, he felt a sharp pain that went through his leg and up through his back, and he fell to the ground.

Shortly after Surratt's accident, he was treated by Dr. Angelo Patil of the University of Nebraska Medical Center. Neither Patil nor any of the other treating physicians at the medical center expressed any opinions that Surratt suffers from a permanent disability. Dr. Lonnie Mercier, an orthopedic surgeon, examined plaintiff on January 14, 1994, and concluded that Surratt would not have any permanency rating. However, Dr. Jay J. Parsow, who also treated Surratt, opined that Surratt had suffered permanency attributable to the accident because a disk tear was reported on the MRI scan indicative of an acute injury.

Although restricted to light-duty tasks, Surratt attempted to return to work in December 1993, at which time he was sent to a compost pile where yard waste was kept. He was required to pick up plastic bags that were blowing around. Because of back discomfort, Surratt was unable to perform this work.

After a "work-hardening" program, Surratt again attempted to return to work in February 1994. There is conflicting testimony as to what Surratt did after returning to work the second time and how he came to be discharged, but there is no question that his employment with Watts was terminated.

Not until the original hearing held by the compensation court

on August 3, 1994, were Watts and Aetna furnished with a copy of Parsow's opinion; Watts and Aetna objected to its admission into evidence on a variety of grounds, including its untimely disclosure. Surratt claimed that it was offered solely in rebuttal to the deposition of Mercier. Apparently, Mercier's deposition was taken on June 30, 1994, but was not transcribed and delivered to the parties until July 29. Surratt took the position that because the deposition transcription was not available until July 29, pursuant to the relevant compensation court rule, he had 10 days from that date in which to disclose rebuttal evidence, a timespan which encompassed the hearing date. The compensation court overruled Watts and Aetna's objection.

The compensation court also received in evidence a report prepared by Midlands Rehabilitation Consultants regarding Surratt's vocational abilities and earning capacity. Watts and Aetna unsuccessfully objected on the basis that the report was not prepared in accordance with the compensation court rules because Watts and Aetna did not agree to the Midlands evaluation, nor was Midlands appointed by the compensation court.

Surratt's position that the award is inadequate is premised on the claim that as Mercier's opinion did not take into account the revelations of the MRI scan, his opinion cannot be relied upon and has no probative force. But Mercier did take the MRI scan revelations into account, for he testified:

> Q. Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether or not . . . Surratt has suffered any permanent injury or impairment as a result of the automobile accident of October 8th, 1993?
>
> A. Yes, I have an opinion.
>
> Q. And what is your opinion?
>
> A. I do not believe . . . Surratt would have any permanency contributable [sic] to this condition.
>
> Q. Doctor, what are the reasons or basis of that opinion?
>
> A. A lack of evidence of any serious injury having occurred.
>
> Q. And what specifically are you referring to?

> A. Essentially normal objective physical exam, and essentially relatively normal MRI studies and other evaluations.

Nevertheless, Surratt points to Parsow's report, which read the MRI scan differently, concluding that the scan revealed a disk tear indicative of an acute injury. However, even assuming that Parsow's report was properly in evidence and contained proper rebuttal testimony, Neb. Rev. Stat. § 48-185 (Reissue 1993) precludes an appellate court from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

It is not the proper function of an appellate court to determine on review whether a disk tear is apparent from an MRI and whether this constitutes a permanent injury; that is the reason expert witnesses are called to testify before a factfinding court. It was for the compensation court to determine which, if any, of the expert witnesses to believe. See, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992); *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). The compensation court decided to believe Mercier, and this decision cannot be said to have been erroneous as a matter of law.

That determination makes it unnecessary for us to concern ourselves with Watts and Aetna's claim that the compensation court erred in receiving in evidence the reports of Parsow and Midlands or with Surratt's claim that the rules on which Watts and Aetna rely in making those claims are unconstitutional.

All that remains, then, is the claim made by Watts and Aetna that as Surratt's appeal was frivolous, they are entitled to an award of attorney fees as a sanction. The general rule is that an attorney fee may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of such. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994); *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). Neb. Rev. Stat. § 25-824(2) (Reissue 1989) provides:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

As used in that statute, "frivolous" means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. *First Nat. Bank in Morrill, supra*; *Nebraska Pub. Emp., supra*. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *Nebraska Pub. Emp., supra*; *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

While Surratt's appeal is meritless, we are not prepared to say that it was wholly without rational argument based on law and the evidence. Surratt relied on a line of decisions holding that the value of an expert's opinion is no stronger than the facts upon which it is based and that because the MRI indicated a disk tear, Mercier's opinions had no probative force.

Accordingly, we deny Watts and Aetna an attorney fee and affirm the award of the compensation court.

AFFIRMED.

CAPORALE, J., dissenting in part.

While I agree with the majority's disposition of the appeal filed by the employee, Bryan Surratt, and with its conclusion that the evidential issues raised by the employer, Watts Trucking, and its carrier, Aetna Casualty Insurance Co., on cross-appeal need not be addressed, I disagree with its determination that Surratt's appeal was not frivolous as that term is used in Neb. Rev. Stat. § 25-824(2) (Reissue 1989).

No matter how one attempts to disguise Surratt's operative assignment of error, it is nothing more than a claim that the compensation court erred in believing one expert rather than another. As the majority opinion itself establishes, the proposition that the compensation court is not required to take

an expert's opinion as binding and may accept or reject such an opinion is so well established that to argue otherwise can only be described as legally absurd.

While I certainly would not want to adopt a judicial policy which would chill the litigation of new propositions of law ultimately ruled to be meritless, or chill efforts to apply old propositions to newly developing factual patterns, I do think we owe litigants a judicial policy which discourages the relitigation of propositions which have repeatedly been held to be meritless in well-established contexts. Only under such a judicial policy can there ever be any hope of once again achieving some semblance of currency in the work of the courts.

Accordingly, I would order Surratt's attorneys to pay the employer and its carrier jointly the sum of $1,500 to apply toward the services of their attorneys in this court.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. J. LINCOLN WOODARD, RESPONDENT.

541 N.W.2d 53

Filed December 29, 1995. No. S-94-171.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: States: Proof.** In the context of reciprocal disciplinary proceedings, a judicial determination of attorney misconduct in one state is generally conclusive proof of guilt and is not subject to relitigation in the second state; however, the judicial determination of misconduct in the first state need not be accepted as conclusive proof of guilt if the offender demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof concerning the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the offender's misconduct cannot be accepted.

3. ____: ____: ____. In a reciprocal disciplinary proceeding, even if the first state's judicial determination of misconduct is accepted as conclusive proof of guilt, it does not necessarily follow that the offender must be disbarred or suspended in the second state; the second state is entitled to make an independent assessment of the facts and an independent determination of the offender's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state.
4. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
5. **Disciplinary Proceedings: Presumptions.** Mitigating factors will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances.
6. **Disciplinary Proceedings.** The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
7. ____. Multiple acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of disbarment.

Patrick T. O'Brien, of Bauer, Galter, O'Brien, Allan & Butler, for relator.

Michael C. Pallesen and David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for respondent.

CAPORALE, LANPHIER, CONNOLLY, and GERRARD, JJ., and FUHRMAN, D.J., and NORTON and WARREN, D. JJ., Retired.

PER CURIAM.

This is an attorney reciprocal discipline case in which the relator, Nebraska State Bar Association, seeks to disbar respondent, J. Lincoln Woodard, in this state on the basis that he was disbarred in the District of Columbia. The sole issue is whether Woodard has carried his burden of establishing that the discipline to be imposed here should be less than that imposed by the District of Columbia. We determine that Woodard has not met that burden and therefore disbar him, effective immediately.

SCOPE OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee; provided, however,

that where the credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995); *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

FACTS

Woodard, who was admitted to the Nebraska and the District of Columbia bars, was later disbarred by the District of Columbia Court of Appeals. *In re Woodard*, 636 A.2d 969 (D.C. App. 1994). The District of Columbia court found that Woodard "recklessly and carelessly" misappropriated the funds of four clients, in violation of Canon 9, DR 9-103(A), of the applicable Code of Professional Responsibility; that he commingled the funds of four clients, in violation of DR 9-103(B)(3); and that he failed to maintain complete records and render appropriate accounts for two clients, in violation of DR 9-103(B)(4). Woodard admitted misappropriating the funds of three clients and commingling funds. He did not contest the charges of failure to maintain complete records and render appropriate accounts.

In those proceedings, Woodard claimed in mitigation that during the relevant period of time, he was addicted to prescription drugs, that his misconduct was substantially caused by that addiction, and that he is now substantially rehabilitated. Woodard urged the court to mitigate the usual sanction of disbarment and allow him to continue in the practice of law under restrictive conditions. The District of Columbia court rejected Woodard's mitigation claim, finding that Woodard had failed to establish that his addiction substantially affected his professional conduct or that he was substantially rehabilitated.

Shortly thereafter, the relator, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1992), sought an order from this court disbarring Woodard in this state. We then issued an order directing Woodard to show cause why he should not be disbarred, and temporarily suspended him from the practice of law in the State of Nebraska. Woodard filed a response, raising

in mitigation his addiction to prescription drugs, and we appointed a referee.

Following a number of evidentiary hearings, the referee noted that just as Woodard had done in the District of Columbia proceedings, he here admitted misappropriating and commingling the funds of three clients and did not contest the charges regarding his failure to keep complete records and render appropriate accountings. Noting that Woodard did not claim his due process rights were violated in the District of Columbia proceedings, the referee found that Woodard had waived any due process or infirmity of proof issue. The referee also accepted the findings of the District of Columbia as conclusive proof of Woodard's misconduct.

As he did in the District of Columbia proceedings, Woodard asserted before the referee here that his professional conduct was substantially affected by his use and abuse of benzodiazepine drugs during the time of the misconduct, specifically from the fall of 1988 to the spring of 1989. Woodard also maintained that he has not ingested such drugs, except for medically necessary treatment, since January 1990 and contended that he has been rehabilitated and is alcohol and drug free. Woodard argued that the sanction imposed upon him should thus be mitigated.

After reviewing the record of the District of Columbia proceedings and the testimony, the referee found that Woodard was addicted to benzodiazepine medications during the time of the misconduct and that Woodard's addiction was a contributing factor to the charged misconduct. The referee also found the evidence supported a finding that Woodard has been free of alcohol abuse since 1983 and from the nonprescribed and nonmedically required use of benzodiazepine since January 1990. In addition, the referee concluded that the termination of use of alcohol and benzodiazepine was a mitigating factor.

The referee noted as well that Woodard provided restitution to his clients (although he did not do so until he was charged or threatened with discipline) and that Woodard's former clients suffered no continuing or permanent harm. The referee also took notice of the numerous affidavits expressing support for Woodard.

Nonetheless, the referee did not find "significant mitigating evidence to warrant discipline other than [disbarment]." He thus determined that Woodard had not demonstrated the requisite fitness to practice law and recommended that Woodard be disbarred in the State of Nebraska.

In taking exception to the referee's findings and recommendation, Woodard argues that his termination of drug and alcohol abuse constitutes not merely a "mitigating factor" but a "significant mitigating factor." Woodard also contends that the referee did not give sufficient weight to the other mitigating factors noted above.

In the context of reciprocal disciplinary proceedings, a judicial determination of attorney misconduct in one state is generally conclusive proof of guilt and is not subject to relitigation in the second state. However, the judicial determination of misconduct in the first state need not be accepted as conclusive proof of guilt if the offender demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof concerning the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the offender's misconduct cannot be accepted. *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995); *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). Here, there is no claim that Woodard was deprived of any due process right in the District of Columbia court nor that there is an infirmity of proof. However, even if the first state's judicial determination of misconduct is accepted as conclusive proof of guilt, it does not necessarily follow that the offender must be disbarred or suspended in the second state. The second state is entitled to make an independent assessment of the facts and an independent determination of the offender's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state. *State ex rel. NSBA v. Ogborn, supra*; *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993); *State ex rel. NSBA v. Dineen, supra*.

Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987). Mitigating factors will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances. See *State ex rel. NSBA v. Gleason, supra*. Illustrative of the seriousness of these offenses is *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992), wherein we suspended for a year the offender's license to practice law, notwithstanding that he had his client's permission to use the client's money.

As an initial matter we note that there is no one particular factor which holds the magic key to the mitigation of disciplinary sanctions. Rather, the determination of an appropriate sanction necessarily entails an assessment of the totality of the particular facts and circumstances in each case.

Woodard reads *State ex rel. NSBA v. Miller, supra*, as establishing a per se rule that termination of alcohol and drug abuse is a "significant mitigating factor" affecting the appropriate disciplinary sanction. However, the actual holding in *Miller* was that the offender's termination of alcohol and drug abuse is a significant mitigating factor affecting the appropriate sanction to be administered. *Miller* did not establish a two-tiered system of mitigating factors where some are considered significant mitigating factors and others are not. Rather, the principle on which *Miller* focused was that "each case justifying discipline of an attorney must be evaluated individually in the light of the particular facts and circumstances." *Id.* at 266, 404 N.W.2d at 43. Certainly, an offender's termination of alcohol and drug abuse is a mitigating factor to be considered in determining appropriate disciplinary sanctions, *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993), and *State ex rel. NSBA v. Matt*, 213 Neb. 123, 327 N.W.2d 622 (1982), but whether it is such a

mitigating factor as warrants moderating the sanction will depend on the particular facts and circumstances of the offender's misconduct.

With the foregoing in mind, we turn to a consideration of whether there are factors present in this case which would mitigate the usual sanction of disbarment.

We accept the referee's findings concerning Woodard's drug addiction. Based on the medical testimony and the testimony of those who observed Woodard at that time, it appears that Woodard was abusing benzodiazepine during the period of his misconduct and that his drug abuse contributed to his misconduct. There is evidence that Woodard has abstained from alcohol abuse since 1983 and is free from the nonmedical use of benzodiazepine since January 1990. Woodard's treating physician also testified that Woodard is "substantially rehabilitated" and not likely to engage in similar misconduct. We therefore find that Woodard's termination of drug and alcohol abuse is a mitigating factor to be considered in fixing an appropriate sanction.

Other mitigating factors include that no other complaints were filed against Woodard prior to or after the charged conduct and that he cooperated fully with the Nebraska State Bar Association's Counsel for Discipline. We also take into account the many supportive affidavits regarding Woodard's reputation in his community and of his competence as a lawyer.

We, however, give no weight to the fact that Woodard provided restitution to his former clients. The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction. *State ex rel. NSBA v. Veith, supra.*

We are not unmindful of the similarities between this case and *State ex rel. NSBA v. Miller, supra,* in which the offender was suspended for 2 years. In both cases, the offenders' misconduct involved the misappropriation and commingling of client funds. Both of the offenders had problems with drug or alcohol abuse, which contributed to the charged misconduct, and had terminated their abuse of such substances. In each case, there were numerous affidavits received in support of the offender's good reputation and competence. Both Woodard and

Miller also fully cooperated with the Counsel for Discipline and had no history of prior complaints.

Despite these similarities, there are critical differences between the cases which cannot be ignored. The most telling difference is the fact that Miller made restitution more than 2 years prior to a complaint being filed against him and without any threat of disciplinary action. This suggests to us that in spite of his substance abuse problems, Miller retained some measure of professional responsibility. The type of restitution made by Woodard suggests an " 'honesty of compulsion,' " proving mostly that Woodard is anxious to become a lawyer again and that he is able somehow to raise the money required to make his former clients as whole as possible. See *In re Wilson*, 81 N.J. 451, 457, 409 A.2d 1153, 1156 (1979).

Another significant difference between the two cases is that Miller was charged with only a single, isolated incident of misconduct. Woodard, in contrast, was found guilty of multiple offenses. Woodard misappropriated and commingled the funds of four clients and failed to maintain complete records and render appropriate accounts for two clients. It is axiomatic that multiple acts of misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. See *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

It is the presence of the factors described above in conjunction with Miller's termination of alcohol and drug abuse which allowed for mitigation of the sanction of disbarment in that case. In Woodard's case, we do not find similar mitigating factors which would justify affording him the same treatment.

We also recall that in the recent case of *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995), misappropriation resulted in the suspension of the offender from the practice of law for an indeterminate period of time. However, *Gleason* is distinguishable from the case at hand because there the offender revealed instances of misconduct which might not otherwise have been discovered and because he had sought psychiatric and psychological help for the condition leading to the misappropriations before any complaint was filed against him.

CONCLUSION

After due consideration of the record and of our solemn duty to protect the public, we determine that Woodard has failed to show that he is fit to practice law in Nebraska or that the discipline imposed in this state should be less severe than that imposed in the District of Columbia. Accordingly, we hereby disbar Woodard, effective immediately.

JUDGMENT OF DISBARMENT.

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

TERRY D. WHITTEN, D.D.S., P.C., DOING BUSINESS AS MIDLANDS DENTAL CENTER, APPELLANT, V. TERRY MALCOLM, D.D.S., APPELLEE.

541 N.W.2d 45

Filed December 29, 1995. No. S-94-230.

1. **Equity: Appeal and Error.** In an appeal of 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, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Contracts: Intent.** When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law.
3. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Restrictive Covenants: Employer and Employee.** There are three considerations used to test the validity of a partial restraint on trade such as a covenant not to compete: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

5. ____: ____. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.
6. ____: ____. As a general rule, a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients with whom the former employee actually did business and has personal contact.
7. **Restrictive Covenants: Courts: Reformation.** It is not the function of courts to reform unreasonable covenants for the purpose of making them enforceable.

Appeal from the District Court for Richardson County: ORVILLE L. COADY, Judge. Affirmed.

Richard L. Halbert and Michael R. Dunn, of Halbert & Dunn, for appellant.

Gary F. Smolen, of Law Office of Eric W. Kruger, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This is an equitable action brought by Terry D. Whitten, D.D.S., P.C., doing business as Midlands Dental Center (Whitten), appellant, to enforce the noncompetition terms of an "Employment Agreement" with its former employee, Terry Malcolm, D.D.S., appellee. Whitten requested injunctive relief restraining and prohibiting Malcolm from practicing dentistry directly or indirectly within a 25-mile radius of Falls City, Nebraska, for a period of 1 year. Whitten also sought damages as a result of the alleged breach of contract. The trial court refused to grant the injunction or award damages. Whitten appealed. We removed this case from the Nebraska Court of Appeals' docket under our power to regulate the caseloads of the lower courts.

The only issue presented to this court is whether the noncompetition clause of the employment agreement is enforceable. Upon a de novo review of the record, we find, as a matter of law, that unreasonable covenants are not enforceable and are not subject to reformation. We affirm.

BACKGROUND

Dr. Terry D. Whitten set up his own dental practice in his hometown of Falls City, Nebraska, in 1971. On June 1, 1991, Malcolm, a recent graduate of dental college, entered into an employment agreement with Whitten. Paragraph 12 of the employment agreement states:

> In consideration of Employer's obligations under this Agreement, Employee agrees and hereby covenants that for one year following the termination of this Agreement, Employee shall not practice dentistry in any form or under any entity, within a 25 mile radius of Falls City, Nebraska and Sabetha, Kansas. The parties agree that the remedy at law for any breach of this Agreement is inadequate, and that Employer shall be entitled to injunctive and other appropriate remedial relief to enforce this covenant. The parties further agree that in the event a court should determine such restrictions to be unreasonable in any respect, it may modify such restrictions as necessary to make them reasonable.

Just prior to the end of the 2-year contract term, Malcolm informed Whitten that he was not going to enter into a new agreement and was going to practice with a competing dentist. On July 6, 1993, Malcolm began practicing with another dentist in Falls City.

On July 14, 1993, Whitten notified Malcolm that his actions were in violation of the terms of the employment agreement. This suit was filed.

ASSIGNMENTS OF ERROR

Whitten assigns as errors:

1. The trial court erred in denying the temporary injunction.
2. The trial court erred in denying the permanent injunction.
3. The trial court erred in failing to award damages to the Plaintiff-Appellant and against the Defendant-Appellee.
4. The trial court erred in its holding that the injunction should be denied based on the Defendant-Appellee's claim

that the covenant attempts to restrict him from practicing and serving clients other than the clients of the Plaintiff-Appellant.

STANDARD OF REVIEW

In an appeal of 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, 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. *City of Lincoln v. Townhouser, Inc.*, 248 Neb. 399, 534 N.W.2d 756 (1995); *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995); *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995).

When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law. *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). See *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

ANALYSIS

There are three considerations used to test the validity of a partial restraint on trade such as a covenant not to compete:

> " ' "First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable

> in the sense that it is not unduly harsh and oppressive on the employee." ' "

Vlasin, 235 Neb. at 453–54, 455 N.W.2d at 775–76. Accord, *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). There is insufficient evidence in the record to adequately discuss the effect of the noncompetition clause on the public; therefore, we turn to whether the restrictions in the covenant are no greater than are reasonably necessary to protect the employer in some legitimate interest.

In *Boisen*, 222 Neb. at 245–46, 383 N.W.2d at 33, we stated:

> Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.

The record shows that Malcolm had the opportunity to abscond with Whitten's goodwill in the form of patients. Therefore, Whitten has a legitimate interest in protecting its existing client base from unfair competition from a former employee. See, *Vlasin, supra*; *Polly, supra*.

As a general rule, a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients with whom the former employee actually did business and has personal contact. *Polly, supra*.

Here, the covenant not to compete unconditionally prohibited Malcolm from practicing dentistry in any form under any entity for 1 year within a 25-mile radius of two separate cities in two separate states. The record reflects that Dr. Whitten did not treat every individual in the area described in the noncompetition clause. The employment agreement does not attempt in any way to limit itself to Whitten's existing client base.

Without deciding whether any other restriction in the covenant was reasonable or unreasonable, the clause would restrict Malcolm from soliciting or working with anyone in the

described area, rather than just Whitten's clients with whom Malcolm did business and has personal contact. It is therefore broader than is reasonably necessary to protect Whitten's legitimate interest in customer goodwill. See *Vlasin, supra*. By virtue of this overbreadth or overreaching, the clause is unreasonable and therefore unenforceable.

In so finding, it is not necessary to inquire whether the restriction is unduly harsh and oppressive on Malcolm. The only issue presented to this court was whether the restriction was valid. It is not.

Finally, it is not the function of courts to reform unreasonable covenants for the purpose of making them enforceable. *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990).

CONCLUSION

Because the covenant not to compete in the employment agreement is unreasonable and unenforceable, any claim by Whitten for damages allegedly arising from Malcolm's breach of the unenforceable covenant must be denied.

The judgment of the district court is hereby affirmed.

AFFIRMED.

PATRICIA R. ADRIAN, APPELLANT, V. ROBERT S. ADRIAN, APPELLEE.

541 N.W.2d 388

Filed December 29, 1995. No. S-94-693.

1. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
2. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Trial: Words and Phrases.** A judicial abuse of discretion requires that the

reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

4. **Constitutional Law: Parent and Child.** The relationship between parent and child is constitutionally protected.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the District Court for Adams County, STEPHEN ILLINGWORTH, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Arthur C. Toogood for appellant.

Susan K. Alexander for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Patricia R. Adrian seeks review of a Nebraska Court of Appeals decision affirming a district court's modification of the Adrians' dissolution of marriage decree, transferring custody of the parties' minor children to Robert S. Adrian, the children's father.

We reverse the Court of Appeals' decision and remand the cause to that court with direction to remand the cause to the district court for Adams County for a new trial.

FACTS

The decree dissolving the Adrians' marriage was entered on September 28, 1990. The district court for Adams County awarded custody of the Adrians' two minor sons to Patricia and granted Robert visitation with the sons on alternate weekends. At the time of the modification hearing, the boys were 7 and 11 years old.

Prior to the dissolution of the Adrians' marriage, Patricia was a licensed practical nurse. Following the dissolution of the marriage, Patricia began training to become a registered nurse. The record also reflects that after dissolution of the marriage, Patricia and the parties' boys lived with her parents at their home in Hastings. The record further reflects that at some point after the dissolution of marriage decree was entered, but prior to the modification hearing, Patricia's mother died.

The record reflects that each morning, Patricia would get the children ready and take them to school. After the children ate their supper, Patricia would help them with their homework. Later, she would join the children in watching television. Patricia attended the children's school functions and on occasion took them to a movie. Both children were involved in scouting and in other afterschool activities. The guardian ad litem reported that the older child had been earning A's and B's in school and that both boys were "bright." Both boys were reported as "outgoing."

Robert was a director for a local television station in Hastings and worked from 4:30 p.m. to 12:30 a.m. He paid his child support, took an interest in the children's education, and was involved in their extracurricular activities. During his weekend visitations, Robert provided activities for the children, such as visits to museums, model building, and photography.

On April 29, 1993, Robert filed an application asking the district court to modify the parties' marriage dissolution decree and grant him additional summer visitation with his children. A hearing on the application was set for September 19.

On August 16, Robert filed a second application to modify the dissolution decree, this time asking that the care, custody, and control of the children be placed in him. A hearing on the second application was set for September 7, a Tuesday. Patricia moved for a continuance, because she would be in class that day. She requested that the hearing be held on a Monday afternoon so that the children would not have to be removed from school. Patricia's motion was granted, and a new hearing date was set for October 25.

Sometime in October, Robert raised allegations that the parties' younger son had been sexually abused by a 12- or 13-year-old son of a babysitter employed by Patricia. The incident had been reported to the Adams County sheriff's office, which found there was insufficient evidence to prosecute the alleged perpetrator. This incident was brought to the trial court's attention at the scheduled hearing of October 25. The trial court granted Patricia's request for a continuance, appointed a guardian ad litem for the children, and increased Robert's visitation. A further hearing was set for May 18, 1994.

On May 12, 1994, Patricia's attorney orally requested a continuance. On the day of the hearing, Patricia's attorney submitted a written motion to continue the May 12 hearing, which motion was supported by Patricia's affidavit that it was necessary for her to be in class on that date. Patricia's attorney explained to the court that Patricia missed class earlier in the year because of her mother's unexpected death and that she "had no choice" but to make up the class on May 18 in order to complete her course to become a registered nurse.

Patricia's motion to continue the May 12 hearing was denied, and the scheduled hearing proceeded in her absence. Patricia's attorney cross-examined the witnesses at trial and offered into evidence a report from a licensed clinical psychologist who had been counseling Patricia and the children.

On May 25, the court transferred custody of the Adrian children to Robert and granted visitation to Patricia.

Patricia's motion for a new trial was denied. On appeal, in *Adrian v. Adrian*, 95 NCA No. 6, case No. A-94-693 (not designated for permanent publication), the Nebraska Court of Appeals (1) held that the trial court did not abuse its discretion in denying Patricia's motion for a continuance of the May 18 hearing and (2) affirmed the district court's order transferring custody of the parties' minor children to Robert. We granted Patricia's timely petition for further review.

ASSIGNMENTS OF ERROR

In the Court of Appeals, Patricia claimed that the district court abused its discretion when it (1) denied her a continuance of the May 18, 1994, hearing and (2) transferred the care, custody, and control of the parties' minor children to Robert. In this court, Patricia claims that the Court of Appeals erred in affirming the rulings of the district court.

STANDARD OF REVIEW

The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. See *Farr v. Newton*, 239 Neb. 179, 474 N.W.2d 683 (1991).

A motion for continuance is addressed to the discretion of the

trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992).

ANALYSIS

For disposition of this appeal, we need only consider Patricia's claim that the trial court abused its discretion in denying her request for a continuance of the May 18, 1994, hearing and the Court of Appeals' affirmation of that denial.

A motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. See *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992).

In denying Patricia's motion, the trial court stated:

> I'm overruling this Motion for Continuance on two grounds. One, the petitioner has had several continuances; and secondly, she doesn't come in and ask for a continuance until a few days ago, and she had notice of this hearing as of March 28th. It's my feeling she could have made arrangements with her schooling with that much notice.

In its review, the Court of Appeals adopted the district court's finding that Patricia had been granted "several continuances." We reviewed the record de novo. Although it is not altogether clear, the record before us appears to reflect that Patricia was granted only two continuances.

Patricia's first motion to continue was made on May 10, 1993, after Robert, on April 29, filed his first application to modify the parties' dissolution decree to provide him more visitation time with the parties' two minor children. A hearing on that application was set for September 19. The transcript is silent as to whether the trial court ruled on Patricia's May 10 continuance request. On August 16, Robert filed a second application to modify the parties' dissolution decree. In that application, Robert asked the court to transfer the care, custody,

and control of the parties' minor children to him. A hearing on that application was set for September 7, a Tuesday. Patricia sought a continuance of that hearing and requested that the hearing be held on a Monday late in the day so that the children would not have to be removed from school and because she would be out of class by late afternoon. It appears from the record before us that this was the first continuance that Patricia received. The hearing was continued to Monday, October 25.

The record appears to reflect that Patricia was granted her second continuance at an October 25 in-chambers hearing where an allegation that the younger son of the parties had allegedly been sexually abused by the son of a babysitter was brought to the court's attention. We observe, however, that the trial court's appointment of a guardian ad litem to report on the case would have necessitated a continuance on the issue of custody regardless of whether Patricia requested a continuance. The October 25 hearing was continued to May 18, 1994.

The Court of Appeals found that Patricia made no showing to the trial court that she had sought, and was denied, alternative arrangements for her classes scheduled for May 18. However, Patricia's attorney stated to the trial court that "she [Patricia] had no choice" but to make up her final classes on that day. Patricia's attorney also stated that the class she was attending should be her last for completion of her training to become a registered nurse. The record reflects that the trial judge, at least at the hearing on Patricia's motion for new trial, was aware on June 17 that she had completed her training to become a registered nurse. The record reflects that Patricia was to take her licensing examinations in July. The record is silent as to when Patricia first knew when she would have to attend a makeup class on May 18. The makeup classes were necessitated because Patricia missed the classes around the time of her mother's death.

The issue to be decided at the May 18 hearing was important. The relationship between parent and child is constitutionally protected. *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

It is well recognized that a trial court has discretion to grant or deny a continuance. However, in this case, the trial judge

abused that discretion because his denial was clearly untenable, unfairly depriving Patricia of a substantial right and a fair trial. In this case, in her affidavit supporting her motion to continue the hearing from May 18, 1994, Patricia advised the court that she would be able to appear on May 19, 20, 26, or 27; June 2 or 3; or any time after June 8. This evidence refutes any suspicion that in seeking a continuance, Patricia was attempting to be dilatory. In not appearing on May 18, Patricia was not attempting to ignore the court. A week before, her lawyer had orally asked the court for the continuance of the May 18 hearing, which was denied. It should have come as no surprise that a written motion for a continuance, supported by an affidavit, was filed on the day of the hearing. Patricia's request for a continuance was not frivolous. She was attempting to complete her education so she could obtain a license as a registered nurse rather than continue as a licensed practical nurse. Her goal could not be accomplished without her making up the classes she missed around the time her mother died. Patricia's becoming a registered nurse would ultimately be of benefit to the parties' children.

If the court had found that the granting of a continuance would have inconvenienced Robert, his lawyer, or the court, or that Robert would have additional expense because of the continuance, the trial court could have imposed a less onerous sanction upon Patricia for seeking a continuance of the scheduled hearing on May 18, 1994.

Because of the gravity of the matter to be decided on the evidence adduced at the May 18, 1994, hearing, because Patricia appears to have been granted only two continuances (one of which would have undoubtedly been granted anyway to accommodate the guardian ad litem), and because there is no discernible intent on Patricia's part to unnecessarily delay the proceedings, we find that under the circumstances of this case, the district court abused its discretion in denying Patricia's motion to continue the May 18 hearing. The Court of Appeals should have so held.

We reverse the Court of Appeals' affirmance of the district court's modification order and remand the cause to the Court of Appeals with direction to set aside the district court's order of

modification and grant Patricia's motion for a new trial on Robert's second application for modification of decree.

REVERSED AND REMANDED WITH DIRECTION.

TODD SCOTT, APPELLEE, V. PEPSI COLA COMPANY AND LUMBERMENS MUTUAL COMPANY, APPELLANTS.

541 N.W.2d 49

Filed December 29, 1995. No. S-95-399.

1. **Workers' Compensation: Evidence: Appeal and Error.** The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
2. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
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. **Appeal and Error.** To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
6. **Workers' Compensation: Notice.** A lack of prejudice is not an exception to the requirement of notice under Neb. Rev. Stat. § 48-133 (Reissue 1993).
7. ____: ____. Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 1993).
8. ____: ____. Neb. Rev. Stat. § 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.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II and Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellee.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Pepsi Cola Company and Lumbermens Mutual Company appeal from an award entered by the Workers' Compensation Court in favor of Todd Scott. The trial court was not persuaded that lack of notice was a defense in the case, and the court opined that Pepsi and Lumbermens were not prejudiced by the delay in the reporting of the injury. The review panel found that Scott had given proper notice under Neb. Rev. Stat. § 48-133 (Reissue 1993). Pepsi and Lumbermens appealed from the order of the review panel, and under the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we removed the appeal to this court.

SCOPE OF REVIEW

The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. Neb. Rev. Stat. § 48-179 (Reissue 1993); *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not

support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993); *Larson v. Hometown Communications, Inc., supra.*

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. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

FACTS

Scott began working for Pepsi as a route driver in October or November 1990. His responsibilities included delivering Pepsi products to restaurants, grocery stores, and convenience stores. He used a truck to make the deliveries, and on an average day, he would make between 50 and 100 stops. At each stop, Scott exited the cab of the truck by stepping down 2 or $2^1/_2$ feet, usually onto a concrete surface.

Scott began to experience problems with his heels in July 1992. The problems gradually became more severe, and he first saw a doctor on April 2, 1993. At that time, Scott reported to his supervisor, Mike Thiem, that he was experiencing problems with his heels. Although Scott believed that the problems were related to his work at Pepsi, he did not specifically discuss with Thiem whether his problems were work related.

In August 1993, Scott informed Thiem that Scott would need surgery on his heels. Thiem stated that Scott should wait until January to have the surgery, because Thiem did not want to run a route. Scott subsequently had surgery on October 28 and December 9. Following the surgeries, Scott's heel problems began to improve; however, Scott testified that he was not back to the point where he was before the problems occurred. In Scott's current employment as a liquor store manager, there are certain physical tasks that he is unable to perform.

Following a hearing on September 12, 1994, a trial judge of the Workers' Compensation Court found that Scott had suffered a work-related injury and was entitled to benefits. The court found that on or about April 2, 1993, Scott was in the employ of Pepsi as a route driver and that

> while so employed and on said date and while engaged in

> the duties of his employment he suffered injuries to both heels as a result of the cumulative effect of repetitive trauma to his heels which occurred when [Scott] repeatedly jumped down from his truck in the performance of his job duties.

As a part of their defense, Pepsi and Lumbermens alleged that Scott did not give notice as soon as practicable after the happening of his accident. The trial court noted that Scott did not attribute the heel complaints to his employment when reporting them to his supervisor, but found that there was no prejudice to Pepsi and Lumbermens in the delay of the reporting. The court also found that the lack of notice was not a defense in the case.

On appeal, the review panel held that the trial judge did, in essence, find that the notice contemplated by § 48-133 was provided in that Scott advised his supervisor that Scott needed to see a doctor due to his heel condition. The review panel found that the trial court's statement regarding prejudice was irrelevant and harmless. The review panel affirmed the award of the trial court, holding that the judgment of the trial court was based on findings of fact which were not clearly wrong and that there was no error of law. Pepsi and Lumbermens timely appealed.

ASSIGNMENTS OF ERROR

Pepsi and Lumbermens assign as error that the trial court erred as a matter of law and was clearly wrong (1) in finding that Scott suffered an accident or injury on April 2, 1993, as a result of the cumulative effect of repetitive trauma to his heels arising out of and in the course of his employment; (2) in finding that there was sufficient expert medical evidence to establish that Scott's injuries were causally related to cumulative trauma; (3) in finding that the required notice of injury was given to Pepsi as soon as practicable after the happening; and (4) in finding that Scott's heel injuries were caused by repetitive trauma occasioned by the performance of his job duties.

ANALYSIS

Pepsi and Lumbermens argue only one of their assignments of error. To be considered by an appellate court, a claimed

prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). Errors assigned but not argued will not be addressed. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). Therefore, we consider only the third assignment of error.

The issue is whether Scott provided notice of his injury in compliance with § 48-133:

> 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 . . . if it be shown that the employer had notice or knowledge of the injury.

The trial court found that the accident occurred on April 2, 1993, in the course of Scott's employment with Pepsi, but that Scott did not attribute his heel problems to his employment when he reported them to his supervisor. Scott testified that it was necessary for him to receive permission from his supervisor to be off work on April 2 in order to go to the doctor and that he told his supervisor that he was going to the doctor because of problems he was experiencing with his heels. The supervisor wanted Scott to wait until January to have the surgery.

The review panel determined that the decision of the trial court with respect to a showing of prejudice was irrelevant and harmless. We agree. A lack of prejudice is not an exception to the requirement of notice under § 48-133.

Since the facts as to what Scott told his supervisor are not in dispute, whether such facts constituted notice to the employer pursuant to § 48-133 is a question of law. An appellate court is

obligated in workers' compensation cases to make its own determinations as to questions of law. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). The review panel determined as a matter of law that notice contemplated by § 48-133 was provided when Scott told his supervisor that Scott needed to see a doctor regarding his heel problems.

The review panel concluded that Scott did not have to give an opinion as to the cause of the injury in order to give notice to his employer. We agree. "Want of such written notice shall not be a bar to proceedings . . . if it be shown that the employer had notice or knowledge of the injury." § 48-133. Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of § 48-133. *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985). Section 48-133 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. *Thompson v. Monfort of Colorado, supra.*

The trial court found that Scott's accident occurred on April 2, 1993, when he first saw a doctor about his problem. Scott had to receive permission from his supervisor to be off work that day to go to the doctor. Scott told the supervisor he was going to the doctor because of problems he was having with his heels. The supervisor wanted Scott to wait until January to have the surgery. Pepsi processed Scott's bills with his group health insurance. These facts, when considered in the light most favorable to Scott, establish that Pepsi had sufficient knowledge of Scott's injury to lead a reasonable person to conclude that Scott's injury was potentially compensable and that Pepsi should further investigate the matter.

The findings of fact by the trial court support the award and the trial court's conclusion that the lack of notice was not a defense in this case. Pepsi and Lumbermens' assignment of error is without merit. The decision of the review panel, which affirmed the trial court's award, is affirmed. Scott is allowed an

attorney fee in this court in the amount of $1,827, which is to be taxed as costs against Pepsi and Lumbermens, and interest as provided by law.

AFFIRMED.

WHITE, C.J., participating on briefs.

C.S.B. CO., A NEBRASKA CORPORATION, APPELLANT, V. ELEANOR JOY ISHAM AND ROBERT W. ISHAM III, COPERSONAL REPRESENTATIVES OF THE ESTATE OF ROBERT W. ISHAM, DECEASED, ET AL., APPELLEES.

541 N.W.2d 392

Filed January 5, 1996. No. S-94-186.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
4. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
5. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
6. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
7. ____. Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Michael V. Smith, of Smith and King, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

C.S.B. Co., the appellant, acquired ownership of the First National Bank of Chadron (Bank) by purchasing the stock of a holding company which owned nearly 100 percent of the Bank's stock. Robert W. Isham, Robert W. Isham III, Robert E. Connealy, and Steven Erwin, the appellees, are the sellers of the stock. The essence of this dispute is whether the terms of the contract governing the stock purchase and sale require the appellees to indemnify C.S.B. Co. for the costs and expenses arising from defending the Bank in two separate lender liability actions. After the stock purchase and sale, the Bank continued to defend a lender liability action, referred to as the G.F. Track case, that had been disclosed in the contract for the sale of the stock. The other lender liability action, the Solar Motors case, was initiated after the contract's closing date. C.S.B. Co. brought an action at law for declaratory judgment in the district court for Sheridan County and sought to recover damages arising from the defense of the G.F. Track and the Solar Motors cases which accrued after the stock purchase. The appellees counterclaimed for attorney fees paid by them after they sold their stock in defense of the G.F. Track case. Both parties moved for summary judgment. The trial court sustained appellees' motion for summary judgment and entered judgment against C.S.B. Co. on its claims and in favor of the appellees on their counterclaim. This appeal timely ensued. We affirm the judgment of the district court as to that part of the summary judgment related to the G.F. Track case and the counterclaim, but hold summary judgment was not proper as to the Solar Motors case and remand for further proceedings.

BACKGROUND

C.S.B. Co. began negotiations for the purchase of the Bank's holding company's stock in early 1990. Clifford Young, the

president of C.S.B. Co., and Robert W. Isham, the principal owner of the holding company's stock, were the primary negotiators.

During the course of the negotiations, C.S.B. Co. undertook its "due diligence" evaluation of the Bank with the assistance of the National Bank of Commerce in Lincoln and Peat Marwick, a national firm of certified public accountants. The National Bank of Commerce examined loan files, investments, and bank operations, while Peat Marwick examined income tax statements and the Bank's accounting system.

The negotiations culminated in the execution of a 16-page contract dated June 25, 1990. The sale of the Bank was subject to the approval of the Federal Reserve bank, and the transaction was not closed until November 1, 1990. A closing statement effecting the transfer was executed on November 1.

The June 25 contract contains purchase terms and provisions relating to the management of the Bank during the interim between the execution of the contract and the closing date. The contract also contains provisions by which the sellers and C.S.B. Co. agreed to indemnify the other as to certain claims or other liabilities.

C.S.B. Co. asserts that under the terms of the parties' contract, the appellees must indemnify it for costs that the Bank incurred in defending the lender liability actions. The G.F. Track case was resolved in favor of the Bank. The Solar Motors case resulted in a $204,357 jury verdict against the Bank. The Bank appealed the Solar Motors verdict, and the Nebraska Court of Appeals reversed the judgment of the trial court and remanded with directions to dismiss. *Solar Motors v. First Nat. Bank of Chadron*, 4 Neb. App. 1, 537 N.W.2d 527 (1995). A petition for further review of the *Solar Motors* opinion was sustained by this court on October 25, 1995, and is still pending at this time.

Following the district court's judgment in favor of Solar Motors, C.S.B. Co. filed this action to recoup the attorney fees paid in the G.F. Track case; the attorney fees and expenses incurred in the defense of the Solar Motors case; the judgment awarded against the Bank in the Solar Motors case; and a declaratory judgment that the appellees are obligated, under the

terms of the contract, to pay accruing attorney fees and expenses involved in the appeal of the Solar Motors case. The appellees counterclaimed for attorney fees paid by them in defense of the G.F. Track case. Both parties moved for summary judgment. The trial court sustained appellees' motion for summary judgment and entered judgment against C.S.B. Co. on its indemnity claim and in favor of the appellees on their counterclaim. The trial court denied C.S.B. Co.'s motion for summary judgment.

C.S.B. Co. timely appealed to the Court of Appeals. We removed the case to our docket. Subsequent to the filing of the appeal, appellee Robert W. Isham died. The appeal has been revived in the name of Eleanor Joy Isham and Robert W. Isham III, copersonal representatives of the estate.

ASSIGNMENTS OF ERROR

C.S.B. Co. asserts that the trial court erred in sustaining the appellees' motions for summary judgment and in denying its motions for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995); *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Poppleton v. Village Realty Co., supra*; *Krohn v. Gardner, supra*.

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the

determinations made by the court below. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

ANALYSIS

G.F. Track

At the time the negotiations for the sale of the Bank began, the Bank was already in litigation regarding the G.F. Track case. G.F. Track had declared bankruptcy and the matter was pending in bankruptcy court. Paragraph 3.6 of the contract provides:

> Litigation. Attached hereto as Exhibit 3.6 is a list of all pending or threatened litigation and, except as set forth on Exhibit 3.6, there is no litigation, proceeding, or investigation pending, or, to the knowledge of the Sellers, threatened against the Company or the Bank, which might result in any material adverse change in the business or prospects or condition (financial or otherwise) of the Company or the Bank . . . .

On exhibit 3.6, the appellees disclosed that a court case titled "G & F Track Service" had been filed in the U.S. Bankruptcy Court, District of Nebraska. The name, address, and telephone number of the attorney handling the case for the Bank was listed.

During his deposition, Young testified that he had discussed the G.F. Track case with the elder Isham prior to the closing. Young stated that Isham had told him that there was a problem with G.F. Track, that the debtors were a "bunch of crooks," and that a frivolous lawsuit had been filed. However, Young also testified that he did not rely upon Isham's representations because "we had a specific paragraph put in the contract that said if it happened when you—if it happened—if you were responsible for the lawsuit, you pay for it."

The G.F. Track case was concluded in favor of the Bank, but the Bank incurred $47,853.88 in attorney fees and expenses in defending the matter. These fees and expenses were incurred after November 1, 1990, the closing date of the contract. C.S.B. Co. made demand upon the appellees to pay these expenses pursuant to paragraph 9 of the contract. Paragraph 9 provides in part:

> Indemnification by Sellers. Sellers hereby covenant and agree to save harmless, defend and indemnify Buyer, its successors and assigns, from any claims, liens, encumbrances, charges, fines, penalties, costs or expenses which may arise against Buyer or be sustained by Buyer subsequent to the Closing Date which claims, liens, encumbrances, charges, fines, penalties, costs or expenses arise out of or as a consequence of the business conducted by Sellers prior to the Closing Date, or arise out of or as a consequence of any inaccuracy in or breach of any representation or warranty made by Sellers.

In their answer, the appellees asserted that they fully disclosed the existence of G.F. Track's claim against the Bank by listing the claim on the schedule of litigation, exhibit 3.6. The appellees asserted that paragraph 10 of the contract required C.S.B. Co. to defend and indemnify the appellees from any liability arising out of specifically disclosed claims or litigation. Paragraph 10 provides in part:

> Indemnification by Buyer. Buyer hereby covenants and agrees to save harmless, defend and indemnify the Sellers from any claims, liens, encumbrances, charges, fines, penalties, costs or expenses which may arise against the Sellers or be sustained by the Sellers subsequent to the Date of Closing, which claims, liens, encumbrances, charges, fines, penalties, costs or expenses arise out of liabilities specifically disclosed to Buyer, or arise out of and as a consequence of the business conducted by Buyer after the Date of Closing.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994).

In this case, both parties argue that the contract is clear and unambiguous, that there are no genuine issues of material fact, and that as a matter of law, summary judgment was proper in their favor. The question then is, Is the construction of the contract a question of law? See, *Rains v. Becton, Dickinson & Co., supra*; *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

C.S.B. Co. argues that the appellees did not provide complete disclosure of the G.F. Track case as required by the contract, because it was identified as a bankruptcy case on the litigation schedule rather than as a lender liability action. C.S.B. Co. asserts that this disclosure is inaccurate because there was no disclosure that the debtor had brought an affirmative claim against the Bank and that "normally" a bankruptcy case "means that the creditor will either recover none of its claim against the debtor in bankruptcy because of the discharge under 11 U.S.C. §524, or will receive the value [of] the collateral securing its claim, if any." Brief for appellant at 23. C.S.B. Co. concludes that the characterization of the G.F. Track case as a bankruptcy matter was materially misleading and subjects the appellees to the indemnity under paragraphs 3.16 and 9 of the contract. Paragraph 3.16 provides:

> Absence of Misrepresentations. No representation or warranty by Sellers in this Agreement or in any exhibit, certificate, financial statement or document furnished or to be furnished to Buyer pursuant hereto contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make the statements contained therein not misleading.

We disagree. The appellees disclosed the existence of the G.F. Track case by listing it on the litigation schedule attached to the contract. Whatever the appellant thinks bankruptcy "normally" means, a bankruptcy case can include or spawn a lender liability action. See, e.g., *Matter of Baudoin*, 981 F.2d 736 (5th Cir. 1993); *In re Heritage Hotel Partnership I*, 160 B.R. 374 (9th Cir. B.A.P. 1993); *Copeland v. America's Favorite Chicken Co.*, 885 F. Supp. 911 (E.D. La. 1995); *In re Lewison Bros.*, 162 B.R. 974 (Bankr. D.N.J. 1993). The G.F. Track case was disclosed, and the name and address of the

attorney handling the matter was provided. Young, the primary negotiator on behalf of C.S.B. Co., testified that he did not rely upon any verbal representations made by the appellees, but, instead, relied upon the terms of the contract and the investigations conducted by his agents.

In the closing statement which completed the contract between the parties, C.S.B. Co. acknowledged that the appellees had accorded it full access at all reasonable times to examine all of the Bank's property and records. C.S.B. Co. has made no allegations of fraud, duress, or overreaching, and the record indicates that the parties dealt with each other at "arms length." See, e.g., *Murphy v. Omaha Loan & Bldg. Ass'n*, 141 Neb. 230, 3 N.W.2d 403 (1942). The fact that the G.F. Track case was disclosed in the contract coupled with the access to the Bank's record equals adequate disclosure in an "arms length" transaction such as this. C.S.B. Co.'s alleged failure to appreciate the exact risk of the G.F. Track case disclosed to it must therefore be borne by it.

In support of their argument that they have no duty to indemnify C.S.B. Co. for any expenses arising out of the G.F. Track case, the appellees urge that the contract's indemnification provisions, paragraphs 9 and 10, must be read together. A contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Rains v. Becton, Dickinson & Co., supra*; *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

In paragraph 9, the appellees as sellers agreed "to save harmless, defend and indemnify" the buyer C.S.B. Co. from certain liabilities which might arise after the closing date as a consequence of business conducted by the appellees prior to the closing date. In paragraph 10, C.S.B. Co. agreed "to save harmless, defend and indemnify" the appellees from any costs or expenses sustained by the appellees after the closing date which arose out of any "specifically disclosed" liabilities.

If a potential liability was disclosed, paragraph 10 negates the indemnity in paragraph 9. Since the appellees specifically disclosed the G.F. Track case, the appellees are not responsible under the contract to indemnify C.S.B. Co. for the expenses of defending the Bank in that case after the closing date.

APPELLEES' COUNTERCLAIM

In addition to the attorney fees paid by the Bank, the appellees paid $21,364.97 in attorney fees in defense of the G.F. Track case after the contract's closing date. In their counterclaim, the appellees sought reimbursement of these attorney fees pursuant to paragraph 10 of the contract.

C.S.B. Co. argues that since the appellees continued making voluntary payments to the Bank's attorneys to defend the G.F. Track case after the contract's closing date, the trial court erred in granting appellees' counterclaim. C.S.B. Co. states that " '[w]here one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity.' " *Malec v. ASCAP*, 146 Neb. 358, 368, 19 N.W.2d 540, 544-45 (1945).

The record indicates that each of the appellees paid the attorney fees from November 1990 until sometime in early 1991. The amount each appellee contributed to the attorney fees was based upon his percentage of stock ownership. The record does not reveal why the appellees paid the attorney fees, and there is no evidence in the record that the payments were made with any reservation of right. At some point, two of the appellees, Robert Isham III and Erwin, discussed the fees and reviewed the contract. On March 4, 1991, Robert Isham III informed the Bank that he had determined that the Bank was liable for the expenses associated with the defense of the G.F. Track case under the contract.

Malec did not involve a three-cornered transaction such as the one before us. In *Malec*, the plaintiff-payor sought to recover from the payee payments it had made to the payee under a contract after a portion of the contract was declared void. The rationale is akin to estoppel. Here, the payments were made to a third-party payee on behalf of the Bank. The appellees do not seek to recover the payments from the payee. The appellees seek to recover damages from C.S.B. Co. due to its alleged breach of contract. *Malec* does not apply.

Accordingly, we affirm the judgment of the district court in favor of the appellees on their counterclaim.

SOLAR MOTORS

We now turn to the Solar Motors case. This lender liability case arose out of a loan made by the Bank to a car dealership, Solar Motors, Inc. The case first surfaced in March 1992, 16 months after the contract's November 1, 1990, closing date. Nonetheless, the origins of this lender liability action predate the closing date.

As discussed above, in paragraph 9, the appellees agreed "to save harmless, defend and indemnify" C.S.B. Co. from liabilities such as the Solar Motors case, which might arise after the closing date as a consequence of business conducted by the appellees prior to the closing date. Since there was no disclosure of the Solar Motors case for the reason that it did not exist at the time of the closing, paragraph 10 does not apply. Therefore, if the Solar Motors case arose as a consequence of the business conducted by the appellees prior to the closing date of the contract, the appellees are liable under the contract. Alternatively, if the Solar Motor case arose as a consequence of the business conducted by C.S.B. Co. after the closing date, then the appellees are not liable under the contract.

The Bank provided floor plan and equipment financing to Solar Motors beginning in December 1988. In August 1990, the Bank called the loans. Solar Motors was aware of the pending change in Bank ownership and discussed the matter with Chuck Berryman in September 1990. After Berryman became the president of the Bank, by a letter dated November 6, he offered to continue the loans for a 6-month period, if stated requirements were followed by Solar Motors. Solar Motors did not accept or reject the offer. On April 1, 1991, the Bank wrote Solar Motors and demanded payment in full by April 22. The matter was turned over to the Bank's attorney, and the notes were paid in full on June 24.

In its lender liability suit against the Bank, Solar Motors pled five theories of recovery, including breach of contract, negligence, misrepresentation, and breach of fiduciary duty. In summary, Solar Motors alleged that the Bank had agreed to provide inventory financing and that it had relied upon the Bank's advice, encouragements, and representations. Solar Motors alleged that when the bank demanded payment in

August 1990, it breached its agreement to continue the floor plan financing established by the Bank's pattern and custom. Solar Motors prayed for $413,719 in damages.

C.S.B. Co. asserts that the appellees are liable because they, as prior management, made the decision to call Solar Motors' loans. C.S.B. Co. urges this court to examine the second amended petition in the Solar Motors case, and it asserts that the petition proves that all of the factual allegations of wrongdoing against the Bank are tied to the operation and decisions made by prior Bank management.

In response, the appellees argue that Solar Motors "spread the blame" among present and past management in the evidence it offered in support of its lender liability action. Among the Bank's alleged wrongdoings after the change of management, Solar Motors complained of the November 6 offer to extend financing only upon certain terms and stated that such offer was an example of the Bank's bad faith. Solar Motors offered testimony regarding the effect of the Bank's refusal to continue providing floor plan financing on the decline of its business and eventual termination of its Chrysler franchise, all of which occurred after the closing date.

The pleadings and depositions before us give rise to genuine issues of material fact and the ultimate inferences that may be drawn from those facts. Solar Motors' allegations of wrongdoing implicate the Bank before and after its change in management. With the record before us, we cannot determine whether as a matter of law the Solar Motors case arose solely as a consequence of the business conducted by the appellees prior to the closing date or if any actions of the Bank's new management after the closing date were contributing factors. Viewing the evidence in a light most favorable to the party against whom the judgment is granted, C.S.B. Co., we cannot say that summary judgment was proper with regard to the Solar Motors case.

CONCLUSION

We affirm the judgment of the district court granting summary judgment in part with regard to the G.F. Track case and the counterclaim. We reverse the district court's judgment

in part with regard to the Solar Motors case and remand for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GLADYS M. JOHNSON, APPELLANT, V. HOLDREGE MEDICAL CLINIC AND CONTINENTAL INSURANCE CO., APPELLEES.

541 N.W.2d 399

Filed January 5, 1996. No. S-94-1034.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
2. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
3. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 1993), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
4. **Workers' Compensation: Words and Phrases: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1993) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
5. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

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

Dale A. Romatzke, of Ross, Schroeder, Brauer & Romatzke, for appellant.

Jay C. Elliott, of Kay & Kay, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The Nebraska Workers' Compensation Court dismissed the petition for benefits under the provisions of the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 through 48-1,117 (Reissue 1993 & Cum. Supp. 1994), filed by the plaintiff-appellant employee, Gladys M. Johnson, against the defendant-appellee employer, Holdrege Medical Clinic, and its compensation insurance carrier, Continental Insurance Co. Claiming, in summary, that the compensation court erred in finding that the injury did not arise out of and in the course of employment, Johnson appealed to the Nebraska Court of Appeals, which affirmed the dismissal. *Johnson v. Holdrege Med. Clinic*, 3 Neb. App. 894, 534 N.W.2d 340 (1995). Johnson thereafter petitioned this court for further review. We now affirm the judgment of the Court of Appeals.

There is no factual dispute in this case; thus, the question presented, whether the injury arose out of and in the course of Johnson's employment with the clinic, is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

Johnson lives in Holdrege, Nebraska, and has been employed at the clinic for 25 years. Her regular working hours were from 8 a.m. to 5 p.m.; however, she often arrived at the clinic before 8 a.m. so that she "could get things straightened out and get ready to go for the day so I could keep caught up with the daily things we had to do." On those occasions when she arrived at work before 8 a.m., she was paid for her time.

At approximately 6:45 a.m. on November 5, 1991, Johnson left her home, which is located about 10 blocks from the clinic, to go to work. She drove directly to a city parking lot, which is located 75 to 100 feet from the back entrance of the clinic. Upon entering the lot, she exited her automobile and walked toward the clinic along her normal route, which took her through the

Home Federal Savings & Loan parking lot to the alley leading to the clinic's back door. As she traversed the distance toward the clinic, Johnson slipped on some ice and fell in the savings and loan driveway at around 7 a.m. The point at which she fell was approximately 50 feet from the edge of the clinic.

The clinic is located in a business district; at the time of the accident, a 40-stall parking lot was maintained by the clinic as a part of its premises located across the alley directly behind, or east of, the clinic. Although employees at one time were allowed to park in this lot, for some time prior to Johnson's accident, the clinic had in place a written policy which, as a general matter, prohibited employees from parking there. The purpose of the policy was to free up parking spaces for medical staff, administrators, patients of the clinic, and tenants who leased apartments from the clinic. At about the same time as the clinic established its parking lot policy, a city map was posted which showed the available public parking. It showed four city parking lots, as well as various areas for street parking. The clinic did not require employees to park in a particular place. Rather, employees were free to park anywhere other than the clinic lot. On the streets adjacent to the west side, or front, of the clinic, parking is limited to 2 hours. Parking is not time limited east of the clinic.

Even prior to the clinic's restricted parking policy, the majority of its employees did not park in the clinic lot. Most of them realized that employee vehicles would fill the lot and leave little room for patients. The restricted policy was aimed at the few employees who parked in the lot and was designed to get them to park elsewhere.

Johnson testified that before the restricted parking policy was instituted, she parked in the clinic's lot. In response to the policy, she began parking in the city lot some 10 to 12 years ago. Johnson was aware that the city of Holdrege owned the lot in which she customarily parked and that the clinic did not require her to park in this particular lot. She was also aware that there were other parking areas available for her use.

Johnson also testified that prior to the day of the accident, there were occasions where she would walk to work from her home. On these occasions, she traveled the same route as she

did on the day of the accident. Both before and after the accident, she sometimes parked her vehicle on a street located east of the city parking lot and would follow the same route as she usually did.

The clinic administrator testified that the city parking lot used by Johnson on the day of the accident was the "lot of choice" for clinic employees, since it is the closest one to the clinic. In addition, he testified that he was aware many different employees who park in that lot follow the same general route that Johnson customarily followed to reach the back entrance of the clinic. There was no clinic policy dictating the route an employee was to take from the city parking lot to the clinic entrance.

The act compensates injury caused an employee "by accident . . . arising out of and in the course of his or her employment . . . ." § 48-101. Accord, *Mauser v. Douglas & Lomason Co.*, 192 Neb. 421, 222 N.W.2d 119 (1974); *Hahl v. Heyne*, 156 Neb. 599, 57 N.W.2d 137 (1953); *Nelms v. Mahoney*, 147 Neb. 626, 24 N.W.2d 558 (1946). The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job. The phrase "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive, and the claimant must establish by a preponderance of the evidence that both conditions exist. *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982).

In *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961), we held that one who had a fixed place of employment and who, while on the way to work, was injured when she slipped and fell on city property at a point less than 2 feet from the employer's premises had not sustained an injury which arose in the course of her employment. See, also, *McDonald v. Richardson County*, 135 Neb. 150, 280 N.W. 456 (1938) (employee injured on driveway located on employer's premises while leaving employment sustained injury arising out of employment); *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N.W. 466 (1931) (employee injured while stepping into hole on public street near employer's premises did not sustain injury arising

out of employment).

Johnson recognizes our current "premises" rule, but invites us to reexamine and overrule it.

Obviously, when a bright-line rule is adopted, there will always be cases that are very close to each side of the line. But not only is such the nature of much of the law, flexible rules frequently produce equally arbitrary decisions. As pointed out in 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 15.12(b) at 4-12 to 4-15 (1995):

> The perils that beset any jurisdiction which abandons the security of the premises rule are dramatically illustrated by the parallel stories that unfolded in Michigan and New Jersey, beginning in 1972, and coming full circle about eight years later in both states. Although both are again safely within the majority fold, the story is well worth retelling, together with the **Treatise's** persistent and emphatic warnings, for the benefit of any other states that are under pressure to poke supposedly harmless holes in the premises dike. . . .
>
> The Michigan case was *Fischer v. Lincoln Tool & Die Co.*[, 37 Mich. App. 198, 194 N.W.2d 476 (1971).] Claimant's employer provided no parking facilities for employees, and expected them to park in the public street. After doing so, claimant proceeded to his place of work, and slipped and fell on some ice on the public sidewalk adjoining the employer's property. The court held that, under such a situation, where the employer expected employees to park in the public street, the adjacent area should be considered part of the employer's premises and a finding below that the claimant was injured while upon employer's premises should be affirmed.
>
> Somewhat similar was the New Jersey case, *Dinardo v. Newark Bd. of Educ.*[, 118 N.J. Super. 536, 289 A.2d 259 (1972).] Claimant was injured after work when her heel caught in a crack in a public sidewalk adjacent to the school building where she worked. Claimant was on her way to a bus stop when the accident occurred. The court held the injury compensable for a number of reasons. It indicated that claimant was in an area where she might

reasonably be and at the time when her presence there would normally be expected. Also, since the injury would have been compensable if claimant had been on her way to a parking lot to pick up her car, she should not be denied compensation because she was using public transportation. The court further argued that using public transportation was a benefit to both the general public and the employer, and emphasized the incongruity of compensating the injury if she had been walking to the parking lot and not compensating if walking to the bus stop. An award of compensation was affirmed.

The *Dinardo* and *Fischer* cases supply classical examples . . . of making law by measuring only the distance to the last precedent while completely losing sight of the essential principle involved in the rule. Here we see the first step in the direction of the erosion of the premises rule by this treacherous technique of selecting some past expansion and then exclaiming over how unfair it is to draw a distinction between two situations that seem so much alike. Had the intermediate New Jersey and Michigan courts really thought through where this process would end? In *Dinardo*, the comparison was between walking to a parking lot and walking to public transportation. Now suppose claimant has parked his car in the public street six blocks from the school. Could walking to this parking space be distinguished from walking to a bus stop? Michigan, in *Fischer*, had already given an answer. Indeed, suppose claimant was not walking to a car or bus at all, but simply walking home. Assuming the distance was no greater than that to the bus stop, how could this claimant be denied compensation merely because he did not happen to need vehicular transportation? Next suppose that the walking distance was a little longer than that to public transportation—was the court going to draw some imaginary line and say that only the first six blocks were covered? If a seven-block case came up, would the court have the audacity to issue a denial, when only one block separated the two cases? Was Michigan going to distinguish between a sidewalk

> adjoining the employer's property and a sidewalk a block away, when this was the nearest street parking available? It hardly needs to be added that the rule of this *Dinardo* case could not be confined to schools and teachers. It must equally apply to offices in crowded downtown areas, factories, construction sites, and any other work premises. In short, there was no stopping the process started by these decisions short of complete demolition of the premises rule, with all the impossible questions this would bring in its wake. Every night millions of people will emerge from factory gates, office buildings, and school yards. Some go straight home; some go shopping; some head for a tavern. Hundreds of them are involved in accidents at varying distances from the premises and at varying degrees of deviation from the direct route home. Two things are certain: first, in the great majority of cases, no one will ever be able to prove whether the claimant was really going straight home at the time of the accident; and second, the source of the hazard will almost never be one distinctly associated with the employment, although here again by gradual extension of the "arising" cases the court might well end by covering all traffic accidents, falls on ice, and the like.

No one pretends that there is a theoretical, ethical, or intellectual reason for the premises rule. The real reason for the rule is the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting the rule would not be unmanageable. The controlling rule is that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 436 N.W.2d 164 (1989); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). See, also, *Arant v. G. H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988) (where Legislature had repealed dramshop liability statutes, such liability would not be imposed by judicial fiat).

Accordingly, we decline Johnson's invitation to overrule our

prior interpretation of the Legislature's intent, and affirm the judgment of the Court of Appeals.

AFFIRMED.

GERRARD, J., concurring.

While I concur with the majority's judgment in *this* case, I write separately because I do not believe that the premises rule should be a bright-line rule for which there is never an exception. The premises rule is, of course, one subcategory of the familiar "going to and from work" rule in workers' compensation cases.

I. "GOING TO AND FROM WORK" RULE

In Nebraska, the rule is that an injury sustained by an employee while going to and from work, at a fixed place of employment, does not arise out of and in the course of employment, subject to a few limited exceptions. See, *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Kopfman v. Freedom Drilling Co.*, 220 Neb. 323, 370 N.W.2d 89 (1985) (transportation furnished to employee by employer either incident to employment contract or because of custom of job operates to bring employee within scope of employment during time of transportation); *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979) (exception when transportation to place of work is furnished by employer and injury occurs while worker is being transported in vehicle under control of employer); *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975).

In *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961), we held that a school employee, who was injured when she slipped and fell on a city sidewalk which was 1.78 feet from the school district's property line, had not sustained an injury which arose in the course of her employment because the accident occurred *off the employer's premises* and, thus, was subject to the "going to and from work" rule.

However, Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injuries caused to an employee "by accident . . . arising out of and in the course of his or her employment . . . ." First, the act does not say, as often paraphrased, that the employee must have been in the course of her employment; it

says that the *injury* must arise in the course of the employment. Second, the verb used in the act is not to "occur" in the course of employment, but to "aris[e] out of" the course of employment, which in a close case often makes a difference. See 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 14.00 (1995).

The real test of compensability should not be based solely on whether an accident occurs *on the employer's premises*; but, instead, if a distinct "arising out of" or causal connection exists between the conditions under which a claimant must approach and leave the work premises and the occurrence of an injury, the injury should be compensable. See *id.* § 15.15.

1. Recognized Exception to Rule

A well-recognized exception to the "going to and from work" rule is pointed out thusly in 1 Larson & Larson, *supra*, § 15.14(a) at 4-57: "One category in which compensation is almost always awarded is that in which the employee travels along or across a public road between two portions of his employer's premises, whether going and coming, or pursuing his active duties." See, e.g., *Hughes v. Decatur General Hosp.*, 514 So. 2d 935 (Ala. 1987) (decedent killed in public street between employer's main premises and employer's parking lot); *Knoop v. Industrial Commission*, 121 Ariz. 293, 589 P.2d 1325 (Ariz. App. 1978) (employee fell and was injured crossing public street between employer's building and employer's parking lot); *State Fund v. Walter*, 143 Colo. 549, 354 P.2d 591 (1960) (employee injured on public street separating employer's premises and parking lot); *Campbell v. Gates Rubber Company*, 526 P.2d 679 (Colo. App. 1974) (employee slipped on ice and fell while walking on sidewalk between employer's premises and parking lot owned and maintained by employer) (citing *State Fund v. Walter, supra*); *West Point Pepperell, Inc. v. McEntire*, 150 Ga. App. 728, 258 S.E.2d 530 (1979), *cert. denied* (employee struck by car while crossing street between employer's premises and employer-owned parking lot); *Gray Hill, Inc. v. Industrial Com.*, 145 Ill. App. 3d 371, 495 N.E.2d 1030 (1986), *cert. denied* 112 Ill. 2d 574, *cert. denied* 479 U.S. 1089, 107 S. Ct. 1298, 94 L. Ed. 2d 154 (1987) (employee fell

on public sidewalk between entrance to employer's premises she was instructed to use and her parking lot); *Thomasee v. Liberty Mut. Ins. Co.*, 385 So. 2d 1219 (La. App. 1980), *writ denied* 392 So. 2d 675 (La. 1980) (employee fell on steps adjacent to employer's premises while walking from parking lot where employee had been directed to park); *Wiley Mfg. Co. v. Wilson*, 280 Md. 200, 373 A.2d 613 (1977) (employee struck by train while taking one of two alternate routes to parking lot); *Matter of Gaik v. National Aniline Div.*, 5 A.D.2d 1039, 173 N.Y.S.2d 409 (1958) (employee injured while walking to employer-owned parking lot two blocks from employer's premises); *Griffin v. General Motors*, 39 Ohio St. 3d 79, 529 N.E.2d 436 (1988) (employee injured while crossing driveway between employer's plant and its parking lot after she had finished work for the day); *Swanson v. General Paint Company*, 361 P.2d 842 (Okla. 1961) (employee killed while crossing public highway between work premises and parking lot furnished by employer's landlord); *Willis v. State Accident Insurance Fund*, 3 Or. App. 565, 475 P.2d 986 (1970) (university dean slipped and fell in public area while walking from university parking lot to his place of work); *Hreha v. Harry Sugerman, Inc.*, 482 Pa. 402, 393 A.2d 1168 (1978) (employee injured crossing street between employer's parking lot and employer's premises); *Epler v. North Am. Rockwell Corp.*, 482 Pa. 391, 393 A.2d 1163 (1978) (employee killed while crossing street to parking lot which city required employer to provide and in which employer required employee to park); *Branco v. Leviton Mfg. Co., Inc.*, 518 A.2d 621 (R.I. 1986) (employee injured crossing street between employer's plant and employer owned and controlled parking lot in which employee was specifically directed to park); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989) (employee injured while walking to employee designated parking area in employer's parking lot generally open to public).

2. Problem With Bright-Line Premises Rule Analysis

Using hypothetical facts similar to those in the instant case as an example: If a medical clinic owns or provides an employee parking lot across the street and requests that employees park in that parking lot, and an employee slips and falls while crossing

the street, then a distinct causal connection exists between an employer-created condition and the occurrence of an injury under the reasoning of a majority of jurisdictions. By owning or sponsoring a parking lot not contiguous to the working premises, an employer creates the condition whereby an employee necessarily must encounter the hazards lying between the two employer premises. Thus, in such a case, there is a distinct "arising out of" or causal connection between the conditions under which an employee must approach and leave the premises and the occurrence of the injury.

However, if we were to apply the bright-line premises rule to the above set of facts, an employee would recover if she slips and falls on the clinic premises or in the clinic-owned parking lot across the street, but not if she falls while she is crossing the public street. There is no logical reason, based on a causal connection analysis, to find that an injury sustained in a parking lot on either side of the street "arises out of" the course of employment and is compensable, but that the same injury does not "arise out of" the course of employment if the accident occurs on a public street or sidewalk connecting the two parking lots.

Of course, the above hypothetical is another case for another day, but it illustrates the problem of trying to fit every set of facts into a bright-line premises rule. Our decisionmaking should be based on a distinct "arising out of" or causation analysis rather than on applying bright-line rules for the sake of administrative ease.

3. Application of Causal Connection Analysis

In the instant case, Johnson was not encountering hazards between two employer premises when she sustained her injury. Nor was she traveling from what could fairly be characterized as an employer-sponsored parking lot to her place of employment. Johnson's employer did not provide a parking lot or require her to park in a particular place. Johnson could have parked anywhere she desired, or she could have walked to work from her home. Clearly, the hazard encountered by Johnson which caused her injury was not one created by the clinic. There was no distinct causal connection between her work conditions

and the occurrence of her injury in the Home Federal Savings & Loan parking lot.

II. CONCLUSION

Therefore, I concur in the result reached by the majority, but I would henceforth abandon the inflexible premises rule set forth in *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961), and, instead, analyze our cases dealing with the "going to and coming from work" rule by determining whether a distinct causal connection exists between an employer-created condition and the occurrence of an injury.

WRIGHT and CONNOLLY, JJ., join in this concurrence.

RAMONA HILL, APPELLEE, V. CITY OF LINCOLN, A NEBRASKA MUNICIPAL CORPORATION, APPELLANT.

541 N.W.2d 655

Filed January 12, 1996. No. S-94-246.

1. **Motions to Dismiss.** When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
2. ____. In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be drawn therefrom.
3. ____. If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law.
4. **Judgments: Appeal and Error.** In rendering judgment as the finder of fact, the trial court resolves credibility issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict.
5. ____: ____. In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
6. **Municipal Corporations: Streets and Sidewalks.** The city is not an ensurer of the safety of those using its sidewalks, but has a duty to use reasonable diligence to keep sidewalks in a reasonably safe condition for pedestrians.
7. **Streets and Sidewalks: Liability.** The owner of property abutting public streets is hereby primarily charged with the duty of keeping and maintaining the

sidewalks thereon in a safe and sound condition, and in default thereof, upon notice to such abutting property owner, such abutting property owner shall be liable for injuries or damages sustained by reason thereof.

8. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
9. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the defendant.
10. **Evidence: Proof.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
11. **Pleadings: Proof.** The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone.
12. **Negligence: Proximate Cause: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury, and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
13. **Streets and Sidewalks: Negligence.** In the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk, night or day, has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger.
14. **Directed Verdict.** A motion for directed verdict should state the specific grounds therefor.
15. **Negligence: Evidence: Trial.** In order to prevail on a theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.

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

David C. Mussman, of Erickson & Sederstrom, P.C., for appellant.

David Geier, of Healey & Wieland Law Firm, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Ramona Hill, plaintiff-appellee, brought this action pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat.

§§ 13-901 to 13-926 (Reissue 1991). In her amended petition, Hill alleged that she tripped and fell on a defective sidewalk that was adjacent to property owned by Lincoln Electric System (LES), an electric generation and distribution system operated by the City of Lincoln, Nebraska (the city). Hill alleged that her injuries were a result of the negligence of the city, doing business as LES. The city moved for a directed verdict at the end of Hill's presentation of evidence. The district court took the motion under advisement, and the city rested without presenting evidence. The district court later denied the city's motion, held in favor of Hill, and awarded her $7,640.17 in damages. The city appeals.

The city assigns as error (1) the district court's failure to dismiss Hill's amended petition in its favor and (2) the district court's failure to find in favor of the city. In support of the assignment of the court's failure to dismiss the amended petition, the city argues that (1) the court erred in failing to dismiss Hill's amended petition in favor of the city by its determination that a vertical change of one-half inch or more constituted a defect in a sidewalk that gave rise to a duty of repair on the part of LES, (2) the court erred in failing to dismiss the amended petition by its determination that § 13-915 was not applicable, (3) the court erred in failing to dismiss by its determination that Hill's negligence was only slight, and (4) the court erred in failing to dismiss the amended petition by its failure to determine that Hill assumed the risk of injury.

Since we find that it was proper for the court to deny the city's motion for directed verdict and that the evidence supports a finding in favor of Hill, we affirm.

On March 4, 1991, Hill fell on a city sidewalk while walking north along 56th Street near the intersection of 56th and Garland Streets. The abutting landowner was the city, doing business as LES. Hill testified at trial that she was walking at a leisurely pace with her husband, both talking to her husband and looking where she was walking. She testified that "[w]e were walking along and all of a sudden I was laying on the ground." When she fell, her chin hit the concrete first, while her arm was folded under her body. Among other injuries, she lacerated her chin and fractured her arm.

Immediately prior to tripping, Hill noticed a surface crack within the sidewalk section and a red X painted on the sidewalk. Prior to falling, she did not notice any vertical unevenness where the two sidewalk sections abutted. After she fell, she and her husband looked at the sidewalk and noticed an elevation in the sidewalk of about 1 inch or more. Hill believed she tripped on the raised sidewalk section and not the crack within the section.

At the time Hill fell, the city was implementing the "Sidewalk Improvement Program." This program entailed city sidewalk inspectors surveying sidewalks and marking with red X's those sidewalks that needed repair. Landowners owning land abutting damaged sidewalks were then sent a notice stating that they were obligated to repair the sidewalks. The notice stated that the "goal of the program is to replace damaged sidewalks City-wide and install new ones where necessary." City sidewalk inspectors followed standard criteria regarding marking sidewalks for repair. At the time of Hill's accident, the standard for a vertical separation in the sidewalk was one-half inch or more. Harry Kroos, the sidewalk inspector at the time of the trial, testified that a goal of the program was to minimize the potential of a trip or fall by pedestrians on city sidewalks.

Hill knew about these red X's because she had seen them in her neighborhood and because a sidewalk section in front of her house had been marked with a red X. She also received a notice from the city concerning the repair of her sidewalk that was marked.

On June 20, 1990, over 8 months prior to Hill's fall, LES received a notice of sidewalk repair from the sidewalk inspector for the city. On July 6, LES requested an extension for repairs on the sidewalk. On July 18, the chief sidewalk inspector for the city granted LES' request to delay the repair until LES had finished construction on the abutting land.

Hill brought this action against the city under the Political Subdivisions Tort Claims Act, §§ 13-901 to 13-926. In its answer, the city raised the following affirmative defense: "Plaintiff had actual knowledge of the alleged defect in the sidewalk in question at the time of her accident, and an alternate safe route was available and known to the Plaintiff." The city

also raised contributory negligence and assumption of risk as affirmative defenses.

Pursuant to § 13-907, trial was held without a jury. After Hill's case in chief, the city moved to dismiss for failure of proof. In support of its motion, the city argued that § 13-915 barred Hill's recovery as a matter of law. Section 13-915 provides:

> In any suit brought pursuant to [the Political Subdivisions Tort Claims Act] and based upon an alleged defect in the construction or maintenance of a sidewalk, public building, or other public facility, an affirmative showing that the claimant had actual knowledge of the alleged defect at the time of the occurrence of the injury, and that an alternate safe route was available and known to the claimant, shall constitute a defense to the suit.

The city also argued in support of its motion that, as a matter of law, a 1-inch elevation in the sidewalk does not constitute a defect. The city also argued that Hill was contributorily negligent as a matter of law.

The court rejected the city's argument as to § 13-915, stating that it did not bar a claim as a matter of law, but instead allowed a defense to a plaintiff's claim under the Political Subdivisions Tort Claims Act. The court took the other two arguments concerning the motion for dismissal under advisement.

On February 7, 1994, the district court found in favor of Hill. The court held that the negligence of LES was attributable to the city. The court found the city grossly negligent and Hill only slightly negligent. In this order, the court also overruled the city's motion to dismiss at the close of plaintiff's case in chief. Concerning § 13-915, the court found that the evidence did not support this defense and that LES offered no proof that an alternative route could be used. The court awarded Hill $7,640.17 in damages.

The motion to dismiss for want of evidence is treated in a nonjury case as is the motion to direct a verdict in a jury case. See *In re Estate of Chaney*, 232 Neb. 121, 439 N.W.2d 764 (1989). When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only

one conclusion. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom. *Id.* If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law. *Id.*

On the other hand, in rendering judgment as the finder of fact, the trial court resolves credibility issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). "In our review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong." *Id.* at 414, 520 N.W.2d at 192.

This court's task is to first determine whether reasonable minds could differ based on the evidence presented, therefore creating a question of fact. If a question of fact exists, it was proper for the district court to deny the city's motion to dismiss. This court must then determine whether the trial court's findings were clearly wrong based on the evidence presented at trial.

The city contends that it was entitled to a dismissal because, as a matter of law, the alleged defect in the sidewalk did not give rise to a duty on the part of the city. The city bases its argument on this court's previous case *Doht v. Village of Walthill*, 207 Neb. 377, 299 N.W.2d 177 (1980). In *Doht*, this court found that a vertical raise of $1^1/_2$ to $1^3/_4$ inches did not constitute negligence on the part of the city. In essence, the city argues it has no duty to repair because the vertical disparity in the sidewalk was less than that found in *Doht*. The city misconstrues *Doht*.

Doht does not state a per se rule of law as to defective sidewalks. In *Doht*, this court stated that the city is not an ensurer of the safety of those using its sidewalks, but has a duty to use reasonable diligence to keep sidewalks in a reasonably safe condition for pedestrians. This court also stated, "The test

ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care." *Doht*, 207 Neb. at 379, 299 N.W.2d at 179. In short, the *Doht* case concedes that it is unrealistic for a city to immediately discover every defect in its sidewalks. The *Doht* case reaches a compromise by still requiring reasonable diligence on the part of the city, but noting that the city is not the general insurer of pedestrians.

In determining whether the city had a duty in this case, we find Neb. Rev. Stat. § 15-734 (Reissue 1991) persuasive. Section 15-734 provides, in relevant part:

> The owner of property abutting on public streets is hereby primarily charged with the duty of keeping and maintaining the sidewalks thereon in a safe and sound condition . . . and in default thereof, upon notice to such abutting property owner as hereinafter provided, such abutting property owner shall be liable for injuries or damages sustained by reason thereof. The city is given general charge, control, and supervision of the streets and sidewalks thereof, and is required to cause to be maintained or maintain the same in a reasonably safe condition.

In this case, at the time of Hill's accident, the city set a 1/2-inch standard as the criteria for determining what sidewalks needed repair throughout the city. One of the purposes behind the program was a safety concern—prevention of tripping and falling by pedestrians. Therefore, the city itself made a policy determination that a vertical raise of greater than one-half inch was likely to cause injury to pedestrians. The city discovered a defect and acknowledged its dangerous condition by marking the defect with a red X. The city then notified the abutting property owner, LES, of its duty to repair the sidewalk. LES is operated by the city. The city had a duty to repair the sidewalk. Therefore, the city was not entitled to a directed verdict.

Concluding that the city had a duty to repair, this court must determine whether the trial court was correct in its finding that the city was negligent based on the facts. The evidence sustains the trial court's finding that the city was negligent. In order to succeed in an action based on negligence, a plaintiff must

establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

Already concluding that the district court was correct in finding that the city had a duty, we must determine whether the court was clearly wrong in finding the city breached its duty. After LES was given notice to repair the sidewalk, it was given permission by the city sidewalk inspector to delay the repair of the sidewalk. No further action was taken by LES. LES claims that it was relieved of any liability to repair the sidewalk until it had completed construction on the abutting property. We will not allow the city to avoid being negligent by claiming it waived its own duty to repair when it acknowledges, according to its own safety criteria, that it was responsible for repairing a dangerously defective sidewalk.

The unrepaired sidewalk proximately caused Hill's injuries. Hill suffered damages. Therefore, the trial court was not clearly wrong in concluding that the city was negligent.

The city also contends that it was entitled to dismissal based on certain affirmative defenses stated in its answer, namely § 13-915, contributory negligence, and assumption of the risk. "The burden of proving an affirmative defense rests upon the defendant." *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 542, 529 N.W.2d 26, 30 (1995). " ' " 'The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery' " '." *Moudry v. Parkos*, 217 Neb. 521, 525, 349 N.W.2d 387, 390 (1984).

As stated earlier, no evidence was presented at trial by the city. Therefore, the only evidence that is useful to the city in support of these defenses is the testimony of Hill from her direct examination and cross-examination. To summarize, Hill testified that immediately prior to falling, she saw a red X and a surface crack in the sidewalk but that she never saw the vertical separation before the fall. She testified that she believed that she tripped over the crack. Also, she testified that she knew that the red X's indicated sections of the sidewalk which had been designated for repair and that she had seen red X's on

other sidewalk sections. Lastly, she testified that she was intermittently looking where she was walking while also looking at her husband.

Concerning the affirmative defense of § 13-915, the city failed in presenting sufficient evidence. As noted earlier, section 13-915 provides:

> In any suit brought pursuant to [the Political Subdivisions Tort Claims Act] and based upon an alleged defect in the construction or maintenance of a sidewalk, public building, or other public facility, an affirmative showing that the claimant had actual knowledge of the alleged defect at the time of the occurrence of the injury, and that an alternate safe route was available and known to the claimant, shall constitute a defense to the suit.

The only time § 13-915 was discussed by the city was when the city's counsel presented his argument in support of a directed verdict. The city's counsel stated:

> [Hill] testified specifically that she knew the purpose of these "X's," she saw the cracks in the sidewalk, she was on a leisure pace. She stated she — no particular destination in mind and, therefore, she falls directly within that statute and is barred from recovery, as a matter of law.

This brief argument by the city falls far short of proving it was entitled to judgment as a matter of law. "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone." *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987).

The city also contends that it was entitled to dismissal because Hill was more than slightly contributorily negligent and therefore barred as a matter of law. At the time of Hill's accident, March 4, 1991, Nebraska had a slight/gross standard of comparative negligence found in Neb. Rev. Stat. § 25-21,185 (Reissue 1989). Section 25-21,185 reads, in relevant part, "[T]he fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison . .

. . ." The district court judge found Hill only slightly negligent in comparison with the city's gross negligence.

"Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury, and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury." *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 792, 515 N.W.2d 756, 766 (1994). Concerning the standard of care that a pedestrian should exercise when walking on public sidewalks, this court has stated:

> In the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk, night or day, has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger.

Crosswhite v. City of Lincoln, 185 Neb. 331, 334, 175 N.W.2d 908, 910 (1970).

This court has held that "where the evidence shows beyond reasonable doubt that plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed." *Rogers v. Shepherd*, 159 Neb. 292, 297, 66 N.W.2d 815, 818 (1954). Based on the evidence concerning where Hill was looking and what she saw when she tripped, the city did not prove beyond a reasonable doubt that Hill's negligence was more than slight. Therefore, the district court was correct in denying the motion to dismiss.

Whether the evidence supported the district court's factual finding that Hill was only slightly negligent in comparison with the city's gross negligence requires more analysis. Hill testified that she was intermittently looking at the sidewalk and looking at her husband while walking. Following *Crosswhite*, this conduct by Hill met the appropriate standard of care if she did not have "notice or knowledge to the contrary." However, *Crosswhite*, although not explicitly stated, implies that a pedestrian will be subject to a higher standard of care if the

pedestrian has notice or knowledge that a sidewalk is dangerous.

No evidence was elicited as to how far in advance, in time or distance, Hill noticed the red X marked on the defective sidewalk section, except that she noticed it immediately prior to falling. Based on the evidence, it is not clear if Hill had any notice or sufficient notice for her to be subject to a higher standard of care than that set forth in *Crosswhite*. Therefore, the district court's determination that Hill was only slightly negligent cannot be said to be clearly wrong and will not be reversed.

The city also argues that the trial court erred in dismissing the action in its favor because it failed to find that Hill assumed the risk. The city contends that Hill knew of the danger, appreciated its dangerous nature, and deliberately exposed herself to that danger.

Although the city raised assumption of risk as an affirmative defense, it failed to argue assumption of risk as a specific ground for granting the directed verdict. Ordinarily, a motion for directed verdict should state the specific grounds therefor. Neb. Rev. Stat. § 25-1315.01 (Reissue 1989). However, this court has held that where proof relating to a specific issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to enter judgment in accordance with the evidence. *Schmid v. Clarke, Inc.*, 245 Neb. 856, 515 N.W.2d 665 (1994). This is not such a case.

In order to prevail on a theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991) (quoting *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988)). See, also, Neb. Rev. Stat. § 25-21,185.12 (Cum. Supp. 1994). Hill testified that she did not see the actual danger that allegedly caused the injury—the raise in the sidewalk. In sum, based on the evidence, whether Hill assumed the risk could not be decided as a matter of law in favor of the city. Therefore, denying dismissal on grounds of assumption of risk was proper.

Moreover, the evidence in support of the city is insufficient to hold that the district judge was clearly wrong in his findings of fact.

For the foregoing reasons, the order of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DIANNE G. KELLEY, APPELLEE.

541 N.W.2d 645

Filed January 12, 1996. No. S-95-300.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Statutes: Courts.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
3. **Statutes: Words and Phrases.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
4. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice.** A criminal defendant is subject to Neb. Ct. R. of Prac. 9E (rev. 1992), which requires a party challenging the constitutionality of a statute to file a copy of the brief assigning unconstitutionality with the Attorney General within 5 days of the filing of the brief with the Clerk of the Supreme Court.
5. **Statutes.** A motion to quash is a proper procedural method for challenging the facial validity of a statute.
6. **Constitutional Law: Statutes.** If a defect is on the face of a statute, a motion to quash is the proper method to challenge its constitutionality.
7. ____: ____. A motion to quash is not appropriate when attacking the constitutionality of a statute as applied.
8. ____: ____. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge.
9. **Constitutional Law: Statutes: Appeal and Error.** An appellate court must judge the constitutionality of an act of the Legislature not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under its provisions.

10. **Constitutional Law: Statutes: Standing.** The traditional rule of standing applies to First Amendment challenges to a statute on the ground of vagueness: one who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.
11. **Standing.** Vagueness, overbreadth, and the unbridled discretion of an administrative decisionmaker are distinct concepts which provide independent grounds for standing.
12. **Constitutional Law: Statutes: Licenses and Permits.** Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad.
13. **Constitutional Law.** Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated.
14. **Constitutional Law: Presumptions.** While prior restraints are not unconstitutional per se, they bear a heavy presumption against constitutional validity.
15. **Constitutional Law.** Protected speech may be subject to reasonable time, place, and manner restrictions.

Appeal from the District Court for Hall County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Hall County, DAVID A. BUSH, Judge. Exceptions overruled.

Vincent Valentino, Special Prosecutor, for appellant.

Rebecca K. Salmon and Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and STEINKE, D.J.

CONNOLLY, J.

In this appeal, we are asked to decide whether the statutory scheme of Neb. Rev. Stat. §§ 28-1440 to 28-1446 (Reissue 1989), which provide licensing requirements for charitable solicitors, constitutes an unconstitutional prior restraint on free speech.

The special prosecutor appointed by the Hall County Attorney has filed error proceedings in this court pursuant to Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1989 & Cum. Supp. 1994), taking exception to the determination of the district court for Hall County that §§ 28-1440 to 28-1446 were unconstitutional; that the motion to quash by the appellee,

Dianne G. Kelley, was the correct method of challenging the facial validity of the statutory scheme of §§ 28-1440 to 28-1446; that Kelley had standing to challenge the constitutionality of the statutes; and that Kelley was not required to notify the Attorney General of her constitutional challenge. We overrule the State's exceptions and affirm the district court's rulings on each of these assignments of error because §§ 28-1440 to 28-1446 are prior restraints of speech and, therefore, unconstitutional.

FACTUAL BACKGROUND

The Hall County Attorney requested that a special prosecutor be appointed for the purpose of investigating allegations involving violations of open meeting laws, conflicts of interest, accountability and disclosure violations, and misuse of official information by employees and city council members of the city of Grand Island. The special prosecutor discovered that Kelley, apparently an employee of the city, had raised funds for a celebration during the dedication of the Grand Island city hall building by soliciting contributions from people outside of Hall County. The special prosecutor filed an amended complaint on behalf of the State against Kelley, complaining that her solicitation of funds outside of Hall County for the city hall dedication violated § 28-1445, which provides: "Any person so soliciting for himself or for any organization, corporation, association or institution that shall not previously have complied with the provisions of sections 28-1440 to 28-1446 shall be guilty of a Class I misdemeanor." Section 28-1440 provides in relevant part the following registration requirements for a charitable solicitor:

> Any person, organization, corporation, association or institution, either resident or nonresident of this state, which solicits funds in any county of this state other than where its home office is located, shall first obtain a letter of approval from the county attorney of the county in which its home office is located, which letter shall be forwarded to the Secretary of State together with a fee of one dollar. Upon receipt of such letter and fee by the Secretary of State, he shall issue a certificate granting the

privilege of soliciting throughout the state for the balance of such calendar year.

In response, Kelley filed a plea in abatement and a motion to quash, and the State demurred to both motions. The county court sustained the State's demurrer with regard to the plea in abatement, but denied the demurrer to the motion to quash.

After hearing arguments on the motion to quash, the county judge for Hall County sustained the motion to quash with respect to paragraphs 6, 7(a), 7(b), and 7(g), which challenged the statutory scheme of §§ 28-1440 to 28-1446 on the grounds of vagueness and overbreadth, and of having a "chilling effect on rights guaranteed by the First Amendment."

The court found that "the defendant does have standing to challenge the constitutionality of Neb. Rev. Stat. 28-1440 et seq. (Reissue 1989), and further, that the statutory scheme enunciated therein is not constitutional. Freedman vs. Maryland, 380 U.S. 51 (1965); Riley vs. National Federation of the Blind, 487 U.S. 781 (1988)." The county court judge overruled the motion to quash with respect to all other paragraphs.

The State instituted error proceedings to the district court for Hall County citing as error the county court's conclusions that (1) count II of the amended complaint was unconstitutional on its face, (2) Kelley did not have to give notice to the Attorney General of these proceedings, (3) Kelley had the requisite standing to raise the issue of the unconstitutionality of the statutory scheme embracing § 28-1445, (4) the statutory scheme of §§ 28-1440 to 28-1446 was violative of the First Amendment to the U.S. Constitution, and (5) a motion to quash was the proper way to raise a First Amendment challenge to a statute.

After the district court affirmed the county court's judgment, the State initiated error proceedings from the decision of the district court pursuant to §§ 29-2315.01 to 29-2316.

ASSIGNMENTS OF ERROR

The State assigns as error the lower courts' rulings that (1) Kelley has standing to assert the unconstitutionality of §§ 28-1440 to 28-1446, (2) the appropriate method to

challenge the constitutionality of §§ 28-1440 to 28-1446 is by a motion to quash, (3) Kelley was not required to give notice to the Attorney General of her intention to challenge the constitutionality of §§ 28-1440 to 28-1446, and (4) the statutory scheme of §§ 28-1440 to 28-1446 is violative of the First Amendment to the U.S. Constitution as an unconstitutional prior restraint of protected speech.

SCOPE OF REVIEW

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995).

ANALYSIS

We begin by noting that the solicitation of charitable contributions is speech protected under the First Amendment. See, *Riley v. National Federation of Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Before reaching the constitutional issues, however, we must discuss the preliminary matters of the jurisdiction of this court, the procedure used by Kelley, and the standing of Kelley to attack the constitutionality of §§ 28-1440 to 28-1446.

JURISDICTION

The State claims that Kelley does not have standing to challenge the constitutionality of the statute because she did not give notice to the Attorney General, pursuant to Neb. Rev. Stat. § 25-21,159 (Reissue 1989), of her intent to challenge the constitutionality of a criminal statute. Although the State expresses its challenge in terms of Kelley's standing, the real issue is whether Kelley's failure to notify the Attorney General of her constitutional challenge prevents this court from obtaining jurisdiction over the claim.

As a preliminary matter we should note that it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995). Furthermore, interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below. *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias, supra*; *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995).

The State argues that Kelley was required to notify the Attorney General of her constitutional challenge pursuant to § 25-21,159. The statute provides:

> *When declaratory relief is sought*, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and *if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.*

(Emphasis supplied.)

This statute does not bar this court's jurisdiction over Kelley's claim. Section 25-21,159 appears in the Nebraska Revised Statutes at chapter 25, entitled "Courts; Civil Procedure"; article 21, entitled "Actions and Proceedings in Particular Cases"; subsection (j), which applies specifically to declaratory judgments.

Furthermore, the first phrase of the statute reads "[w]hen declaratory relief is sought." Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *State ex rel. Perkins Cty.*

v. County Superintendent, 247 Neb. 573, 528 N.W.2d 340 (1995); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). As the introduction to the statute, the phrase "[w]hen declaratory relief is sought" should be read to include all of the language which follows thereafter.

Therefore, in order for § 25-21,159 to apply, this action must be for declaratory relief. See *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993) (recognizing that this court was precluded from considering any constitutional attacks of declaratory nature because plaintiff failed to serve Attorney General with copy of proceeding). However, this action is not for declaratory judgment. Declaratory judgments "resolve uncertainties and controversies before obligations are repudiated, rights are invaded or wrongs are committed." 22A Am. Jur. 2d *Declaratory Judgments* § 1 (1988). If, as Kelley contends, § 28-1440 is unconstitutional, her rights have been invaded by a prosecution pursuant to an invalid statute. Therefore, her request is not for declaratory relief, and § 25-21,159 does not apply.

Applying § 25-21,159 only to declaratory judgment actions is consistent with this court's treatment of the statute in previous cases. Kelley correctly asserts that no reported criminal cases have denied a defendant the opportunity to present a constitutional question to this court because the defendant failed to follow the provisions of § 25-21,159. Furthermore, this court has never raised § 25-21,159 on its own motion to bar consideration of a constitutional question in a criminal case.

However, a criminal defendant is subject to Neb. Ct. R. of Prac. 9E (rev. 1992), which requires a party challenging the constitutionality of a statute to file a copy of the brief assigning unconstitutionality with the Attorney General within 5 days of the filing of the brief with the Clerk of the Supreme Court. See *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). As Kelley complied with the requirements of rule 9E, the rule presents no bar to this court's consideration of Kelley's constitutional challenge.

We hold that § 25-21,159 does not apply in this case. Therefore, this court has jurisdiction over Kelley's claim.

MOTION TO QUASH

The State objects to Kelley's use of a motion to quash to challenge the constitutionality of the statutory certification scheme. The State argues that Kelley's claim should be brought under a not guilty plea, rather than a motion to quash.

Under Nebraska law, a motion to quash is a proper procedural method for challenging the facial validity of a statute. Neb. Rev. Stat. § 29-1808 (Reissue 1989) provides, "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Consequently, this court has held that if a defect is on the face of a statute, a motion to quash is the proper method to challenge its constitutionality. *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980) (denying facial challenge to concealed weapons statute).

However, this court has held that a motion to quash is not appropriate when attacking the constitutionality of a statute as applied. *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993). Nevertheless, *Saulsbury* held that if no other evidence is needed in order to sustain the challenge to the statute, a motion to quash is the appropriate procedural device.

In the case at bar, we conclude that no evidence is needed to rule on the constitutionality of the statutory scheme. Kelley asserts that the statute is invalid because it places "unbridled discretion" in the hands of the county attorney, thereby violating the First Amendment. Brief for appellee at 8. If the statute does, in fact, allow "unbridled discretion," it has no valid application. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. See *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (holding that facial challenge to legislative act is most difficult challenge to mount successfully, because challenger must establish that no set of circumstances exists under which Act would be valid).

The State argues that Kelley's challenge is really to the statute as applied; therefore, the testimony of the Hall County Attorney is necessary in order to determine the validity of the statute. However, even if Kelley's challenge were to the statute

as applied, the county attorney's interpretation of the statute is not dispositive. This court must judge the constitutionality of an act of the Legislature not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under its provisions. *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982). Therefore, this court must evaluate what the county attorney may do under the provisions of § 28-1440. If the language of § 28-1440 authorizes the exercise of unlimited discretion on the part of the county attorney, this court needs no other evidence of constitutional insufficiency.

STANDING

Kelley mounts a facial challenge to this statute as an unconstitutional licensing scheme which violates her rights under the First Amendment to the U.S. Constitution. The State argues that Kelley does not have standing to challenge the constitutionality of the statute because her conduct is clearly prohibited by the statute. See, *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). However, Kelley contends that she has standing to challenge the statute on the ground that it delegates overly broad licensing discretion to the county attorney. See, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); *State v. Kipf, supra*.

This court has recognized that the traditional rule of standing applies to First Amendment challenges to a statute on the ground of vagueness: one who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others. *State v. Walton*, 246 Neb. 893, 523 N.W.2d 699 (1994); *State v. Kipf, supra* (citing *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987)). Section 28-1440 requires those who solicit outside their home county to obtain a certificate before soliciting, and Kelley failed to do so. Because her conduct was clearly proscribed by the statute, she does not have standing to challenge the statute as vague. However, our inquiry does not end here, as vagueness, overbreadth, and the unbridled

discretion of an administrative decisionmaker are distinct concepts which provide independent grounds for standing. See, *State v. Pierson, supra*; *State v. Kipf, supra*.

Kelley may challenge the facial validity of §§ 28-1440 to 28-1446 as vesting unbridled discretion in the county attorney. Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. *FW/PBS, Inc. v. Dallas, supra*. See, also, *State v. Kipf, supra* (citing *New York State Club Assn. v. New York City*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988)). This rule of standing is justified as a way to protect those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *State v. Kipf, supra* (citing *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987)).

Although Kelley's failure to obtain a certificate was in violation of § 28-1440, she may challenge the facial constitutionality of the statute as vesting the county attorney with unbridled discretion. Furthermore, under this rule of standing, Kelley may challenge the constitutionality of the entire statutory scheme even though she was prosecuted only for violating § 28-1445. See *Freedman v. Maryland, supra*.

PRIOR RESTRAINT

As previously stated, solicitation of charitable contributions is speech protected under the First Amendment. *Riley v. National Federation of Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Furthermore, when a state enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech, it is subject to First Amendment scrutiny to ensure that the licensor's discretion is suitably confined. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

Governmental action constitutes a prior restraint when it is

directed to suppressing speech because of its content before the speech is communicated. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). While prior restraints are not unconstitutional per se, they bear a heavy presumption against constitutional validity. *J.Q. Office Equip. v. Sullivan*, 230 Neb. 397, 432 N.W.2d 211 (1988) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975)).

The U.S. Supreme Court has struck down statutory schemes in which there are little or no limitations on the administrative decisionmaker. The Court has recognized two evils that will not be tolerated in schemes of prior restraint. First, the Court condemns schemes that place " 'unbridled discretion in the hands of a government official' " because they may result in censorship. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In *FW/PBS, Inc.*, the Court said:

> " ' "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." ' "

493 U.S. at 226 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969)).

Second, the Court condemns a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license. In *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), the Court held that failure to place limitations on the time within which a censorship board decisionmaker must make a determination of obscenity is a species of unbridled discretion. When a scheme creates a " '[r]isk of delay' . . . such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,' " facial challenges are permitted. *FW/PBS, Inc. v. Dallas*, 493 U.S. at 223–24. A licensing scheme failing to provide for definite limitations on the time within which the license must be issued

is impermissible, because " 'delay compel[s] the speaker's silence.' " 493 U.S. at 226 (citing *Riley v. National Federation of Blind, supra*).

Kelley challenges the constitutionality of §§ 28-1440 to 28-1446, which require certification before solicitation of funds is allowed outside one's home county. As previously stated, § 28-1440 requires a person or organization desiring to solicit funds outside its home county to send a letter of approval obtained from the county attorney of its home county to the Secretary of State along with a fee of $1. After receiving the letter, the Secretary of State is required to issue a certificate granting the privilege of soliciting outside the home county for 1 year.

The State argues that there is no discretion contained in § 28-1440, because the statute indicates that the Secretary of State "shall" issue a certificate granting the privilege of soliciting. While this is true with regard to the Secretary of State, the State neglects to mention the other phase of the process. The statute requires a registrant to obtain a "letter of approval from the county attorney in which [its] home office is located." There is no language that limits the county attorney's conduct.

Section 28-1440 fails because it contains both of the impermissible elements of a prior restraint. First, the issuance of a letter is subject to the whim of a county attorney. Section 28-1440 sets forth no standards to limit the county attorney's discretion. In effect, the county attorney may either refuse or neglect to act upon an application, meanwhile stifling protected speech. Nor are there any provisions for judicial review if any request for a letter from the county attorney is denied. Section 28-1440 places protected First Amendment activity, charitable solicitations, in jeopardy of being arbitrarily suppressed.

The second impermissible element of a prior restraint scheme inherent in § 28-1440 is the lack of time limits within which the county attorney must make a decision to issue a letter. There is far too grave a danger of suppression of ideas when the licensor is given no time limits within which to make his decision. *FW/PBS, Inc. v. Dallas, supra*. Section 28-1440 would allow a county attorney to refuse to take any action upon

an application by simply indefinitely postponing the issuance of a letter, while stifling protected speech.

TIME, PLACE, AND MANNER REGULATION

The State argues that it is free to impose content-neutral time, place, and manner restrictions on charitable solicitations. The State correctly asserts that protected speech may be subject to reasonable time, place, and manner restrictions, see *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), and that licensing requirements are permissible in the context of charitable solicitations, see *Riley v. National Federation of Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

However, a statute which contains the risk of arbitrary application is " 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992). As stated earlier, § 28-1440 contains no adequate standards to proscribe the exercise of the county attorney's discretion. Absent such standards, those wishing to solicit charitable contributions may be completely silenced by the county attorney. Section 28-1440 contains the risk of arbitrary suppression of the speech of those soliciting charitable contributions; thus, it is inherently inconsistent with valid time, place, and manner restrictions.

Because the Hall County Attorney has no standards to prevent her from suppressing speech, §§ 28-1440 to 28-1446 have no valid application and, in the absence of standards, cannot be salvaged.

CONCLUSION

The statutory scheme of §§ 28-1440 to 28-1446 places no limitation on the exercise of the county attorney's discretion in issuing the letters which enable persons or organizations to solicit outside their home county. As this presents a grave danger of suppressing protected speech, it cannot stand. The State's exceptions are overruled, and the Hall County district court's ruling affirming the county court is affirmed.

EXCEPTIONS OVERRULED.

JACQUELINE PAULSEN, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

541 N.W.2d 636

Filed January 12, 1996. No. S-95-428.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court award 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 was not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Rules of Evidence.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
3. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right or denying a just result in matters submitted for disposition through a judicial system.
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 such evidence admitted or excluded.
6. **Workers' Compensation: Expert Witnesses: Proof.** Where a physician's testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.
7. **Workers' Compensation: Expert Witnesses.** An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."
8. **Workers' Compensation.** A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then the claimant cannot recover.
9. **Workers' Compensation: Proof.** The workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment.
10. **Trial: Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.

11. ____: ____. An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance.
12. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
13. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
14. **Trial: Evidence: Waiver.** If the party against whom evidence is offered fails to object to such evidence, that party is considered to have waived whatever objection he or she may have had, and the evidence is in the record for consideration the same as other evidence.
15. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
16. **Workers' Compensation: Expert Witnesses.** Triers of fact, including the Nebraska Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding.
17. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jeffrey A. Silver for appellant.

Jill Gradwohl Schroeder, Special Assistant Attorney General, and Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Jacqueline Paulsen appeals from a judgment entered by the Nebraska Workers' Compensation Court. The trial court held that Paulsen was entitled to a limited amount of benefits as the result of a work-related injury, but the court refused to characterize Paulsen as permanently disabled. Paulsen appealed to a workers' compensation review panel, claiming that she had suffered a temporary total disability extending beyond the date of the award and/or a permanent injury. The review panel

affirmed the trial court's decision, and Paulsen appeals.

SCOPE OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court award 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 was 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. Neb. Rev. Stat. § 48-185 (Reissue 1993).

FACTS

Paulsen was employed by the State of Nebraska as a nursing assistant at the Thomas Fitzgerald Veterans Home from October 26, 1992, until April 4, 1994. Her duties at the facility included dressing patients, assisting patients in moving throughout the facility, and lifting patients out of and into their beds.

According to Paulsen, on March 6, 1993, she and a coworker were lifting a 140- to 145-pound amputee into a bathroom chair when the patient suddenly jerked, knocking the workers down. After this incident, Paulsen considered herself to be uninjured and went on with her daily duties. Shortly thereafter, Paulsen and a coworker were attempting to place a patient into bed when the patient suddenly twisted Paulsen behind him in such a manner that Paulsen was thrown to the floor. Following this incident, Paulsen proceeded with her duties. However, within approximately 10 minutes of the second incident, she collapsed while walking down a corridor. Paulsen testified that she was suddenly overcome with pain throughout her entire body and compared the incident to having convulsions. She stated that the pain was in her lower back, through her left hip, and from her neck through her shoulders. Paulsen testified that the pain she was experiencing in her lower back at the time of trial was similar to that she felt the day after the incidents.

Following the March 6 incidents, Paulsen was treated by Dr. Edward Montanez for general pain symptoms in the thoracic and cervical areas and in her left shoulder. An x-ray examination of the lumbar area of Paulsen's spine revealed no abnormalities. Montanez instructed Paulsen that she could

return to work on March 15, 1993, with certain limitations on the type of work she could perform for 10 days. Shortly thereafter, a urinalysis report revealed that Paulsen was pregnant. No further x rays were permitted, and Paulsen was required to forgo pain-killing medication. Montanez agreed with Paulsen's suggestion that she see a chiropractor to facilitate pain relief until the end of her pregnancy. Thereafter, for reasons unrelated to her work, Paulsen left her employment with the veterans home and moved to California. In May 1993, Paulsen had a miscarriage.

After the hearing, the trial court found that Paulsen had suffered temporary total disability for a work-related injury and was entitled to compensation for medical expenses, hospital expenses, and lost wages during the period of March 7 through 31, 1993, a period of $3^4/_7$ weeks. The court held that Paulsen failed to prove she had sustained an additional temporary total disability or any permanent disability after March 31 as a result of the March 6 incidents.

On appeal, the workers' compensation review panel affirmed the trial court's decision. Paulsen appealed to the Nebraska Court of Appeals, and we removed the appeal to this court under the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Paulsen makes nine assignments of error which we summarize as follows: The trial court's rulings concerning exhibits 3 and 4 were contrary to law; the court erred in considering Paulsen's pregnancy; the court was clearly wrong in its findings, which were contrary to the law; and the court erred in relying upon Dr. Alan Fruin's opinion to conclude that Paulsen failed to prove that she had sustained any total or permanent disability after March 31, 1993.

ANALYSIS

We first address the trial court's exclusion of exhibits 3 and 4. At trial, the State objected to Paulsen's exhibits 3 and 4, which consisted of medical reports, for the reason that the exhibits were not listed on her pretrial disclosures. The court

ultimately received only the fourth page of exhibit 3 and the first page of exhibit 4 and sustained the objections to the remainder of exhibits 3 and 4. In our review of an error directed at the admission or exclusion of evidence, we note that the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. See, Neb. Rev. Stat. § 48-168 (Reissue 1993); *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989). Therefore, our standard for review of an assigned error directed at the exclusion or admission of evidence is one of abuse of discretion.

Paulsen argues that the trial court should not have sustained the State's objection on the grounds that exhibits 3 and 4 were not included in Paulsen's pretrial disclosures. Paulsen claims that if the State offered one page of both exhibits 3 and 4, Neb. Rev. Stat. § 27-106 (Reissue 1989) requires that Paulsen be permitted to offer the balance of those two exhibits. This argument fails because Paulsen, not the State, offered exhibits 3 and 4.

We next consider whether the court abused its discretion in excluding the exhibits. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right or denying a just result in matters submitted for disposition through a judicial system. See *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992). We therefore examine the contents of exhibits 3 and 4.

Exhibit 3 contained the notes of Dr. Montanez. The notes reflect Paulsen's complaints of persistent thoracic, lumbar, and shoulder pain since her injury at the veterans home. Montanez noted discomfort throughout her neck and upper back and diagnosed her as having "[t]horacocervical muscle strain with diminished range of motion secondary to pain" and that Paulsen was experiencing continued back pain. On April 2, 1993, he noted that Paulsen was experiencing increased pain on the left

side of her neck and in her left shoulder girdle, with some involvement of the left arm and upper thoracic region of her back.

The first physical capacity report noted "[t]horaco-cervical muscle strain" and imposed work restrictions for "10 days from 03-15-93." The second physical capacity report, dated April 2, 1993, reported a diagnosis of persistent pain in the left shoulder, left arm, neck, and back and that Paulsen would be able to return to work in 3 to 4 weeks.

Exhibit 4 consisted of reports from a physical therapist to Dr. Montanez. One report noted that Paulsen was seen for evaluation and treatment of cervical-thoracic strain; that Paulsen stated she had injured her neck and upper back on March 6, 1993; and that she complained of left shoulder pain and dislocation sensations. Paulsen gave a past medical history of having her shoulder dislocated approximately 9 years prior. She was treated with electrical muscle stimulation to the cervical and upper thoracic musculature, therapeutic exercise, and the application of ice to the left shoulder. Another report indicated Paulsen stated that she was experiencing uncomfortable tightness in her shoulders and that her shoulder had recently dislocated.

The trial court found that Paulsen's complaints related to the March 6, 1993, incidents were in the cervical and thoracic areas rather than the low-back area. Exhibits 3 and 4 would have supported the trial court's findings that Paulsen was complaining of cervical-thoracic strain in her neck, upper back, and left shoulder. Although the reports note that Paulsen mentioned cervical lumbar pain, the treatment given was for cervical and upper thoracic musculature and the left shoulder. The failure of the trial court to admit the entire contents of exhibits 3 and 4 was not an abuse of discretion by the trial court. The exclusion of exhibits 3 and 4 was not prejudicial to Paulsen. As a general rule, 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 such evidence admitted or excluded. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994).

Paulsen next argues that the trial court erred in considering

her pregnancy. This argument has no merit. The court found that the pain localized in Paulsen's lower back after her miscarriage in May 1993. This finding merely established the date on which the court determined the low-back pain occurred.

Paulsen also argues that the trial court erred in accepting the opinion of Dr. Fruin. Fruin and Dr. David Dubin disagreed regarding Paulsen's condition and prognosis.

Paulsen saw Dr. Dubin, a family practice physician, after she moved to California. In a July 5, 1994, report, Dubin stated that he saw Paulsen in June 1993 regarding her injury of March 6. Dubin had ordered a "CT scan." The report of the CT scan stated in part: "IMPRESSION: AT L2-3 ASYMMETRIC DIS[K] BULGE WITHOUT SPINAL STENOSIS OR NEURAL ENTRAPMENT. SMALL LEFT PARACENTRAL DIS[K] HERNIATION EXTENDING MINIMALLY INTO THE LEFT LATERAL RECESS. THIS TIME NO DEFINITE NERVE ROOT ENTRAPMENT OR IMPINGEMENT IS IDENTIFIED. MILD BULGING DIS[K] AT L4-5."

Dr. Dubin opined that Paulsen had a herniated lumbar disk and was currently totally disabled, but not permanently disabled, since this was likely to be "remediable surgically." A second report, dated July 26, 1994, stated that Dubin's opinion of July 5 was based upon his education, training, and experience and was to a reasonable degree of medical probability and that "[t]he accident in question is responsible for [Paulsen's] injuries."

Dr. Fruin's report dated August 30, 1994, was submitted on behalf of the State. Fruin saw Paulsen in an independent medical examination on August 29. Prior to the exam, Fruin reviewed Paulsen's medical records and obtained a history from Paulsen, including the fact that she had experienced two lifting incidents at the veterans home in Omaha in March 1993. Paulsen told Fruin that following the lifting incidents, she was walking down the hall at the veterans home when she had an "attack" and that she had experienced these attacks approximately two times per month since the initial attack. Fruin reported that the attacks were characterized by Paulsen "feeling shaky, faint, a warm feeling throughout the body, but the hands and feet feeling cool and sweating all over the body.

She has shortness of breath, throbbing headache, lower lumbar pain, left hand and left leg numbness. The right leg twitches and jerks uncontrollably."

Dr. Fruin reported that there was no particular activity that brought on these attacks, which could happen when Paulsen was resting or doing various activities, and that between these attacks, Paulsen complained of left parascapular and shoulder pain without any radicular pain into her left arm. She also complained of lower lumbar pain with occasional but infrequent radiation of pain into her left leg and told Fruin that the pain in her left leg was more a numbness than true pain and was made worse by sitting.

Dr. Fruin's report stated that Paulsen had one of her "spells" while she was in his office. During the spell, Paulsen seemed hysterical, confused, and somewhat irrational. Fruin made the following comments in his report:

> Her diagnosis at the current time would include the following:
>
> a) complaint of left shoulder, left scapular and low back pain without any apparent underlying organic disease.
>
> b) possibility of hysteria, not related to her incident at work at the Veterans Home in March 1993.
>
> c) unlikely possibility of a pheochromocytoma, also unrelated to her incident at work at the Veterans Home in March 1993.
>
> 2) I can find no evidence on her examination that any injury was sustained by the lifting inciden[ts] of March 6, 1993.
>
> 3) I believe that Ms. Paulsen has reached maximum medical improvement in that she needs no other specific diagnostic studies or therapy related to the incident of March 1993. I do not believe that there is any permanent impairment as a result of the incident.
>
> 4) There are no permanent physical restrictions related to the March 6, 1993[,] incident. Any activity restrictions are strictly self-imposed.
>
> 5) I would not make any recommendations for future medical treatment other than purely symptomatic relief of her complaints.

> 6) Based on her examination and the report of the CT scan of her lumbar spine, it is unnecessary for her to undergo any type of surgery on her back and is actually ill-advised at this time for her to have any surgery.
>
> 7) If I were her treating physician, I would feel obliged to refer her to a psychiatrist and to a[n] internist with a special interest in endocrinology to evaluate the possibility of her hysteria and pheochromocytoma. If she has either one of these conditions, it would not be related to the March 6, 1993[,] incident, but she should have these problems followed up from a medical point of view.

Paulsen asserts that "[a]s a matter of law, Dr. Dubin's opinion, couched in specific medical terms and supported by an objective, unrefuted CAT Scan should have been considered uncontroverted, and the Review Panel's decision was therefore clearly wrong." Brief for appellant at 25. At trial, Paulsen objected to Dr. Fruin's testimony because his opinion was not based upon a reasonable degree of medical certainty. The State argues that since Fruin's opinion was not offered as the basis of an award, the requirement that the medical opinion be based on a reasonable degree of medical probability is not applicable. We therefore review the criteria for the admission of expert medical opinions.

In *Welke v. City of Ainsworth*, 179 Neb. 496, 504-05, 138 N.W.2d 808, 813 (1965), we stated:

> Where the [physician's] testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

Using *Welke* as a basis, we held in *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991), that medical testimony expressed in terms of "possibly" was not sufficient, but that such testimony couched in terms of "probability" was sufficient. See, *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992); *Castro v. Gillette Group,*

Inc., 239 Neb. 895, 479 N.W.2d 460 (1992); *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983). "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. See *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991). In *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992), we stated that an expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty." We reaffirmed this standard in *Morton* and stated that the sufficiency of the expert's opinion is judged in the context of the expert's entire statement.

Our cases discussing the sufficiency of expert opinions have been a survey of various characterizations by the claimants' experts as to how certain they are that the claimant's injury was caused by his or her employment. We have held that expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to meet the claimant's burden to prove causation. See, *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992); *Edmonds v. IBP, inc.*, *supra*. Our well-known preference for the use of the phrases "reasonable degree of medical certainty" or "reasonable degree of probability" is an indication to courts and parties of the necessity that the medical expert opinion must be stated in terms that the trier of fact is not required to guess at the cause of the injury.

Our workers' compensation cases regarding the certainty of the language used by medical experts have focused on the substantive issue of whether the claimant's injuries and disability were caused by conditions of his or her employment. We recognized in *Welke* that to require a greater degree of proof in a workers' compensation case than we required in a tort action would thwart the basic purpose of the workers' compensation statutes. Causation must be proved by a preponderance of the evidence, and the weight of the claimant's evidence must be sufficient to meet this burden. "The rule is well established in this jurisdiction that a workmen's compensation award cannot be based on possibility or

speculation and if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover." *Welke v. City of Ainsworth*, 179 Neb. 496, 502, 138 N.W.2d 808, 812 (1965).

The workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment. See *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992). We have held that with many types of injuries it is impossible to meet this burden of proof without the use of medical expert testimony. In *Caradori v. Frontier Airlines*, 213 Neb. 513, 516-17, 329 N.W.2d 865, 867 (1983), we stated:

> " 'Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.' The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability."

We have recognized that medical experts often find it necessary to qualify their medical opinions to clarify the certainty of their opinion.

> In the area of certain disabilities it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Medical diagnosis is not that exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the [word] "probably . . . ."

Welke v. City of Ainsworth, 179 Neb. at 502-03, 138 N.W.2d at 812.

In *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), we noted that the Nebraska Evidence Rules, with reference to testimony by experts, do not require that the expert testify "with reasonable certainty." We stated that the test was whether the specialized knowledge would

assist the trier of fact to understand the evidence or to determine a fact in issue. We referred to the foundational requirements applicable to expert testimony articulated in the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-702 and 27-703 (Reissue 1989). *Lane v. State Farm Mut. Automobile Ins. Co., supra.*

Read together, *Welke* and *Lane* outline what is required in the use of medical expert opinion evidence. The witness must qualify as an expert, and the witness' testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.

A qualified expert may not testify without adequate basis for his or her opinions concerning the facts of the case on which the expert is testifying. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995). The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. See *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985). Thus, a trial court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant.

At trial, Paulsen made a foundational objection to the admission of Dr. Fruin's opinion because Fruin did not say that his opinion was based on a "reasonable degree of medical certainty." Such an objection is not a foundational objection. At trial, Paulsen did not challenge Fruin's qualifications as an expert, nor did she challenge the underlying factual basis for his opinion.

An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1989). "Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained." *Welke v. City of Ainsworth*, 179 Neb. 496, 504, 138 N.W.2d 808, 813 (1965).

Testimony which gives rise to conflicting inferences of equal probability is not relevant. Paulsen did not object to the opinion based on relevance. Therefore, Paulsen failed to raise a proper objection to Fruin's testimony. To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992). If the party against whom evidence is offered fails to object to such evidence, that party is considered to have waived whatever objection he or she may have had, and the evidence is in the record for consideration the same as other evidence. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

Pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994); *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

We find there is sufficient competent evidence to warrant the trial court's order. Dr. Fruin stated that he found no evidence during his examination of Paulsen that any injury was sustained as the result of the lifting incidents of March 6, 1993. Based upon his examination of Paulsen and the CT scan report, Fruin

opined that there was no permanent injury as a result of the incidents and that it was unnecessary and ill-advised for her to have any surgery. Fruin stated that in his opinion, any restrictions on Paulsen's level of activity were self-imposed.

Paulsen also claims that Dr. Dubin's testimony should have been considered uncontroverted because it was based on objective medical evidence (the CT scan) and that, therefore, the trial court was clearly wrong in not adopting Dubin's opinion. This argument is without merit. Two doctors reviewed the CT scan and had different opinions as to its meaning. Triers of fact, including the Nebraska Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding. *Aken v. Nebraska Methodist Hosp., supra.* When the record in a workers' compensation case presents conflicting medical testimony, the appellate court will not substitute its judgment for that of the compensation court. *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

Having found Paulsen's assignments of error to be without merit, we affirm the judgment of the Workers' Compensation Court.

AFFIRMED.

DARRELL D. HULL, APPELLANT, V. AETNA INSURANCE COMPANY AND CONTINENTAL WESTERN INSURANCE COMPANY, APPELLEES.
541 N.W.2d 631

Filed January 12, 1996. No. S-95-561.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to

make its own determinations as to questions of law.

3. **Workers' Compensation.** When a self-employed person elects to come within the coverage of the Nebraska Workers' Compensation Act pursuant to Neb. Rev. Stat. § 48-115(4) (Reissue 1993), the Workers' Compensation Court must accord the self-employed person the same rights as any other employee coming within the purview of the Nebraska Workers' Compensation Act.
4. ____. The Workers' Compensation Court is required to determine the average weekly wage of the claimant at the time of the injury.
5. ____. The determination of the definition of the average weekly wage of a self-employed claimant is a question of law.
6. **Workers' Compensation: Presumptions: Proof.** Business expenses are to be deducted in determining the wage of a self-employed claimant, and business expenses set forth on a claimant's tax return shall be presumed correct. Either party may rebut this presumption of correctness by proving by a preponderance of the evidence that certain business expenses distort the claimant's true rate of compensation at the time of the accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Timothy C. Phillips, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Aetna Insurance Co.

CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Darrell D. Hull appeals the determination of the three-judge review panel of the Nebraska Workers' Compensation Court that the trial judge was clearly wrong in determining the average weekly wage of Hull.

In Hull's first appearance before this court, on a petition for further review, we held that a self-employed claimant's average weekly wage under Neb. Rev. Stat. § 48-121(2) (Reissue 1993) shall be based upon the claimant's gross income less business expenses, i.e., net income. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995) (*Hull I*). Upon further consideration, we now hold that a claimant may elect to show that the deduction of a particular expense is not reflective of real economic gain to the claimant and should not be deducted from his gross income. As Hull introduced no evidence to show that the net income figure from his federal tax form is not reflective

of his real economic gain, we find that there is not sufficient competent evidence in the record to warrant an average weekly wage figure of $571.80. We therefore affirm.

BACKGROUND

This is Hull's second appearance before this court. However, as the instant appeal concerns many of the same factual issues as the earlier petition for further review, a review of the prior proceedings is appropriate.

Darrell D. Hull, a dentist by trade, filed an amended petition in Workers' Compensation Court on July 29, 1992, alleging that he had developed asthma and contact dermatitis as a result of exposure to chemicals and compounds used in his dentistry practice. As a sole proprietor, Hull had contracted for workers' compensation insurance from Continental Western Insurance Company (Continental) from October 15, 1987, to October 15, 1988, and from Aetna Insurance Company (Aetna) from October 15, 1988, to October 15, 1990.

The trial judge, applying the last injurious exposure rule, found Aetna to be the only liable defendant. In determining the average weekly wage of Hull, the judge concluded that "real economic gain" is the appropriate test for determining the average weekly wage of a self-employed individual and that the net earnings of the self-employed individual provide the correct basis for determining the average weekly wage. Nevertheless, the trial judge continued:

> The Court is now faced with the formidable if not impossible task of determining the plaintiff's average weekly wage. The 26 weeks period preceding February 1, 1989, is the pertinent earnings period. According to Exhibit 37 [sic], a copy of the plaintiff's federal income tax return for 1988, the plaintiff had a net business income of $6,419 for the calendar year 1988, which would produce an average of approximately $123 per week for the year. I view this wage figure as obviously nonreflective of the plaintiff's real economic gain, and I am not inclined to accept it. Unfortunately, as the record does not provide adequate data for an accurate determination of the plaintiff's applicable average weekly wage, I have no

> alternative but to improvise and seriously attempt to arrive at a figure that is reasonably reflective of the average weekly wage during the period in question. I have chosen the following method: Taking the figure of $54,267 on Line 5 of Schedule 3 [sic] of Exhibit 36 denominated "gross income" and reducing it by 50 per cent for ordinary and necessary business expenses, I derived the figure of $27,133.50 as the net business income for calendar year 1988, which converts to an average net weekly earnings of $571.80 [sic]. I have chosen to adopt the latter sum as the applicable average weekly wage.

Apparently the judge mislabeled the exhibits upon which he relied because exhibit 37 is not the 1988 tax return. Exhibit 36 is actually the 1988 tax return. There is also a mathematical error in the calculation of the average weekly wage. According to the calculations described by the trial judge, the average net weekly earnings should have been $521.80.

The Workers' Compensation Court review panel disagreed with the use of the last injurious exposure rule and held that the date of injury determines liability when there are several insurers. Therefore, the review panel vacated the trial court's award and remanded the cause for a determination of the date of Hull's injury. However, Continental appealed and Hull cross-appealed the review panel's order to the Nebraska Court of Appeals, assigning as error the panel's refusal to use the last injurious exposure rule. Also, Hull alleged that the review panel erred in determining the amount of compensation payable to Hull by using his income tax returns to determine his average weekly wage.

The Court of Appeals held that the review panel's order did not affect a substantial right of the parties; therefore, it was not a final, appealable order, and the court dismissed the appeal. Continental petitioned this court for further review, assigning as error the Court of Appeals' conclusion that the review panel's order was not a final, appealable order.

In *Hull I*, we held that the Workers' Compensation Court review panel's order vacating the award entered by the trial court substantially affected the rights of Hull and Continental; therefore, it was a final, appealable order. Also, we found that

the liability between successive insurers for a claimant's occupational illness is premised upon (1) the date that the accumulated effects of the illness manifest to the level of disability entitling the claimant to compensation and (2) the last carrier on risk that bears a causal relation to that disability. Finally, we held that a self-employed claimant's average weekly wage under § 48-121(2) shall be based upon the claimant's gross income less business expenses, i.e., net income.

We remanded the cause to the Workers' Compensation Court with orders to enter judgment consistent with our opinion. The Workers' Compensation Court review panel reviewed the findings of the trial judge and determined that the judge erred with respect to his determination of the average weekly wage of Hull. While the review panel concluded that the trial judge's finding of Hull's net business income of $6,419 for the year of 1988 was not clearly wrong, it found that this figure should have been used by the judge in determining Hull's average weekly wage. Therefore, the review panel concluded that the judge was clearly wrong in failing to find that Hull had an average weekly wage of $123.44 for the applicable time period.

Hull appeals the determination of the review panel that the trial judge erred in determining his average weekly wage.

ASSIGNMENT OF ERROR

Hull contends that the Workers' Compensation Court review panel erred in finding that the trial judge's determination that the average weekly wage of Hull was $571.80 was clearly wrong.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994).

An appellate court is obligated in workers' compensation

cases to make its own determinations as to questions of law. *Hull I, supra*; *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

ANALYSIS

When a self-employed person elects to come within the coverage of the Nebraska Workers' Compensation Act pursuant to Neb. Rev. Stat. § 48-115(4) (Reissue 1993), the Workers' Compensation Court must accord the self-employed person the same rights as any other employee coming within the purview of the Nebraska Workers' Compensation Act.

Under § 48-121(2), the compensation provided to an employee for permanent partial disability is determined by finding $66^2/_3$ percent of the difference between the wages received by the employee at the time of injury and the earning power of the employee after the injury; however, the compensation may not exceed the weekly income benefit allowed by Neb. Rev. Stat. § 48-121.01 (Reissue 1993). Therefore, the Workers' Compensation Court is required to determine the average weekly wage of the claimant at the time of the injury. See *McGowan v. Lockwood Corp., supra.*

Wages are defined in Neb. Rev. Stat. § 48-126 (Reissue 1993) as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." However, a self-employed claimant does not receive a wage in the traditional sense because he or she is not subject to a contract of hiring. See *Mail Boxes v. Indus. Com'n of Az.*, 181 Ariz. 119, 888 P.2d 777 (1995). Nevertheless, the Workers' Compensation Court must set an average weekly wage for the self-employed claimant in order to set the rate of compensation.

Generally, courts have used either the revenues or the profits of the business in determining the proprietor's average weekly wage. Prior to *Hull I*, we had not determined whether a self-employed claimant's business expenses should be included as wages for workers' compensation purposes. Deducting business expenses from the gross income of the business necessarily decreases the average weekly wage figure of the self-employed claimant because the wage figure is determined

from the profits of the business rather than the revenues. In *Hull I*, we held that business expenses should be deducted; however, we did not define the term "business expenses."

We note that the determination of the definition of the average weekly wage of a self-employed claimant is a question of law. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Hull I, supra*; *McGowan v. Lockwood Corp., supra*. Thus, we are obligated to clarify the meaning of the term "business expenses" in our previous holding.

Upon further consideration of our previous holding, we now hold that business expenses should be deducted in determining the wage of a self-employed claimant and that business expenses set forth on a claimant's tax return shall be presumed correct. Either party may rebut this presumption of correctness by proving by a preponderance of the evidence that certain business expenses distort the claimant's true rate of compensation at the time of the accident. We have left the business expenses in the equation in order to avoid inflating the claimant's wages, but we allow either party to demonstrate that the expenses claimed as tax deductions are not indicative of the true rate of compensation.

With this clarification of our previous holding in mind, we must evaluate the trial judge's determination of average weekly wage. As stated above, pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994).

The trial judge used exhibit 36, the federal tax form from 1988, to determine that the total business income was $6,419. We find that there was sufficient competent evidence in the record to warrant the making of this finding.

However, we find that the factual finding of total business income of $6,419 does not support the determination of the

average weekly wage to be $571.80. Hull introduced no evidence other than his federal income tax form to demonstrate what business deductions should be taken into account to determine his average weekly wage; therefore, the trial court was bound to use the tax form, which indicated a business income of $6,419.

Instead, the judge disregarded the total business income figure of $6,419 and invented a formula for determining average weekly wage which divided gross income by 50 percent for ordinary and necessary business expenses. There was not sufficient competent evidence in the record to warrant the making of the award based upon this calculation.

Therefore, we find that there was sufficient competent evidence in the record to support the finding of a total business income of $6,419 and insufficient competent evidence to warrant the making of the award. We affirm the ruling of the review panel, which found that the trial judge erred in determining Hull's average weekly wage.

CONCLUSION

The trial judge did not have sufficient competent evidence in the record to warrant the making of his order, based upon an average weekly wage of $571.80, because no evidence of Hull's business expenses other than his 1988 tax return was introduced at trial. Therefore, the Workers' Compensation Court review panel's decision reversing the trial judge's determination of Hull's average weekly wage is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.
FAHRNBRUCH, J., not participating.

IN RE INTEREST OF D.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. K.W. AND D.W., APPELLANTS.

542 N.W.2d 407

Filed January 19, 1996. No. S-94-642.

1. **Juvenile Courts: Appeal and Error.** Ordinarily, juvenile court cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
3. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning the jurisdiction of a lower court or tribunal, it not only is within the power but is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
5. ____: ____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
6. **Constitutional Law: Parent and Child.** It is well established in Nebraska that the relationship between parent and child is constitutionally protected. This protection applies to the relationship between parents and each of their children individually.

Petition for further review from the Nebraska Court of Appeals, IRWIN and MILLER-LERMAN, Judges, and MORAN, District Judge, Retired, on appeal thereto from the Separate Juvenile Court of Sarpy County, LAWRENCE D. GENDLER, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

James Martin Davis for appellants.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

This appeal involves whether a juvenile court, having jurisdiction over a child who no longer lives with his parents,

can require the subject child's parents to make available for visitation with the subject child the subject child's 3-year-old sister.

The separate juvenile court of Sarpy County entered such an order, which, on appeal, was affirmed by the Nebraska Court of Appeals. This court granted the parents' petition for further review.

Upon a de novo review, we find that the juvenile court had no jurisdiction over the subject child's sister and had no authority to interfere with the parents' control over their daughter.

As a result, we remand the cause to the Court of Appeals with direction to vacate the juvenile court's order requiring the parents in this case to make their daughter available for visitation with her brother.

STANDARD OF REVIEW

Ordinarily, juvenile court cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. See *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). In the present case, the appellants failed to present any assignments of error to the Court of Appeals. 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. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994). Plain error is "error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process." *Id.* at 233, 512 N.W.2d at 365. In affirming the order of the juvenile court in this case, the Court of Appeals found no plain error.

However, controlling in this case is the rule that whether or not a question is raised by the parties concerning the jurisdiction of a lower court or tribunal, it not only is within the power but is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995). When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a

reviewing court to raise and determine the issue of jurisdiction sua sponte. See *In re Interest of D.M.B.*, 240 Neb. 349, 352, 481 N.W.2d 905, 909 (1992) (where we held that "[i]f the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication–disposition hearing").

FACTS

On April 2, 1992, the Sarpy County Attorney's office filed a petition in the separate juvenile court of Sarpy County, alleging that the subject child, D.W., who, at the time, was 13 years of age, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993) who deported himself so as to injure or endanger seriously the morals or health of himself or others. The petition prayed that the court issue orders concerning the care, custody, and control of D.W. At a detention hearing held the same day, the juvenile court found that D.W.'s detention was necessary and that D.W. should be placed in the temporary custody of the Nebraska Department of Social Services (DSS) pending further proceedings.

At an April 22 hearing at which D.W., his parents, his guardian ad litem, and a DSS representative were present, D.W. admitted the allegations contained in the county attorney's petition, which admissions were accepted by the court. The juvenile court found that D.W. was a child within the meaning of § 43-247(3)(b). D.W.'s custody was placed with the Sarpy County sheriff.

On May 22, another dispositional hearing was held. The court continued the matter for another dispositional hearing and ordered, in relevant part, that D.W. live with his parents, that his parents complete a parenting program, and that D.W.'s application for admission to Boys Town should proceed.

On May 28, the juvenile court issued an order remanding D.W.'s custody to the Sarpy County sheriff pending further proceedings. On the same day, the Sarpy County Attorney's

office filed a motion with the court for review of D.W.'s disposition. On September 4, the custody of D.W. was awarded to DSS so he could be placed at Boys Town. On September 10, D.W. entered Boys Town, and he remained there until August 11, 1993. After leaving Boys Town, D.W. remained in the custody of DSS but lived with his maternal grandmother.

At yet another dispositional hearing, on December 16, D.W.'s guardian ad litem orally asked the juvenile court to grant supervised visitations between D.W. and his sister, who was not yet 3 years old. The court took the motion under advisement. There appears to have been no formal pleading or summons issued for the sister nor any reason given why the juvenile court assumed jurisdiction over the sister.

At the next dispositional hearing, held on February 3, 1994, D.W.'s father voiced opposition to the proposed visitation between D.W. and D.W.'s sister, stating that he and his wife felt it was not in their daughter's best interests to have contact with D.W. at that time. The court reviewed the evidence as it pertained to D.W. and ordered 1 hour of supervised visitation each month between D.W. and his sister. There is nothing in the record reflecting that the court took into consideration the sister's best interests, and, indeed, there is no evidence in that regard except the father's statement to the court that visitation of D.W. with his sister was not in her best interests. It appears that the last time D.W. had seen his sister, she was under 6 months of age.

On June 9, 1994, the court held another dispositional hearing. The record reflects that no visitations between D.W. and his sister had occurred. The court ordered that (1) D.W. have visitation with his sister for 1 hour per month, supervised by D.W.'s therapist; (2) D.W.'s parents make their daughter available for said visitation; and (3) DSS give the siblings' parents 48 hours' notice of said visitation. We note that in none of the recited proceedings involving D.W.'s sister was a guardian ad litem or a lawyer appointed to protect her interests.

D.W.'s parents timely appealed the separate juvenile court's visitation order to the Court of Appeals. However, they failed to assign any errors in their appeal to that court. Accordingly, the Court of Appeals reviewed the matter under a "plain error"

standard. In a 2-to-1 decision, the Court of Appeals found that the juvenile court did not commit plain error in granting sibling visitation between D.W. and his sister. D.W.'s parents then timely petitioned this court for further review, which we granted.

ANALYSIS

The Court of Appeals was correct in finding that the juvenile court had no direct statutory jurisdictional authority over D.W.'s sister. See *In re Interest of [D.W.]*, 3 Neb. App. 630, 529 N.W.2d 548 (1995). The Court of Appeals was also correct when it held that the juvenile court had jurisdiction over D.W.'s parents and that such court has broad powers to fashion remedies in the best interests of a child such as D.W. over whom it has jurisdiction. However, both the juvenile court and the Court of Appeals erred in requiring D.W.'s parents to make their daughter available for visitation with D.W. Both courts lacked personal jurisdiction over the sister. Therefore, neither court had the power to order the parents to comply with the court's visitation order.

As restated, the issue before this court is whether the power of a juvenile court over parents under its jurisdiction extends to interfering with those parents' rights over a nonadjudicated child. We find that it does not when the juvenile court lacks personal jurisdiction over the nonadjudicated child.

There is nothing in the pleadings or record of this case to justify a juvenile court's assuming jurisdiction over an uncharged and unadjudicated child such as D.W.'s sister. See, *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

In regard to D.W.'s sister, we are faced with an order assuming jurisdiction over her when there are no factual allegations, no evidence at an adjudication hearing, and no findings concerning the actions of the sister or actions of the sister's parents in regard to their daughter that would invoke the jurisdiction of the separate juvenile court of Sarpy County. See *In re Interest of N.M. and J.M., supra*.

It is well established in Nebraska that the relationship

between parent and child is constitutionally protected. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986) (citing *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978)). This protection applies to the relationship between parents and each of their children individually. Just because one child in a family is adjudicated as a child coming under the Nebraska Juvenile Code does not provide a juvenile court carte blanche jurisdiction over the adjudicated child's unadjudicated siblings.

Accordingly, we hold that the separate juvenile court of Sarpy County lacked jurisdiction to require the parents of D.W. to make their daughter available for visitation with D.W. Since the juvenile court involved here lacked jurisdiction to enter the visitation order that it did, the Court of Appeals also lacked jurisdiction to affirm such order.

The decision of the Court of Appeals is reversed, and the cause is remanded to that court with direction to vacate the visitation order of the separate juvenile court of Sarpy County requiring the parents in this case to make their daughter available for visitation with D.W.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. SHERLINE R. WOODS, APPELLANT.

542 N.W.2d 410

Filed January 26, 1996. No. S-92-1095.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Motions for Mistrial: Appeal and Error.** The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
3. **Trial: Prosecuting Attorneys: Miranda Rights.** A prosecutor's use of a defendant's postarrest, post-*Miranda* silence is fundamentally unfair because *Miranda* warnings imply not only that a person has the right to remain silent but that his or her silence will not be used against him or her as evidence of guilt.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL MCGILL, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

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

Don Stenberg, Attorney General, Jay C. Hinsley, and, on brief, Delores Coe-Barbee for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and GERRARD, JJ., and STEINKE, D.J., and NORTON, D.J., Retired.

PER CURIAM.

The defendant, Sherline R. Woods, was convicted by a jury of manslaughter and use of a knife to commit a felony. Woods was sentenced to 5 to 10 years' imprisonment for the manslaughter conviction and a consecutive sentence of 2 to 4 years' imprisonment for the conviction of use of a knife to commit a felony. She appealed to the Nebraska Court of Appeals.

The Court of Appeals held that Woods' failure to give a taped statement had no probative value, that the prosecutor had no right to ask the investigating officer whether Woods had refused to give a tape-recorded statement, and that the trial court erred in allowing the prosecution to ask this question. However, the Court of Appeals further found that this error was harmless because the jury heard evidence that Woods provided more than one version of the events on the night she was arrested,

including her admission that she held the knife that killed the victim. The Court of Appeals therefore held that the fact that it was elicited at trial that Woods refused to give a tape-recorded statement did not materially influence the outcome of the jury's verdict.

The Court of Appeals also determined that the trial court's instruction to the jury concerning intoxication was not prejudicial or did not otherwise adversely affect Woods' right of asserting a claim of self-defense.

The Court of Appeals affirmed the judgment of the trial court. *State v. Woods*, 94 NCA No. 8, case No. A-92-1095 (not designated for permanent publication). We reverse the decision of the Court of Appeals and remand this cause of action to the district court for a new trial.

BACKGROUND

Woods and the deceased, Cheryl Culliver, were involved in a lesbian relationship. During December 1991, Culliver occasionally lived with Woods. Woods testified that she carried a knife for protection and that she had it with her when she went to work on December 20, 1991, at 6 a.m. She called Culliver in the afternoon and told her that she would be late because she was going out with some coworkers.

Woods returned to her apartment after 1 a.m. and found Culliver and a man in the kitchen area smoking crack cocaine. She became upset and asked the man and Culliver to leave. Woods and Culliver continued to talk after the man left. Woods asked Culliver three or four times to leave the apartment. When Culliver refused to leave, Woods called her mother and then called a neighbor, Denise Coleman, for help in getting Culliver to leave. When Coleman arrived, Culliver had pinned Woods on the floor and was "head-butting" her. Eventually, Culliver let Woods up, and Woods pushed Culliver off.

In Coleman's presence, Woods again asked Culliver to leave. Culliver again refused to leave and began pushing and head-butting Woods. Coleman described Culliver as intoxicated and very aggressive. She said that the left side of Woods' face was beginning to swell from the head-butting.

At some point, Woods went into the kitchen, got a knife

which was on top of the refrigerator, and walked out of the kitchen, holding the knife to attempt to scare Culliver into leaving. Coleman testified that Woods never held the knife in a menacing or threatening manner or pointed the knife at Culliver when Woods asked her to leave. Woods then tried to persuade Coleman to assist Woods in talking Culliver into leaving. Coleman continued to attempt to get Culliver to leave and questioned both Woods and Culliver, "Why are y'all acting like this?" Woods responded, "I'm not, I'm trying to get her to leave." Woods stated that she thought Culliver was crazy. She stated that when she picked up the knife, it did not seem to improve the situation with Culliver. In fact, Woods said, Culliver got worse to the point that she thought Culliver was going to also do something to the neighbor, Coleman. Woods laid the knife on a mattress and reached for the telephone to call the police. Culliver then ran toward Woods to stop her from making the call. Woods threw down the phone, grabbed the knife, and told Culliver to get out. Culliver continued moving toward Woods and said, "What are you going to do, are you going to kill me?" Woods kept moving back until she did not have any more room.

Culliver and Woods began struggling, and Woods ended up with her back to the wall of the apartment. Culliver's hand was on top of Woods' hand which was on the knife. Woods said that Culliver leaned toward her and that as Woods pushed Culliver away, Woods pulled the knife out of Culliver.

Coleman said the knife then went up in the air. She went to Woods and Culliver, took their arms and pushed them against the wall, and used her hips to push the women away from the wall. The knife fell, and Coleman picked it up and threw it in the kitchen sink. When she returned from the kitchen, Woods and Culliver were still struggling. Coleman noticed blood on Culliver's shirt and said, "Damn, Sherline, she's cut." Woods and Culliver quit struggling, and Woods pushed Culliver away and tore her shirt open to see the wound. Woods then laid Culliver down on the mattress.

The 911 emergency dispatcher testified that he received a call reporting that a person had been cut. The caller stated that the perpetrator had left. At the scene, Woods told Officer Donald

Stephens that she had witnessed the stabbing and that it was done by a black male named "Clyde." As Woods was being transported to police headquarters, she said that Culliver had been smoking crack cocaine with a male and that in the process of an argument, the male picked up the knife and stabbed Culliver.

At police headquarters, Officer James Wilson told Woods that Culliver was dead. After Wilson administered the *Miranda* warnings to Woods, Woods told him that she got off work at 3 p.m. and called Culliver to tell her she would not be home for a while because she was going out with some friends. She went home about 6 p.m. and then left again. When she returned at about 1 a.m., she found a man named "Albert" smoking crack cocaine with Culliver. Woods became upset and began to argue with Culliver and asked her to leave. Woods said that she got a knife from the kitchen and that during the argument, Culliver lunged at the knife, causing the stab wound.

A pathologist, Blaine Roffman, testified that the stab wound in the left chest was approximately 16 millimeters wide and approximately 6 inches deep. The wound penetrated the chest at approximately the fifth rib, entering the pericardial sac in the top surface of the left part of the heart. The stab wound was the only significant finding which could have resulted in death. He said the knife entered the body straight, like an arrow, with no downward motion. He stated that in general, if a stab wound enters the heart and the knife is taken out, blood will fill the pericardial sac in 3 minutes, causing the heart to stop. In the next 3 to 5 minutes, resuscitation can occur before the victim is brain-dead. He opined that a person could still engage in physical activity for a brief time after sustaining this type of injury. While a significant degree of force is necessary for a knife to penetrate the rib, the force could be the result of a person thrusting the knife or a person falling on it. Roffman said blood tests showed Culliver's blood alcohol level was .242 and that she had a cocaine level of 69 nanograms per milliliter.

During the jury trial, the prosecutor called Officer Wilson to testify about Woods' confession. Based on the following questions by the prosecutor and the answers by Officer Wilson, Woods moved for a mistrial. The court overruled that motion.

The testimony was as follows:

[Prosecutor:] After you got the statement from her, is it your procedure, as it was in the case of Denise Coleman, to ask for a taped statement?

[Officer Wilson:] Yes, sir.

[Prosecutor:] And did you do that in this case?

[Defense counsel]: Your Honor, I object. May we approach the bench?

(A discussion was held in low tones at the bench.)

[Prosecutor]: Now, what?

[Defense counsel]: Judge, she declined to give them a taped statement. I think he's getting close to her commenting on her right to remain silent and that's getting close to a mistrial if he gets into evidence at some point she declines to give a statement. It's an unpermissible [sic] inference to raise or to comment on. And I object to this line of questioning and where it's leading.

THE COURT: What's your position?

[Prosecutor]: All I'm asking is if he offered her the opportunity to make a taped statement. He's going to say, "Yes." And did she decline to make a statement? Yes. I don't think it's a comment on her right to counsel. She's already waived her right to counsel.

THE COURT: The objection will be overruled.

(The following proceedings were had in normal tones.)

[Prosecutor:] Okay. Would you just answer these questions "yes" or "no."

Did you afford Ms. Woods an opportunity to make — give a formal taped statement?

[Officer Wilson:] Yes.

[Prosecutor:] Did she decline to give a statement?

[Officer Wilson:] Yes, sir.

[Prosecutor]: That's all.

[Defense counsel]: Your Honor, I move for a mistrial based on this witness' answers to the last two questions in that it's an unfair comment on defendant's right to remain silent.

THE COURT: The motion for mistrial will be overruled.

Following the close of evidence in the jury trial, several instructions were given, including instruction No. 13, to which Woods objected and which states:

> There has been evidence that the Defendant was drinking and/or using drugs prior to the time that the crimes with which she is charged were committed.
>
> Intoxication is a defense only when a person's mental abilities were so far overcome by the use of alcohol or drugs that she could not have had the required intent. You may consider evidence of alcohol or drug use along with all of the other evidence in deciding whether the Defendant had the required intent.

ASSIGNMENTS OF ERROR

Woods assigned as error to the Court of Appeals:

> [1.] The trial court erred in overruling Defendant's motion for a mistrial.
>
> [2.] The trial court erred in instructing the jury on the defense of intoxication, when such instruction was not requested by the defense and was contradictory to the proffered theory of self-defense.
>
> [3.] The evidence is insufficient, as a matter of law, to support the conviction.

On her petition for further review, Woods asserts that the Court of Appeals erred in finding harmless error upon the prosecutor's comment on Woods' post-*Miranda* silence, and further erred by failing to find that a substantial right of Woods was affected by the trial court's erroneous instruction on intoxication.

STANDARD OF REVIEW

In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993).

ANALYSIS

MOTION FOR MISTRIAL

Woods argues that the trial court erred in overruling her motion for mistrial, which was based on questions asked by the prosecutor. She claims the questions deprived her of due process by allowing her constitutional right of silence to be improperly used against her at trial.

The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993).

The U.S. Supreme Court, in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), held that a prosecutor's use of a defendant's postarrest, post-*Miranda* silence is fundamentally unfair because *Miranda* warnings imply not only that a person has the right to remain silent but that his or her silence will not be used against him or her as evidence of guilt. It makes no mention of an exception to this rule to permit use of postarrest, post-*Miranda* silence if the defendant has previously given a statement. Here, the prosecutor elicited testimony from a police officer about Woods' refusal to give a tape-recorded statement after Woods had given an oral statement, a refusal which occurred post-*Miranda*.

A defendant's refusal to give a statement constitutes "silence," regardless of whether the defendant has previously given a statement to police. As a result, use of the police officer's statement about Woods' refusal to give a tape-recorded statement was fundamentally unfair and constitutes a violation of due process. See *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). Thus, there was an abuse of discretion.

JURY INSTRUCTIONS

We next address Woods' contention that the trial court erred in instructing the jury on the defense of intoxication, when Woods did not request the instruction and it contradicted her proffered theory of self-defense. Woods argues that the court erred in giving instruction No. 13.

Woods did not request an instruction on intoxication as a defense, and she objected to instruction No. 13. Woods argues that she was not proceeding on the theory of intoxication as a defense and that her theory of self-defense contradicted the defense of intoxication. She argues that a finding of intoxication would "negate any basis for finding that [Woods] had a reasonable belief that the use of force was necessary to protect herself." Brief for appellant at 12-13. Woods asserts that the prosecutor insisted on instruction No. 13 to confuse and mislead the jury. In other words, if Woods was so intoxicated that she could not form the necessary intent to kill, then she would also be too intoxicated to believe that she needed to protect herself, which related to her self-defense claim.

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

The jury could have considered whether Woods was "so far overcome by the use of alcohol" that she was incapable of exercising the powers of reason necessary to act in self-defense, even though there was insufficient evidence in the record to warrant an instruction on intoxication.

As indicated in the following excerpt from the State's closing argument, the State hoped to undercut Woods' theory of self-defense by encouraging the jury to consider whether Woods' ability to reason was so impaired by alcohol that she could not have acted in self-defense:

> [Prosecutor]: . . . [I]f you want to think in terms of self-defense, if that's what she's claiming, and what you have really here is a hybrid defense of self-defense and accident, maybe I was drinking too much —
>
> [Defense counsel]: I'm going to object as outside the scope of my argument.
>
> THE COURT: The objection will be overruled.
>
> [Prosecutor]: If you want to apply self-defense, then you have to understand what you're applying it to is an

> intentional act. If I want to claim that I killed somebody in self-defense, I also have to do part of that saying I intended to do that. So I did it in self-defense. If you didn't intend it, that isn't self-defense.

By introducing instruction No. 13, the State apparently sought to sow in the minds of the jurors the idea that the fight between Woods and Culliver was simply a drunken brawl between two women in which one of the brawlers produced a knife.

In our review of the instructions, we find that the court should not have given the intoxication instruction over Woods' objection. Because Woods relied on the theory of self-defense, there was no reason to instruct the jury that Woods had been drinking or that intoxication was a defense. Woods made no attempt to rely upon voluntary intoxication as a defense and stated under oath that although she had some drinks she was not intoxicated. We find that under the circumstances of this case, the State should not have been permitted to force Woods to assert a defense through the use of an instruction on intoxication, when she expressly denied being intoxicated, did not intend to rely on intoxication as a defense, and the evidence did not support a finding of intoxication.

The issue, then, is whether instruction No. 13 was prejudicial to Woods or otherwise adversely affected one of her substantial rights. See, *Derry, supra*; *McHenry, supra*; *Flye, supra*. We find that instruction No. 13 could well have materially influenced the jury to reject Woods' theory of self-defense.

Having reviewed the record, we find that instruction No. 13 was confusing and misleading to the jury and that it might have influenced the jury to determine that Woods was "so far overcome by the use of alcohol" that she was incapable of exercising the powers of reason necessary to act in self-defense.

Therefore, for the foregoing reasons, the judgments of conviction are reversed, and this cause of action is remanded to the district court for a new trial.

The trial of this matter was held before this court decided *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). Therefore, the district court, when instructing the jury on remand, is to remove the word "intent" from the manslaughter instruction.

CONCLUSION

The judgments of conviction and the sentences are reversed, and this cause of action is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT and CONNOLLY, JJ., not participating.

GERRARD, J., concurring.

I agree with the judgment of the majority. However, my view is that criminal homicide as the result of legally recognized provocation, i.e., upon a sudden quarrel, distinguishes the first-prong ("sudden quarrel") manslaughter from the crime of murder in the second degree. My concurrence in this judgment should not be read as an adherence to the view that an intentional killing committed "upon a sudden quarrel" can never constitute the crime of manslaughter. While the law currently is to the contrary, I do not adhere to the view that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill." *State v. Jones*, 245 Neb. 821, 830, 515 N.W.2d 654, 659 (1994) (*overruling, State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989)).

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

I agree with the judgment of the majority. However, while I am mindful that the law currently is to the contrary, I am nonetheless of the view that there are instances in which intent should be an element of manslaughter. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) (Caporale, J., concurring in part, and in part dissenting).

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

Although I agree with the majority's conclusion to grant Woods a new trial, I respectfully disagree with its reasoning as to the jury instruction regarding the defendant's use of alcohol or drugs.

In my opinion, the trial court properly instructed the jury to consider evidence of alcohol or drug use in deciding whether the defendant had the required intent. Because manslaughter is an unintentional act, intent, in this case, goes only to the issue

of justification. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

Woods raised the affirmative defense of justification, claiming that she believed the force she used against the victim was necessary to protect herself against death or serious bodily harm compelled by the victim's assault. A defendant's intentional infliction of physical harm upon another is said to be justified when the defendant acts in self-defense. See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7(i) (1986). The question of whether a defendant has a reasonable and good faith belief in the necessity to use force is a question of fact to be determined by a jury and is not to be determined solely by the defendant's own subjective belief in the necessity to use force. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). Therefore, to consider Woods' claim of self-defense, it is essential that the jury consider whether Woods had the capacity to reasonably believe she was in danger and intentionally respond to that reasonable belief.

The record reflects alcohol or drug use by Woods on the night of the victim's death. Woods admitted in her testimony that she consumed approximately one drink per hour that night, and when asked if she was impaired in any way, she responded: "Yeah, I was high." Denise Coleman testified that Woods sounded drunk when she called and asked Coleman to come to her apartment with beer. The arresting officer testified that Woods appeared under the influence of drugs and that Woods told the arresting officer that she, the victim, and a man "had been partying for quite some period of time," which included smoking crack cocaine.

The jury needed to consider whether Woods was under the influence of alcohol or drugs or both to such a degree that she could not have the requisite protective intent to act in self-defense. The majority opinion emphasizes that Woods did not request the intoxication instruction. However, it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Therefore, the trial court did not err in instructing the jury to consider evidence of alcohol or drug use.

GLENN G. PAYNE, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

542 N.W.2d 694

Filed January 26, 1996. No. S-93-819.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decisions made by the courts below.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
4. **Jurisdiction: Appeal and Error.** When a lower court lacks the 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.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals affirmed as modified.

Thom K. Cope, of Bailey, Polsky, Cope & Knapp, for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

Petitioner-appellant, Glenn G. Payne, sought review by the district court of the Nebraska Equal Opportunity Commission's ruling that in discharging him from employment, the respondent-appellee, Nebraska Department of Correctional Services, did not violate the Nebraska Fair Employment Practice Act. The district court affirmed the commission's ruling, whereupon Payne appealed to the Nebraska Court of Appeals. It reasoned that as Payne had failed to make a timely

request for the official record of the proceedings before the commission, the district court lacked jurisdiction to review the matter, and thus dismissed the appeal without reaching the merits of the issues raised by Payne's assignments of error. *Payne v. Nebraska Dept. of Corr. Servs.*, 3 Neb. App. 969, 536 N.W.2d 656 (1995). We granted Payne's petition for further review and now, for the reasons hereinafter set forth, modify the judgment of the Court of Appeals by remanding the matter with the direction that it order dismissal of the district court proceeding and, as so modified, affirm.

The question presented, whether Payne timely perfected his appeal, is controlled by the language of Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994). Thus, the issue is one of statutory interpretation, a matter which presents a question of law in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decisions made by the courts below. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995). Stated another way, when a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. See *Becker v. Nebraska Acct. & Disclosure Comm.*, *ante* p. 28, 541 N.W.2d 36 (1995).

With that standard of review in mind, we turn our attention to the language of § 84-917(2)(a), which reads:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action. If the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the

> official record upon the agency within thirty days of the filing of the petition. The court, in its discretion, may permit other interested persons to intervene.

Although we cannot determine from the record that such is the case, since it makes no difference to the outcome, we assume, as have the parties, that Payne filed his petition seeking judicial review of the commission's ruling by the district court within 30 days of the date that ruling was served upon him, and we also assume that he obtained service of process upon the department, and needlessly upon the commission as well, within that same 30-day period. The record makes clear, however, that he did not request that the commission prepare the official record of its proceedings until after that 30-day period had elapsed.

In urging that his failure to have requested the official record of the commission proceedings within 30 days of the service upon him of the commission ruling does not defeat his appeal, Payne relies upon two prior decisions of this court: *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), and *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994).

It is true that in *Maurer*, we held that it was not a jurisdictional requirement that an agency prepare and file the official record within the statutory timeframe. However, § 84-917 (Reissue 1981), the version of the statute then in effect, not only did not under any circumstances require a party to serve a request for the preparation of the "transcript," it allowed for an extension of the filing deadline if the agency could show good cause. As noted in *Ernest v. Jensen*, 226 Neb. 759, 762, 415 N.W.2d 121, 123 (1987), "[t]he idea of a possible extension of a filing time militates against such a time's being jurisdictional." Section 84-917 makes no provision for extending the time within which one seeking judicial review must request preparation of the official record. Thus, *Maurer* provides no authority for resolution of the issue now before us.

Nor does *James* control the matter before us. It is true that therein, in the course of reviewing the appropriateness of a sanction imposed for a party's failure to timely prepare and file a record, we wrote that under § 84-917, the "filing of the petition and the service of summons are the two actions that are

necessary to establish jurisdiction . . . ." *James*, 246 Neb. at 332, 518 N.W.2d at 152. But the *James* dictum, *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995), was written in the course of deciding a case in which the agency was a party of record. In such an instance, § 84-917(2)(a) does not require that the party seeking judicial review request preparation of the official record; the agency is to prepare it without request. Here, the commission was a neutral factfinding body, an important distinction. See *Becker v. Nebraska Acct. & Disclosure Comm.*, *ante* p. 28, 541 N.W.2d 36 (1995).

The controlling statutory language specifies that "[i]f the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of the petition." § 84-917(2)(a). The Legislature's use of the word "shall" in this context is significant. As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950). Coupled with the fact that there are no provisions which would allow for the filing deadline to be extended, it is evident that the Legislature intended that a request for the preparation of the official record be made as a prerequisite to the exercise by the district court of its jurisdiction over the subject matter presented by Payne's petition.

As Payne failed to make such a request, the district court did not acquire the authority to review the commission's ruling. When a lower court lacks the 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. *Becker, supra*; *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

Because the district court lacked the authority to exercise its jurisdiction over the subject matter presented by Payne's petition, the Court of Appeals' judgment of dismissal is

modified as set forth in the first paragraph of this opinion and, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

MARICA BOGARDI, APPELLANT, V. ISTVAN BOGARDI, APPELLEE.
542 N.W.2d 417

Filed January 26, 1996. No. S-94-097.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
2. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
3. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Divorce: Statutes.** A court looks to statutes to determine the appropriate remedy for individuals seeking dissolution of a marital union.
6. **Actions: Divorce.** Legal separation or divorce proceedings cannot be sustained if the parties are not married.
7. **Marriage.** The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there, it will be held valid everywhere, and conversely, if invalid by the lex loci contractus, it will be invalid wherever the question may arise.

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

Con M. Keating, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Steven J. Flodman, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Marica Bogardi appeals from the district court's order of December 29, 1993, granting Istvan Bogardi's motion for summary judgment, which resulted in the dismissal of Marica Bogardi's petition for legal separation. The district court received evidence from both parties that they were legally divorced in Hungary. The court stated that there were therefore no issues of material fact and dismissed the action. The district court could not decide issues relating to marital property in the context of a legal separation. We affirm.

BACKGROUND

The Bogardis were married in Budapest, Hungary, on February 28, 1974. They have two children: Reka, born April 9, 1975, and Peter, born April 15, 1978.

In 1985, they moved to Lincoln, where Istvan Bogardi taught at the University of Nebraska.

In 1991, Istvan Bogardi filed a petition for dissolution of marriage in Budapest, Hungary, in the Hungarian court. At that time, both were domiciled in Hungary.

On September 24, 1992, Marica Bogardi filed in Lancaster County District Court a petition for legal separation from her husband, also seeking alimony and division of certain marital property.

On October 8, the Lancaster County District Court entered an order exercising jurisdiction over the subject matter of the action commenced by Marica Bogardi.

On June 10, 1993, the marriage between the parties was dissolved under Hungarian law by the Hungarian court. On the first page of the order, the Hungarian court noted that both parties were Hungarian domiciliaries.

On September 30, a hearing was held on Istvan Bogardi's motion for summary judgment.

At that hearing, Istvan Bogardi entered his affidavit into

evidence, as well as the Hungarian divorce decree regarding the dissolution of the Bogardis' marriage and the hearing held in Hungary prior to the dissolution. Marica Bogardi entered into evidence her attorney's affidavit, portions of the Hungarian divorce decree with a letter from Marica Bogardi's Hungarian counsel, evidence of the property held in the United States, the deposition of Istvan Bogardi's supervisor, and portions of a deposition of Istvan Bogardi.

The parties did not dispute that the Hungarian court's order dissolving the marriage was a final order. The district court granted the motion for summary judgment. An action for legal separation presupposes an existing marriage. Because the marriage at issue had been dissolved by a final order, the court had no jurisdiction to determine property rights in the context of an action for legal separation.

ASSIGNMENTS OF ERROR

Marica Bogardi assigns as error that the district court erred in granting a motion for summary judgment where the pleadings, affidavits, depositions, and stipulations showed that there was a genuine issue as to a material fact as to alimony and rights to property because the Hungarian court had not made a determination regarding alimony or the property held in the United States.

Marica Bogardi also asserts that the district court erred in failing to construe any reasonable doubts and inferences in favor of the party opposing summary judgment.

STANDARD OF REVIEW

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995); *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995).

After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

Horace Mann Cos. v. Pinaire, supra; *Oliver v. Clark, supra*; *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995).

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Horace Mann Cos. v. Pinaire, supra*; *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Poppleton v. Village Realty Co., supra.*

ANALYSIS

We look to statutes to determine the appropriate remedy for individuals seeking dissolution of a marital union. See *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985).

The action sought by Marica Bogardi in this case is legal separation. Legal separation is defined in Neb. Rev. Stat. § 42-347(3) (Reissue 1993), which states, "Legal separation shall mean a decree of a court of competent jurisdiction providing that two persons who have been legally married shall thereafter live separate and apart and providing for any necessary adjustment of property, support, and custody rights between the parties but not dissolving the marriage."

Implicit in the reading of § 42-347(3) is that the parties must be married in order for the court to legally separate them. Legal separation or divorce proceedings cannot be sustained if the parties are not married. See, *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

Therefore, the threshold issue of material fact which faced the trial court was the sole issue of material fact necessary to decide this case, that is, whether the parties were married.

The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there, it will be held valid everywhere, and conversely, if

invalid by the lex loci contractus, it will be invalid wherever the question may arise. *Randall v. Randall, supra*; *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951); *Forshay v. Johnston*, 144 Neb. 525, 13 N.W.2d 873 (1944).

The parties were married in Hungary. The Bogardis are now divorced by a Hungarian court. If we are to recognize the Hungarian marriage as valid, it requires in the same breath that we recognize the Hungarian divorce as valid. Neither party disputes that no valid marriage exists and that the judgment which did this is a final order. In fact, each party offered into evidence Hungarian court documents stating that the parties were no longer married.

Absent a genuine issue of fact as to the marital relationship between the parties—a fact both parties agreed to—the court correctly dismissed the action. See, *Randall v. Randall, supra*; *Abramson v. Abramson, supra*.

The courts of Nebraska have no statutory authority to sustain legal separation proceedings in the absence of a valid marriage.

Marica Bogardi's motion for attorney fees and costs is denied.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

FRANK KOTERZINA, APPELLEE AND CROSS-APPELLANT, V. COPPLE CHEVROLET, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT AND CROSS-APPELLEE.

542 N.W.2d 696

Filed January 26, 1996. No. S-94-117.

1. **Garnishment: Appeal and Error.** Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on

appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.

2. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate 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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
3. **Workers' Compensation: Words and Phrases.** "Compensation," used in Neb. Rev. Stat. § 48-125(1) (Reissue 1993) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death.
4. **Judgments: Workers' Compensation: Attorney Fees: Interest.** When a court awards attorney fees against an employer pursuant to Neb. Rev. Stat. § 48-125(1) (Reissue 1993), the employer shall be liable for interest pursuant to § 48-125(2).
5. **Workers' Compensation: Second Injury Fund: Attorney Fees: Interest.** The Second Injury Fund, as an employer, is liable for interest under the mandate of Neb. Rev. Stat. § 48-125(2) (Reissue 1993) when both compensation and attorney fees are assessed against it.
6. **Workers' Compensation: Attorney Fees: Interest.** In order to receive interest under Neb. Rev. Stat. § 48-125(2) (Reissue 1993), compensation and attorney fees must be assessed against the same employer under § 48-125(1).
7. **Workers' Compensation: Second Injury Fund.** The Second Injury Fund is an employer within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1993).
8. **Workers' Compensation: Courts: Judgments.** Under Neb. Rev. Stat. § 48-188 (Reissue 1993), a district court enforces a Workers' Compensation Court judgment as if it had been rendered in a suit determined by such district court.
9. **Judgments: Interest.** Judgment interest shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment.
10. **Workers' Compensation: Courts: Judicial Notice: Appeal and Error.** When a district court enforces a decision of the Workers' Compensation Court, the district court has a duty to take judicial notice of any appellate decisions which have been rendered in the same case.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Michael G. Goodman, of Cannon, Goodman, O'Brien & Grant, P.C., for appellee Koterzina.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee Copple Chevrolet.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

The State of Nebraska, Second Injury Fund (the Fund), appealed to the Nebraska Court of Appeals an order of the Douglas County District Court which held the Fund liable for interest on a workers' compensation award. The district court held that interest was due under Neb. Rev. Stat. § 45-103 (Reissue 1993), the general judgment statute, and under Neb. Rev. Stat. § 48-125(2) (Reissue 1993), which provides for interest accruing on workers' compensation awards when there is an award of attorney fees. The Court of Appeals reversed the award of interest against the Fund because no award of attorney fees was made. Frank Koterzina seeks further review of that decision of the Court of Appeals.

BACKGROUND

Koterzina originally brought an action in the Nebraska Workers' Compensation Court to recover disability against his employer, Copple Chevrolet, Inc. The Fund was a third-party defendant in that case. The compensation court entered an award in favor of Koterzina and ordered Copple to pay all medical and hospital services, $140 per week for home health care provided by Koterzina's wife, $18,376 in construction costs to make Koterzina's new home handicapped accessible, all of Koterzina's temporary total disability benefits, and 70 percent of the weekly permanent total disability payments. The compensation court ordered the Fund to pay the other 30 percent of Koterzina's weekly permanent total disability payments. The award on rehearing in the Workers' Compensation Court was filed on September 3, 1992.

KOTERZINA I

Copple appealed the compensation court's award to the Court

of Appeals. On July 6, 1993, that court decided *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993) (*Koterzina I*). *Koterzina I* modified the initial award, stating that liability should remain with the Fund, but that the Fund should provide 100 percent of the temporary total and weekly permanent total disability benefits. Koterzina was awarded attorney fees against Copple in the amount of $1,500. No attorney fees were assessed against the Fund.

Garnishment Proceeding

On November 24, 1993, Koterzina instituted garnishment proceedings for $5,410.31 in the Douglas County District Court against Copple's surety, United States Fidelity and Guaranty Company (USF&G), to enforce *Koterzina I*. That amount represented prejudgment and postjudgment interest Koterzina believed was due and owing him from Copple. On that same day, Koterzina also filed a copy of the Workers' Compensation Court's award with the clerk of the Douglas County District Court.

On December 10, 1993, Copple filed a request for hearing regarding the garnishment proceeding. In its motion, Copple asserted that all amounts due and owing Koterzina from Copple pursuant to the compensation court's September 3, 1992, award, as modified by *Koterzina I*, had been paid in full. Copple further contended that any amounts due and owing pursuant to the prior award and *Koterzina I* were the responsibility of the Fund, rather than Copple. Copple stated in its motion that either (1) no interest was due and owing on such awards or (2) any such interest if due and owing was owed to Koterzina by the Fund and not Copple.

On December 29, 1993, the district court determined that the garnishee, USF&G, was liable for interest pursuant to § 45-103 (interest adjustments) in the amount of $2,847.34 and that the Fund was liable for interest pursuant to § 48-125(2) (interest on Workers' Compensation Court awards).

Koterzina II

The Fund appealed the order of interest against it. Copple also cross-appealed the order of interest against it. Koterzina cross-appealed. The Court of Appeals reversed the garnishment

order of the district court, *Koterzina v. Copple Chevrolet*, 3 Neb. App. 695, 531 N.W.2d 1 (1995) (*Koterzina II*). The Court of Appeals reversed with respect to the Fund's appeal; made no ruling on Copple's cross-appeal, which was abandoned; and denied Koterzina's motion for attorney fees. The Court of Appeals thus disallowed any interest award to Koterzina, stating that the district court's awards of interest against both the Fund and Copple were improper. The Court of Appeals held that § 48-125(2) was the exclusive interest statute for workers' compensation awards and only allowed interest where attorney fees were awarded. The Court of Appeals held that since the Fund was not assessed attorney fees, no interest could be assessed.

Koterzina's petition for further review was granted. By a joint motion, Copple and Koterzina withdrew Copple's cross-appeal. The sole issue now before us is whether assessment of interest by the district court against the Fund was proper.

ASSIGNMENTS OF ERROR

In *Koterzina II*, the Fund claimed as a single assignment of error that the district court erred in finding that the Fund was liable for interest accruing under § 48-125(2).

On petition for further review, Koterzina seeks review of two issues decided by the Court of Appeals: (1) The Court of Appeals denied Koterzina his statutorily-entitled interest pursuant to § 48-125(2), and (2) the Court of Appeals denied Koterzina interest payable under § 45-103 for the award from the Workers' Compensation Court.

STANDARD OF REVIEW

Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995).

In settling upon the meaning of a statute, an appellate 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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995); *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995).

ANALYSIS

It is necessary to provide a chronological history in order to undertake an analysis of whether the district court's interest award against the Fund was proper.

On September 3, 1992, the Workers' Compensation Court found the Fund liable for 30 percent of the weekly permanent total disability payments and found Copple liable for the entire amount of the temporary total disability benefits and 70 percent of the weekly permanent total disability payments.

In *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 553, 451 N.W.2d 910, 920 (1990), this court defined "compensation" under § 48-125(1) as follows: " 'Compensation,' used in § 48-125(1) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death."

Pursuant to *Bituminous Casualty Corp.* and § 48-125(1), the court awarded Koterzina attorney fees against Copple. Section 48-125(1), in relevant part, states:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death . . . . Whenever the employer refuses payment of compensation . . . or when the employer neglects to pay compensation for thirty days after injury . . . and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. . . . [T]he Court of Appeals or

> Supreme Court shall . . . allow the employee a reasonable sum as attorney's fees for [appeals] in the Court of Appeals or Supreme Court. . . . A reasonable attorney's fee allowed pursuant to this section shall not affect or diminish the amount of the award.

In *Sherard v. State*, 244 Neb. 743, 747, 509 N.W.2d 194, 198 (1993), this court held that "when a court awards attorney fees against an employer pursuant to § 48-125(1), the employer shall be liable for interest pursuant to § 48-125(2)." Because Copple was liable for the entire amount of the temporary total disability benefits and a part of the weekly permanent total disability payments, liable for compensation as defined by *Bituminous Casualty Corp.*, and liable for attorney fees under § 48-125(1), the Workers' Compensation Court awarded Koterzina interest against Copple under § 48-125(2).

Section 48-125(2), in relevant part, states:

> When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable, as provided in section 48-119, at a rate equal to the rate of interest allowed per annum under section 45-104.01, as such rate may from time to time be adjusted by the Legislature. Interest shall apply only to those weekly compensation benefits awarded which have accrued at the time payment is made by the employer.

In holding the Fund liable for interest, the compensation court was complying with the holding in *Sherard*. In *Sherard*, this court found that the Fund, as an employer, was liable for interest under the mandate of § 48-125(2) when both compensation and attorney fees were assessed against it.

KOTERZINA I

In order to receive interest under § 48-125(2), compensation and attorney fees must be assessed against the same employer under § 48-125(1). *Sherard, supra*. The Fund is an employer within the meaning of § 48-125. *Sherard, supra*; *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982).

In *Sherard*, a Workers' Compensation Court award was affirmed where the compensation was left divided between the two employers and attorney fees assessed against one of them. Therefore, one employer had both compensation and attorney fees assessed against it. This same result was effected by the original Workers' Compensation Court decision in *Koterzina*.

However, the Court of Appeals, in *Koterzina I*, then modified the compensation award by assessing 100 percent of the compensation, as defined by *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990), against the Fund. In that modification, the Court of Appeals did not assess attorney fees against the Fund, but did assess attorney fees against Copple. Because *Sherard* held that interest could be assessed only when attorney fees were awarded, the Court of Appeals could no longer assess interest under § 48-125(2). That modification resulted in each employer arguing that the other employer was liable for the interest on the compensation.

KOTERZINA II

In the garnishment proceeding, the district court assigned interest against the Fund under § 48-125(2) based on the September 3, 1992, Workers' Compensation Court award which had been filed in the district court.

The Court of Appeals concluded that the district court expanded the original judgment. The Court of Appeals specifically held that "the district court's consideration and determination of liability of the Fund and Copple for prejudgment interest during the garnishment proceeding exceeded the provisions of the garnishment statutes" and that the district court "creat[ed] interest liability at the garnishment level." *Koterzina II*, 3 Neb. App. at 700, 531 N.W.2d at 5, 6.

The Court of Appeals stated that *Koterzina I* did not award attorney fees against the Fund. Since interest on compensation can be assessed only where attorney fees are awarded, "the district court's order directing the Fund to pay interest pursuant to § 48-125(2) was improper." *Koterzina II*, 3 Neb. App. at 701, 531 N.W.2d at 6. We agree with that conclusion of the Court of Appeals. Under *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993), the Fund is not liable for interest under § 48-125(2).

However, we disagree with the conclusion that § 48-125(2) is the sole statute for assessing interest on workers' compensation awards and that the district court erred in awarding other judgment interest. A judgment liability existed which allowed interest to accrue pursuant to Neb. Rev. Stat. §§ 45-103.01 and 48-188 (Reissue 1993).

The filing of the compensation award under § 48-188 provided the basis for the district court to enforce a judgment for interest in the garnishment proceeding. See *Sherard, supra*.

Section 48-188, in relevant part, states:

> Any order, award, or judgment . . . for compensation pursuant to the Nebraska Workers' Compensation Act may . . . be filed with the district court of any county or counties in the State of Nebraska upon the payment of a fee . . . . *Upon filing, such order, award, or judgment shall have the same force and effect as a judgment of such district court or courts and all proceedings in relation thereto shall thereafter be the same as though the order, award, or judgment had been rendered in a suit duly heard and determined by such district court or courts.*

(Emphasis supplied.)

The district court enforces the Workers' Compensation Court judgment (rendered here on September 3, 1992) as if it had been "rendered in a suit . . . determined by such district court." Section 48-188, as such, has a nunc pro tunc, or "now for then," effect. The district court treats the compensation award as if it had rendered the award on September 3, 1992.

Rendition of judgment is defined by Neb. Rev. Stat. § 25-1301(2) (Reissue 1989), which states:

> Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.

Section 45-103.01 states: "Judgment interest shall accrue on decrees and judgments for the payment of money *from the date of rendition of judgment* until satisfaction of judgment." (Emphasis supplied.)

Thus, pursuant to §§ 48-188, 45-103.01, and 25-1301(2),

the Fund owes postjudgment interest on the Workers' Compensation Court award from the time the award was rendered. Rendition of judgment was effected when the Workers' Compensation Court noted its decision in its record on September 3, 1992. That is the date the Workers' Compensation Court award on rehearing was initially filed in that court.

On September 3, 1992, the Fund was liable for only a portion of compensation as defined by *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). However, when a district court enforces a decision of the Workers' Compensation Court, the district court has a duty to take judicial notice of any appellate decisions which have been rendered in the same case. *Sherard, supra*. Cf. *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979). The September 3, 1992, award was subsequently modified by the Court of Appeals, and the Fund was assessed 100 percent of compensation, as defined by *Bituminous Casualty Corp.* However, the modification, decided July 6, 1993, happened before the compensation award was filed in district court, November 24, 1993. Therefore, the district court is charged with the knowledge of the modification.

When the original compensation award was filed in the district court, the Court of Appeals' modification of that award also had a nunc pro tunc effect, pursuant to § 48-188. In other words, once the compensation award was filed in district court, the Fund was accountable for interest on 100 percent of the compensation, as defined by *Bituminous Casualty Corp.*, since September 3, 1992, the original date of the subsequently modified compensation award.

CONCLUSION

The Fund is liable to Koterzina for interest on 100 percent of compensation from September 3, 1992. Therefore, the Court of Appeals' decision is reversed, and the cause is remanded to the Court of Appeals with directions to remand to the district court with directions to order interest paid to Koterzina by the Fund by computing postjudgment interest due on 100 percent of unpaid compensation since September 3, 1992.

Koterzina's motion for attorney fees of $1,800 is granted.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., dissenting.

I dissent from the majority's opinion, which holds that the Fund is liable to Koterzina for interest on 100 percent of the compensation from September 3, 1992. I would award interest on the compensation from the date that the award was filed in the district court. It is the filing of the compensation award under Neb. Rev. Stat. § 48-188 (Reissue 1993) which is the date from which interest should be computed. Section 48-188 provides that "[u]pon filing, such order, award, or judgment shall have the same force and effect as a judgment of such district court . . . ."

I disagree that § 48-188 has a "nunc pro tunc" effect on the workers' compensation award. Pursuant to Neb. Rev. Stat. § 45-103.01 (Reissue 1993), judgment interest accrues from the date of rendition of the judgment. As the statute applies to workers' compensation awards, the judgment is not rendered until it is filed in the district court pursuant to § 48-188. The compensation award becomes a judgment in the district court for purposes of § 45-103.01 on the date it was filed in the district court.

The majority opinion affirms the Court of Appeals' holding that Neb. Rev. Stat. § 48-125(2) (Reissue 1993) is the exclusive interest statute for workers' compensation awards and allows interest only where attorney fees are awarded. Since attorney fees were not awarded, no interest could be assessed in the compensation court. It is inconsistent for the majority to conclude that § 48-125(2) is the exclusive interest statute for workers' compensation awards and retroactively modify the compensation award by allowing interest to the date of the workers' compensation award. There is nothing in § 48-188 which makes interest awards retroactive to the date of the workers' compensation award. It is only upon filing of the workers' compensation award in the district court that interest commences.

CONNOLLY, J., joins in this dissent.

SUE R. ANDERSEN, APPELLEE, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, APPELLANT.

542 N.W.2d 703

Filed January 26, 1996. No. S-94-145.

1. **Courts: Time.** Unless otherwise provided by order of the district court, a term of court begins on January 1 of a given year and ends on December 31 of that same year.
2. **Courts: Judgments: Time.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to modify the judgment except for the reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1989).
3. **Judgments: Records.** The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which, through inadvertence or mistake, was not truly recorded.
4. ____: ____. It is not the function of an order nunc pro tunc 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 though such order was not the order intended.
5. ____: ____. The true purpose of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made so that it will truly record the action really had, but which, through some inadvertence or mistake, has not been truly recorded.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Jeffrey H. Jacobsen and Timothy M. Welsh, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Dale A. Romatzke, of Ross, Schroeder, Brauer & Romatzke, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

American Family Mutual Insurance Company (AFI) appeals an order of the district court for Buffalo County denying AFI's motion to amend a November 30, 1993, journal entry or, in the alternative, for an order nunc pro tunc. We affirm the holding of the district court.

FACTS

Sue R. Andersen brought this action against AFI under both

the uninsured and underinsured motorist coverage of her AFI automobile insurance policy for injuries she received in a motor vehicle accident that occurred in Arizona.

In its answer to Andersen's petition, AFI raised several affirmative defenses. After a pretrial hearing, the district court held, as a matter of law, that AFI's affirmative defense claims were without merit. This case then proceeded to trial only on the issue of damages.

On November 29, 1993, a jury returned a $12,893.30 verdict in favor of Andersen. On November 30, the trial court entered judgment accordingly and taxed litigation costs to AFI. The trial court also found that pursuant to a stipulation of the parties, AFI was entitled to a $15,000 credit against the judgment. The stipulation was based upon a prior settlement under which Andersen received $15,000 from the driver of the vehicle involved in the Arizona accident. The jury verdict and the court's ruling were memorialized in the November 30 journal entry, which was signed by the trial judge.

On January 13, 1994, the trial court, on Andersen's motion, ordered AFI to pay Andersen $5,000 for attorney fees.

On January 31, 1994, AFI filed a motion to amend the trial court's November 30, 1993, journal entry or for an order nunc pro tunc. In its motion, AFI asked the court to amend the journal entry by substituting for it a proposed journal entry that was attached to its motion. AFI's proposed journal entry would have had the trial court enter judgment in favor of AFI and against Andersen, whereas the jury verdict and the November 30 journal entry were in favor of Andersen and against AFI.

Both Andersen's motion for a new trial, filed December 6, 1993, and AFI's January 31, 1994, motion to amend or for a nunc pro tunc order in regard to the November 30, 1993, journal entry were overruled by the trial court in an order dated January 31, 1994. On February 8, AFI appealed from the trial court's January 31 order. Andersen did not appeal or cross-appeal the overruling of her motion for a new trial.

ASSIGNMENTS OF ERROR

AFI claims that the trial court erred in (1) determining that Arizona law controlled the insurance contract, (2) failing to find

that Andersen was precluded from recovering from AFI, (3) awarding attorney fees to Andersen, and (4) awarding excessive attorney fees to Andersen.

ANALYSIS

Initially, we consider whether this court has jurisdiction to consider AFI's assigned errors. None of the assigned errors pertain to the January 31, 1994, trial court order from which AFI appeals. AFI apparently seeks to use the denial of its motion to amend or for an order nunc pro tunc to gain appellate review of the November 30, 1993, trial court order. This AFI is not permitted to do. AFI's motion to amend or for an order nunc pro tunc, with respect to the November 30, 1993, journal entry, was filed and ruled upon on January 31, 1994, well beyond the deadline for filing an appeal from the November 30 journal entry. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994).

Because AFI's assignments of error are not properly before this court, we address only whether the trial court erred in denying AFI's January 31, 1994, motion to amend the trial court's journal entry or for an order nunc pro tunc.

AFI's Motion To Amend

The January 31, 1994, motion filed by AFI asked the trial court to amend a November 30, 1993, journal entry. As such, AFI's motion was not filed in the same term of court as the journal entry which AFI asked the trial court to amend. Unless otherwise provided by order of the district court, a term of court begins on January 1 of a given year and ends on December 31 of that same year. *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). We have found nothing in the record to reflect that the trial court fixed a different term of court than provided in *In re Estate of Weinberger*.

After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to modify the judgment except for the reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1989). See *Meier v. Nelsen*, 156 Neb. 666, 57 N.W.2d 273 (1953). Section 25-2001 provides for nine independent reasons for which a district court can modify its own judgments or

orders after the term at which such judgments or orders were made. However, none of those reasons are present in the case at bar. Therefore, at the time of AFI's motion to amend the November 30, 1993, journal entry, the trial court was without authority to modify its judgments rendered at a prior term.

Motion for Order Nunc Pro Tunc

When considered as a motion for an order nunc pro tunc, AFI's motion lacks merit. The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which, through inadvertence or mistake, was not truly recorded. *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). AFI's motion made no attempt to show that the trial court's November 30, 1993, journal entry did not truly reflect the action taken by the jury or by the trial court on November 30. Our review of the record reveals no evidence that the trial court's November 30 journal entry did not correctly reflect the court's action at that time.

AFI essentially asked the trial court to set aside a judgment actually rendered and enter judgment in favor of AFI notwithstanding the jury verdict in favor of Andersen. It is not the function of an order nunc pro tunc 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 though such order was not the order intended. *Id.* The true purpose of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made so that it will truly record the action really had, but which, through some inadvertence or mistake, has not been truly recorded. *Andrews v. Nebraska State Railway Commission*, 178 Neb. 799, 135 N.W.2d 712 (1965). In the case at bar, AFI was attempting to correct an affirmative action by the trial court, which is not the purpose of a nunc pro tunc order. Therefore, the trial court did not err in overruling AFI's motion for a nunc pro tunc order.

CONCLUSION

AFI appeals from the denial of a motion to amend a journal

entry or for an order nunc pro tunc. The trial court did not have the authority to amend its judgment after term, and the trial court cannot alter a judgment through a nunc pro tunc order. Therefore, the trial court did not err in overruling AFI's motion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KATHY F. SCHLUND, APPELLANT.

542 N.W.2d 421

Filed January 26, 1996. No. S-95-208.

1. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
2. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** A criminal defendant has a Sixth Amendment right to effective and conflict-free assistance of counsel.
3. **Constitutional Law: Right to Counsel.** When counsel is court-appointed, the defendant does not have a constitutional right to counsel of his or her choice.
4. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
5. ____: ____. If a party's substantial rights are not determined by a court's order and the cause is retained for further action, the order is not final for purposes of appeal.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Kathy F. Schlund appeals the disqualification of her attorney, the Hall County public defender. The disqualification was based upon a conflict of interest. The threshold issue in this appeal is whether an order granting a motion to disqualify a criminal defendant's court-appointed attorney is a final, appealable order. We conclude that an order disqualifying a defendant's court-appointed attorney is not a final order, and we affirm the order of the Nebraska Court of Appeals.

FACTUAL BACKGROUND

The State of Nebraska filed two charges of child abuse against Schlund in Hall County Court on August 24, 1994. The Hall County public defender was appointed to represent Schlund. On October 13, the State filed a notice and motion notifying the court of a "possible conflict of interest" of the Hall County public defender.

The county court held a hearing on the State's motion on November 2, at which the court admitted exhibits offered by the State that disclosed the alleged conflict. The exhibits offered by the State indicated a pending criminal case against Schlund's husband, Kevin Schlund, who was represented in this case by the Hall County public defender's office. Furthermore, several exhibits recount plea negotiations between the State and Schlund. Additionally, the exhibits and the testimony at the hearing disclosed a pending juvenile case concerning Schlund's children.

The public defender offered the testimony of Schlund, who indicated that she had been advised of the possible conflict of interest in her cases and her husband's criminal cases. Additionally, Schlund explained her understanding of a conflict of interest as "mixing up the two cases" and "one [case] might get in the way of the other [case]." Schlund told the court that she understood that another attorney could be appointed, but

that she wanted to retain the Hall County public defender as her attorney despite the possible conflict of interest.

The Hall County Court disqualified the Hall County public defender. Schlund appealed to the district court for Hall County, and the district court affirmed the county court's disqualification order. Schlund further appealed to the Court of Appeals, which granted the State's motion for summary dismissal pursuant to Neb. Ct. R. of Prac. 7B(1) (rev. 1993), regarding lack of jurisdiction. The Court of Appeals sustained the motion without a written opinion.

ASSIGNMENT OF ERROR

Schlund alleges that the Court of Appeals erred in sustaining the motion for summary dismissal because a motion to disqualify counsel is a final, appealable order, as an order affecting a substantial right in a special proceeding.

STANDARD OF REVIEW

The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

ANALYSIS

As stated, the issue in this case is whether the motion to disqualify Schlund's counsel was a final, appealable order which is sufficient to create appellate jurisdiction.

There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1994). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Rohde v. Farmers*

Alliance Mut. Ins. Co., supra; *Jarrett v. Eichler, supra*.

Schlund argues that a motion to disqualify counsel is a final, appealable order under § 25-1902 as an order "affecting a substantial right made in a special proceeding." Determining whether the motion is a final order thus requires a determination of whether the motion "affect[s] a substantial right."

Schlund asserts that the substantial right affected by a motion to disqualify is the right to counsel. A criminal defendant has a Sixth Amendment right to effective and conflict-free assistance of counsel. *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994). However, when counsel is court-appointed, the defendant does not have a constitutional right to counsel of his or her choice. *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). As Schlund's counsel was court-appointed, the disqualification of the public defender does not affect the alleged "substantial right" to counsel.

Furthermore, under this court's previous definition of substantial right in the context of final orders, the disqualification of the public defender is not a substantial right. This court has determined that a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Jarrett v. Eichler, supra*. The motion to disqualify affects the peripheral matter of the counsel qualified to represent the defendant, rather than affecting the subject matter of the case; thus, under the *Jarrett* definition of substantial right, the motion to disqualify is not a final order.

While this court has not previously decided whether the *Jarrett* definition of "substantial right" is the exclusive definition of the term, we need not resolve this question. The motion to disqualify concerns the defendant's choice of counsel, and this court has never recognized any right to such a choice when counsel is court-appointed. Therefore, without determining whether other rights can be substantial, we conclude that the motion to disqualify does not affect a "substantial right" of Schlund.

If a party's substantial rights are not determined by a court's

order and the cause is retained for further action, the order is not final for purposes of appeal. *Rohde v. Farmers Alliance Mut. Ins. Co., supra.* Because the motion to disqualify did not affect a "substantial right" of Schlund under this court's previous definitions, the order disqualifying the public defender is not a final order.

An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995). Thus, the Court of Appeals was correct in dismissing Schlund's appeal for lack of jurisdiction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL J. HANSEN, APPELLANT.

542 N.W.2d 424

Filed January 26, 1996. No. S-95-312.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
3. **Statutes: Words and Phrases.** "Special proceeding" means every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes.
4. **Double Jeopardy.** The determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense.
5. **Double Jeopardy: Words and Phrases.** In making the assessment of whether a sanction constitutes punishment for double jeopardy purposes, the labels "criminal" and "civil" are not of paramount importance.
6. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

7. ____. While recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription against multiple punishments.
8. **Penalties and Forfeitures.** The determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.
9. **Criminal Law: Double Jeopardy.** A defendant who already has been punished in a criminal proceeding may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
10. **Statutes: Drunk Driving: Licenses and Permits: Revocation.** Substantial remedial purposes underlie the administrative license revocation statutes, and their remedial character is not defeated by the fact that the statutes also play a role in deterring others from driving drunk.
11. **Motor Vehicles: Licenses and Permits.** Driving a motor vehicle is not a fundamental right, but is a privilege granted by the state.
12. **Motor Vehicles: Licenses and Permits: Revocation.** A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state.
13. **Statutes: Licenses and Permits: Revocation.** Although there is an element of deterrence, and thus a "sting" of punishment, incorporated in the administrative license revocation statutes, this element is present in any loss of license or privilege and is not the primary focus of the statutes.
14. **Statutes: Drunk Driving: Licenses and Permits: Revocation.** Under the administrative license revocation statutes, a driver's license is not suspended to deter the offender or seek retribution, but to protect the public against dangerous drunk drivers.
15. **Statutes: Licenses and Permits: Revocation: Time.** The period of revocation allowable under the administrative license revocation statutes is not excessive in relation to the remedial goal of protecting the public health and safety.
16. **Double Jeopardy: Licenses and Permits: Revocation: Public Health and Welfare.** When the government employs a licensing scheme to regulate an activity that affects the public health and safety, the administrative revocation of that license can legitimately serve to deter conduct and still remain remedial for double jeopardy purposes so long as the revocation is based on conduct that bears a direct relation to the government's remedial goals or to the proper administration and enforcement of the regulatory scheme.
17. **Double Jeopardy: Drunk Driving: Licenses and Permits: Revocation.** The Double Jeopardy Clause does not bar prosecuting a motorist for driving under the influence after the motorist's driver's license has been administratively revoked, because such revocation does not subject the offender to multiple punishment for the same offense.

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

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

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

In this appeal, we are asked to determine whether the criminal prosecution of a motorist for driving under the influence of intoxicating liquor (DUI) after the motorist's driver's license has been administratively revoked violates the constitutional prohibition against double jeopardy.

Russell J. Hansen appeals from an order of the district court for Dodge County affirming the county court's overruling of Hansen's plea in bar to criminal DUI charges. The court found that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions are not applicable because the administrative revocation of Hansen's driver's license was remedial in nature and not punitive. We affirm the district court's finding that the Double Jeopardy Clauses do not bar the criminal prosecution of Hansen for DUI because the administrative revocation of his driver's license for 90 days was remedial in nature and that, thus, he is not subject to multiple punishment for the same offense.

I. ASSIGNMENTS OF ERROR

Hansen alleges the district court erred in not finding that his criminal DUI prosecution was barred by the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions because the DUI prosecution, in addition to the administrative revocation of his driver's license, subjects him to multiple punishment for the same offense.

II. SCOPE OF REVIEW

Regarding questions of law, an appellate court is obligated to

reach a conclusion independent of determinations reached by the trial court. *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

III. BACKGROUND

On November 12, 1994, Hansen was stopped by a deputy of the Dodge County Sheriff's Department in Scribner, Nebraska, for driving at night with a burned out taillight. Upon approaching Hansen's vehicle, the officer detected the odor of alcohol, observed that Hansen's face was flushed, and noted that Hansen's speech was dry mouthed and chalky. Hansen agreed to take a preliminary breath test, the results of which were over the legal limit of .10 grams of alcohol per 210 liters of breath. Hansen was then placed under arrest and transported to the Dodge County Judicial Center in Fremont, Nebraska. At the center, an official breath test was administered with a resultant reading of .143 grams of alcohol per 210 liters of breath. As a result, Hansen was given notice of revocation of his driver's license, a temporary driver's license, and a form to petition for an administrative hearing along with an addressed envelope.

On December 13, 1994, Hansen's driver's license was ordered revoked by the Department of Motor Vehicles for 90 days. At the same time, Hansen was also facing criminal prosecution in the county court for Dodge County for DUI, third offense. Hansen filed a plea in bar alleging that the criminal DUI prosecution was barred by the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions, because he had already been punished for the same offense by having his driver's license administratively revoked. The county court overruled Hansen's plea in bar, and the district court affirmed.

IV. OVERVIEW OF ADMINISTRATIVE LICENSE REVOCATION PROCEDURE

Preliminarily, we believe it helpful to give a description of Nebraska's administrative license revocation statutes, Neb. Rev. Stat. §§ 60-6,205 to 60-6,208 (Reissue 1993). Under the statutes, a person who is arrested for driving under the influence of alcohol and who submits to a chemical test which discloses the presence of alcohol in any of the concentrations

specified in Neb. Rev. Stat. § 60-6,196 (Reissue 1993), .10 of a gram or more of alcohol per 100 milliliters of blood or .10 of a gram or more of alcohol per 210 liters of breath, shall be served verbal notice by the arresting officer, as an agent of the director of the Department of Motor Vehicles, of the intention to immediately impound and revoke the driver's license of such person and that the revocation will be automatic 30 days after the date of the arrest. § 60-6,205(3).

The arresting officer is then required to take possession of the driver's license and to issue a temporary license, which is valid for 30 days. § 60-6,205(4). The arresting officer is also required to explain the administrative license revocation procedure and the rights of the arrested person, and to provide an addressed envelope and a petition form which may be used to request a hearing before the director of the Department of Motor Vehicles to contest the revocation. *Id.*

The burden of proof is on the State to make a prima facie case for revocation before the director. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995); *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975). However, once the 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.*

If the offender is unable to show cause why his driver's license should not be revoked, then the director shall revoke his license for a period of *90 days* for a first offense and 1 year for the second and any subsequent offense within an 8-year period. § 60-6,206(1). Any person who feels himself or herself aggrieved because of such revocation may petition for judicial review therefrom to the district court of the county where the alleged events occurred. § 60-6,208.

V. ANALYSIS

1. Plea in Bar

Before addressing the double jeopardy issue raised by Hansen, we must first address the threshold issue of whether this court has jurisdiction to hear an appeal from an order

overruling a plea in bar arising after Hansen's driver's license was administratively revoked, but before the merits of his criminal DUI prosecution have been litigated.

As a general rule, appeals may be taken only from final judgments. Neb. Rev. Stat. § 25-1901 (Cum. Supp. 1994). Hansen contends that the district court's denial of his plea in bar was a final order appealable when entered. The State contends that the denial was not a final, appealable order because Hansen could ultimately prevail on the merits of his DUI prosecution.

There are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1994); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

Thus, whether an order is final and appealable does not always depend upon whether that order completely disposes of the action. *Jarrett v. Eichler, supra*. For example, an order affecting a substantial right made during a special proceeding is a final and appealable order. *Id.* This court has construed the phrase "special proceeding" to mean every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes. *Jarrett v. Eichler, supra*; *In re Interest of R.G., supra*. The director's authority to revoke Hansen's license does not derive from chapter 25. Rather, the authority is derived from chapter 60. Thus, we are dealing with a special proceeding.

However, the fact that the order arose during a special proceeding does not end our inquiry. To be final and appealable, the order made in such a proceeding must also affect a substantial right. In *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), this court said that there is no question that a determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense

and concluded that a denial of a plea in bar, filed pursuant to Neb. Rev. Stat. § 29-1817 (Reissue 1989), is a final order as defined in § 25-1902.

However, the State argues that *Milenkovich* dealt with a plea in bar filed after one criminal charge, while another criminal charge was pending, whereas in the instant case, Hansen is attempting to invoke double jeopardy protections from a clearly civil-administrative procedure to a criminal DUI prosecution. As such, the State argues that Hansen's situation is more analogous to *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988). In that case, the defendants filed a plea in bar alleging that a default judgment in one civil case precluded maintenance of another civil suit against them arising out of the same fact pattern. This court found that while the granting of a plea in bar is final and appealable, the trial court's order *overruling* the defendants' plea in bar was not a final, appealable order because the "presently unsuccessful parties may ultimately prevail following a trial on the merits." *Id.* at 621, 428 N.W.2d at 213.

It is true that the merits of Hansen's DUI prosecution have not been litigated and that the revocation of his license was accomplished through a civil-administrative, not a criminal, proceeding. However, in *United States v. Halper*, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), the Supreme Court held:

> In making this assessment [of whether a sanction constitutes punishment for double jeopardy purposes], the labels "criminal" and "civil" are not of paramount importance. . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

If Hansen were not permitted to appeal the denial of his plea in bar until after the merits of his DUI prosecution were litigated, he potentially could be forced to "run the gauntlet" twice—a harm that the constitutional prohibition against double jeopardy was designed to prevent. Thus, we conclude in this

case that a pretrial order denying a plea in bar based on a nonfrivolous double jeopardy claim is appealable because Hansen's substantial rights may be irreparably lost if review is delayed until final judgment.

2. Double Jeopardy

The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense."

The U.S. Supreme Court has interpreted the Fifth Amendment's Double Jeopardy Clause to protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *United States v. Halper, supra*; *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). This court has not construed Nebraska's Double Jeopardy Clause to provide any greater protections than those guaranteed by the federal Constitution. Hansen contends that because he has already had his driver's license administratively revoked, to prosecute him for DUI would subject him to multiple punishment for the same offense. As a result, we must determine whether the administrative revocation of his driver's license for 90 days pursuant to § 60-6,206 constitutes "punishment" for purposes of double jeopardy.

3. *United States v. Halper*

Hansen's double jeopardy argument rests on a trio of cases decided by the U.S. Supreme Court: *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In these cases, the Supreme Court expanded the scope of the Double Jeopardy Clause by construing it to protect

individuals from the imposition of certain penalties, forfeitures, and taxes—monetary impositions that traditionally had not been considered criminal punishments. We find *Austin*, which was a forfeiture case, was decided upon the Eighth Amendment's "Excessive Fines" Clause, and *Kurth Ranch*, which is fact specific to the drug tax context, are inapplicable to the instant case. Thus, for purposes of analyzing Hansen's argument, we begin by discussing *United States v. Halper, supra*.

In *Halper*, the Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (Emphasis supplied.) 490 U.S. at 448–49.

In that case, Halper was convicted of submitting 65 false claims for reimbursement under medicare. He was sentenced to 2 years in prison and fined $5,000. Subsequently, the government brought an action against Halper for civil violation of the False Claims Act, and the court granted summary judgment for the government. At that time, the False Claims Act provided for a penalty of $2,000 per violation, which resulted in Halper's civil penalties amounting to $130,000 for the 65 violations for which he had been convicted. However, the total amount of money Halper actually defrauded the government was less than $600.

The Court reasoned:

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449–50.

4. Applicability of *Halper*

Although *Halper* involved a setting where the criminal case came first and the civil case followed, from the totality of the

cases discussing the issue, it is evident that the order is not significant. See, e.g., *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. at 1958 (Scalia, J., dissenting) ("if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference"). See, also, *U.S. v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991); *State v. Hanson*, 532 N.W.2d 598 (Minn. App. 1995).

The *Halper* Court was careful to note that "[w]hat we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. Thus, on its face, *Halper* may apply only to instances where the government attempts to extract from a person who has committed a punishable act, preceded or followed by a criminal prosecution, a monetary penalty related to the goal of making the government whole.

Unlike *Halper*, in the present case, we are not analyzing the constitutionality of any monetary sanctions designed to compensate the State for losses it sustained as a result of Hansen's criminal actions. Instead, we must look at the principles enunciated in *Halper* to determine whether the 90-day revocation of Hansen's driver's license constitutes a second punishment for purposes of double jeopardy.

5. Legislative History and Plain Meaning

The administrative license revocation procedure is codified at §§ 60-6,205 to 60-6,208. Section 60-6,205(1) states:

> 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 by driving with an excessive concentration of alcohol in his or her body and to *deter* others from driving while under the influence of alcohol.

(Emphasis supplied.)

The plain language of the statute indicates that the legislative purpose is to protect the public from the health and safety

hazards associated with drunk driving by quickly getting those people who drive while under the influence of alcohol off the road. It is also clear that another purpose the statute is intended to serve is to deter others from driving while under the influence of alcohol.

Hansen argues that since the plain meaning of the statute indicates that one of its purposes is to deter others from driving while under the influence of alcohol, its application constitutes punishment for the purposes of double jeopardy. Hansen further argues that the legislative history of § 60-6,205 supports this claim because some legislators when debating the passage of the statute used the term "deterrent" during their floor speeches.

However, the language used by the legislators, on the floor and in the statute, is not controlling. In *United States v. Halper*, 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), the Court elaborated:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. [Citation omitted.] This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

The Court was careful to state, "This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. . . . [F]or the defendant even remedial sanctions carry the sting of punishment." 490 U.S. at 447 n.7. The Court reiterated that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." 490 U.S. at 448. Thus, the plain language and legislative history is not dispositive of our inquiry whether administrative license revocations are remedial or constitute punishment for purposes of double jeopardy. Instead, as

directed by *Halper*, we must make a particularized assessment of the penalty or sanction actually imposed and the purpose the statute may fairly be said to serve.

6. PURPOSE STATUTE MAY FAIRLY BE SAID TO SERVE

Hansen next contends that the purpose § 60-6,205 may fairly be said to serve is that of punishment. To support his argument, Hansen cites the following language from *Halper*:

> "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U. S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can *only* be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

(Emphasis supplied.) 490 U.S. at 448.

Thus, Hansen argues that the administrative revocation of his driver's license served a deterrent purpose which, based on the aforementioned language, is one of the goals of punishment and therefore must be deemed "punishment" for purposes of double jeopardy.

While it is correct that some appellate courts have acknowledged that the revocation of a driver's license based on the driver's misconduct has a deterrent aspect, none have found that administrative license revocations constitute punishment under the Double Jeopardy Clause. *State v. Zerkel*, 900 P.2d 744 (Alaska App. 1995); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630 and 36 Cal. App. 4th 454N, 42 Cal. Rptr. 2d 422 (1995); *State v. Strong*, 605 A.2d 510 (Vt. 1992); *Butler v. Dept. of Public Safety & Corr.*, 609 So. 2d 790 (La. 1992); *State v. Nichols*, 169 Ariz. 409, 819 P.2d 995 (Ariz. App. 1991). The vast majority of other jurisdictions that have interpreted *Halper* have found the following language, and not the language cited by Hansen, to be controlling:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosection may not be subjected to an additional civil

> sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only as a deterrent or retribution*.

(Emphasis supplied.) 490 U.S. at 448–49.

It is important to note that in *Halper*, the Court stated that "the question we face today [is]: whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The way the Court framed the issue is indicative of the view that a statute may contain certain punitive qualities and yet remain remedial for purposes of double jeopardy.

It is also noteworthy that in *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 1946, 128 L. Ed. 2d 767 (1994), although the Court found the tax imposed to be excessive and thus punishment, it acknowledged that other types of nonpunitive sanctions could legitimately include deterrent aspects: "We begin by noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment."

Thus, we find that Hansen has read *Halper* incorrectly. Section 60-6,205(1) makes it clear that the revocation of a motorist's driving privileges primarily serves the remedial purpose of protecting the public health and safety by quickly removing dangerous drunk drivers from the roads. Certainly, this is a rational alternative purpose to the statute's secondary deterrent objective. Thus, we have no difficulty finding that substantial remedial purposes underlie the administrative license revocation statutes and conclude that their remedial character is not defeated by the fact that the statutes also play a role in deterring others from driving drunk. However, our analysis does not end here. We must still make a particularized assessment of the 90-day revocation period actually imposed pursuant to § 60-6,206(1) in order to determine whether it is remedial or constitutes punishment for purposes of double jeopardy.

7. Assessment of Penalty Actually Imposed

(a) Privilege, Not a Right

We have repeatedly held that driving a motor vehicle is not a

fundamental right, but is a privilege granted by the state. *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988); *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961). "A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state." *Durfee v. Ress*, 163 Neb. 768, 772, 81 N.W.2d 148, 150 (1957).

Likewise, the case law of other jurisdictions demonstrates that the revocation of a driver's license is actually the revocation of a privilege voluntarily granted, a traditional attribute of a remedial action. See, *State v. Zerkel*, 900 P.2d 744 (Alaska App. 1995); *Moser v. Richmond County Bd. of Commrs.*, 263 Ga. 63, 428 S.E.2d 71 (1993); *State v. Strong*, 605 A.2d 510 (Vt. 1992); *Butler v. Dept. of Public Safety & Corr.*, 609 So. 2d 790 (La. 1992); *Freeman v. State*, 611 So. 2d 1260 (Fla. App. 1992). " '[R]evocation of a voluntary privilege is "characteristically free of the punitive criminal element." ' " *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995).

(b) Historically Remedial

In 1957, this court held that the "purpose of the revocation [of a license] is to protect the public, and not to punish the licensee." *Durfee v. Ress*, 163 Neb. at 773, 81 N.W.2d at 151 (a case involving revocation of a driver's license under the point system). More recently, this court determined that the revocation of a motorist's license under the implied consent laws, for refusing to submit to a breath or chemical test, was a civil action remedial in nature. *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982). Thus, it is evident that the administrative revocation of driving privileges for driving offenses has historically served a regulatory purpose and has not been regarded as punishment. See, also, *State v. Hanson*, 532 N.W.2d 598 (Minn. App. 1995); *State v. Strong, supra*.

(c) Analogy to Professional License Revocations

The principles underlying the administrative revocation of a driver's license after refusal to take, or failure of, a chemical

test are closely analogous to the principles underlying the disbarment or suspension of an attorney or doctor after conviction of a crime involving moral turpitude. It has been repeatedly held that the Double Jeopardy Clause does not prevent the revocation of a professional license for conduct which also gives rise to criminal conviction. See, *Loui v. Board of Medical Examiners*, 78 Haw. 21, 889 P.2d 705 (1995); *Schillerstrom v. State*, 180 Ariz. 468, 885 P.2d 156 (Ariz. App. 1994); *Alexander v. State Bd. of Med. Examiners*, 644 So. 2d 238 (La. App. 1994). These courts reasoned that the purpose of revoking or suspending a professional license is not to punish, but to maintain sound professional standards of conduct and to protect the public from unfit lawyers and doctors. *Id.*

Although there is an element of deterrence, and thus a "sting" of punishment, incorporated into the administrative license revocation statutes, this element is present in any loss of license or privilege and is not the primary focus of the statutes. A driver's license is not suspended to deter the offender or seek retribution, but to protect the public against dangerous drunk drivers. See, *State v. Savard, supra*; *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995); *State v. Zerkel, supra*; *State v. Nichols*, 169 Ariz. 409, 819 P.2d 995 (Ariz. App. 1991). Simply put, the fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence as well does not necessitate the conclusion that the statute results in punishment for double jeopardy purposes.

(d) Not Excessive

The Legislature has determined that a person who operates a motor vehicle when his or her blood-alcohol level is .10 percent or higher poses a danger to the public's health and safety. A person's willingness to engage in such dangerous conduct justifies the inference that his or her continued authorization to drive will likewise pose a continuous danger to the public. In response to this emergency situation, the Legislature requires the director to administratively revoke an offender's driver's license for a period of 90 days for a first offense and 1 year for a second and any subsequent offense within an 8-year period. These swift revocations are the Legislature's attempt to abate

the dangers posed by drunk drivers in the interim period between arrest and prosecution. The temporary 30-day license is issued in order to protect the offender's right to due process.

The Legislature has enacted various guidelines to ensure that the period of revocation is not excessive in relation to the statutes' remedial objectives. For instance, § 60-6,196(5) states in pertinent part that "[a]ny period of revocation or order not to drive imposed under this section shall be reduced by any period imposed under section 60-6,206."

Section 60-6,206 states that after a conviction for DUI the court shall order the offender's driver's license revoked for 6 months. However, if the court places the offender on probation, it shall revoke the offender's license for a period of 60 days. A second-time offender within an 8-year period shall have his or her driver's license revoked for 1 year unless probation is ordered; in which case, the offender's license shall be revoked for 6 months. § 60-6,196(2)(b). An offender of three or more times within an 8-year period shall have his or her driver's license revoked for 15 years unless probation is ordered; in which case, the license shall be revoked for 1 year. § 60-6,196(2)(c).

It is true that an offender's driving privileges may be administratively revoked under § 60-6,206 for a period of time greater than the period revoked if the trial judge chooses to impose probation pursuant to § 60-6,196(2)(a). For example, a first-time offender shall have his or her driver's license administratively revoked for 90 days, whereas if the trial judge chooses probation after a DUI conviction, the offender's license shall be revoked for only 60 days. Under these circumstances, the 30-day disparity cannot be offset as required by § 60-6,196(5). However, whether or not an offender receives the 60-day probationary revocation is discretionary on the part of the trial judge. If the judge chooses not to give probation, or if the offender for one reason or another refuses probation, then the judge is required by § 60-6,196(2)(a) to revoke the offender's license for 6 months. Furthermore, the judge is to impose a mandatory minimum penalty of 7 days' imprisonment and a $200 fine, up to a maximum of 60 days' imprisonment and a $500 fine, pursuant to Neb. Rev. Stat. § 28-106(1) (Cum.

Supp. 1994). As such, it cannot be said that the 90-day administrative revocation is excessive in comparison to the period of revocation and penalty permitted upon a DUI conviction.

Furthermore, an administrative license revocation is a temporary measure that can be administered in various degrees. Section 60-6,206(2) states in part:

> At the expiration of thirty days after an order of revocation is entered under subsection (1) of this section, any person whose operator's license has been administratively revoked for a period of ninety days for submitting to a chemical test pursuant to section 60-6,197 which disclosed the presence of a concentration of alcohol in violation of section 60-6,196(a) may make application to the director for issuance of an employment driving permit pursuant to section 60-4,130 and (b) is eligible for an order pursuant to section 60-6,211.05 to operate a motor vehicle equipped with an ignition interlock device.

Simply stated, temporarily removing a motorist who fails a breath test from the road for 90 days is not excessive as were the civil damages assessed in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Importantly, the Supreme Court deemed *Halper* "the rare case" and was simply of the opinion that the $130,000 civil penalty sought was "overwhelmingly disproportionate" to the $600 that the government was actually defrauded. In the instant case, we do not find this minimal revocation period to be excessive in relation to the remedial goal of protecting the public health and safety. Because our analysis under *Halper* overwhelmingly points to the nonpunitive nature of the administrative license revocation statutes, we must defer to the Legislature's determination of what remedial action is necessary to achieve the Legislature's goals. See *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

VI. CONCLUSION

We find that when the State employs a licensing system to regulate an activity that affects the public health and safety, the administrative revocation of that license can legitimately serve

to deter conduct and still remain remedial for double jeopardy purposes. However, for this to be true the revocation must be based on conduct that bears a direct relation to the government's remedial goals or to the proper administration and enforcement of the regulatory scheme.

Under our administrative license revocation statutes, the revocation of a driver's license subsequent to a prosecution for DUI is part of an overall plan developed by our Legislature for swiftly and surely dealing with the very serious problem of drinking and driving. Any deterrent purpose served by the revocation of a driver's license following an arrest for DUI is merely secondary to the overriding purpose of providing the public with safe roadways.

Thus, we conclude that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions do not bar prosecuting a motorist for DUI after the motorist's driver's license has been administratively revoked, because such revocation does not subject the offender to multiple punishment for the same offense.

AFFIRMED.

GERRARD, J., dissenting.

There is no doubt that the state has an interest in removing drunk drivers from the road to promote highway safety. However, this interest must be advanced within the framework of the U.S. and Nebraska Constitutions. I dissent because, in my opinion, the driver's license suspension provisions in the administrative license revocation (ALR) statutes, Neb. Rev. Stat. §§ 60-6,205 through 60-6,208 (Reissue 1993), constitute a civil sanction which cannot fairly be characterized as solely serving a remedial purpose and therefore "is punishment, as we have come to understand the term." *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Accordingly, since Hansen has been punished by the administrative revocation of his driver's license for driving while under the influence (DUI), he cannot constitutionally be subjected to multiple punishment by criminal prosecution for the same offense of DUI.

HALPER AND *AUSTIN* ANALYSIS

I agree with the majority that Hansen's double jeopardy

argument must be analyzed in light of a trio of U.S. Supreme Court cases: *United States v. Halper, supra*; *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). However, I disagree with the majority's view that *Austin* is inapplicable to the resolution of the issues before us in the instant case. Instead, my view is that it is absolutely necessary to analyze and apply the holding of *Halper* in light of the Supreme Court's analysis in *Austin*, as *Austin* is the only Supreme Court case which employs a *Halper* analysis to resolve this specific double jeopardy issue, i.e., whether a particular civil sanction can fairly be characterized as solely remedial. Moreover, *Austin* resolves any ambiguities that existed in *Halper* concerning when a civil sanction's "sting of punishment" can no longer be fairly characterized as solely remedial and, instead, can only be considered punishment as defined by the Supreme Court. 490 U.S. at 447 n.7.

In *Halper*, the defendant was convicted of 65 separate violations of the criminal false-claims statute, sentenced to prison, and fined. Subsequent to his criminal conviction and concerning the same conduct which constituted the criminal convictions, the government filed 65 separate violations of the civil False Claims Act against Halper and recovered the statutorily authorized civil penalty of $2,000 for each violation. Halper complained that this $130,000 penalty bore no rational relationship to the government's costs of investigation and prosecution and was thus not a civil sanction, but a second punishment for the same conduct.

The Court identified that the sole question before it was whether the statutory penalty authorized by the False Claims Act constituted a second punishment for the purposes of a double jeopardy analysis, i.e., "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. In this context, the Court concluded that the government is entitled to rough remedial justice; however, when rough justice "authorizes a supposedly remedial sanction that does not remotely approximate the Government's

damages and actual costs, [then] rough justice becomes clear injustice." 490 U.S. at 446. Accordingly, resolution of the question, whether and under what circumstances a civil sanction may be punishment for the purposes of double jeopardy, requires an assessment of "the character of the actual sanctions imposed on the individual by the machinery of the state." 490 U.S. at 447. Furthermore, the U.S. Supreme Court stated:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. [Citation omitted.] The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. [Citation omitted.] To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires *a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve*. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

(Emphasis supplied.) *United States v. Halper*, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).

Applying these principles to the case at hand, the Court in *Halper* held as follows:

> From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. [Citation omitted.] We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not

> fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-49.

In *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the Court revisited the issue of whether a civil sanction constituted punishment when it examined the specific issue of whether the Excessive Fines Clause of the Eighth Amendment applied to civil forfeitures of property. In this case, Austin was indicted on four counts of violating state drug laws. He ultimately pled guilty to one count of possessing cocaine with intent to distribute and was sentenced to 7 years' imprisonment. Subsequent to Austin's indictment, the United States filed an in rem action seeking forfeiture of Austin's mobile home and auto body shop. The district court entered summary judgment for the United States, and this order was upheld by the U.S. Court of Appeals for the Eighth Circuit.

The Supreme Court stated: "The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. . . . The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.' " (Emphasis in original.) 509 U.S. at 609-10. The Court concluded that the question is not whether forfeiture is a civil or criminal sanction, but whether forfeiture is "punishment" in the constitutional sense. Continuing, the Court in *Austin* stated:

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction *that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment*, as we have come to understand the term."

(Emphasis supplied.) 509 U.S. at 610.

Similarly, four recent federal court of appeals cases have

followed the guidance of *Austin* in applying the above-stated definition of "punishment" in the context of the Double Jeopardy Clause, and the reasoning of each circuit court is persuasive. See, *U.S. v. Perez*, 70 F.3d 345 (5th Cir. 1995); *U.S. v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995) (holding that civil forfeiture under 21 U.S.C. § 881(a)(6) constitutes punishment for double jeopardy purposes because *Austin* " 'resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause' "); *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) (stating that *Austin* emphasized that sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has remedial purpose, under both Eighth Amendment Excessive Fines Clause and Double Jeopardy Clause in context of civil forfeitures); *U.S. v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) (in analyzing whether nonparticipation sanctions and monetary sanctions imposed against bank officials constituted double punishment when defendants were also prosecuted criminally, the Court stated: "Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. U.S.*").

In conducting a *Halper* analysis, that is, in making a particularized assessment of the penalty imposed by forfeiture and the purposes that a civil forfeiture may fairly be said to serve, the Court in *Austin* examined three factors: (1) the historical understanding of forfeitures, (2) the focus of the federal forfeiture statute, and (3) if forfeiture is in part punishment, can the forfeiture, nonetheless, fairly be characterized as solely remedial. The Court eventually concluded that forfeiture pursuant to the federal statute at issue did not solely serve a remedial purpose and that, thus, it was punishment subject to the Excessive Fines Clause.

APPLICATION OF *HALPER* ANALYSIS

Thus, for Hansen, *Halper* and *Austin* require us to make a particularized assessment of the penalty imposed by a driver's

license suspension and of the purposes that such a suspension may fairly be said to serve. Accordingly, a resolution of the present issue requires: (1) an examination of the historical purpose of driver's license suspensions in the context of drunk driving, (2) an examination of the focus of our ALR statutes, and (3) if suspension of a driver's license within the statutes is in part punishment, may the statutes, nonetheless, be fairly characterized as solely remedial.

History of Driver's License Suspension in Context of Drunk Driving.

An examination of our statutes reveals that, even before the enactment of Nebraska's first motor vehicle licensing statute, the suspension of the privilege to drive had been utilized as a form of punishment for drunk driving in this state. The first laws governing use of motor vehicles upon our highways appeared in 1919. In that year, the Legislature made it "unlawful for any person under sixteen years of age, or for any intoxicated person to operate a motor vehicle." 1919 Neb. Laws, ch. 190, § 27, p. 828 (codified at Comp. Stat. § 8391 (1922)). The penalty for violation of § 27 was a fine not exceeding $50 for the first offense, and not less than $50 nor more than $100, or imprisonment not exceeding 60 days in the county jail for each subsequent offense. 1919 Neb. Laws, ch. 190, § 32, p. 830 (codified at Comp. Stat. § 8396 (1922)).

In 1927, the penalty for driving while intoxicated was amended to include suspension of the privilege of driving. In addition to a fine and possible imprisonment generally applicable for other motor vehicle violations, any person found guilty of operating a motor vehicle while intoxicated was to be ordered by the court not to drive a motor vehicle of any description within this state for a period of 1 year from the date of judgment. 1927 Neb. Laws, ch. 153, § 1, p. 411. These laws predate our first motor vehicle licensing statute. Thus, it is evident that even *before* this state enacted its first motor vehicle licensing statute, an order not to drive a motor vehicle was considered to be an effective punishment for the crime of drunk driving.

The Legislature enacted our first motor vehicle licensing

statute in 1929. 1929 Neb. Laws, ch. 148, pp. 512-20. Section 1 proscribed operation of a motor vehicle on the streets, alleys, or public highways without a license obtained from the Department of Public Works. Comp. Stat. § 60-401 (1929). If a motorist was convicted of driving under the influence of alcohol or a narcotic drug, § 12 mandated that a motorist's license be suspended for a period of 1 year from the date of conviction. Importantly, in § 13, the Legislature also gave the director of an administrative agency, the Department of Public Works, the discretionary power to suspend a driver's license for a period of 1 year, if the person was convicted of operating a motor vehicle while under the influence of alcohol or narcotic drugs. Comp. Stat. § 60-413 (1929). This discretionary authority vested in the department director was repealed in 1937 and replaced with the mandatory responsibility to revoke a driver's license upon receiving a record of the operator's criminal conviction of driving while under the influence of alcohol. 1937 Neb. Laws, ch. 141, pp. 506-26.

Of course, under this statutory scheme, courts had the option to suspend a sentence and place an individual on probation, and, therefore, the convicted drunk driver did not always face the mandatory sanction of loss of driving privileges. In response, the Legislature passed 1982 Neb. Laws, L.B. 568, which *mandated* that courts impound driving privileges for certain minimum time periods after a DUI conviction, whether or not probation is granted in a particular case. Thus, historically, driver's license suspensions in the context of drunk driving have been predicated upon an underlying DUI criminal conviction.

In 1992, our statutory scheme regarding license revocation changed dramatically with the enactment of the ALR statutes. Unlike our prior statutes, §§ 60-6,205 through 60-6,208 vest in the director of the Department of Motor Vehicles the authority to revoke a driver's license prior to a motorist's criminal conviction for DUI. Moreover, the statutes require the director to impose a sanction of license revocation upon a motorist that is in excess of the sanction imposed upon a motorist if he or she is subsequently convicted of a criminal charge of DUI as a first- or second-time offender and

sentenced to probation.

For example, § 60-6,206 requires the director to revoke the driver's license of a first-time offender for a period of 90 days and to revoke the license of a second-time offender for a period of 1 year. In contrast, subsequent to a criminal conviction for DUI, a first-time offender who is placed on probation with a minimum sentence is subject to having his or her license impounded by the court for a period of 60 days. A second-time offender who is placed on probation with a minimum sentence is subject to having his or her license impounded by the court for a period of 6 months. Thus, the "remedial" sanction under this scenario is 30 days longer than the "criminal" sanction for the first-time offender, and 6 months longer for the second-time offender. Given this practical reality and the fact that the revocation period arbitrarily increases from 90 days to 1 year between a first-time offender and a second-time offender, it is difficult to glean the "remedial" portion of the ALR sanction.

This type of result is not surprising when we consider the legislative history behind the federal statute that encouraged states to adopt ALR statutes. Chapter 23 U.S.C. § 408(e)(1)(A) (1994) provides grants to states for alcohol traffic safety programs if the state provides for the "prompt suspension . . . of the driver's license [for a minimum of 90 days for a first offender and 1 year for a repeat offender] of any individual who a law enforcement officer has probable cause . . . to believe has committed an alcohol-related traffic offense."

The Congressional intent of this statute is clearly illustrated throughout the legislative history by statements such as: "Historically, license revocation has been treated as a discretionary criminal sanction. This bill, however, recognizes that license revocation is a highly effective deterrent against drunk driving that should not be used exclusively as a criminal penalty imposed only after lengthy court proceedings." 128 Cong. Rec. 26949 (1982) (statement of Sen. Danforth). Further illustration comes from the statement that "the main aim of the bill is deterrence [and] [p]unishment is justified after the fact." 128 Cong. Rec. 25966 (1982) (statement of Rep. Howard). Finally, when the Senate debated amendments to 23 U.S.C. § 408, it was noted that "in 1982 we enacted Public Law

97-364 [23 U.S.C. § 408] . . . to prevent, detect and punish drunk driving." 130 Cong. Rec. 18657 (1984) (statement of Sen. Mathias).

There is little question what Congress had in mind when it handed out inducements to the states to pass ALR statutes in order to combat drunk driving. Seasoned prosecutors and astute legislators know that driver's license revocations are among the most effective tools to punish offenders and deter drivers from operating vehicles when drunk. It is in this context that we will analyze the focus of Nebraska's ALR statutes.

Focus of ALR Statutes.

The focus of Nebraska's ALR statutes can be found 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 by driving with an excessive concentration of alcohol in his or her body and *to deter* others from driving while under the influence of alcohol.

(Emphasis supplied.) Thus, the focus of the statutes is ostensibly twofold: to protect the public from unsafe drivers and to deter drivers from operating a vehicle when drunk.

Unlike the majority, I am unable to come to the conclusion that by this statement, the legislative intent is primarily to protect the public and secondarily to deter drunk driving. Moreover, even if the legislative intent to deter was secondary, such an inquiry is irrelevant. The relevant inquiry for our purposes is whether the civil sanction can fairly be characterized as solely remedial. See, *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Even if a particular sanction was intended to deter as a secondary effect, if this secondary effect precludes characterizing the sanction as solely remedial, then the sanction is *punishment* as the U.S. Supreme Court has defined the term. *Austin v. U.S., supra*; *United States v. Halper, supra*.

Let us examine the first stated purpose of the ALR statutes, that is, to protect the public from unsafe drivers. I find nothing in this record that allows one to leap to the conclusion that Hansen is presumptively "a hazard to the health and safety of all persons using the highways" for the next 90 days because he was stopped for a burned out taillight and eventually tested .143 grams of alcohol per 210 liters of breath on a November 1994 evening. If those facts are proved beyond a reasonable doubt in a court of law, then Hansen should be *punished* for the crime of DUI under the laws of the state. However, there is no basis in the ALR statutes or the prior decisions of this court for concluding in every case, regardless of circumstances, that the driver is unsafe for an arbitrary period of 90 days or that recidivism is likely during that period of time.

The underlying premise that every first-offense drunk driver is presumed to be "a hazard to the health and safety of all persons using the highways" for an arbitrary 90-day time period is not based on sound reasoning or any evidence in this record. Notably, the arbitrary length of the administrative law revocation (90 days for a first offender) ensures that it is both longer than necessary to allow the driver time to sober up and become a safe driver—and shorter than necessary to allow any meaningful rehabilitation to occur.

In addition, pursuant to § 60-6,205(4), a license revocation is not effective until 30 days after the date of the arrest in order to allow the offender an opportunity to exercise his or her rights in an administrative hearing. While such a 30-day waiting period is probably constitutionally necessary, it hardly serves the "remedial" goal of swiftly removing an unsafe driver from the highway when he or she is likely to be *the most* unsafe in the hours or days immediately after the arrest.

Moreover, in contrast to several other states that have adopted ALR statutes, our ALR statutes have no requirement of alcohol evaluation, substance abuse treatment, or alcohol abuse education in conjunction with the revocation time period, or as a prerequisite to reinstatement of a revoked license for first- or second-time offenders. Compare Neb. Rev. Stat. §§ 60-6,205 and 60-6,211.05 (Reissue 1993) with Alaska Stat. § 28.35.030(h) (Cum. Supp. 1995) (requiring person convicted

of DUI to satisfy screening, evaluation, referral, and program requirements of authorized rehabilitation agency); Ariz. Rev. Stat. Ann. § 28-692.01(A) (Cum. Supp. 1995) (requiring person convicted of DUI to complete alcohol screening and any necessary additional treatment); Cal. Veh. Code § 23161(b) (West Cum. Supp. 1996); Haw. Rev. Stat. § 286-261(d) (1993) (mandating that offender be referred to certified substance abuse counselor for assessment of offender's alcohol abuse or dependence and need for treatment; if counselor recommends treatment for offender, offender may be ordered to comply); Me. Rev. Stat. Ann. tit. 29-A, § 2502 (West Supp. 1995); and Vt. Stat. Ann. tit. 23, § 1209a (Cum. Supp. 1995) (requiring first-time offenders to submit to alcohol assessment screening to determine whether reinstatement of license should be conditioned on satisfactory completion of therapy program; even if treatment is not ordered, offender must complete alcohol and driving education program at own expense).

If our ALR statutory scheme is really intended to protect the public or remedy the problem of drunk driving in some form, other than swift punishment or deterrence, it is woefully inadequate in that regard.

ALR Solely Remedial?

One does not have to go beyond the plain language of § 60-6,205(1) to determine that our ALR statutes were intended to serve both a remedial and a punitive goal by acting *to deter* drivers from operating a vehicle when drunk. While the deterrence of drunk driving is unquestionably a proper societal goal, a deterrent purpose in a civil sanction *is punishment* as we have come to understand the term. *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Thus, the final inquiry is, notwithstanding the stated punitive purpose and clear punitive effect, whether our ALR statutory scheme is still capable of being fairly characterized as solely serving a remedial purpose. *United States v. Halper, supra.*

The majority relies to some degree on authority from seven other states which have held that their particular ALR statutory schemes do not constitute punishment for double jeopardy

purposes. However, the majority fails to adequately address the relevant issue. It is not whether another state's ALR statutory scheme is considered punitive or remedial in nature, but whether *this* state's ALR statutory scheme can fairly be characterized as solely remedial.

In fact, of the jurisdictions cited by the majority, all administratively suspend a motorist's license for DUI for the same or a lesser length of time and under similar conditions as the concomitant criminal sanction of driver's license suspension for DUI. See Alaska Stat. § 28.15.165(d) (1994). Compare, Ariz. Rev. Stat. Ann. § 28-692.01 with § 28-694 (Cum. Supp. 1995); Cal. Veh. Code § 23160 with § 13352 (West Cum. Supp. 1996); Haw. Rev. Stat. § 286-261 with § 291-4 (1993); La. Rev. Stat. Ann. § 32:414 with § 32:667 (West Cum. Supp. 1995); Me. Rev. Stat. Ann. tit. 29-A, § 2453 with § 2411 (West Supp. 1995); Vt. Stat. Ann. tit. 23, § 1205 (Cum. Supp. 1995) with §§ 1206 (1987) and 1208 (Cum. Supp. 1995). Also, as stated previously, six of the jurisdictions require some type of alcohol evaluation and substance abuse education or treatment as part of their remedial sanctions.

The majority also cites several pre-1989 cases for the propositions that (1) driving a motor vehicle is not a fundamental right, but a privilege granted by the state, and (2) the purpose of license revocation was historically considered to be remedial in nature. The cites to cases that predate *United States v. Halper, supra*, are of minimal assistance in making a particularized assessment of the penalty imposed in *this* case.

The view that it is somehow important to characterize a driver's license as a right or a privilege is misplaced. The U.S. Supreme Court has referred to the revocation of an operator's license, for procedural due process purposes, as an "entitlement," and not as a mere privilege that could be summarily revoked by a state for cause. See *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). This court has acknowledged the U.S. Supreme Court's classification in *Bell* by referring to the revocation of a license as the denial of an entitlement because it oftentimes results in a loss of livelihood to the licensee. See, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *State v. Michalski*, 221 Neb.

380, 377 N.W.2d 510 (1985). Unfortunately, this court continues to revert back to erroneously labeling driver's licenses as privileges, and it does nothing to advance the notion of whether the revocation of a license is considered "remedial" or "punitive" in these post-*Halper* times.

Further, in light of *Halper* and *Austin*, the majority's reliance on *Durfee v. Ress*, 163 Neb. 768, 81 N.W.2d 148 (1957), and *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982), for the proposition that revocation of motorists' licenses has historically been considered a civil action remedial in nature, is outmoded and unhelpful. We are to make a particularized assessment of the penalty imposed, as mandated by the rules of law announced in *Halper* and *Austin*, and the purposes that the penalty may fairly be said to serve.

A particularized assessment of Nebraska's ALR statutes reveals that the administrative sanction (1) is tied directly to the guilt of the accused for the underlying DUI; (2) imposes greater periods of revocation than the concomitant criminal sanction for DUI in many instances; (3) has an arbitrary 90-day license revocation that is longer than necessary for an individual to sober up and become a safe driver, and shorter than necessary for meaningful alcohol rehabilitation to occur; (4) increases the license revocation from an arbitrary 90-day period for first offenders to an arbitrary 1-year period for multiple offenders; and (5) provides for no alcohol evaluation or remedial alcohol education during the revocation period. The ALR statutes are not a model of "remedial" legislation. At least, the Legislature honestly set forth its purpose in § 60-6,205(1) and did not hide the fact that deterring drunk drivers from operating motor vehicles was one of its clear intentions.

Given these characteristics, the driver's license revocation provisions in the ALR statutes cannot be *fairly characterized* as solely serving a remedial purpose and should be deemed punishment as that term is now defined by the U.S. Supreme Court. However, a determination that imposition of an ALR and a subsequent criminal prosecution for the same underlying offense constitutes double jeopardy is not to say that drunk drivers can or will avoid prosecution. As the U.S. Supreme Court noted in *United States v. Halper*, 490 U.S. 435, 450, 109

S. Ct. 1892, 104 L. Ed. 2d 487 (1989):

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct . . . . Nor does the decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the *same proceeding*.

(Emphasis supplied.)

Halper and its progeny simply mean that the government's interest in removing drunk drivers from the road must be advanced within the well-established framework of the U.S. and Nebraska Constitutions.

WHITE, C.J., and FAHRNBRUCH, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. REEDER, APPELLANT.

543 N.W.2d 429

Filed February 2, 1996. No. S-94-848.

1. **Search Warrants: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion.
2. **Search Warrants: Evidence: Motions to Suppress.** A motion to suppress is the appropriate remedy to exclude evidence which has been obtained through an invalid search warrant.
3. **Search Warrants: Evidence: Police Officers and Sheriffs.** Evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate later found to be invalid is nonetheless admissible.
4. **Search Warrants: Probable Cause: Proof.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.
5. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.

6. ____: ____. Generally, there are four methods of establishing the reliability of an informant: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement against his or her penal interest, or (4) the informant's reliability or the reliability of the information given by the informant is established by a police officer's independent investigation.
7. **Search Warrants: Affidavits: Probable Cause.** The test for reasonable reliance on a search warrant is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.
8. **Search Warrants: Police Officers and Sheriffs: Probable Cause.** The test for reasonable reliance on a search warrant is an objective standard of reasonableness which requires officers to have a reasonable knowledge of what the law prohibits.
9. **Search Warrants: Affidavits: Judges: Motions to Suppress.** Suppression of the evidence remains appropriate if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals reversed and remanded with directions to dismiss.

Kirk E. Naylor, Jr., for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This is an appeal by John M. Reeder from the convictions and sentences of the felony offenses of possession of cocaine with intent to deliver and felon in possession of a firearm. At trial, Reeder filed a motion to suppress evidence seized from his residence, claiming that the search warrant executed to search the residence was not based on probable cause. The district court for Platte County overruled Reeder's motion to suppress, concluding that the warrant was based on probable cause. The

district court, in a bench trial, subsequently found Reeder guilty.

Reeder appealed to the Nebraska Court of Appeals, which affirmed. *State v. Reeder*, 95 NCA No. 22, case No. A-94-848 (not designated for permanent publication). The Court of Appeals held that the search warrant was not based on probable cause, but concluded that the evidence seized pursuant to the warrant was nonetheless admissible pursuant to the "good faith" exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Reeder successfully petitioned this court for further review.

Reeder assigns one error to the Court of Appeals' decision. He contends that the Court of Appeals incorrectly applied the good faith exception set forth in *Leon* to prevent the exclusion of the evidence obtained pursuant to the search warrant. We agree with the Court of Appeals that the affidavit in support of obtaining the search warrant failed to establish probable cause; however, we disagree with the Court of Appeals that the *Leon* good faith exception applies to the circumstances of this case. Therefore, the evidence should have been suppressed, and we reverse the decision of the Court of Appeals and remand the cause with directions to vacate Reeder's convictions and dismiss the charges against him.

At 11:06 p.m. on September 26, 1993, a search warrant was issued permitting the search of Reeder, his residence, and a red 1979 Chevrolet van with the license plate number NE 25-G951. Investigator Galen D. Svoboda, a drug investigator for the Nebraska State Patrol, accompanied by two other officers, executed the warrant. The following items were seized as a result of these searches: over 30 grams of cocaine and related drug paraphernalia, a cocaine cutting agent known as inositol, a triple-beam scale, a revolver with ammunition, large firecrackers, and more than $1,000 in cash.

The warrant authorizing the search was based solely on a September 26, 1993, sworn affidavit and application of Investigator Svoboda. The affidavit stated various grounds in support of the issuance of the warrant. Five of the grounds supporting the warrant involved information anywhere from 4 months to 10 years old: (1) In 1983, a wiretap indicated Reeder

was involved in cocaine distribution; (2) in 1990, an informant stated that Reeder was a supplier of drugs; (3) in 1992, a reliable informant stated that Reeder was a cocaine dealer in Columbus; (4) in 1992, another confidential informant stated that Reeder distributed cocaine in Columbus and that the informant had received cocaine from Reeder in the past; the confidential informant also stated that three other parties—David Markovic, a confidential informant known as CI29-09-25-93 (CI), and the CI's close personal friend—had all obtained cocaine from Reeder; and (5) in March 1993, according to another reliable confidential informant, Reeder was a distributor of cocaine in Columbus.

The sixth paragraph of the affidavit pertained to information from the CI regarding alleged current drug activities of Reeder. Paragraph six stated:

> On 09-25-93, affiant received information from Sgt. Todd Thalken of the Columbus Police Department. Thalken had contact with CI29-09-25-93. At this time Thalken believed CI29-09-25-93 to be under the influence of alcohol because Thalken could smell the odor of an alcoholic beverage emitting from CI29-09-25-93. CI29-09-25-93 stated to Thalken, without being prompted or threatened, that there is an individual by the name of John Reeder who lives in an old school house North of Columbus, NE who deals in large quantities of cocaine and is currently in possession of approximately one pound of cocaine in his home. CI29-09-25-93 stated to Thalken that CI29-09-25-93 has purchased cocaine from Reeder in the past but is currently trying to quit using cocaine; that Reeder often goes to Omaha, Ne to a place that fixes motorcycles to get cocaine; that Reeder keeps the cocaine well hidden in his bedroom; Reeder does not use scales to measure off cocaine but, "eyeballs it" and if you want the cocaine weighed off you have to bring your own scale. CI29-09-25-93 stated that Reeder told CI29-09-25-93 that if his place was ever searched it would require a drug dog; that Reeder has threatened people in the past who may give information about his dealings to the Police; and that Reeder has boasted that he

> has a woman who works in the Platte County Courthouse who knows about search warrant affidavits and informs Reeder about the affidavits. Thalken states that CI29-09-25-93 did not actually see this one pound of cocaine but spoke to a close personal friend, who CI29-09-25-93 named to Thalken and is known to affiant. This close personal friend told CI29-09-25-93 that this close personal friend purchased cocaine from John Reeder, at his residence, on 09-23-93 and that Reeder had a "rock" of cocaine about one pound in size. Thalken states that Thalken has know[n] CI29-09-25-93 for many years and that CI29-09-25-93 has never made false statements to Thalken before but that CI29-09-25-93 has never provided substantial information in the past. CI29-09-25-93 also told Thalken that this close personal friend would not assist in any investigation and should not be contacted.

The remainder of the affidavit stated that the "close personal friend" was the same person referred to by the other informants and that this person was known to Investigator Svoboda. The affidavit also stated that Investigator Svoboda had verified Reeder's ownership of the van often parked in front of Reeder's alleged residence and that he had verified the telephone number to the residence. Investigator Svoboda also stated in the affidavit that Reeder's family members advised a Platte County deputy sheriff on an unknown date that Reeder was violent, carried a pistol, and beat his sister. Investigator Svoboda also stated in the affidavit that Reeder's criminal history revealed an assault conviction in 1967 and a conviction of delivery of controlled substances in 1987.

On October 26, 1993, Reeder was charged with four felonies: possession with the intent to deliver a controlled substance—cocaine, failure to affix drug tax stamps on a controlled substance, possession of a firearm by a felon or fugitive, and first degree possession of explosives.

On March 4, 1994, Reeder moved to suppress the evidence obtained pursuant to the search warrant, alleging that the warrant was not based on probable cause. This motion was overruled by the district court, which concluded that the warrant

was based on probable cause.

At a trial before the court, jury trial being waived, Reeder made a continuing objection to the admission of the evidence obtained pursuant to the warrant. The district court found Reeder guilty of possession with intent to deliver a controlled substance—cocaine—and possession of a firearm by a felon or fugitive.

The Court of Appeals reviewed the trial court's overruling of Reeder's motion to suppress and the court's decision to admit the evidence obtained pursuant to the warrant. The Court of Appeals held that the information in the warrant regarding alleged activity from 1983 through May 1993 was stale, that the information provided by the CI was unreliable, and that, therefore, no probable cause existed to justify issuance of the warrant. However, the court concluded that the evidence need not be suppressed because it fell under the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Based on the *Leon* good faith exception, the Court of Appeals affirmed the district court's ruling.

"A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion . . . ." *State v. Grimes*, 246 Neb. 473, 478, 519 N.W.2d 507, 513 (1994). "It is beyond question that a motion to suppress is the appropriate remedy to exclude evidence which has been obtained through an invalid search warrant." *State v. Utterback*, 240 Neb. 981, 984, 485 N.W.2d 760, 766 (1992). However, evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate later found to be invalid is nonetheless admissible. *Leon, supra*.

We agree with the Court of Appeals' holding that the information relating to alleged previous activities of Reeder was stale information that could not be used to support probable cause for the search in question. "Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Hodge and Carpenter*, 225 Neb. 94, 101, 402 N.W.2d 867, 873 (1987). As the Court of Appeals found, the information in the

affidavit of Reeder's alleged prior drug activities was not closely related in time and therefore was insufficient to justify probable cause for the search warrant.

We also agree with the Court of Appeals' holding that the information in the affidavit concerning the CI was insufficient to prove probable cause to justify the issuance of the search warrant.

> When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.

Grimes, 246 Neb. at 479, 519 N.W.2d at 513.

Generally, there are four methods of establishing the reliability of an informant: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement against his or her penal interest, or (4) the informant's reliability or the reliability of the information given by the informant is established by a police officer's independent investigation. *Grimes, supra.*

As the Court of Appeals found, the affidavit provides no substantial basis for establishing the credibility of the CI or of his close personal friend who provided information pertaining to Reeder's alleged drug-related activities. These two had not given reliable information in the past, they were not citizen informants, they did not make definitive statements against any possible penal interest, and no independent investigation as to reliability was conducted by the police. Therefore, as the Court of Appeals found, the affidavit in support of the search warrant failed to establish probable cause.

Although the Court of Appeals was correct in finding that the affidavit failed to establish probable cause, the Court of Appeals erred in determining that the evidence was nonetheless admissible under the good faith exception to the exclusionary rule as set forth in *United States v. Leon*, 468 U.S. 897, 104 S.

Ct. 3405, 82 L. Ed. 2d 677 (1984). As previously stated, under the *Leon* good faith exception, evidence obtained pursuant to an invalid search warrant may nonetheless be admissible if the evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate.

In regard to an officer's reasonable reliance on the invalid warrant, the test for reasonable reliance is whether the affidavit was sufficient to " ' "create disagreement among thoughtful and competent judges as to the existence of probable cause." ' " *State v. Parmar*, 231 Neb. 687, 697, 437 N.W.2d 503, 510 (1989) (quoting *U.S. v. Hove*, 848 F.2d 137 (9th Cir. 1988)). Also, this is an objective standard of reasonableness, which "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 U.S. at 920 n.20. See, also, *United States v. Peltier*, 422 U.S. 531, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975).

Pursuant to *Leon, supra*, suppression of the evidence remains appropriate if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

We find that it was entirely unreasonable for Investigator Svoboda to rely on the affidavit he presented in support of the search warrant. The affidavit simply lacks any information pertaining to the reliability of both the CI and his close personal friend. The affidavit is also lacking in any corroboration to the CI's statement that the close personal friend purchased cocaine 3 days prior to the issuance of the warrant and that Reeder had a "rock" of cocaine about 1 pound in size at the time of the alleged sale.

As the affidavit indicates, the CI was intoxicated at the time he divulged information to Officer Todd Thalken. The CI gave information based on what the close personal friend allegedly had stated to him and then told Officer Thalken that he should

not contact the close personal friend. Officer Thalken could not conclusively state that the CI was a reliable informant. Investigator Svoboda, in his affidavit, also could not conclude that either the CI or the close personal friend were reliable. Instead, he merely stated that he knew both of them.

As to the corroboration by independent investigation, the affidavit failed to contain sufficient information regarding corroboration to support a reasonable reliance on the affidavit. As the Court of Appeals found, the only investigation undertaken by Investigator Svoboda was to obtain incidental information as to Reeder's residence, phone number, and prior criminal history.

It is true that other more reliable informants in the affidavit state in their testimonials that they know the CI and the close personal friend. These informants also state that at the time they gave the information, they knew the close personal friend was receiving drugs from Reeder. However, none of this information relates to any activity conducted by the CI or the close personal friend in the 4 months prior to the warrant issuance date. Moreover, none of the information given by the other informants pertained to the reliability of the CI or the close personal friend.

The Court of Appeals, in its conclusion that the *Leon* good faith exception applied to this case, stated that

> although the affidavit may be lacking probable cause because of a lack of corroboration of the friend's information, the affidavit as a whole creates a good faith belief that Reeder was a drug dealer who had made a very recent sale to a known user and regular customer, i.e., the friend.

State v. Reeder, 95 NCA No. 22 at 15, case No. A-94-848 (not designated for permanent publication). The Court of Appeals misconstrues the standard behind the good faith exception. The standard is not whether an officer had a good faith belief that the defendant was a drug dealer, as the Court of Appeals stated; rather, the standard is whether the officer had a good faith belief that the affidavit submitted in support of obtaining the search warrant was based on probable cause. As previously stated, officers must act within the confines of the law and must, when acting on a reasonable belief, know what the law prohibits.

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The law prohibits the issuance of a search warrant based on an affidavit lacking probable cause. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). Therefore, the affidavit as a whole must create a good faith belief that the affidavit is based on probable cause.

In sum, the information set forth in the affidavit was insufficient to such a degree that Investigator Svoboda was entirely unreasonable in believing that probable cause existed to support the issuance of the warrant. The affidavit fails to set forth any information as to the reliability of the CI's or the close personal friend's statements regarding Reeder's recent drug activities. Investigator Svoboda's failure to set forth in his affidavit any indicia of reliability, combined with the staleness of all other information set forth in the affidavit, prevents any reasonable reliance on a search warrant obtained on the basis of the affidavit. Therefore, the evidence obtained pursuant to the search warrant should have been suppressed.

Because he was convicted upon illegally obtained evidence, Reeder's convictions are reversed. There being no evidence of Reeder's guilt other than that which was seized pursuant to the invalid warrant, this cause is remanded to the Court of Appeals with directions to remand to the district court with directions to vacate Reeder's convictions and dismiss the charges against him.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WRIGHT, J., dissenting.

I respectfully dissent. In my opinion, the majority has misapplied the good faith exception to the exclusionary rule as articulated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

The Court held in *Leon* that evidence need not be suppressed when the police obtain it through objective good faith reliance on a facially valid warrant that is later found to lack probable cause. In applying this exception to the exclusionary rule, it is necessary to consider the objective reasonableness of the officers who provide information material to the probable cause determination. *Id.* The test for objective reasonableness is

whether the affidavit supporting the warrant was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. *Id.*; *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989).

It is particularly disturbing in the present case that the majority gives no weight to the finding of probable cause by the lower court judges in determining whether the officer acted with objective reasonableness. Investigator Svoboda's good faith belief in the existence of probable cause was confirmed by the judge who issued the warrant. The district court judge affirmed this probable cause finding at the suppression hearing. The Court of Appeals held that although the affidavit lacked probable cause, Investigator Svoboda's actions were objectively reasonable. This demonstrates overwhelmingly that Investigator Svoboda was objectively reasonable in believing that the affidavit established probable cause.

In my view, disagreement among thoughtful and competent judges as to the existence of probable cause should be accorded substantial evidentiary weight in any case where the objective reasonableness of an officer's actions is at issue. The purpose of the exclusionary rule is to deter police misconduct. *Leon, supra*. Suppression of evidence obtained pursuant to a warrant should be ordered only in those unusual cases where exclusion will further the purposes of the rule. *Id.* Where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way. *Id.*

In the case at bar, the affidavit creates a reasonable belief that Reeder was a drug dealer who had made a very recent sale to a known user and regular customer. Thoughtful, competent judges disagreed as to whether this affidavit supported a finding of probable cause. The majority cites no evidence of bad faith or recklessness on the part of Investigator Svoboda. Accordingly, I would allow the evidence obtained by the officers and would affirm Reeder's convictions.

CONNOLLY, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DENNIS RYAN, APPELLANT.

543 N.W.2d 128

Filed February 2, 1996. No. S-94-1202.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Criminal Law: Statutes: Words and Phrases.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
5. **Courts: Statutes: Words and Phrases.** A state's highest court may, by authoritative interpretation, put words in a statute as if it had been so amended by the Legislature.
6. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
7. **Constitutional Law: Statutes.** When a statute is susceptible of two constructions, under one of which the statute is unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
8. ____: ____. An overbroad statute should be construed so as to avoid any constitutional problems.
9. **Statutes: Homicide: Intent.** Without the element of malice or mens rea, Neb. Rev. Stat. § 28-304(1) (Reissue 1989), the second degree murder statute, would be of doubtful validity and perhaps unconstitutional.
10. **Criminal Law: Intent.** Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse.
11. **Legislature: Criminal Law: Statutes: Intent.** Legislative silence as to a mental element in a crime already so well defined in common law and statutory interpretation is not to be construed as eliminating that element from the crime.
12. **Criminal Law: Statutes: Intent.** A statute may be construed to include a criminal intent element absent from its face.
13. **Due Process: Criminal Law: Statutes.** Due process of law requires that criminal statutes be clear and that ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment. A construction resulting in unreasonableness as well as

absurd consequences will be avoided.

14. **Constitutional Law: Statutes.** A statute is unconstitutionally vague or overbroad if it proscribes legal as well as illegal conduct.
15. **Criminal Law: Presumptions: Proof.** A person charged with a crime is entitled to a presumption of innocence, and may insist that the State prove his guilt beyond a reasonable doubt.
16. **Criminal Law: Jury Instructions.** Jury instructions which set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime.
17. **Homicide: Intent: Jury Instructions: Appeal and Error.** A jury instruction that fails to include malice as a material element of murder in the second degree is plain error and prejudicial.
18. **Postconviction: Homicide: Intent: Jury Instructions.** When the material element of malice is omitted from the second degree murder jury instruction, a defendant's conviction for second degree murder is constitutionally invalid, and postconviction relief is proper to rectify the constitutionally invalid conviction.
19. **Jurisdiction: Sentences: Appeal and Error.** An appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings.
20. **Judgments: Time.** A void judgment may be attacked at any time in any proceeding.
21. **Postconviction: Waiver: Appeal and Error.** To use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless.
22. **Constitutional Law: Criminal Law: Juries.** The Sixth Amendment provides in criminal prosecutions the defendant's right to an impartial jury. This right to trial by jury is fundamental to the American scheme of justice and includes as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt.
23. **Homicide: Intent: Proof: Juries.** However clear the proof may be, or however incontrovertible may seem to the court to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. The same ruling is applicable to the element of malice in a second degree murder trial.
24. **Homicide: Intent.** Malice is an essential element of the crime of second degree murder, and the absence of malice is not an affirmative defense.
25. **Due Process: Criminal Law: Jury Instructions: Presumptions.** Due process in a trial of a criminal case prohibits a jury instruction which contradicts the presumption of a defendant's innocence or shifts to a defendant the burden of persuasion on an element of the crime charged.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with direction.

J. William Gallup for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Dennis Ryan filed a postconviction relief motion in the district court for Richardson County asking that his conviction and sentence for second degree murder be vacated. He claimed that in its instructions, the trial court had erred in failing to include "malice" as an essential element of the crime for which he was convicted.

Following a hearing, the district court denied Ryan the relief he prayed for and Ryan timely appealed to this court from that judgment.

We find that, as a matter of law, the jury instructions given in Ryan's trial violated Ryan's rights under the U.S. and Nebraska Constitutions and that his conviction and sentence are void. As a result, we reverse the postconviction relief judgment of the district court and remand the cause to that court with direction to vacate its postconviction relief judgment and grant Ryan a new trial.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Barfoot*, 248 Neb. 335, 534 N.W.2d 572 (1995). In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. See *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994).

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

FACTS

The facts underlying this case are fully set forth in Ryan's direct appeal. See *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). The State charged Ryan by information with first degree murder. At trial, Ryan's major defense was his state of mind at the time of the murder. Following a jury trial, Ryan was convicted of second degree murder. He was sentenced to life imprisonment.

The jury was told in instruction No. 7 the material elements of first degree murder, second degree murder, and manslaughter. Section II of instruction No. 7 told the jury:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> (1) That defendant Dennis Ryan, on or about April 30, 1985, did kill James Thimm, either alone or while aiding and abetting another;
>
> (2) That he did so in Richardson County, Nebraska;
>
> (3) That the defendant did so intentionally, but without premeditation.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree in order to convict the defendant of the crime of murder in the second degree.
>
> *If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements of this Section II is true, it is your duty to find the defendant guilty of the crime of murder in the second degree done purposely and maliciously but without deliberation and premeditation, and you shall so indicate by your verdict,* unless you find that the defendant is not responsible by reason of insanity as set forth in Instruction No. 7A.
>
> If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in Section I and that the State has failed to prove any one or more of the material elements in Section II, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall

> then proceed to consider the lesser included offense of manslaughter set out in Section III below.

(Emphasis supplied.)

Through his trial counsel, Ryan filed a direct appeal of his conviction to this court. At that time, the giving of jury instruction No. 7 was not assigned as error. Rather, Ryan assigned that the trial court erred in (1) failing to grant his motion to waive jurisdiction to the juvenile court, (2) receiving into evidence various photographs, (3) excluding certain testimony, (4) sustaining a codefendant's objections to the introduction of two depositions, (5) refusing to give certain requested jury instructions, and (6) imposing an excessive sentence. Upon review of the assigned errors, this court affirmed Ryan's conviction. *State v. Ryan, supra.*

On June 29, 1990, Ryan, represented by different counsel, filed a second amended motion for postconviction relief. Again, the giving of instruction No. 7 was not assigned as error. Rather, Ryan claimed that his conviction was void or voidable because (1) the State "prepped" its witnesses, (2) the court dictated to defense counsel how to prepare defense strategy, (3) the court denied Ryan's motion to transfer his case to juvenile court, (4) Ryan's defense was not allowed to fully cross-examine the State's witnesses, (5) the trial court allowed Ryan to be tried jointly with his father, (6) Ryan's sentence was excessive, and (7) Ryan had ineffective assistance of trial counsel. The district court for Richardson County denied that motion after a hearing. Ryan did not appeal the denial of his second amended motion for postconviction relief.

On September 8, 1994, Ryan, represented by other, new counsel, filed in the district court for Richardson County a postconviction relief motion seeking vacation of his conviction and sentence. In that motion, Ryan focused solely on jury instruction No. 7 and alleged, in substance, that (1) the trial court improperly instructed the jury as to the elements required to be proved by the State in order to convict Ryan of second degree murder, (2) his court-appointed trial counsel was ineffective for failing to object to the trial court's instruction on second degree murder, and (3) his counsel on direct appeal was ineffective in failing to assign as error the trial court's erroneous

jury instruction on second degree murder.

After a hearing, the district court denied Ryan's postconviction relief motion, and Ryan timely appealed to this court.

ASSIGNMENT OF ERROR

Ryan contends that the district court erred in denying his motion to vacate his conviction and sentence.

ANALYSIS

Malice as Element of Second Degree Murder

We have held that it is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). However, the U.S. Supreme Court has held that a state's highest court may, by authoritative interpretation, put words in a statute as if it had been so amended by the Legislature. See *Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948). Although we construe penal statutes strictly, we give penal statutes a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). Moreover, when a statute is susceptible of two constructions, under one of which the statute is unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *Id.* As a result, an overbroad statute should be construed so as to avoid any constitutional problems. *Id.* (citing *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

Without the element of malice or mens rea, Neb. Rev. Stat. § 28-304(1) (Reissue 1989), the second degree murder statute of which Ryan was convicted, would be of doubtful validity and perhaps unconstitutional. Through acceptable statutory construction principles, we have held and continue to hold that under § 28-304(1), malice is a necessary element of second degree murder. By such statutory construction, there can be no question of § 28-304(1)'s validity.

For over a century, Nebraska, by statute, defined second degree murder as the killing of another person purposely and maliciously, but without deliberation and premeditation. See, Gen. Stat. ch. 58, § 4 (1873); Neb. Rev. Stat. § 28-402 (Reissue 1975). In doing so, Nebraska followed the commonly held view in this country that malice is an essential element of murder in the second degree. See 40 C.J.S. *Homicide* §§ 64 and 65 (1991). Operative July 1, 1978, the Legislature adopted the current criminal code, which defined second degree murder as causing the death of a person intentionally, but without premeditation. See § 28-304(1) (Reissue 1989).

We first addressed the elements of second degree murder under the current criminal code in *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). The crime in that case was committed July 22, 1978, 3 weeks after the amendment became effective. The defendant assigned as error that the evidence was insufficient to support the verdict of guilty of second degree murder. We affirmed the trial court, holding that there was sufficient and competent evidence to support the conviction. In the *Clermont* opinion of October 1979, we continued to hold that the essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. In *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), the defendant assigned as error insufficient evidence to support a second degree murder conviction. In affirming the conviction, we recognized the discrepancy between our previous holding in *Clermont* and the strict reading of § 28-304(1). This court construed § 28-304(1) to its most reasonable and valid construction by stating:

> Section 28-304(1) provides: "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." In *State v. Clermont* . . . this court said: "The essential elements in the crime of murder in the second degree are that the killing be done *purposely and maliciously.*" We also said in *State v. Clermont* . . . "*The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without*

just cause or excuse . . . ."

(Emphasis supplied.) *State v. Rowe*, 214 Neb. at 689–90, 335 N.W.2d at 312–13.

Proper statutory construction of § 28–304(1) mandates that malice remain an element of second degree murder. As a general rule, statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978). Legislative silence as to a mental element in a crime already so well defined in common law and statutory interpretation is not to be construed as eliminating that element from the crime. See, *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

In *Morissette v. United States*, the defendant was charged with stealing and converting property of the United States in violation of 18 U.S.C. § 641, which statute is silent as to felonious intent. The trial court, over Morissette's objection, did not instruct the jury on felonious intent. The U.S. Court of Appeals for the Sixth Circuit held that the trial court did not err in refusing to instruct the jury on intent, because the statutory offense did not require an element of criminal intent. The U.S. Supreme Court noted that the mental element of intent was longstanding and well defined in common law, and thus, the Court reversed the lower court and held that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced. The Court described the government's request for a strict statutory construction without reading the element of intent as follows:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

342 U.S. at 263. Malice, like intent, is an element concerning the state of mind of the accused. *State v. Rowe, supra.* Malice, a material element of second degree murder dating back to the creation of the crime in the Nebraska Criminal Code, is a material element founded in statutory and common law. See *id.*

Legislative silence cannot do away with such a basic premise of what constitutes second degree murder. Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act, in connection with its manifest purpose and design. Thus, a statute may be construed to include a criminal intent element absent from its face. *State v. Conner*, 292 N.W.2d 682 (Iowa 1980).

Due process of law requires that criminal statutes be clear and that ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment. *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993). A construction resulting in unreasonableness as well as absurd consequences will be avoided. *State v. Conner, supra.*

In regard to § 28-304(1), we have held that when the express language of the statute does not make the elements of the crime clear, the express language of the statute is insufficient. See *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

A statute is unconstitutionally vague or overbroad if it proscribes legal as well as illegal conduct. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). Mens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct. See *U.S. v. X-Citement Video, Inc.*, ____ U.S. ____, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). Construing the legislative silence of § 28-304(1) as eliminating malice as a material element of second degree murder would result in the absurd consequence of an overbroad murder statute making certain legal acts illegal.

For example, law enforcement officials forced to kill in the line of duty cause the death of another person intentionally. The

law enforcement official, however, does not commit a wrongful act but acts with just cause. Similarly, the corrections employee or agent designated to carry out a criminal's sentence of death causes the death of another person intentionally. The prosecutor who successfully persuades a court to sentence a defendant to death causes the death of another person intentionally. Ordinarily, a court will not impose a death sentence unless a prosecutor has requested such sentence and has also adduced sufficient evidence to support the request. Even Nebraska's Board of Pardons, which includes Nebraska's Governor, Attorney General, and Secretary of State, causes the death of another person intentionally when the board's members turn down a reduction of sentence requested by an inmate who is awaiting execution. If malice is not read into § 28-304(1), these individuals carrying out state duties would be in violation of that statute unless the statute is properly construed.

If malice is not read into § 28-304(1), individuals who commit legal acts, though punishable under the statute, would have to defend themselves through an affirmative defense of justification. See Neb. Rev. Stat. § 28-1416 (Reissue 1989). This results in a shifting of the State's burden of proving every element of the crime charged in a criminal case. As a practical matter, the defendant would be forced to forego his or her presumption of innocence and be required to produce evidence that he or she in causing the death of a person acted lawfully. See *State v. Grimes, supra*. A person charged with a crime is entitled to a presumption of innocence and may insist that the State prove his guilt beyond a reasonable doubt. See *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

When the rules of proper statutory construction are applied to § 28-304(1), that statute, though silent as to the longstanding material element of malice, must be read to include malice as an element of second degree murder in order to preserve a defendant's right to his or her presumption of innocence.

As previously stated, the material elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. These material elements are not new. Rather, they are over a century old and have always been the

material elements of second degree murder in Nebraska and remain the material elements of the crime after the adoption of the current criminal code. See, Gen. Stat. ch. 58, § 4 (1873); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979).

Jury Instruction's Omission of Malice as Material Element

In the case at bar, the trial court instructed the jury that the material elements of murder in the second degree are that the killing be done intentionally, but without premeditation. Such a jury instruction does not correctly instruct the jury of the material elements of second degree murder because it omits that the killing must be done maliciously.

The trial court also instructed the jury that if the State proved beyond a reasonable doubt that Ryan killed intentionally, but without premeditation, *then the jury had a duty* to find Ryan guilty of second degree murder done purposely and *maliciously*. Although the trial court recognized that malice is an essential element of second degree murder, its instruction did not require the jury *to find* whether Ryan killed with malice. Rather, the instruction commanded that if the jury determined that Ryan killed intentionally, but without premeditation, then the jury had a duty to find that he acted purposely and maliciously. As worded, the jury instruction requires the jury to presume malice if it finds that the killing was done intentionally.

Also as worded, the jury instruction does not require the State to prove each material element of second degree murder beyond a reasonable doubt. By ordering the jury to presume that Ryan acted with malice, a material element of the crime of second degree murder, the instruction violated Ryan's 14th Amendment rights to due process. See, *Francis v. Franklin*, 471

U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). That violation was prejudicial to Ryan.

We have previously held that jury instructions which set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime. *State v. Williams, supra*. We have also previously held that a jury instruction that fails to include malice as a material element of murder in the second degree is plain error and prejudicial. See, *State v. Williams, supra*; *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). When the material element of malice is omitted from the second degree murder jury instruction, a defendant's conviction for second degree murder is constitutionally invalid and postconviction relief is proper to rectify the constitutionally invalid conviction. See, *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995); *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995).

PROCEDURAL DEFAULT

The State contends that Ryan's motion must be overruled because it is procedurally barred due to his prior direct appeal and his previous unsuccessful motion for postconviction relief which he did not appeal. As previously stated, however, the omission of malice as a material element to the crime of second degree murder is plain error and prejudicial. A judge's instructions to the jury as to the law and how the evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities of our legal system. Errors in such matters may go to the heart of the question of guilt. See *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995).

An appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). Moreover, the defendant's conviction was constitutionally infirm and, therefore, void ab initio. See, *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984); *State v.*

Ewert, 194 Neb. 203, 230 N.W.2d 609 (1975). A void sentence is no sentence. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990). It has been longstanding law in Nebraska that a void judgment may be attacked at any time in any proceeding. See *State v. Ewert, supra*. Thus, to use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless. *State v. Plant, supra*.

HARMLESS ERROR ANALYSIS

The State, apparently laying aside that the burden is upon it to prove every element of the crime charged, argues that the erroneous jury instruction was harmless error because Ryan did not produce evidence to show a lack of malice. Ryan, however, did present evidence at trial that he was under "mind control" during the crime and " 'was not acting on his own free will.' " *State v. Ryan*, 226 Neb. 59, 72, 74, 409 N.W.2d 579, 588, 589 (1987).

The Due Process Clause of the 14th Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Francis v. Franklin, supra*.

In *Sandstrom v. Montana*, 442 U.S. 510, 512, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), the U.S. Supreme Court addressed whether, in a case in which intent is an element of the crime charged, the jury instruction, " 'the law presumes that a person intends the ordinary consequences of his voluntary acts,' " violates the 14th Amendment's requirement that the State prove *every* element of a criminal offense beyond a reasonable doubt. The Court held that the challenged jury instruction had the effect of relieving the State of the burden of proof on the critical question of petitioner's state of mind. *Id.* In *Sandstrom*, the Court stated:

> [A] conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every

> element of the crime," and would "invade [the] factfinding function" which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," [citation omitted], and defendant was deprived of his constitutional rights . . . .

442 U.S. at 523.

The Sixth Amendment provides in criminal prosecutions, such as in Ryan's case, the defendant's right to an impartial jury. This right to trial by jury is fundamental to the American scheme of justice and includes as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt. See *Sparf and Hansen v. United States*, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895). The Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, then leave it to the court to determine whether the defendant is guilty of all elements beyond a reasonable doubt. The jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). However clear the proof may be, or however incontrovertible may seem to the court to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952) (quoting Judge Andrews in *People v. Flack*, 125 N.Y. 324, 26 N.E. 267 (1891)). The same ruling is applicable to the element of malice in a second degree murder trial.

Assuming Ryan's jury could have ignored the instruction's command that the jury presume malice and found Ryan guilty because he acted with malice, we cannot be certain that this is in fact what the jury did do. See *Sandstrom v. Montana, supra.*

In *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), the U.S. Supreme Court applied a harmless error analysis to a jury instruction that instructed the jury to presume malice if the State proved beyond a reasonable doubt that a killing had occurred. The "presumption" instruction stated:

> " 'All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.' "

478 U.S. at 574.

The facts in *Rose v. Clark*, however, are significantly distinguishable from the case at bar. In *Rose v. Clark*, 478 U.S. at 574–75 n.2, the trial court also instructed the jury:

> "The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has . . . proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense."

The Court determined that, based upon the record as a whole, the jury instruction to presume malice was not the kind of error that automatically required reversal of an otherwise valid conviction. *Rose v. Clark, supra.* The jury in Ryan's trial was not instructed that the State had to prove beyond a reasonable doubt that Ryan acted with malice. This is significant when considering that the Court further stated in *Rose v. Clark* that

when a jury is instructed to presume malice from predicate facts, it *still must find the existence of those facts beyond a reasonable doubt.*

In the trial of Ryan, the jury was not instructed that malice is a material element of the crime of second degree murder. The Ryan jury was never instructed to determine whether malice existed. The jury was never instructed to deliberate or consider whether Ryan acted with malice. The jury was instructed only that if it found that Ryan, either alone or while aiding and abetting another, did kill James Thimm on or about April 30, 1985, in Richardson County and did so intentionally, but without premeditation, then it had a duty to find Ryan guilty of murder in the second degree done purposely and maliciously. Clearly, the instruction ordered the jury to presume malice without considering it to be a material element of the crime. We presume that juries follow their instructions. See *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). A reasonable juror in the Ryan trial would never consider the issue of malice and whether the State produced evidence to prove beyond a reasonable doubt that element of second degree murder, but would follow the court's instruction to find that Ryan acted maliciously if he acted intentionally but without premeditation.

An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is simply irrelevant. *Connecticut v. Johnson*, 460 U.S. 73, 103 S. Ct. 969, 74 L. Ed. 2d 823 (1983). In Ryan's case, the record conclusively shows that Ryan was convicted of second degree murder without the jury having to find that the State proved beyond a reasonable doubt a material element of the crime of second degree murder, malice. Such an error deprived Ryan of a constitutional right so basic to a fair trial that the infraction can never be treated as harmless error. See, *id.*; *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

AFFIRMATIVE DEFENSE OF INSANITY

We do note that the court instructed the Ryan jury as to the affirmative defense of insanity in jury instruction No. 7A. The jury was instructed to find Ryan not responsible by reason of insanity if Ryan proved by a preponderance of the evidence that he did not have the mental capacity to understand the nature and quality of his act, or to distinguish between right and wrong with respect to it, or to know that such act was wrong and deserved punishment.

In *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the U.S. Supreme Court addressed the constitutionality of burdening a defendant in a New York second degree murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law. The *Patterson* Court held that once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence *including the evidence of the defendant's mental state*, a criminal statute may mandate that the defendant prove the affirmative defense . . . by a preponderance of the evidence. The Court further stated:

> We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt *all* of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

(Emphasis supplied.) 432 U.S. at 210.

In so holding, the Court distinguished *Patterson* from *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). In *Mullaney*, 421 U.S. at 684, the court addressed whether a Maine statute requiring a defendant charged with murder to prove that he acted " 'in the heat of passion on sudden provocation' " in order to reduce the homicide charge to manslaughter comported with the due process requirement to prove beyond a reasonable doubt every

fact necessary to constitute the crime charged. The trial court instructed the jury that " 'malice aforethought is an essential and indispensable element of the crime of murder,' " without which the homicide would be manslaughter. 421 U.S. at 686. The jury was further instructed, however, that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The defendant successfully petitioned in federal court for a writ of habeas corpus to set aside his murder conviction. In granting habeas corpus relief, the federal court held that the prosecution must prove malice beyond a reasonable doubt. The Supreme Court, in affirming the federal court's grant of habeas corpus relief, held that the result in a case where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. The Court further stated:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.

421 U.S. at 703–04.

The *Patterson* Court found that *Mullaney* was distinguishable because in *Mullaney* the defendant was required to prove an element of the crime, whereas in *Patterson*, extreme emotional disturbance was not a part of the definition of the crime.

Thus, while a defendant may be required to prove by a preponderance of the evidence an affirmative defense, a defendant may not be required to assume the burden of disproving the existence of an essential element of a crime.

Malice is an essential element of the crime of second degree murder, and the absence of malice is not an affirmative defense. The State must prove every ingredient of an offense beyond a reasonable doubt, and it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause. *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). See, *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993); *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).

Accordingly, the State may not constitutionally rely upon the affirmative defense of insanity as a means of addressing the material element of malice in a trial for second degree murder because it relieves the State from proving beyond a reasonable doubt the defendant's guilt of each and every essential element of the crime, particularly malice.

Due process in a trial of a criminal case prohibits a jury instruction which contradicts the presumption of a defendant's innocence or shifts to a defendant the burden of persuasion on an element of the crime charged. See, *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994); *State v. Gatson*, 244 Neb. 231, 505 N.W.2d 696 (1993); *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991). Thus, the affirmative defense instruction cannot cure the court's failure to instruct the jury to find whether the State proved beyond a reasonable doubt each element of the crime charged.

A basic foundation of our criminal justice system is that the accused is presumed innocent and the State must prove beyond a reasonable doubt each element of the crime charged. The record reflects that Ryan, charged with a horrific crime, was not accorded the presumption of innocence. The State was not required to prove beyond a reasonable doubt each element of the crime with which Ryan was convicted and for which a life sentence was imposed. We cannot ignore or excuse a trial error that strikes at the foundation of our criminal justice system and which was prejudicial to Ryan.

CONCLUSION

As a result of the prejudicial jury instructions, Ryan's trial was rendered fundamentally unfair in violation of the U.S. and Nebraska Constitutions. We must and do reverse the postconviction relief judgment of the district court and remand the cause to that court with direction to vacate its postconviction relief judgment and grant Ryan a new trial on the second degree murder charge.

REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., concurring.

Although I vote for the majority opinion, I, nevertheless, write separately to address some issues raised by the dissenting opinions.

The dissenters correctly contend that there are only statutory crimes. Even so, the elements of statutory crimes are interpreted by common law. One dissenter acknowledges this by stating: "Because there are no common-law crimes in this state, we must resort to only common-law definitions where general terms are used to designate crime."

The majority does not chart new ground by finding a common-law element in a statutory crime. We have required the State to prove beyond a reasonable doubt the common-law element of "without consent" in order to convict a defendant of the crime of robbery under Neb. Rev. Stat. § 28-414 (Reissue 1964). See *State v. McClarity*, 180 Neb. 246, 249, 142 N.W.2d 152, 154 (1966). One dissenter relies on false imprisonment as an example of where we do not read into the statutory crime necessary elements in order to avoid construing a lawful arrest as false imprisonment. However, we define false imprisonment as the unlawful restraint of a person without his consent either with or without process of law. *Grebe v. State*, 113 Neb. 327, 202 N.W. 909 (1925). The statutory definition of false imprisonment does not contain the terms "unlawful" or "without consent." See Neb. Rev. Stat. §§ 28-314 and 28-315 (Reissue 1989). This court, however, necessarily reads the terms into the statutory crime of false imprisonment.

As to second degree murder, this court has long recognized "malice" as a material element of the crime. Thus, we did not add an element by "judicial fiat." Rather, the majority has held

that legislative silence as to a long-held material element of a crime did not, in fact, eliminate that material element from the crime.

The dissenters look to the State of Washington's Supreme Court for guidance on how Nebraska's second degree murder should be construed. Assuming the opinion is relevant to Nebraska law, *State v. McCullum*, 98 Wash. 2d. 484, 656 P.2d 1064 (1983), is not persuasive. In *State v. McCullum*, the appellant claimed that the jury instruction as to his affirmative defense of self-defense improperly placed the burden of proof upon the defendant. The Washington Supreme Court agreed with the appellant and held that because the legislature had not clearly imposed the burden of proving self-defense on criminal defendants, the obligation to prove the absence of self-defense remained with the prosecution. It is important to realize that *State v. McCullum* is an affirmative defense case and not a statutory construction case.

It is true that *State v. McCullum* mentions that the former Washington first degree murder statute which provided that "a killing was murder or manslaughter, unless it was 'excusable or justifiable,' " was amended to omit the " 'excusable or justifiable' " language. 98 Wash. 2d at 491, 656 P.2d at 1069. The Washington Supreme Court accepted the plain language of the statute. The plain language of the amended statute, however, did not omit an essential element, because the State of Washington defines "intent" as acting " 'with the objective or purpose to accomplish a result which constitutes a crime.' " 98 Wash. 2d at 495, 656 P.2d at 1071. The Washington Supreme Court held that, given the Washington statutory definition of intent, a person acting in self-defense cannot be acting intentionally as defined by Washington statutes.

Nebraska does not, however, follow Washington statutory law. In Nebraska, intent is acting willfully or purposely and not accidentally or involuntarily. See *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). The Nebraska definition of intent does not resolve the ambiguities left by the silent omission of the element of malice in the printed language of Neb. Rev. Stat. § 28-304 (Reissue 1989). Therefore, the Washington Supreme Court case is significantly distinguishable and not applicable to

the reasons why we have continuously held that malice is an essential element of § 28-304.

One of the dissenters contends that Ryan's jury "was instructed that they must find that Ryan acted with the requisite *criminal intent* as a material element of the crime." I do not agree that such instruction overcomes the omission of malice as an essential element of second degree murder. Jury instruction No. 11, referred to by the dissenter, does not define "criminal intent." Rather, that instruction instructs the jury to determine whether Ryan had the requisite "criminal intent" *as required by jury instruction No. 7.* Jury instruction No. 7 instructed the jury that among the material elements that the State must prove beyond a reasonable doubt is that Ryan did kill "intentionally, but without premeditation." Jury instruction No. 10 defined "intentionally" as "willfully or purposely and not accidentally or involuntary." As stated earlier, that definition of "intentionally" does not resolve the ambiguities left by the silent omission of the element of malice in the printed language of § 28-304.

The majority opinion states that "[i]f malice is not read into § 28-304(1), individuals who commit legal acts, though punishable under the statute, would have to defend themselves through an affirmative defense of justification." The dissenters claim that the public officials need merely raise that they are statutorily protected. The dissenters also argue that it is not constitutionally infirm to require defendants to bear a burden of production. The dissenters' analysis, however, places upon the defendant the burden of adducing evidence to prove the absence of a material element of a crime. To ignore the statute's overbreadth by requiring the defendant to raise, for the first time before the jury, the absence of a material element of a crime as an affirmative defense would not accord the defendant the presumption of innocence which is a basic foundation of our criminal justice system. It must be remembered that the burden is upon the State to prove beyond a reasonable doubt each essential element of a crime and that the burden never shifts. See *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

One of the dissenters states: "[E]ach and every statute in a criminal code ought to be construed to reach only criminal conduct, that is, conduct which is unlawful, unjustified, or inexcusable." This is exactly the reason that this court has construed § 28-304 to include the element of malice—so that the criminal conduct of second degree murder is unlawful and without just cause or excuse. Furthermore, as articulated in the majority opinion, malice is an element which a jury, before convicting a defendant, must find that the State proved beyond a reasonable doubt. An appellate court cannot in lieu of the jury determine whether the State proved an essential element of a crime when the jury did not even address whether the State proved beyond a reasonable doubt that essential element.

Finally, a dissenter argues that justice is not served by the majority's holding. The evidence indeed may be overwhelming that Ryan acted with malice. However, a jury must make that determination, not a trial court, unless a jury is waived. In a case such as Ryan's, an appellate court can only review the case to assure that a defendant was given all the rights to which that defendant was entitled at trial. In *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976), the U.S. Supreme Court addressed whether a defendant may enter a voluntary plea of guilty to a charge of second degree murder without being informed that intent to cause the death of his victim was an element of the offense. The Court assumed that the prosecutor had overwhelming evidence of guilt available. Nevertheless, the Court held that the guilty plea was not voluntary in a constitutional sense and that, in fact, the charge of second degree murder was never formally made because the defendant was not advised of an essential element of the crime. The Court further stated that nothing in the trial court record could serve as a substitute for either a finding after trial, or a voluntary admission, that the defendant had the requisite intent. See *id.*

It would be well to recall the words of Justice Oliver Wendell Holmes, Jr., who, in referring to the U.S. Supreme Court, stated that "[t]his is a court of law . . . not a court of justice." The majority opinion is in tune with the U.S. and Nebraska Constitutions in requiring the State to prove to a jury, beyond a

reasonable doubt, that a defendant is guilty of each and every element of the crime charged. Ryan, charged with second degree murder, was convicted by a jury that was not instructed upon or required to address whether the State proved beyond a reasonable doubt the essential element of malice. The Constitutions and the laws of the United States and Nebraska require that Ryan's conviction of second degree murder be overturned and that he be granted a new trial.

One of the fundamental reasons that courts exist is to protect a citizen from the arbitrary acts of government. Every defendant, regardless of the brutality of his or her criminal act, is entitled to the presumption of innocence until a jury finds the defendant guilty of each and every element of the crime charged. Therefore, any holding, other than the holding reached by the majority opinion, would deprive Ryan of a fair and full criminal jury trial, which is guaranteed to all defendants under the U.S. and Nebraska Constitutions.

GERRARD, J., dissenting.

Because this court holds, as a matter of law, that the jury instructions given in Ryan's trial violated his rights under the U.S. and Nebraska Constitutions, I am compelled to dissent and write separately.

It is obvious that the Legislature, in revising the Nebraska Criminal Code in 1977, intended to remove malice, the lack of just cause or excuse, as an element of second degree murder. As a corollary to that revision, the Legislature had previously set forth a procedure in the criminal code whereby a defendant could raise justification or excuse as an affirmative defense in cases where the facts warrant such a defense. For the reasons that follow, I do not agree with the majority's assertion that the legislative act, which affirmatively removed malice as an element of second degree murder, creates "the absurd consequence of an overbroad murder statute making certain legal acts illegal."

Furthermore, requiring a defendant to raise the issue of justification or excuse as defined by our statutes, Neb. Rev. Stat. §§ 28-1406 through 28-1416 (Reissue 1989), does not unconstitutionally shift the State's burden of proving every

element of the crime charged in a criminal case.

Finally, even if Ryan were due a jury instruction explicitly stating that the jury needed to find Ryan acted with malice, on the facts in this case, not receiving such an instruction was clearly harmless error.

I. MALICE AS ELEMENT OF SECOND DEGREE MURDER

The majority opinion asserts that without the element of malice or mens rea, the second degree murder statute of which Ryan was convicted would be of doubtful validity and, perhaps, unconstitutional. I take exception with this underlying proposition, set forth by the majority, for several reasons.

1. Statutory Construction

Neb. Rev. Stat. § 28-304(1) (Reissue 1989) defines second degree murder as "caus[ing] the death of a person intentionally, but without premeditation." Malice is the intentional doing of a wrongful act without just cause or excuse. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

The meaning of the word "malice" added to the statutory text of § 28-304(1) adds nothing to the statutory definition of second degree murder which would not exist through the use of well-established principles of statutory construction. Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *Id.*

(a) Presumption That Legislature Knows the Law

There are no common-law crimes in Nebraska. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910). Within constitutional boundaries, the Legislature is empowered to define a crime. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

In construing a penal statute, a court cannot supply language which is absent from the statutory definition for a criminal offense. *State v. Schaaf, supra.* Because there are no common-law crimes in this state, we must resort to only common-law definitions where general terms are used to designate crime. *State v. Hauck*, 190 Neb. 534, 209 N.W.2d 580 (1973); *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960).

The Legislature is presumed to have known the preexisting law, and in enacting an amendatory statute, we are compelled to conclude that the language was intentionally changed for the purpose of effecting a change in the law itself. *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980).

(b) Revisions to Criminal Code

Nebraska, like many other states, made significant revisions to its criminal code beginning in the early 1970's. In 1972, L.B. 8, a proposed complete revision of the Nebraska Criminal Code, first came before the Judiciary Committee. In 1977, after much study and debate, the Legislature passed 1977 Neb. Laws, L.B. 38, the framework for what is now the Nebraska Criminal Code. The only change effected by the 1977 criminal code revision on our homicide statutes was to remove from our former second degree murder statute the requirement that second degree murder is a killing done "purposely and maliciously, but without deliberation and premeditation," replacing it with the requirement that murder in the second degree is causing the death of another person "intentionally, but without premeditation." Compare Neb. Rev. Stat. § 28-402 (Reissue 1975) with § 28-304. In contrast, the 1977 revision of the criminal code left undisturbed the requirement that malice is an element of first degree murder. Compare Neb. Rev. Stat. § 28-401 (Reissue 1975) with Neb. Rev. Stat. § 28-303 (Reissue 1989). In addition, the revised manslaughter statute continued to specifically require that manslaughter is a killing done without malice. Compare Neb. Rev. Stat. § 28-403 (Reissue 1975) with Neb. Rev. Stat. § 28-305 (Reissue 1989).

Thus, it is clear that the Legislature, in the 1977 revision of the criminal code, contrary to the majority's assertion, was not

silent as to whether malice remained an element of second degree murder. By removing malice from the statutory text of only the second degree murder statute, the Legislature acted affirmatively with the intention of changing only the second degree murder statute and eliminating malice as an element of that particular crime. The effect of this change can only be examined within the context of the entire criminal code.

In 1969, the Legislature enacted Nebraska's first justification statute, the "Nebraska Self-Defense Act," Neb. Rev. Stat. § 29-114 (Cum. Supp. 1969). *State v. Goodseal*, 186 Neb. 359, 365, 183 N.W.2d 258, 262 (1971). Prior to that time, self-defense and other justification defenses in homicide cases were defined by the common law in this state. This court declared § 29-114 unconstitutional in *State v. Goodseal, supra*. In response, the Legislature immediately drafted what was then the justification statutes from the Model Penal Code into 1971 Neb. Laws, L.B. 895. Judiciary Committee Hearing, L.B. 895, 82d Leg., 1st Sess. 1-6 (April 13, 1971). This bill became law in 1972 and is currently codified at §§ 28-1406 through 28-1416.

The effect of this legislation was to change self-defense and other justifications or excuses for the use of deadly force from common-law defenses to statutorily defined affirmative defenses. See § 28-1416(1). The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove beyond a reasonable doubt. See, *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

As a practical matter, the evidence necessary to raise an affirmative defense may be adduced either by the defendant's witnesses or in the State's case in chief without the necessity of the defendant presenting evidence. A defendant is not required to plead and give notice of an affirmative defense of justification or self-defense. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986). The defendant need only adduce more than a scintilla of evidence to satisfy this initial burden. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992).

In this context, the effect of the legislative act, which affirmatively removed malice as an element of second degree murder within a short time after the Legislature statutorily defined justification defenses, was to relieve the prosecution of an unnecessary burden in those cases where justification or self-defense was not at issue. In other words, Nebraska law intended to treat an accused who intentionally, but without premeditation, killed another as one guilty of second degree murder unless and until the accused raised the issue of just cause or excuse. Once the accused raises the issue of justification, then the burden is on the State to disprove beyond a reasonable doubt the existence of justification for the use of deadly force.

Instructive on this issue is *State v. McCullum*, 98 Wash. 2d 484, 656 P.2d 1064 (1983). The State of Washington adopted revisions to its criminal code and, in particular, its homicide statutes in 1975. In *McCullum*, the defendant claimed the trial court's jury instruction unconstitutionally shifted the burden of proof concerning his claim of self-defense. In analyzing the statutory allocation of burden of proof as to self-defense, the Washington Supreme Court first found that under their former criminal code, the state had the burden of proving, beyond a reasonable doubt, the absence of self-defense in a murder prosecution. Washington's former first degree murder statute included the provision that a killing was murder unless it was justifiable or excusable. This language was removed by the Washington Legislature in 1975. In addition, the legislature made self-defense an affirmative defense to homicide in the 1975 revisions to Washington's criminal code.

The court in *McCullum* reasoned that when the legislature removed the language, "unless it was 'excusable or justifiable' " from Washington's former murder statute, it did not relieve the state of its burden to prove, beyond a reasonable doubt, that a killing was without justification or excuse, when at the same time the legislature made self-defense an affirmative defense without allocating a burden of proof to the defendant. *Id.* at 491, 656 P.2d at 1069.

As a matter of statutory construction, the Washington court presumed that the legislature did not engage in a meaningless

act by removing the language of justification or excuse from the former murder statute. Thus, the court concluded that with these changes in the criminal code, the legislature intended to relieve the prosecution of the necessity of pleading the absence of self-defense.

> [T]he Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be involved in each case. Once the issue of self-defense is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt.

Id. at 493-94, 656 P.2d at 1070.

I find the reasoning of the Washington Supreme Court to be persuasive in the instant case. It seems clear that the Nebraska Legislature, in amending our second degree murder statute, intended to remove the words "purposely" and "maliciously" and, instead, define second degree murder as intentionally (as that word must be understood within the context of the criminal code) causing the death of another, without premeditation.

Moreover, the Legislature, by making justification or excuse for the use of force a *statutory* defense, intended to treat any intentional killing as unlawful unless the defendant, by any means possible, raised the issue of justification or excuse. If any effect is to be given the legislative act of removing malice from Nebraska's second degree murder statute, it must be that, as in Washington, the Legislature intended to relieve the prosecution of the burden of pleading and proving the lack of justification or excuse when the defendant has not first raised the issue.

(c) § 28-304(1) Is Not Unconstitutionally Overbroad

A series or collection of statutes pertaining to a certain subject matter, statutory components of acts which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

The majority asserts that malice must be inserted as a material element of second degree murder to avoid "the absurd

consequence of an overbroad murder statute making certain legal acts illegal." In support, the majority claims law enforcement officers forced to kill in the line of duty, prosecutors who successfully persuade a court to sentence a convicted murderer to death, the executioner who carries out any such sentence, and members of the Nebraska Board of Pardons could possibly be charged with second degree murder when performing their respective governmental duties.

However, the mere fact that one is a public officer raises the issue of justification for the use of deadly force. Nebraska's homicide statutes and justification for the use of force statutes must be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of our criminal code are consistent, harmonious, and sensible.

Thus, even though a public officer may intentionally, but without premeditation, take the life of another, the operation of § 28-1408, justification for the use of force in execution of a public duty, would require that, merely because an individual is a public officer, the State must prove, beyond a reasonable doubt, that such public officer was acting outside his or her duties or functions or outside the judgment or order of a competent court or tribunal. Clearly, police officers, corrections officials, members of the Nebraska Board of Pardons, and, for that matter, judges who sentence first degree murderers to death and Supreme Court justices who set execution dates, do not need malice inserted into the second degree murder statute to protect them in carrying out their public function.

It is axiomatic that a criminal code is only intended to proscribe criminal conduct. Thus, each and every statute in a criminal code ought to be construed to reach only criminal conduct, that is, conduct which is unlawful, unjustified, or inexcusable. The necessary corollary to this axiom is that when a criminal statute proscribes intentional conduct, it can only mean that the statute proscribes intentional conduct which is unlawful, unjustified, or inexcusable, in other words, intentional conduct done with a criminal intent.

This is precisely the manner in which the Legislature has directed the courts to construe the criminal code. Neb. Rev.

Stat. § 28-102 (Reissue 1989) delineates the purposes and principles of construction for the criminal code. It states, "The general purposes of the provisions governing the definition of offenses are: (1) To forbid and prevent conduct that *unjustifiably and inexcusably* inflicts or threatens substantial harm to individual or public interests . . . ." (Emphasis supplied.) Thus, the criminal code is only meant to reach intentional conduct, done with a criminal intent, that is not justified or excused by the statutory defenses contained in the criminal code.

Furthermore, the jury in this case was instructed that it must find that Ryan acted with the requisite *criminal intent* as a material element of the crime, not some abstract or undefined intent. Instruction No. 11 stated, in pertinent part:

> Intent or purpose is a mental process and it therefore generally remains hidden within the mind where it is conceived. . . . It may, however, be inferred from the words and acts of each defendant and from the facts and circumstances surrounding his conduct. . . . It is for you to determine from all of the facts and circumstances in evidence whether or not each defendant had the *criminal intent or purpose required* by [the] Instruction[s] [concerning either first degree murder, second degree murder, or manslaughter]. If you have any reasonable doubt with respect to either, with regard to a defendant, you must find the defendant not guilty of murder in the first degree or the lesser included offense of murder in the second degree; remembering that you must consider the guilt or innocence of each defendant individually.

(Emphasis supplied.) Accordingly, contrary to the majority's assertion, the jury was informed that it is only criminal intentional conduct which can support a guilty verdict and that if it was to find Ryan guilty, it must find the existence of criminal intent with respect to Ryan's conduct beyond a reasonable doubt.

Thus, taken in its proper statutory context, § 28-304(1) can only mean that second degree murder is intentionally, meaning with the requisite criminal intent, but without premeditation, causing the death of another—unless such intentional act is justified or excused under §§ 28-1406 through 28-1416. It is

incumbent upon the defendant to raise a justification defense if such a defense exists in a case, and it is not necessary for this court to judicially add the element of malice to the second degree murder statute after the Legislature revised the criminal code in the 1970's.

Furthermore, there is a practical problem if the majority's position on overbreadth is taken to its logical conclusion. If the second degree murder statute is overbroad without judicially supplying the element of malice, then there are many other statutes in our criminal code which may also be constitutionally suspect unless an additional "mens rea" element is judicially added to the statutory definition of those crimes.

For example, Neb. Rev. Stat. § 28-308(1) (Reissue 1989) states, "A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." Thus, without limiting the conduct causing serious bodily injury to only that intentional or knowing conduct which *maliciously* (meaning without just cause or excuse) causes serious bodily injury, the statute proscribing first degree assault is potentially as overbroad as the second degree murder statute.

The first degree assault statute is just one of many statutes in the criminal code which, like second degree murder, proscribe intentional conduct that is harmful to other persons without the necessity of including malice in its statutory definition. It is my contention that when the intentional conduct criminal statutes are construed in light of § 28-102 and the justification statutes, a court is not compelled to add malice as a necessary element of such crimes in order to withstand a constitutional overbreadth challenge. To construe the intentional conduct statutes otherwise would surely lead to absurd consequences.

2. Shifting of Burden of Production Is Not Unconstitutional

The majority also asserts:

> If malice is not read into § 28-304(1), individuals who commit legal acts, though punishable under the statute, would have to defend themselves through an affirmative defense of justification. . . . This results in a shifting of

the State's burden of proving every element of the crime charged in a criminal case.

Contrary to the majority's assertion, there is nothing in the plain language of our justification for the use of force statutes which evinces a legislative intent to shift the ultimate burden of proof concerning the lack of justification or excuse away from the State. Moreover, neither the legislative history of Nebraska's justification statutes nor our case law construing the justification statutes, supports the majority's position that the justification statutory scheme relieves the State of its burden of proving beyond a reasonable doubt the lack of justification or excuse when raised by a defendant.

As stated previously, Nebraska's justification for the use of force statutes is taken directly from the Model Penal Code. Comments to article 3 of the Model Penal Code state, concerning an affirmative defense, that "the prosecution can be silent on the question of justification unless and until evidence is adduced (typically by the defendant) in support of the defense." Model Penal Code § 3.01, comment at 6 (1985).

Further support can be found in the Model Penal Code section concerning affirmative defenses in general. For defenses "denominated affirmative by the Code or another statute, or involving a matter of justification 'peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence,' the state's burden does not arise unless there is some evidence supporting the defense." Model Penal Code § 1.12, explanatory note at 187 (1985).

More importantly, several U.S. Supreme Court cases do not support the majority's contention that requiring a defendant to raise justification as an affirmative defense is an unconstitutional shifting of the State's burden of proof. In *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), a case in which the defendant was convicted of second degree murder for the shooting death of a neighbor, the Supreme Court stated that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required . . . ." It is only the burden of persuasion concerning an element of the crime which remains with the State at all times, not necessarily the burden of

production. *Patterson v. New York, supra.*

In addition, in *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), the Court held an Ohio statute constitutional which, in fact, shifted the burden of persuasion and required a defendant to prove by a preponderance of the evidence the existence of self-defense in a murder case. The Court found that under the Ohio statutory scheme, such an allocation would not relieve the state of its burden, to prove the elements of the crime beyond a reasonable doubt. *Martin v. Ohio, supra.*

Even Justice Lewis Powell's dissents in *Patterson* and *Martin* clearly acknowledge that it is the *burden of persuasion* that the state is required to bear beyond a reasonable doubt under the holdings of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 508 (1975), not the burden of production. Thus, concerning this particular issue, there is unanimity of opinion on the U.S. Supreme Court.

There is a clear constitutional distinction between casting the burden of *production* on an accused and casting the burden of *persuasion* on an accused. In discussing affirmative defenses, LaFave and Scott write:

> As to the burden of production of evidence, it is uniformly held that the defendant is obliged to start matters off by putting in some evidence in support of his defense—e.g., evidence of his insanity, or of his acting in self-defense, or of one of the other affirmative defenses—unless of course the prosecution, in presenting its own side of the case, puts in some evidence of a defense, in which case the matter of defense is properly an issue though the defendant himself produces nothing further to support it. Experience shows that most people who commit crimes are sane and conscious; they are not compelled to commit them; and they are not so intoxicated that they cannot entertain the states of mind which their crimes may require. Thus it makes good sense to say that if any of these unusual features are to be injected into the case, the defendant is the one to do it; it would not be sensible to make the prosecution in all cases prove the defendant's

> sanity, sobriety and freedom from compulsion. . . . Nothing in *Mullaney* or *Patterson* casts any doubt upon the constitutionality of so allocating the burden of production.

1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 1.8(c) at 72 (1986).

Therefore, the fact that the State of Nebraska requires an accused to raise the issue of justification neither relieves the State of proving guilt beyond a reasonable doubt of every element of a crime, nor does the requirement force the defendant to forgo the presumption of innocence in violation of his rights under the U.S. and Nebraska Constitutions.

II. HARMLESS ERROR ANALYSIS

The jury instruction for second degree murder given in this case informed the jurors that if they find the State proved, beyond a reasonable doubt, that while in Richardson County, Ryan, either alone or while aiding and abetting another, intentionally, but without premeditation, killed Thimm, then they must find Ryan guilty of second degree murder done purposely and maliciously, but without deliberation and premeditation.

The majority asserts this instruction created a mandatory presumption requiring the jury to find Ryan acted with malice, that is, without just cause or excuse, upon finding Ryan acted intentionally, but without premeditation in killing Thimm. Thus, the majority concludes the instruction as given relieved the State of its burden to prove beyond a reasonable doubt each element of the crime charged, to wit: proof of malice, meaning proof of the lack of just cause or excuse. Moreover, the majority contends that this error was not harmless beyond a reasonable doubt because in addition to not being instructed that malice is an element of second degree murder, the jurors were also not instructed to find beyond a reasonable doubt the existence of the facts which give rise to the presumption of malice.

"Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense." *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L.

Ed. 2d 344 (1985). Thus, the issue for our consideration is not whether the instruction as given created a mandatory presumption, but, rather, whether the instruction relieved the State of the burden of persuasion on an element of the offense of second degree murder. An analysis of the facts reveals that the jury instruction did not relieve the State of the burden of persuasion on an element of the offense of second degree murder.

The majority's position is that to sustain Ryan's conviction, the State was obligated to prove, beyond a reasonable doubt, Ryan intentionally and with malice, but without premeditation, killed Thimm. The jury's guilty verdict necessarily found the following: (1) Beyond a reasonable doubt, Ryan acted intentionally in causing Thimm's death; (2) beyond a reasonable doubt, Ryan did not premeditate his intentional act which caused Thimm's death; and (3) Ryan did not prove by a preponderance of the evidence that he was insane at the time he killed Thimm and was, therefore, excused. Thus, the only remaining element that a majority of this court would require the State to prove is that Ryan acted maliciously, that is, without just cause or excuse in killing Thimm.

At trial, Ryan never raised the issue of justification or excuse as a defense to his participation in the brutal killing of Thimm. Instead, Ryan chose to defend by claiming he was not guilty by reason of insanity. Ryan presented evidence at trial, in the context of an insanity defense, that he was under the mind control of his father and the religious cult at the Rulo farm and, thus, " 'was not acting on his own free will.' " *State v. Ryan*, 226 Neb. 59, 72, 409 N.W.2d 579, 588 (1987). The jury was properly instructed on the insanity defense. This defense is wholly inconsistent with the justification or excuse defenses set forth in §§ 28-1406 through 28-1416. It was Ryan's burden to prove his insanity at the time of the murder by a preponderance of the evidence. See Neb. Rev. Stat. § 29-2203 (Reissue 1989). The jury did not accept Ryan's claim of insanity at the time of his trial.

In Nebraska, for a defendant to claim insanity as a defense, he or she would necessarily assert either that he or she does not have the capacity to understand the nature of the act alleged to

be criminal or that he or she does not have the ability to distinguish between right and wrong with respect to such act. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). Ryan made these very claims at trial. It is logically impossible for a defendant to claim on one hand that he did not understand the nature of his act and, at the same time, claim he understood his act to be justified under the circumstances. Claiming an act is justified necessarily means one understands the nature of the act performed. In addition, if one is unable to distinguish whether an act is right or wrong, then one cannot claim his act was, in fact, right and thus justified or excused by law.

Justification was never at issue in Ryan's case. As is true with every insanity plea, Ryan's reliance on the insanity defense necessarily admitted the fact of the killing. The insanity defense merely acts to completely absolve a defendant of criminal culpability if he did not appreciate the wrongfulness of his conduct or that he was unable to distinguish between right or wrong. Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 Am. J.L. & Med. 271 (1982).

Therefore, even if the jury instruction required the jury to presume the lack of justification, this instruction did not relieve the State of its burden of proving every element of the crime. Justification, as defined by statute, was not an issue in this case. For that reason alone, the error, if any, is harmless beyond a reasonable doubt.

Further, in *Rose v. Clark*, 478 U.S. 570, 579, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), the Supreme Court held a harmless error analysis was applicable to an "erroneous malice instruction" in a Tennessee murder case. Significantly, as in the instant case, the accused in *Rose* defended on the ground that he was either insane or incapable of forming the requisite intent to kill the victims. The defendant had an opportunity to present evidence and argue in support of his innocence, he was tried by an impartial jury and supervised by an impartial judge, and, aside from the malice instruction, the jury was clearly instructed that it had to find the defendant guilty beyond a reasonable doubt as to every element of the crimes charged.

In this context, the Court found that the erroneous malice

instruction did not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction. The error in the instruction of impermissibly shifting the burden of proof on malice was not " 'so basic to a fair trial' " that it could never be harmless. 478 U.S. at 580. The Court concluded, in finding harmless error, that "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.*

Moreover, in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), a unanimous Supreme Court reaffirmed and clarified the type of jury instruction errors that are amenable to a harmless error analysis under the U.S. Constitution. The Court divided the class of constitutional violations that may occur during the course of a criminal proceeding into two categories:

> one consisting of "trial error[s]," which "may . . . be quantitatively assessed in the context of other evidence presented," [*Arizona v. Fulminante*, 499 U.S. 279, 307–08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)], and are amenable to harmless-error analysis; the other consisting of "structural defects," which "affec[t] the framework within which the trial proceeds," [499 U.S. at 310], and require automatic reversal. There is a "strong presumption" that any error will fall into the first of these categories.

Sullivan, 508 U.S. at 282 (Rehnquist, C.J., concurring) (citing *Rose v. Clark, supra*).

The Supreme Court clearly pointed out that a jury instruction error of erecting a presumption regarding an element of an offense falls into the first category, which is amenable to a harmless error analysis, and is quite different than an erroneous reasonable doubt instruction, which requires an automatic reversal. *Sullivan v. Louisiana, supra*. The Court explained:

> A mandatory presumption—for example . . . violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. [Citations omitted.] But "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Rose v. Clark*, [478 U.S. 570, 580, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460

> (1986)]. And when the latter facts "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." *Carella v. California*, 491 U.S. 263, 271, (1989) (Scalia, J., concurring in judgment). . . . A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt.

508 U.S. at 280-81.

The instant case, like *Rose v. Clark, supra*, clearly falls into the first category of cases and is amenable to a harmless error analysis. The majority distinguished *Rose* from the instant case by stating that the instruction in this case did not allow the defendant to rebut the presumption of malice. However, the question is not whether the presumption of malice given in the jury instruction was rebuttable, but whether the presumption relieved the State of its duty to prove Ryan's guilt beyond a reasonable doubt of every element of the crime charged. Clearly, the presumption of malice or, better stated, the presumption of lack of just cause in this case did not relieve the State of any burden of proof. Instead, Ryan removed the issue of justification, or whether he acted with malice, by tendering an insanity defense.

In addition, there were absolutely no facts in this record setting forth a possible justification defense for the torture killing of Thimm. A full rendition of the sordid facts of this case is set forth in this court's opinion rendered as a result of Ryan's direct appeal. See *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). However, a minimal review of the facts of this case is necessary to an understanding of the complete and utter absence of any justification defense in this record. Thimm died on or about April 30, 1985, as the result of being physically abused for several days before his death. Thimm had been given the status of slave by Ryan's father after the first of the year in 1984. About 1 month prior to his death, Thimm was chained up at night and forced to sleep on the porch of a trailer house. Thimm was chained at night by Ryan, or others, and he did not

resist this treatment in any manner.

Two days before his death, Thimm was moved to a hog confinement building and was instructed by Ryan's father to take a goat with him and have sex with it. Thimm was given a jar for water, a hot plate, and a sleeping bag. The day before Thimm died, Ryan's father inserted a greased shovel handle into Thimm's rectum several times, then Ryan performed the same act. Thimm offered no resistance. Later that same day, Ryan participated in the whipping of Thimm. At this time, Thimm was spread-eagled against an auger.

The next day Ryan participated in another whipping of Thimm because the redness from the first day was gone. During this time, Thimm was undressed except for the socks he wore. Ryan, at the direction of his father, then took his turn at shooting off the fingertips on one of Thimm's hands. The hand was propped up on a block of wood, palm up. The victim was then whipped again by Ryan. Shortly thereafter, Ryan participated in skinning one of Thimm's legs with a razor blade and pliers. Then Ryan and another codefendant each broke one of the victim's legs.

One of the trial witnesses, John David Andreas, testified that Ryan " 'thought it was kind of—it was kind of neat that he had helped kill somebody.' " *Ryan*, 226 Neb. at 65, 409 N.W.2d at 584. Andreas also testified that Ryan had later bragged about the killing and did not show remorse or sorrow.

The guilty verdict for Ryan clearly cannot be attributed to a purported error of instructing a jury that it must presume the lack of just cause if it found Ryan intentionally, but without premeditation, killed Thimm. There was no evidence whatsoever concerning just cause offered by Ryan or any of the other defendants at trial. The only defense tendered by Ryan at trial was insanity. Ryan claimed he did not appreciate the wrongfulness of his conduct because of his age and the influence that his father exerted over him. The jury was properly instructed on the insanity defense, and it clearly rejected the defense that Ryan tendered at trial.

Therefore, even if there was error in the instructions in this case, "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (Emphasis in original.) See

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

III. CONCLUSION

For the above reasons, I would find Nebraska's second degree murder statute to be clear, unambiguous, and valid in all respects. In my opinion, the jury was properly instructed, and Ryan's motion for postconviction relief was appropriately denied by the trial court.

Even if the jury was erroneously instructed to presume malice from certain predicate facts in this case, such an instruction was harmless beyond a reasonable doubt based on a proper application of the standards set forth by the U.S. Supreme Court. Assuming that the jury should have received an instruction on malice in the instant case—what possible justification or excuse existed in this record? Rather than theorizing about absurd consequences in the abstract, this court, as an institution, need concern itself with avoiding absurd consequences in second degree murder cases that we are called upon to decide. It is difficult to conceive a more absurd consequence than the granting of a new trial for Ryan based on the facts of this case and the instructions that were given to the jury.

WRIGHT and CONNOLLY, JJ., join in this dissent.

CONNOLLY, J., dissenting.

Once again, I dissent on the malice issue.

In reviewing the criminal code which became operative on July 1, 1978, the Legislature deliberately eliminated malice as an element of second degree murder. "In construing a penal statute, a court cannot supply language which is absent from the statutory definition for a criminal offense." *State v. Schaaf*, 234 Neb. 144, 157, 449 N.W.2d 762, 770 (1989). Also, it will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). Nonetheless, the majority has once again, by judicial fiat, determined that malice is an essential element of second degree murder.

The majority reasons that malice must be inserted as a material element of second degree murder to avoid "the absurd consequence of an overbroad murder statute making certain legal acts illegal." The majority opinion suggests that law enforcement officers who kill in the line of duty, prosecutors who successfully persuade a court to sentence a convicted murderer to death, and the executioner who carries out any such sentence could all be charged with second degree murder for performing their respective duties.

This reasoning is nonsensical. The general purpose of our criminal code is to forbid and prevent only conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests. See Neb. Rev. Stat. § 28-102(1) (Reissue 1989). If one follows the majority's opinion to its logical conclusion, then a number of criminal statutes that proscribe intentional or knowing conduct, but do not include the word "malice," could be construed similarly.

For example, our first degree false imprisonment statute, Neb. Rev. Stat. § 28-314 (Reissue 1989), would require the inclusion of the word "malice" because otherwise a police officer performing his or her duty by handcuffing a criminal suspect could be charged with false imprisonment. Likewise, our assault statutes, Neb. Rev. Stat. §§ 28-308 to 28-310 (Reissue 1989), would require malice because a police officer who causes bodily injury to a criminal suspect that physically resists arrest could be charged with assault. As one can see, the majority opinion poses the potential danger of leading to similar absurd results in other areas of our penal law.

The majority's tortuous reasoning has created a Jabberwocky decision in which rules are subject to change without notice to the parties or the trial court. This should not be.

WRIGHT and GERRARD, JJ., join in this dissent.

WRIGHT, J., dissenting.

I reiterate my dissent as stated in *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), and I join the dissents of Justices Connolly and Gerrard.

I cannot agree with any of the reasoning used by the majority to justify its conclusion that malice is an element of second

degree murder. It is my belief that justice is not well served by the majority's opinion.

CONNOLLY and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. BRIAN HOWARD BAINBRIDGE, APPELLANT.

543 N.W.2d 154

Filed February 2, 1996. No. S-95-067.

1. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by a reviewing court independently from the conclusion reached by the inferior court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
4. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.
5. ____: ____: ____. The unconstitutionality of a statute must be clearly established before a court may declare it void.
6. **Constitutional Law: Appeal and Error.** A constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal.
7. **Constitutional Law: Statutes.** The issue of constitutionality of a statute must be specifically called to the trial court's attention in some way so that it has an opportunity to rule upon it.
8. **Constitutional Law.** The powers of the state government are separated into three distinct departments, none of which shall exercise the powers belonging to the others.
9. **Constitutional Law: Board of Pardons.** The Governor, Attorney General, and Secretary of State, sitting as a board, shall have power to grant commutations in all cases of conviction for offenses against the laws of the state.
10. **Constitutional Law: Board of Pardons: Statutes: Sentences.** Neb. Const. art. IV, § 13, clearly entrusts the power of commutation to the Board of Pardons, and a statute empowering the judiciary to reduce sentences already imposed violates the separation of powers clause.

11. **Courts: Sentences.** A sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation.
12. **Sentences.** The essence of a commutation of a sentence is the substitution of a milder punishment.
13. **Statutes.** When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court affirmed.

Michael W. Heavey for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and GERRARD, JJ., and NORTON, D.J., Retired.

PER CURIAM.

This is an appeal by Brian Howard Bainbridge, defendant-appellant, from the denial of his application, pursuant to former Neb. Rev. Stat. § 39-669.19 (Cum. Supp. 1992), for reduction to time served of a 15-year revocation of his motor vehicle operator's license. Section 39-669.19 has since been transferred to Neb. Rev. Stat. § 60-6,209 (Reissue 1993). The county court for Douglas County denied Bainbridge's application for reduction. The court found that Bainbridge had not been cured and therefore concluded that he was not entitled to a reduction. The court, following *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994), held that it did not have the constitutional authority to reduce Bainbridge's sentence because § 60-6,209 violated the separation of powers clause contained in Neb. Const. art. II, § 1. The district court for Douglas County affirmed.

Bainbridge assigns two errors. He contends that (1) the trial court erred in determining that § 60-6,209 violates the Nebraska Constitution's separation of powers clause, and (2) if the statute is constitutional, the trial court abused its discretion by failing to reduce the revocation of Bainbridge's operator's

license to time served. We affirm the judgment of the district court.

On March 14, 1989, Bainbridge was sentenced on a charge of driving while intoxicated (DWI). This was his sixth such offense. Bainbridge was sentenced to 180 days in jail and a $500 fine. The court also sentenced Bainbridge to a 15-year revocation of his motor vehicle operator's license pursuant to Neb. Rev. Stat. § 39-669.07(c) (Reissue 1988), since transferred to Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993).

In April 1994, Bainbridge filed an application to have his license revocation reduced to time served pursuant to § 39-669.19, since transferred to § 60-6,209.

On September 29, 1994, the county court held a hearing to determine whether a reduction should be granted. At the hearing, the State argued to the county court that § 60-6,209 was unconstitutional. The prosecutor stated at the hearing:

> At this time, Judge, in light of the recent Supreme Court decision that was decided last week, the State would contend that the statute that the legislature passed enacting the provision that the Court may reduce the 15-year term to a 5-year term, is unconstitutional as a violation of the separation of powers.

At the conclusion of the proceedings, the county court held that Bainbridge's sentence should not be reduced. The court stated that based on the evidence, Bainbridge had not yet been cured. The judge also concluded that he no longer had the constitutional authority to reduce the revocation sentence. He based this conclusion on the Nebraska Supreme Court decision in *Philipps, supra*, decided 6 days prior to the hearing, which held that a sentence reduction statute was unconstitutional.

Concerning this court's standard of review, the alleged unconstitutionality of a statute presents a question of law which must be determined by a reviewing court independently from the conclusion reached by the inferior court. *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995); *Philipps, supra*; *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). "A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality." *Jones*, 248 Neb. at 119, 532 N.W.2d at 295. Accord *Philipps, supra*. Regarding a

penal statute, it must be construed so as to meet constitutional requirements if such can reasonably be done. *Jones, supra.* The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *Id.*; *Philipps, supra.* Also, the unconstitutionality of a statute must be clearly established before a court may declare it void. *Philipps, supra*; *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990).

Under his first assignment of error, Bainbridge contends that the court erred in finding the sentence reduction statute previously found in § 39-669.19, now found in § 60-6,209, unconstitutional. Bainbridge first argues that the county court should never have considered the constitutionality issue, claiming the State failed to properly raise the issue at Bainbridge's hearing. It is true that a constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). " '[W]e have long held that the issue must be specifically called to the trial court's attention in some way so that it has an opportunity to rule upon it . . . .' " *State v. Ulrich*, 217 Neb. 817, 819-20, 351 N.W.2d 417, 419 (1984). In this case, the constitutional issue on appeal was called to the attention of the county judge. The record indicates that the court based its final decision in part on its finding that the statute was unconstitutional. This assignment is without merit.

Bainbridge contends that even if it was proper for the court to consider the constitutionality issue, the court erred in determining § 60-6,209 unconstitutional as a violation of the separation of powers clause. In Neb. Const. art. II, § 1, the powers of the state government are separated into three distinct departments, none of which shall exercise the powers belonging to the others. The power to commute sentences is entrusted in an executive department board of our state government known as the Board of Pardons. Article IV, § 13, of the Nebraska Constitution reads, in relevant part, "The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to . . . grant . . . commutations in all cases of conviction for offenses against the laws of the state . . . ."

In *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994), this court found unconstitutional Neb. Rev. Stat. § 29-2308.01 (Reissue 1989), which provided that the sentencing court may reduce a sentence it had previously imposed within 120 days after (1) the sentence was imposed or probation revoked or (2) the court received a mandate issued upon affirmance of the judgment or dismissal of the appeal. This court held that article IV, § 13, clearly entrusts the power of commutation to the Board of Pardons and that a statute empowering the judiciary to reduce sentences already imposed violates the separation of powers clause found in article II, § 1. We stated that "a sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation." *Philipps*, 246 Neb. at 616, 521 N.W.2d at 917.

The holding and rationale of *Philipps* were followed by this court in *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995). The defendant in *Jones* was a sex offender seeking a sentence redetermination under Neb. Rev. Stat. § 29-2931 (Cum. Supp. 1994), which provided the trial judge authority to (1) reduce the offender's sentence by placing him on probation with the condition that he enroll in an approved aftercare treatment program or (2) modify the original sentence to allow earlier eligibility for parole. We concluded, following *Philipps*, that § 29-2931 was unconstitutional because it permitted the judicial branch to exercise the power of commutation, a power that clearly belongs to the executive branch.

The sentence reduction statute at issue in this case states in relevant part:

> Any revocation of a person's operator's license pursuant to sections 60-6,196, 60-6,197, and 60-6,199 to 60-6,208 for a third or subsequent time for a period of fifteen years may be reduced to the time served upon application to the court if the court finds that such applicant has served at least five years of such revocation and that all of the [listed requirements] are shown by the applicant by a preponderance of the evidence . . . .

§ 60-6,209. Section 60-6,209 reduces a 15-year license revocation sentence that is imposed under either

§ 60-6,196(2)(c) or Neb. Rev. Stat. § 60-6,197(4)(c) (Reissue 1993). Bainbridge was sentenced under § 39-669.07(c), which is currently § 60-6,196(2)(c). Section 60-6,196 reads, in relevant part:

> (2) Any person who operates or is in the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section shall be guilty of a crime and upon conviction punished as follows:
>
> . . . .
>
> (c) If such person . . . has had two or more convictions under this section in the eight years prior to the date of the current conviction . . . such person shall be guilty of a Class W misdemeanor, and the 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.

In order for § 60-6,209 to invade the Board of Pardons' power to commute sentences and therefore violate the separation of powers clause, the purpose behind the 15-year license revocation under § 60-6,196(2)(c) must be one of punishment rather than remedial. The essence of a commutation of a sentence is the substitution of a milder punishment. *State v. Philipps, supra*; *Lincoln v. Sigler*, 183 Neb. 347, 160 N.W.2d 87 (1968). We find that the 15-year revocation of an operator's license under § 60-6,196(2)(c) is punishment. Therefore, § 60-6,209 is unconstitutional, as it permits a judicial commutation of a sentence of punishment.

We first look to the plain language of § 60-6,196(2)(c). "When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning." *State v. Wragge*, 246 Neb. 864, 866, 524 N.W.2d 54, 56-57 (1994). Analyzing the language of § 60-6,196(2)(c) shows that the statute clearly defines the 15-year revocation as serving as punishment. The introductory language of subsection (2) of § 60-6,196 states that a defendant shall be "punished" as provided in the statute. Subsection (2)(c) pertains to defendants who have had two or more DWI

convictions in the 8 years previous to the current conviction. It states that the defendant "shall be guilty of a Class W misdemeanor" and orders the court "as part of the judgment of conviction" to revoke the defendant's license for a period of 15 years. As the plain language of § 60-6,196(2)(c) indicates, the revocation is part of the overall punishment of the defendant, in conjunction with the fines and jail terms imposed for the offense under Class W misdemeanors.

This court has previously referred to the license revocation now found under § 60-6,196(2)(c) as punishment. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), pertained to permanent revocation under § 39-669.07 for third-offense DWI, now a 15-year revocation under § 60-6,196. This court found that the license revocation penalty deserved analysis under the Cruel and Unusual Punishment Clause of both the U.S. and Nebraska Constitutions. We held that the defendant had failed to prove that the revocation penalty was either cruel, unusual, or disproportionate. Referring to the revocation penalty, we stated, "The Nebraska constitutional prohibition against cruel and unusual punishment 'does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime.' " *Michalski*, 221 Neb. at 395, 377 N.W.2d at 520. Therefore, under *Michalski*, although the license revocation is not cruel or unusual punishment, it is punishment.

Bainbridge contends that following this court's decision in *Durfee v. Ress*, 163 Neb. 768, 81 N.W.2d 148 (1957), the revocation of an operator's license is not a penalty, but, rather, is imposed to serve a remedial purpose of public safety. *Durfee* involved a license revocation under the point system. The defendant argued that the application of recently enacted statutes under the point system added to his penalty of punishment, violating the Ex Post Facto Clause of the Constitution. The court rejected the defendant's argument, stating, "We conclude that the revocation of a license to operate a motor vehicle in this state under the point system provided by statute is not an added punishment for the offense or offenses committed as a result of which the points are accumulated." *Durfee*, 163 Neb. at 773, 81 N.W.2d at 151.

The 15-year revocation imposed under § 60-6,196 is distinguishable from the revocation under *Durfee*. *Durfee* was decided before the 15-year license revocation was statutorily enacted. At the time of the *Durfee* decision in 1957, the revocation period for third-offense DWI was 1 year. See 1953 Neb. Laws, ch. 214, § 1, p. 755. Moreover, *Durfee* did not pertain to a license revocation for a penal conviction of third-offense DWI. Rather, it involved a 1-year administrative revocation under the point system. Therefore, we find *Durfee* inapplicable.

This court has also recently held that license revocation under the administrative license revocation (ALR) statutes, Neb. Rev. Stat. §§ 60-6,205 to 60-6,208 (Reissue 1993), serves a primarily remedial purpose. *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996). In *Hansen*, we addressed the issue of whether ALR was punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. This court held that ALR was primarily remedial, while serving a secondary deterrent purpose.

This court's analysis in *Hansen* of ALR does not apply to the 15-year license revocation imposed under § 60-6,196(2)(c) for third-offense DWI convictions. This court's analysis in *Hansen* was specifically limited to administrative revocations under the ALR statutes. We addressed only the legislative purposes explicitly set forth in the ALR statutes. We stated, "Thus, we have no difficulty finding that substantial remedial purposes *underlie the administrative license revocation statutes* and conclude that their remedial character is not defeated by the fact that the statutes also play a role in deterring others from driving drunk." (Emphasis supplied.) *Hansen, ante* at 189, 542 N.W.2d at 433. There is a much stronger deterrent purpose and effect when a 15-year license revocation is imposed. The holding and rationale of *Hansen* are therefore inapplicable to the 15-year license revocation imposed under § 60-6,196(2)(c).

In sum, pursuant to § 60-6,209, a court has the power to substitute a milder punishment for a sentence that has already been imposed. Specifically, the court has the power to reduce a 15-year license revocation already imposed under § 60-6,196(2)(c) to time served after the defendant has served

5 years of the revocation. Section 60-6,209 permits the judicial branch to exercise the power of commutation, a power which clearly belongs to the executive branch pursuant to article IV, § 13, of the Nebraska Constitution. Therefore, § 60-6,209 is unconstitutional as a violation of the separation of powers clause of the Nebraska Constitution.

Since we hold that § 60-6,209 is unconstitutional, we need not address Bainbridge's second assignment of error, regarding the court's abuse of discretion. The district court was not in error in denying Bainbridge's application for reduction.

AFFIRMED.

CONNOLLY, J., not participating.

WHITE, C.J., concurring.

I concur with the majority's holding that a statute that authorizes a court to reduce a 15-year vehicle operator's license revocation to time served is a commutation of a sentence, in violation of article II, § 1, of the Nebraska Constitution. However, I believe that in analyzing the punishing nature of a license revocation, it is time for this court to reexamine what exactly is being taken away from the person as a result of the license revocation.

Driver's licenses historically have been referred to by this court as privileges. See, *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988). This court's continuous assertion that a driver's license is a privilege is outmoded and, at best, inaccurate, if not incorrect. The U.S. Supreme Court has referred to an operator's license, for procedural due process purposes, as an "entitlement," and not as a mere privilege that could be revoked by a state for cause. See *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). This court has acknowledged the U.S. Supreme Court's classification in *Bell* by referring to the revocation of a license as the denial of an entitlement because it may result in a loss of livelihood to the licensee. See, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). Unfortunately, this court continuously reverts back to erroneously labeling driver's licenses as privileges, as recently

as this term. See *Hansen, supra*.

The facts of this case illustrate that the revocation of a license is not a mere denial of a privilege. Bainbridge operates a 500-acre farm in rural Nebraska. He stated that having no license severely inhibits his abilities to operate his farm and to carry out everyday activities. He indicates,

> [i]t is ten miles to the nearest town. Whenever he transports commodities to market, whenever he needs food or supplies, whenever he needs repair parts for his equipment, whenever he needs anything whatsoever to maintain his business operation or to sustain his life, he must obtain transportation from one of his neighbors.

Brief for appellant at 16. This has been imposed on Bainbridge for 6 years of his life and is to continue for another 9 years. This 15-year revocation has resulted in a loss of livelihood for Bainbridge. In short, this revocation is more than a mere denial of a privilege.

A conclusion that a loss of one's right to drive is to be analyzed under a denial-of-a-privilege type of analysis is a conclusion ignorant of the practical realities of driving in the State of Nebraska. Nebraska is the 15th-largest state in the United States, with a land area of 77,355 square miles. Nebraska Blue Book 1994-95 at 9. As it is a predominantly rural state, automobiles are essential to transportation. Furthermore, in the rural areas of the state, no mass transit system exists. These characteristics of our state reflect the critical role driving plays in a Nebraska resident's day-to-day life.

In sum, the time is ripe for this court to reexamine its precedent finding operator's licenses to be mere privileges. Until we undertake this task, the punishing effect of license revocations will remain unclear.

CHARLES STEUBEN AND REBECCA STEUBEN, APPELLANTS, V. CITY OF LINCOLN, APPELLEE.

543 N.W.2d 161

Filed February 9, 1996. No. S-94-066.

1. **Appeal and Error.** In an action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong.
2. **Constitutional Law: Eminent Domain: Limitations of Actions.** Actions commenced under Neb. Const. art. I, § 21, are subject to a 10-year statute of limitations.
3. **Limitations of Actions: Time: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.
4. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.

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

David P. Kyker and Brian R. Watkins for appellants.

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Charles and Rebecca Steuben brought this action against the City of Lincoln (City) for damages to their house and personal property sustained as a result of floodwaters. At trial, the Steubens advanced two theories of recovery against the City: (1) negligence under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 1991) and (2) inverse condemnation under Neb. Const. art. I, § 21. After a bench trial, the district court for Lancaster County held that either the several alleged acts of negligence were not actionable or the Steubens failed to show the existence of any duty that was breached by the City. Regarding the alleged inverse condemnation, the court held that there was no taking for a public purpose.

In the brief submitted to this court, the Steubens assigned as error the district court's determination that the City was not negligent under the Political Subdivisions Tort Claims Act. However, in oral argument, the Steubens' counsel conceded that their negligence claim under the act was not actionable. As a result, we will not address this assigned error. We affirm the district court's finding that the Steubens failed to prove the City effected a taking of their property. We therefore affirm.

ASSIGNMENTS OF ERROR

The Steubens allege the district court erred in (1) failing to find that their property had been taken for public use without just compensation, (2) failing to find a taking for a public purpose, and (3) failing to find that the City had altered or changed a natural waterway.

SCOPE OF REVIEW

In an action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong. *RaDec Constr. v. School Dist. No. 17*, 248 Neb. 338, 535 N.W.2d 408 (1995); *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

BACKGROUND

In the fall of 1986, Charles and Rebecca Steuben acquired property and constructed a residence in northeast Lincoln pursuant to a building permit authorized by the City. The property, located at 7410 East Colfax Circle, was officially conveyed by the predecessors in title to Rebecca Steuben by warranty deed on December 21, 1987. The property is located on a circle drive northerly adjacent to the Regent Heights, Golf Park I, and Golf Park II residential subdivisions. The plats for these various subdivisions were approved by the Lincoln City Council. The east side of the Steubens' property is southerly adjacent to city-owned Mahoney Golf Course and Mahoney Park.

Also adjacent to the Steubens' property is a railroad fill of the Chicago and Rock Island Railroad which runs east and west along the north side of the property. This embankment, which is substantially higher than the Steubens' property, blocks the

natural drainage flowing northerly behind the property. Within the embankment were two 42-inch culverts through which surface water draining north could pass. The embankment and culverts are outside the city limits. The culverts were installed by the railroad prior to the City's approval and development of the plats, park, and golf course. The City's issuance of the Steubens' building permit occurred after the plats, park, and golf course were approved and developed.

On July 25, 1990, a 2-year rainfall fell in the northeast area of Lincoln. A 2-year rainfall means that every year there is a 50-percent chance that that storm will either occur or be exceeded. Surface water draining behind the Steubens' property backed up against the railroad fill, reaching a depth of approximately 8 feet. The water flowed onto the Steubens' property, eventually reaching a depth of approximately 6 feet against their house. The water pressure shattered the basement windows and door, and water entered the basement, destroying or damaging the carpeting, drywall, foundation, and numerous personal items located in the basement. The total damages sustained were in excess of $30,000. On the date of the flood, it was discovered that one of the culverts was clogged with debris.

The trial court held that the Steubens failed to prove their property had been taken pursuant to Neb. Const. art. I, § 21. The court reasoned that there had been no taking for a public purpose. In addition, the court found that the City had not changed any natural waterways, constructed any dams or embankments, or intentionally directed water onto the Steubens' property. The Steubens appeal.

ANALYSIS

Statute of Limitations

The City alleges that the Steubens' inverse condemnation claim is time barred by the applicable statute of limitations. Actions commenced under article I, § 21, are subject to a 10-year statute of limitations. Neb. Rev. Stat. § 25-202 (Reissue 1989); *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). An action accrues and the statutory time within which the action must be filed begins to run when the injured

party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). The Steubens filed their claim well within 10 years of any event which would have given them the right to institute and maintain a lawsuit. As a result, the Steubens are not time barred from bringing this inverse condemnation action.

INVERSE CONDEMNATION

The Steubens allege that the City's actions and inactions constitute a taking of their property under article I, § 21. More specifically, the Steubens argue that the damage to their property was the result of the City increasing surface water drainage and runoff, by developing residential areas and irrigating Mahoney Golf Course, without modifying the existing storm water drainage systems to handle the increased drainage. Article I, § 21, states: "The property of no person shall be taken or damaged for public use without just compensation therefor."

It is undisputed that the high water level was caused by the lack of capacity of the culverts under the railroad fill. However, these culverts were not owned, installed, or maintained by the City. In fact, the culverts were not within city limits. Although the City participated in replacing the old culverts after the flood, it did so pursuant to an interlocal agreement between the City, Lancaster County, and the Lower Platte South Natural Resources District.

As a result, in order to make their inverse condemnation claim actionable, the Steubens have the burden of proving that the City's approval, development, and maintenance of the plats, park, and golf course was the proximate cause of their damages. The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994).

In the instant case, no evidence was adduced that the City changed or altered a natural waterway, constructed a dam or embankment, or intentionally directed water onto the Steubens'

property. While the development of the plats and irrigation of the golf course may have increased surface water drainage, the Steubens did not offer any proof of what impact this increased surface water drainage had on the July 25, 1990, flood. There is no evidence to establish the origin of the surface water or to assume the City was the only property owner in the watershed dispelling surface water during the flood. Thus, we hold that the Steubens have failed to prove that the City's actions and inactions were the proximate cause of their damages. As a result, we conclude that the Steubens' property has not been taken by the City for a public purpose.

CONCLUSION

We find that the Steubens failed to attribute any improper drainage of surface water to the City. Accordingly, we affirm the district court's finding that the Steubens failed to prove the City effected a taking of their property.

AFFIRMED.

SUSANNA M. KOCSIS AND MARK S. KOCSIS, APPELLANTS, V. W.L. HARRISON, M.D., ET AL., APPELLEES.

543 N.W.2d 164

Filed February 9, 1996. No. S-94-078.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

4. ____: ____. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
5. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
6. **Limitations of Actions: Malpractice: Damages: Negligence.** Any action to recover damages based on alleged malpractice or professional negligence or upon alleged breach of warranty in rendering or failing to render professional services shall be commenced within 2 years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action.
7. **Limitations of Actions: Pleadings: Time: Dismissal and Nonsuit.** For purposes of determining whether an action is time barred, an action is commenced on the date the petition is filed. The action shall stand dismissed without prejudice as to any defendant not served within 6 months from the date the petition was filed.
8. **Employer and Employee: Negligence: Liability.** Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business.
9. ____: ____: ____. If an employee is not liable, the employer cannot be liable under the doctrine of respondeat superior.
10. **Actions: Employer and Employee.** A plaintiff is not required to join the employee when suing the employer under the doctrine of respondeat superior.
11. **Limitations of Actions: Employer and Employee.** When a plaintiff initiates an action under the theory of respondeat superior against an employer before the statute of limitations has run as to the employee, the plaintiff need not sue both the employer and employee to prevent his action from being time barred.
12. **Limitations of Actions: Employer and Employee: Negligence: Liability.** If the action is brought within the limitations period that applies to the employee's tortious conduct, the action is not time barred as to the employer whose liability is solely vicarious.
13. **Employer and Employee: Negligence: Liability.** Under the doctrine of respondeat superior, an employer's liability is derivative rather than that of a joint tort-feasor.
14. **Limitations of Actions: Malpractice.** In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for further proceedings.

Thomas A. Gleason for appellants.

William M. Lamson, Jr., and William R. Settles, of Kennedy, Holland, DeLacy & Svoboda, for appellee Omaha Primary Care Associates, P.C.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Appellants, Susanna M. and Mark S. Kocsis, brought an action for medical malpractice against appellees. In their petition, the Kocsises allege that appellees negligently diagnosed and treated Susanna Kocsis for a lump in her right breast. Dr. Dee R. Mattley, an employee of Omaha Primary Care Associates, P.C. (OPCA), was dismissed from the case for lack of personal jurisdiction. OPCA thereupon moved for summary judgment. The district court for Douglas County granted OPCA's motion for summary judgment, concluding that any further action against Dr. Mattley after his dismissal would be barred by the statute of limitations and that, therefore, no action could be maintained against his employer. The Kocsises appeal.

The Kocsises assign one error, that the district court, in granting OPCA's motion for summary judgment, erroneously applied the doctrine of respondeat superior by ruling that both master and servant must be parties to a suit. OPCA contends that even if the court misapplied the law of respondeat superior, the statute of limitations bars the Kocsises' action against OPCA as a matter of law.

We hold that the district court erred in granting OPCA's motion for summary judgment, and we reverse the order of the district court and remand for further proceedings.

The evidence presented in support of and opposing the motion for summary judgment is as follows: Dr. Mattley became Susanna Kocsis' primary care physician on June 3, 1988. In June 1988, Kocsis expressed concern to Dr. Mattley regarding her family's history of breast cancer. Dr. Mattley advised her to conduct monthly breast self-examinations.

On November 1, 1990, Kocsis consulted with Dr. Mattley concerning a lump in her right breast. Dr. Mattley reviewed a mammogram of Kocsis' breast that was conducted on January 2, 1990. Dr. Mattley advised Kocsis that her breast condition

was normal and needed no further treatment.

The affidavits submitted in support of and in opposition to OPCA's motion for summary judgment are in conflict as to when Dr. Mattley's treatment of Kocsis ceased. OPCA submitted the affidavit of Dr. Mattley, and Kocsis submitted her own affidavit in opposition to the motion.

Dr. Mattley states in his affidavit that all medical treatment and consultation regarding Kocsis' breast condition ceased on November 1, 1990, when he reviewed and discussed the January 1990 mammogram with Kocsis. However, the Kocsises' petition alleges that on November 15, Dr. Mattley referred her to Dr. William W. Jurgensen. Moreover, OPCA's answer, contrary to the affidavit of Dr. Mattley, admits that on November 15, Kocsis consulted with Dr. Mattley concerning her breast condition.

Kocsis states in her affidavit that Dr. Mattley personally treated her for her breast condition on November 15, December 3, and December 13, 1990.

The documents attached to Kocsis' affidavit indicate that Dr. Jurgensen wrote Dr. Mattley a letter dated December 12, 1990. The letter stated in pertinent part, "I have asked her to schedule a repeat mammogram for follow-up." Apparently in response to this letter, a handwritten note was made in Kocsis' medical records at Dr. Mattley's office that stated, "12-13-90. Mammogram 12-15-90 Breast mass per Dr. Jurgenson." However, in his affidavit, Dr. Mattley states that he did not read or evaluate the mammogram performed on December 15.

The Kocsises allege in their petition that "[o]n December 18, 1990 Defendant Jurgensen, at the request of Defendant Mattley, orally informed the Plaintiff Susanna M. Kocsis over the telephone that the repeat mammogram was negative and that no further treatment or evaluation was necessary." Also, in her affidavit, Kocsis states that she believes that at some point after December 15, 1990, Dr. Jurgenson informed Dr. Mattley of the mammogram results and that Dr. Mattley then requested Dr. Jurgenson to inform her of the results.

Kocsis also contends in her affidavit that Dr. Mattley remained her primary care physician for her breast condition at least through December 31, 1990.

In their petition, the Kocsises allege that they relied upon Dr. Mattley's and Dr. Jurgensen's opinions regarding Kocsis' breast condition until July 13, 1991. The petition also alleges that on August 23 a biopsy was performed, which revealed Kocsis' breast to be cancerous. The petition further alleges that Kocsis was required to undergo extensive surgical and medical treatment for her cancerous breast condition.

The Kocsises filed their petition on December 15, 1992. Concerning the negligence of Dr. Mattley, the Kocsises alleged that he was negligent, among other things, "[i]n failing to properly read and interpret the mammograms of January 2, 1990 and December 15, 1990" and "[i]n failing to inform and advise the Plaintiff of the percentage of false negative mammogram reports." OPCA was served with the summons and petition on June 15, 1993.

Dr. Mattley filed a special appearance pursuant to Neb. Rev. Stat. § 25-516.01 (Reissue 1989) for the sole purpose of objecting to the exercise of personal jurisdiction. At the hearing on the special appearance, the district court sustained the special appearance and dismissed Dr. Mattley from the suit for lack of personal jurisdiction.

Thereafter, OPCA moved for summary judgment. The district court granted OPCA's motion and held that an employer can only be liable under the doctrine of respondeat superior if the employee is liable. The court concluded that any claim against Dr. Mattley after his dismissal would be barred by the statute of limitations. The court therefore concluded that OPCA could not be liable under the doctrine of respondeat superior.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of

material fact exists. *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Healy, supra*. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Id.*

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Western Sec. Bank, supra*; *Healy, supra*.

The applicable statute of limitations is found in Neb. Rev. Stat. § 44-2828 (Reissue 1993) of the Nebraska Hospital-Medical Liability Act. Section 44-2828 reads in relevant part:

> [A]ny action to recover damages based on alleged malpractice or professional negligence or upon alleged breach of warranty in rendering or failing to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action . . . .

For purposes of determining whether an action is time barred, an action is commenced on the date the petition is filed. Neb. Rev. Stat. § 25-217 (Reissue 1989); *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990). However, "[t]he action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." § 25-217.

Based on the record, the district court was correct in finding that any action by the Kocsises against Dr. Mattley after his dismissal would be time barred by § 44-2828. A petition was filed on December 15, 1992, but the Kocsises' counsel failed to serve Dr. Mattley within the required 6-month time period. The

Kocsises have taken no further action against Dr. Mattley.

The Kocsises contend that the district court misapplied the doctrine of respondeat superior in this case. The Kocsises contend that if an employer is sued under the doctrine of respondeat superior before the statute of limitations has barred a claim against the employee, then the employee does not have to be joined as a party.

Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991); *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959). If an employee is not liable, the employer cannot be liable under the doctrine of respondeat superior. *Plock, supra*. The principal's liability is derived solely from that of its agent. *Id.* Nonetheless, it is also well established that a plaintiff is not required to join the employee when suing the employer under the doctrine of respondeat superior. See *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952). See, also, *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984); *Trans Union Leasing Corp. v. Hamilton*, 93 N.M. 310, 600 P.2d 256 (1979); *Vendrell v. School District No. 26C et al*, 226 Or. 263, 360 P.2d 282 (1961).

We hold that when a plaintiff initiates an action under the theory of respondeat superior against an employer before the statute of limitations has run as to the employee, the plaintiff need not sue both the employer and employee to prevent his action from being time barred. The controlling statute of limitations applicable to the employer is that which would apply to the employee. Therefore, if the action is brought within the limitations period that applies to the employee's tortious conduct, the action is not time barred as to the employer whose liability is solely vicarious.

One concern under the doctrine of respondeat superior is a result that finds the employer liable with no means of recourse against the person primarily liable—the employee. Our holding does not leave such a result. One who is held to be vicariously liable for the active negligence of another has a claim for indemnity from that person who is primarily liable. *Hiway 20*

Terminal, Inc. v. Tri-County Agri-Supply, Inc., 232 Neb. 763, 443 N.W.2d 872 (1989). Under the doctrine of respondeat superior, an employer's liability is derivative rather than that of a joint tort-feasor. See *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972). For purposes of the statute of limitations, a claim for indemnity accrues not at the time of the underlying transaction, but, rather, at the time the indemnity claimant suffers loss or damage. *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989). Therefore, by bringing an action for indemnity, the employer will maintain a method of recourse against its negligent employee.

OPCA contends that even if Dr. Mattley does not have to be joined as a party in order for the Kocsises to maintain their action, the action against OPCA is nonetheless time barred as a matter of law. OPCA contends that the Kocsises did not commence their action within 2 years of the termination of Dr. Mattley's treatment of Kocsis' breast condition. The Kocsises contend that, in the very least, a question of material fact exists as to whether the action was brought within the statute of limitations time period.

"In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed." *Healy v. Langdon*, 245 Neb. 1, 5, 511 N.W.2d 498, 501 (1994). The Kocsises filed their petition against OPCA on December 15, 1992. Therefore, Dr. Mattley's treatment for Kocsis' breast condition must have ceased prior to December 15, 1990, for the action to be time barred.

The record does not definitively establish the date on which Dr. Mattley's treatment of Kocsis' breast condition ceased. The parties' pleadings, affidavits, and documents accompanying the affidavits create a factual dispute as to whether Dr. Mattley consulted with Dr. Jurgensen concerning a December 15, 1990, mammogram and whether he requested Dr. Jurgensen to instruct Kocsis on the results of that mammogram. Dr. Mattley contends in his affidavit that he did not have any further involvement in the care and treatment of Kocsis' breast condition after November 1, 1990. However, Dr. Jurgensen wrote a letter on December 12 to Dr. Mattley indicating that Dr.

Jurgensen had ordered a follow-up mammogram for Kocsis. Also, Kocsis' medical records kept by Dr. Mattley reflect a December 13 notation stating that this mammogram was to be conducted on December 15.

Kocsis claims in both her petition and affidavit that she believes that Dr. Mattley consulted with Dr. Jurgenson on or after December 15, 1990, concerning the mammogram and that Dr. Mattley requested Dr. Jurgensen to inform Kocsis of their conclusion that the test was negative. Dr. Mattley presented no evidence refuting Kocsis' statements regarding what she believed took place on or after December 15.

Viewing the evidence in the light most favorable to the Kocsises, we find that a question of fact exists regarding whether Dr. Mattley read the mammogram of December 15, 1990, and regarding whether he made a diagnosis of Kocsis' breast condition from the results of that mammogram. The determination of whether the acts of alleged negligence occurred within the period of limitations is a task of the trier of fact and not a proper determination by the court on a motion for summary judgment.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., not participating.

MARSHALL K. BIDDLECOME, APPELLEE, V. JACK C. CONRAD, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

543 N.W.2d 170

Filed February 9, 1996. No. S-94-090.

1. **Rules of the Supreme Court: Appeal and Error.** While Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit this court to note any plain error not assigned.

2. **Appeal and Error: Words and Phrases.** Plain error exists where there is an 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.
3. **Motor Vehicles: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** Upon requesting a motorist to submit to a chemical test, an officer must advise that motorist of the consequences both of refusing to submit to the test and of submitting to and failing the test.
4. **Motor Vehicles: Licenses and Permits: Revocation.** In enacting and amending the administrative license revocation statutes, the Legislature made the advisement of consequences mandatory.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Following an administrative hearing, Jack C. Conrad, director of the Nebraska Department of Motor Vehicles, revoked the motor vehicle operator's license of Marshall K. Biddlecome for 90 days pursuant to Conrad's authority under the administrative license revocation statutes, Neb. Rev. Stat. §§ 60-6,205 to 60-6,208 (Reissue 1993). (As of January 1, 1994, the Nebraska Rules of the Road, chapter 39 of the Nebraska Revised Statutes, were renumbered. They are now codified at Neb. Rev. Stat. § 60-601 et seq. (Reissue 1993 & Cum. Supp. 1994). For convenience, we use the new numbering scheme.) Biddlecome appealed the revocation decision to the district court for Buffalo County. On December 20, 1993, the district court reversed Conrad's order and reinstated Biddlecome's license. Conrad appeals from that decision; we affirm, albeit on grounds unrelated to the issues presented for appeal.

On March 23, 1993, Officer John Schmitt of the Kearney Police Department arrested Biddlecome for driving under the

influence of alcohol. Biddlecome subsequently received notice of revocation of his operator's license from Conrad through certified mail, in accordance with § 60-6,205(5)(b). The crux of Biddlecome's complaint at his administrative hearing, and later to the district court, was the failure of the Kearney Police Department to serve Biddlecome personally; under § 60-6,205(4), the arresting officer shall serve notice of revocation on the motorist unless he is unable to do so.

At Biddlecome's administrative hearing, Officer Schmitt testified under cross-examination that no physical reason (such as an incorrect address) actually rendered him unable to perfect personal service of Biddlecome's notice of revocation. Biddlecome argued successfully to the district court that Officer Schmitt's deviation from the administrative license revocation statutes negated the director's authority to revoke Biddlecome's license.

We need not address the findings of the district court in order to dispose of the director's appeal. The form by which Officer Schmitt advised Biddlecome of the statutory consequences of failing a chemical test fails to protect Biddlecome's rights adequately under our decision in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). That Biddlecome did not raise this error below is of no matter. While Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit this court to note any plain error not assigned. *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979).

> Plain error exists where there is an 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.

In re Estate of Morse, 248 Neb. 896, 897, 540 N.W.2d 131, 132 (1995). In the present case, the inadequacy of the license revocation advisory form constitutes such an error under our holding in *Smith v. State, supra*.

In *Smith*, we upheld an order vacating administrative license revocation pursuant to § 60-6,197(10), which mandates that upon requesting a motorist to submit to a chemical test, an officer must advise that motorist of the consequences both of refusing to submit to the test and of submitting to and failing the test. The police officer in *Smith* had advised the motorist of some but not all of these consequences. The officer failed to advise Smith that he would owe a special fee to earn reinstatement of his operator's license, that the results of the chemical test qualified as competent evidence in a criminal driving under the influence of alcohol prosecution, and that other felony charges could result from a test result disclosing an illegal concentration of alcohol. These omissions negated the director's authority to revoke an operator's license insofar as the motorist was unable to make a rational and informed decision: "It is impossible to understand information that is never conveyed." *Id.* at 368, 535 N.W.2d at 699.

In this case, Officer Schmitt used an advisory form in his arrest of Biddlecome that suffers from the same infirmities. The advisory form does not mention the evidentiary consequences of the chemical test enumerated in § 60-6,210. It further fails to mention the reinstatement fees required by § 60-6,206(3). It did not advise Biddlecome clearly whether criminal penalties attach to the first, second, third, and fourth commissions of refusal to submit to the chemical test, or rather to the first, second, third, and fourth commissions of driving under the influence of alcohol. The form makes no mention of other charges, including felony charges, which can result from a test disclosing an illegal concentration of alcohol. It does not mention the restrictions on a motorist's ability to obtain employment driving privileges contained in § 60-6,206(2). Much like the advisory form we found defective in *Smith*, the form read to Biddlecome includes such a limited recitation of consequences as to be "not only inadequate but misleading." See *Smith*, 248 Neb. at 367, 535 N.W.2d at 698.

In enacting and amending the administrative license revocation statutes, the Legislature made the advisement of consequences mandatory. Since the advisory form in this case

fails to conform to that mandate, the director had no authority to revoke Biddlecome's license.

AFFIRMED.

CONNOLLY, J., dissenting.

I dissent for the reasons stated in my dissent in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

WRIGHT and GERRARD, JJ., join in this dissent.

JOHN MARKEL FORD, INC., A NEBRASKA CORPORATION, APPELLANT, V. AUTO-OWNERS INSURANCE COMPANY, APPELLEE.

543 N.W.2d 173

Filed February 9, 1996. No. S-94-137.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Actions: Federal Acts: Debtors and Creditors.** 15 U.S.C. § 1640(a) (1988) gives a consumer a private right of action against a creditor who fails to make the required disclosures; it does not provide for the bringing of a suit to enforce compliance with the Truth in Lending Act, as it does not envision suits by governmental enforcement agencies, such suits being treated elsewhere.
3. **Insurance: Contracts.** An ambiguous insurance contract will be construed in favor of the insured.
4. ____: ____. An ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract.
5. **Words and Phrases.** The term "unfair competition" does not refer to conduct prohibited by unfair business practices statutes.
6. **Insurance: Contracts: Proof.** In order to claim bad faith in an insurer's failure to defend or indemnify an insured, the insured must show an absence of a reasonable basis by the insurer for denying the insured the benefits of the insurance contract and must prove the insurer's knowledge or reckless disregard of a lack of a reasonable basis for the denial.
7. **Insurance: Contracts: Liability.** An insurer's duty to defend is broader than its duty to indemnify; an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.
8. **Insurance: Liability.** An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.

9. **Summary Judgment: Evidence: Appeal and Error.** A summary judgment hearing is similar to a bench trial of an action at law; thus, ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

James D. Sherrets and Mary M. Carnazzo, of Sherrets, Smith & Gardner, P.C., for appellant.

Thomas A. Otepka and Alison Lonsdale McGinn, of Gross & Welch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

Plaintiff-appellant, John Markel Ford, Inc., alleges that defendant-appellee, Auto-Owners Insurance Company, breached the parties' contract of insurance. The district court sustained the motion for summary judgment filed by Auto-Owners, thereby dismissing Markel Ford's action. Markel Ford then appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) determining as a matter of law that the contract did not obligate Auto-Owners to either defend or indemnify Markel Ford in a suit brought against it by the State of Iowa, (2) determining as a matter of law that Auto-Owners did not act in bad faith in refusing to defend or indemnify Markel Ford, and (3) receiving certain evidence. We, on our own motion, removed the matter to this court under our authority to regulate the caseloads of the Court of Appeals and this court. We now affirm the judgment of the district court.

II. SCOPE OF REVIEW

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

a matter of law. *C.S.B. Co. v. Isham, ante* p. 66, 541 N.W.2d 392 (1996); *Blackbird v. SDB Investments, ante* p. 13, 541 N.W.2d 25 (1995); *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995).

III. FACTS

Markel Ford is a Nebraska corporation maintaining a place of business in Omaha, Nebraska, from which it sells new and used motor vehicles. In the course of conducting its business, it offered motor vehicles for sale or lease through advertisements which reached the Iowa market.

As a consequence, the State of Iowa, by and through its attorney general, brought suit in 1987 against Markel Ford, alleging violations of the Iowa Consumer Fraud Act and the Iowa Consumer Credit Code, which incorporates the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. (1988), and regulations promulgated thereunder. As a result, Markel Ford entered into a consent judgment requiring it to reimburse the State of Iowa $4,000 for its costs in bringing the action and to make a cash payment of $6,000 to the Iowa Attorney General's Consumer Education and Litigation Fund. In addition, Markel Ford alleges that it incurred attorney fees of $9,834.33 in defending the lawsuit.

IV. ANALYSIS

1. Contract Theory

The first assignment of error, the district court's determination that as a matter of law Auto-Owners had no obligation to either defend or indemnify Markel Ford, rests on the language contained in the errors and omissions endorsement and the advertising endorsement of the insurance contract, coupled with the language of the defense clause granting Auto-Owners "the right and duty to defend . . . any suit . . . seeking damages . . . where [Auto-Owners] is liable to [Markel Ford] in case of judgment, even if any of the allegations of the suit are groundless, false or fraudulent . . . ."

(a) Errors and Omissions Endorsement

The "Truth In Lending Errors and Omissions Endorsement" of the contract reads:

> In consideration of an additional premium and subject to all the provisions of the policy not expressly modified hereby, [Auto-Owners] agrees with [Markel Ford] as follows:
>
> . . . .
>
> [Auto-Owners] will pay on behalf of [Markel Ford] all sums which [Markel Ford] shall become legally obligated to pay as damages in an action brought solely under 15 U.S.C. Sec. 1640 (Consumer Credit Protection Act - Public Law 90-321, Title I, as amended, because of error or omission during the policy period in complying with any requirement imposed under 15 U.S.C., Section 1631 et seq.

Markel Ford contends, first, that the foregoing language expressly covers the Iowa suit and, second, that if it does not do so expressly, the language is ambiguous and thus must be construed against Auto-Owners so as to provide such coverage by implication.

(i) Express Coverage

It is Markel Ford's position that by its express terms, the foregoing language provides coverage for any errors or omissions resulting in the failure to comply with the requirements imposed under any provision of the Consumer Credit Protection Act.

The language specifies that Auto-Owners will indemnify Markel Ford when it becomes obligated to pay damages in a suit brought pursuant to § 1640 as a result of any errors or omissions in complying with the act. Thus, under the express language, the question is whether the action brought by Iowa was an action brought solely under § 1640.

That section gives a consumer a private right of action against a creditor who fails to make the required disclosures. § 1640(a). The statute does not provide for the bringing of a suit to enforce compliance with the act, as it does not envision suits by governmental enforcement agencies; such suits are treated elsewhere. See *Tower v. Moss*, 625 F.2d 1161, 1165 (5th Cir. 1980) ("[t]he Truth in Lending Act provides not only for enforcement by the Federal Trade Commission and other federal

agencies, but it also establishes a civil cause of action by a consumer against a creditor who fails to make the required disclosures. 15 U.S.C. § 1640(a)").

Thus, Markel Ford's position that the errors and omissions language expressly obligates Auto-Owners to indemnify it directly contradicts the wording of the errors and omissions endorsement, for the language does not expressly cover the type of suit brought by Iowa. It cannot be maintained that the words "in an action brought solely under 15 U.S.C. Sec. 1640" actually mean "in any action whatsoever."

(ii) Implied Coverage

But Markel Ford further urges that if the endorsement does not by its express terms obligate Auto-Owners to defend and indemnify Markel Ford, the language is ambiguous and must be construed so as to provide such coverage. In this latter connection, Markel Ford argues that the failure of Auto-Owners to have placed a closing parenthesis in the portion of the errors and omissions endorsement describing the source of the damages it would pay renders the language ambiguous and such as to not limit the obligation of Auto-Owners to pay only those damages arising in an action brought solely under § 1640.

This argument requires a phrase-by-phrase analysis of the subject language thusly:

> (1) [Auto-Owners] will pay on behalf of [Markel Ford]
> (2) all sums which [Markel Ford] shall become legally obligated to pay as damages
> (3) in an action brought solely under 15 U.S.C. Sec. 1640
> (4) (Consumer Credit Protection Act - Public Law 90-321, Title I, as amended,
> (5) because of error or omission during the policy period in complying with any requirement imposed under 15 U.S.C., Section 1631 et seq.

The first phrase unambiguously declares that Auto-Owners will pay on behalf of Markel Ford that which is described in the second phrase.

The second phrase unambiguously declares that Auto-Owners will pay on behalf of Markel Ford all damages Markel Ford is legally required to pay.

As noted earlier, the third phrase limits the type of damages

that Auto-Owners will pay on behalf of Markel Ford to those resulting from an action brought solely under § 1640.

The fourth phrase modifies § 1640 by describing the act of which § 1640 is merely a part. Public Law 90-321 encompasses the entire Consumer Credit Protection Act and has been amended several times. See, e.g., § 1640 of Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (amended 1974, 1976, 1980, and 1994).

The fifth phrase modifies the word "action" in the third phrase. While the action under which Markel Ford is required to pay damages must be brought under § 1640, the action is brought because Markel Ford failed to comply with the requirements of § 1631 et seq.

We therefore have a situation in which (1) Auto-Owners promises to pay any damages Markel Ford is required to pay (2) as a result of a suit brought by a consumer pursuant to § 1640 which (3) alleges that Markel Ford failed to comply with the Truth in Lending Act.

That is not the situation at hand. Here, the Iowa attorney general brought suit against Markel Ford for alleged violations of the Iowa Consumer Fraud Act and the Iowa Consumer Credit Code. Even assuming, but not deciding, that alleging violations of state law in a suit is the same thing as alleging violations of federal law, the suit brought by the Iowa attorney general is not one brought solely under § 1640, for, as noted previously, at the relevant time the federal act treated enforcement by consumers separately from enforcement by governmental agencies. Compare § 1607 with § 1640(a). While Markel Ford urges that the Iowa attorney general could be viewed as stepping into the shoes of Iowa consumers, the same could be said of the Federal Trade Commission.

In addition, Markel Ford does not meet the definition of creditor in the suit brought by the Iowa attorney general, and therefore, such a suit could not have been brought pursuant to § 1640. That section provides in part that "any *creditor* who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person . . . ." (Emphasis supplied.) "Creditor" is defined in the federal act as referring

> only to a person who both (1) regularly extends . . . consumer credit . . . and (2) *is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.*

(Emphasis supplied.) § 1602(f). In this situation, there is no consumer credit transaction between Markel Ford and the Iowa attorney general, there is no debt between them, there is no evidence of indebtedness, and there is no agreement. Plainly, Markel Ford is not a creditor in this situation, and for that additional reason, the suit by the Iowa attorney general could not have been brought pursuant to § 1640.

While it is true that an ambiguous insurance contract will be construed in favor of the insured, it is also true that an ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract. See *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995).

(b) Advertising Endorsement

Next, Markel Ford contends that in any event, Auto-Owners was obligated to defend and indemnify Markel Ford under the language of the "Advertising Offense Liability" endorsement, reading:

> [Auto-Owners] will pay on behalf of [Markel Ford] all sums which [Markel Ford] shall become legally obligated to pay as damages because of injury which occurs in the course of [Markel Ford's] advertising activities and arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan committed during the policy period.

Markel Ford argues that the Iowa lawsuit was brought on account of its advertising and that as such, it was a suit involving unfair competition, thus bringing it within the policy's coverage.

According to the pertinent language, to come within the policy the Iowa lawsuit must have been related to Markel Ford's

advertising activities and have arisen out of one of the acts enumerated in the endorsement, i.e., unfair competition.

In response to an interrogatory, Markel Ford stated that the statutes which the State of Iowa alleged Markel Ford violated are designed for the protection of unfair competition of advertisers. There is no doubt that the lawsuit was brought in regard to Markel Ford's advertising activities. The issue therefore is whether the suit arose out of unfair competition.

It is true that with regard to advertising, the definition of unfair competition has been somewhat expanded in the third Restatement of Unfair Competition to encompass the tenet that "[o]ne who, in connection with the marketing of goods or services, makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another . . . is subject to liability to the other . . . ." Restatement (Third) of Unfair Competition § 2 at 21 (1995). However, the common-law definition of unfair competition involves "palming off" one's goods as the goods of another. 1 Rudolf Callmann, The Law of Unfair Competition, Trademarks and Monopolies §§ 2.01 and 2.02 (4th ed. 1995).

Most courts which have considered the matter in the context of errors and omissions language such as is at issue here have adhered to the common-law definition. See, *Granite State Ins. Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316 (3d Cir. 1995); *Nationwide Mut. Ins. Co. v. Dynasty Solar, Inc.*, 753 F. Supp. 853 (N.D. Cal. 1990); *Globe Indem. Co. v. First American State Bank*, 720 F. Supp. 853 (W.D. Wash. 1989); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981); *Seaboard v. Williams' NW Chrysler*, 81 Wash. 2d 740, 504 P.2d 1139 (1973); *A-Mark Fin. v. CIGNA Prop. & Cas.-INA*, 34 Cal. App. 4th 1179, 40 Cal. Rptr. 2d 808 (1995); *McLaughlin v. National Union Fire Ins.*, 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559 (1994); *Graham Resources v. Lexington Ins.*, 625 So. 2d 716 (La. App. 1993); *Chatton v. National Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992); *Practice Management v. Old Dominion Ins.*, 601 So. 2d 587

(Fla. App. 1992); *Aetna Casualty v. M&S Industries*, 64 Wash. App. 916, 827 P.2d 321 (1992); *Boggs v. Whitaker, Lipp & Helea*, 56 Wash. App. 583, 784 P.2d 1273 (1990).

Indeed, many courts have stated that the term "unfair competition" does not refer to conduct prohibited by unfair business practices statutes, i.e., the Iowa consumer protection statutes that Markel Ford was alleged to have violated. See, e.g., *Bank of the West, supra*; *Graham Resources, supra*; *Boggs, supra*. We agree.

Neither is the phrase "unfair competition" ambiguous in this context. As the federal district court stated in *Nationwide Mut. Ins. Co.*, 753 F. Supp. at 857: "Reading it in context, the court detects no ambiguity in the meaning of the term unfair competition as used in [the insurer's] policies. This term appears . . . alongside a host of readily identified common law torts including libel, slander, defamation and piracy." As observed in *State v. Kipf*, 234 Neb. 227, 234, 450 N.W.2d 397, 404 (1990), "like people, words are known by the company they keep . . . and thus take meaning from the words with which they are associated."

The suit brought by Iowa therefore was not one for unfair competition as the term is used in the insurance contract.

(c) Resolution

The Iowa lawsuit not being covered by either the errors and omissions endorsement or the advertising endorsement, it necessarily follows that the district court did not err in concluding as a matter of law that Auto-Owners had no contractual obligation to indemnify Markel Ford. Because the defense clause obligates Auto-Owners to defend only those suits the allegations of which it is obligated to indemnify against, neither was Auto-Owners contractually obligated to defend the Iowa suit.

2. Bad Faith Theory

The second assignment of error asserts the district court nonetheless wrongly ruled that Auto-Owners did not act in bad faith in failing to defend and indemnify Markel Ford.

In order to claim bad faith in Auto-Owners' failure to defend or indemnify it, Markel Ford must show an absence of a

reasonable basis by Auto-Owners for denying Markel Ford the benefits of the insurance contract and must prove Auto-Owners' knowledge or reckless disregard of a lack of a reasonable basis for the denial. See, *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). As established in part IV(1) above, Auto-Owners had a reasonable basis for refusing to indemnify Markel Ford; thus, it did not act in bad faith in that regard.

However, as Markel Ford points out, an insurer's duty to defend is broader than its duty to indemnify. See, *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995); *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993). An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). More specifically, as suggested by one writer, under *Novak*, an insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. Robert Works, Nebraska Property & Liability Insurance Law § 11.2.2 (1985). See, *Union Ins. Co., supra* (insurer has duty to defend its insured whenever it ascertains facts which give rise to potential of liability under policy).

As Auto-Owners had no duty to indemnify Markel Ford and as a reasonable investigation of the facts would have added nothing to what was contained in the complaint of the Iowa lawsuit, Auto-Owners was under no duty to defend Markel Ford in the Iowa lawsuit. In *Seaboard v. Williams' NW Chrysler*, 81 Wash. 2d 740, 504 P.2d 1139 (1973), the attorney general of Washington brought suit against an automobile dealer, seeking to enjoin alleged unfair methods of competition and unfair or deceptive acts or practices and to secure a judgment for penalties as provided by statute. The insurer of the automobile dealer then brought a declaratory judgment action, seeking a judicial determination that it had no duty to defend the suit brought by the attorney general. The insurance contract

provided that the insurance company would pay on behalf of the automobile dealer any sums which the automobile dealer was obligated to pay as the result of a final judgment for money damages resulting from, inter alia, unfair competition. The insurer also undertook to defend any suit seeking damages for unfair competition, even if such suit was groundless, false, or fraudulent. The Supreme Court of Washington held that the insurer was under no duty to defend the automobile dealer, as the suit by the attorney general was not one for unfair competition and thus did not come within the coverage of the policy.

In *A-Mark Fin. v. CIGNA Prop. & Cas.-INA*, 34 Cal. App. 4th 1179, 40 Cal. Rptr. 2d 808 (1995), an insured alleged that its insurer had a duty to defend it in a lawsuit which the insured claimed involved unfair competition. The insured argued that as *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992), which held that the type of suit the insured was involved in did not constitute unfair competition, was decided after its suit had commenced, a potential of liability existed, triggering the insurer's duty to defend. The California Court of Appeal disagreed, stating:

> In *State Farm*, for example, coverage turned on the interpretation by the court of a policy term. The insured argued that State Farm had a duty to defend because "the term 'accident' was ambiguous, giving rise to potential liability." . . . The court disagreed, holding that "[a]ppellants misapprehend the notion of 'potential liability.' Potential liability deals with whether the insurer owes coverage to the insured based upon the facts known to the insurer or facts pleaded in the complaint, even if false. . . . Here, any potential for liability did not arise from disputed facts, but hinged on resolution of a legal question, i.e., whether the undisputed facts constituted an 'accident' during the policy period. We know of no case suggesting that an insurer has a duty to defend where the only potential for liability turns on resolution of a legal question." . . .
>
> . . . .
>
> We agree with the authorities cited above that a

> "potential for indemnity" cannot be based on an unresolved dispute concerning a purely legal question or question of policy interpretation when the question is resolved favorably to the insurer. To hold otherwise would put the insurer in an untenable position. Rarely has a legal issue arising in the context of a coverage dispute been resolved with absolute finality. Thus, the insurer would be required to provide a defense every time a demand was made, no matter how implausible the theory on which it was based.

(Citations omitted.) *A-Mark Fin.*, 34 Cal. App. 4th at 1191-92, 40 Cal. Rptr. 2d at 815-16.

Accordingly, the district court did not err in concluding as a matter of law that Auto-Owners did not act in bad faith in refusing to defend or indemnify Markel Ford.

3. Evidential Rulings

The third and final assignment of error claims the district court improperly received five exhibits into evidence because foundation for their admission was lacking.

In this context, the summary judgment hearing was similar to a bench trial of an action at law. Ordinarily, the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). We apply the same reasoning to the erroneous admission of evidence on a summary judgment hearing. Here, the other evidence which was admitted without objection from Markel Ford, including the insurance policy, the petition in the Iowa lawsuit, the consent judgment, the affidavit of an assistant attorney general of Iowa, and the affidavit of the president of Markel Ford, was sufficient to sustain the district court's ruling. Therefore, even if the questioned exhibits were erroneously admitted, a matter we do not decide, the error was not prejudicial and thus provides no basis for reversal. See *Jeffres*

v. Countryside Homes, 220 Neb. 26, 367 N.W.2d 728 (1985) (if admission of questioned evidence erroneous, error harmless as other sufficient, competent, and relevant evidence sustained judgment).

V. JUDGMENT

As the record fails to sustain any assignment of error, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., dissenting.

The majority affirmed the district court's granting of a summary judgment in favor of Auto-Owners Insurance Company. Because I find the term "unfair competition" set forth in the "Advertising Offense Liability" portion of the contract ambiguous, I respectfully dissent.

An ambiguous term in an insurance policy will be construed in favor of the insured. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993). An ambiguity in an insurance policy exists when the policy can be interpreted to have two or more reasonable meanings. *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986).

The majority sets forth two different interpretations of the phrase "unfair competition." The majority first refers to an expanded definition as found in the Restatement (Third) of Unfair Competition, and then references to the narrower, common-law definition. These are two reasonable meanings, and the phrase "unfair competition" is therefore an ambiguous term in the parties' insurance contract. John Markel Ford should have been entitled to the broader definition. Nonetheless, the majority found no ambiguity and applied the common-law definition.

Applying the broader definition of "unfair competition," at the very least, creates a question of material fact as to whether the suit brought by the State of Iowa against John Markel Ford was one of unfair competition, therefore requiring Auto-Owners Insurance Company to defend and indemnify. Summary judgment should have been denied.

LANPHIER, J., joins in this dissent.

KARL F. MARTEN AND ADAM J. MARTEN, APPELLEES, V. BARBARA A. STAAB AND JUDITH M. MARTEN, COPERSONAL REPRESENTATIVES OF THE ESTATES OF FRED J. MARTEN AND RUTHANNA MARTEN, DECEASED, APPELLANTS.

543 N.W.2d 436

Filed February 9, 1996. No. S-94-621.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
3. **Actions: Parties: Standing.** In order for one to be entitled to invoke a court's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy.
4. ____: ____: ____. The purpose of an inquiry on standing is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
5. **Contracts: Actions: Principal and Agent.** An agent who, on behalf of an undisclosed principal, enters into a contract in the agent's own name is entitled to maintain an action thereon in the agent's own name.
6. **Contracts: Intent.** In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them.
7. **Contracts.** A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee.
8. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
9. **Contracts: Auctions.** Whether a contract was formed at an auction is a question of law.
10. **Auctions: Principal and Agent: Words and Phrases.** In an auction with reserve, the auctioneer, as agent of the seller, invites bids (offers) with the understanding that no bargain exists until the seller has made a further manifestation of assent; the auctioneer may reject all bids and withdraw the goods from sale until he announces completion of the sale.
11. **Auctions.** In an auction with reserve, the bidder is deemed to be the offeror, while the auctioneer is the offeree.
12. **Auctions: Presumptions.** Auctions are presumed to be with reserve unless they are expressly stated to be without reserve.

13. **Auctions.** In a no-reserve auction, also known as an absolute auction, the seller becomes the offeror and the bidder the offeree.
14. **Contracts: Auctions.** In a no-reserve auction, the contract is consummated with each bid, subject only to a higher bid being received.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Thomas County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals affirmed.

Claude E. Berreckman, of Berreckman & Berreckman, P.C., for appellants.

Robert E. Wheeler for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

The defendants-appellants, Barbara A. Staab and Judith M. Marten, copersonal representatives of the estates of their deceased parents, challenged in the Nebraska Court of Appeals the district court's decree of specific performance requiring them to sell certain auctioned lands to their brother, plaintiff-appellee Karl F. Marten, and their nephew, plaintiff-appellee Adam J. Marten, the aforesaid brother's son. In so doing, the personal representatives asserted, among other things, that the district court erred in ruling that (1) the county court probating the estates lacked jurisdiction to confirm the sales and (2) the auction created an enforceable contract. The Court of Appeals reversed the judgment of the district court. *Marten v. Staab*, 4 Neb. App. 19, 537 N.W.2d 518 (1995). We then granted the petition for further review filed by the brother and nephew and now affirm the judgment of the Court of Appeals.

II. SCOPE OF REVIEW

An action for specific performance sounds in equity. *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact

and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995).

III. FACTS

The personal representatives obtained an order from the county court probating the estates to sell five parcels of estate land, either at a public auction or a private sale. After advertising and publishing legal notice of the sale, attorney Tedd Huston conducted an auction of the lands at the Thomas County courthouse. On behalf of the brother and nephew, attorney Robert Wheeler recorded the introduction and bidding portions of the auction on audiotape. The tape and transcription of its contents were received in evidence in the proceedings below.

Huston began the auction by reading the legal notice and describing the lands. At that point, the following exchange took place:

> SALE ATTENDEE: You're not going to tie it altogether?
>
> [Huston]: It's going to be sold only by the tracts and we're not going to have one overall bid for all.
>
> [Nephew]: Is this an absolute sale?
>
> [Huston]: This is a sale subject to confirmation by the court, as I just read. It will have to be approved by the county court.

Huston also stated that

> [t]his will be an auction with no protected bids, however, the sale is upon authority of the county court and it will be held open for one hour and will be confirmed by the court which will take approximately 20 to 30 days from the date of the sale to be confirmed by the court.

Huston then proceeded to auction the various tracts of land. For the first tract, Huston stated: "We're going to open the bidding on Tract Number 1 at $200 per acre. That's our starting bid, $200 per acre." The nephew then bid $125 per acre. Huston responded that he could not accept that bid because the opening bid was $200 per acre. The nephew was the only

person at the auction who bid on that particular tract of land.

The remaining tracts of land received similar treatment, with Huston calling for starting bids at a certain price and the nephew, as the only bidder, offering prices below the starting bid requested. A written record of the bids was made, and at the conclusion of the bidding, the following was said:

> [Huston:] These bids have been recorded, they'll be reported to the court and we'll take no further bids. . . . I can assure you that probably the court will not confirm any of these because they are inadequate. If any of you are interested in purchasing any of this property in small tracts that we have here, it can be sold at a private sale and if you are please contact me or one of the [personal] representatives of the estate. . . .
>
> [Wheeler]: Mr. Huston, before you close . . . .
>
> [Huston]: The sale has been open for an hour, and is now officially closed.
>
> [Wheeler]: Mr. Huston, I don't think it's been open an hour from the time you started the bidding[.]
>
> [Huston]: We started at . . . .
>
> [Wheeler]: Well I know that's the time you started, but may I ask you, you had bids and from my understanding it's an absolute sale. Are you then accepting the bids of [the nephew].
>
> [Huston]: First of all, it's not an absolute sale. What we've done, we've posted this, and we've told you several times "These bids will be submitted to the court and the court will either confirm or not confirm[.]"
>
> [Wheeler]: So are you saying you are accepting [the nephew's] bid to submit to the court for confirmation?
>
> [Huston]: It's the only one we have to submit to the court so obviously since we have no other bids. We will submit it.

Huston then called the nephew over to the clerk's table to make the downpayment. Mike Moody accompanied the nephew and presented a check for 20 percent of the bids. There is conflicting testimony, and no taped recording, as to what was said when Moody presented the check. Moody testified that he understood the check would be cashed. However, Howard

Furgeson, the clerk of the auction, and attorney Jason White, who practices law with Huston and attended the sale, testified that Huston stated there had been no sale and had informed Moody that the check would not be cashed.

In any event, Huston thereafter submitted the nephew's bids to the probate court, which refused to confirm the sale. Following the denial of confirmation, Huston returned Moody's check.

IV. ANALYSIS

Before addressing the assignments of error, an initial question exists with regard to the brother's standing to bring this action.

In order for one to be entitled to invoke a court's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of an inquiry on standing is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995).

The brother claims to have standing based on an option agreement he and the nephew entered into with Moody for the purchase of the subject lands. The option agreement provides as follows:

> AGREEMENT FOR OPTION TO PURCHASE REAL ESTATE
>
> This Agreement made and entered into . . . by and between . . . Moody, hereafter Seller, and [the brother] and [the nephew], hereafter Buyer, jointly or severally.
>
> WHEREAS, Seller and Buyer had on September 29, 1993 made an oral agreement that [the nephew] would bid at the sale of the real property of the Estates of [the personal representatives' parents] . . . for . . . Moody as real purchaser, who would pay the consideration for the purchase, and in whose name the real property would be placed as buyer . . . ;
>
> . . . .

> NOW THEREFORE . . . Moody does grant to [the brother] and [the nephew] an option to buy the premises on the following terms and conditions which are intended to conform to the terms of the purchase of the real estate by . . . Moody from the Estates of [the personal representatives' parents].

But the brother's rights under the foregoing option agreement are irrelevant to this inquiry, as in this suit his rights depend on the contract which allegedly arose out of the auction of the lands. The only parties to that putative contract are the estates and Moody.

However, because an agent who, on behalf of an undisclosed principal, enters into a contract in the agent's own name is entitled to maintain an action thereon in the agent's own name, the nephew has standing to sue on this putative contract. See Harold G. Reuschlein & William A. Gregory, The Law of Agency and Partnership § 134 (2d ed. 1990). See, also, *Smith v. Orion Insurance Company*, 298 F.2d 528 (10th Cir. 1961); *Baumgartner v. Burt*, 148 Colo. 64, 365 P.2d 681 (1961); *Trust Co. v. Bank*, 255 N.C. 205, 120 S.E.2d 830 (1961).

As the brother was neither a party to the putative contract nor acting as Moody's agent, he has no rights under the putative contract unless he qualifies as a third-party beneficiary thereof. In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them. A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993). See, also, *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983). Thus, for the brother to qualify as a third-party beneficiary to the putative contract, it must appear that his rights and interests were contemplated by the parties thereto and that provision was made for them.

The rights and interests of third parties are not normally taken into consideration by the seller at an auction; such a seller

is interested only in receiving the highest bid possible from a group of potential buyers. It cannot be said that if the nephew's bid was accepted and therefore a valid contract resulted, the brother's rights and interests were taken into consideration by the estates. Thus, the evidence fails to establish that the brother's rights and interests were contemplated in the putative contract.

As the brother was neither the agent for an undisclosed principal to the putative contract nor a third-party beneficiary thereunder, it necessarily follows that he does not have standing to enforce the putative contract and is, for that reason, not a proper party to this action.

Accordingly, the remainder of the analysis which follows relates only to issues existing between the personal representatives and the nephew.

1. Jurisdiction of Probate Court

The personal representatives first assert that the district court erred in holding that the probate court lacked jurisdiction to confirm the sales, thus making confirmation of the putative contract a noncondition.

In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts. *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991); *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985). In addition, Neb. Rev. Stat. § 30-2405 (Reissue 1989) provides that "[t]he [county] court has jurisdiction of all proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed." Clearly, the confirmation of a sale of estate property presents a question of how an estate is to be distributed.

Furthermore, Neb. Rev. Stat. § 30-2465 (Reissue 1989) provides that a personal representative "may invoke the jurisdiction of the [county] court, in proceedings authorized by this [probate] code, to resolve questions concerning the estate or its administration." The comment to that section states in part: "This section is intended to confer authority on the personal representative to initiate a proceeding at any time when

it is necessary to resolve a question relating to administration."

Whether bids at an auction for estate property are sufficient or adequate relates to the administration of the estate. Thus, a personal representative is given the right to invoke the jurisdiction of the county court, and the county court probating an estate does, in fact, possess jurisdiction to hear such questions. Therefore, the probate court here had jurisdiction to confirm or reject the bids made at the auction, and confirmation was a condition to the formation of a contract, not a noncondition, as the district court ruled.

2. Effect of Auction

The personal representatives next urge that the district court erred in holding that a contract resulted from the auction of the lands.

> Before a court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists. The burden of proving a contract is on the party who seeks to compel specific performance. . . . To establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance. . . .
>
> A party attempting to enforce a contract, therefore, has the burden of proving there was a definite offer and an unconditional acceptance. Furthermore, for a binding contract to result from an offer and acceptance, it is essential that the minds of the parties meet at every point. Nothing can be left open for further arrangement.

Satellite Dev. Co. v. Bernt, 229 Neb. 778, 780–81, 429 N.W.2d 334, 337 (1988). Whether a contract was formed at the auction is a question of law, upon which this court must reach a conclusion independent of the trial court. See, *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995).

In order to determine whether a contract was formed at the auction, it is necessary to identify the type of auction that occurred. We agree that "[t]here are generally two methods for a seller to offer property for sale at an auction: either 'with

reserve' or 'without reserve.' " *Nicholson v. Clark*, 802 S.W.2d 934, 937 (Ky. App. 1990). See, *Drew v. Deere Co.*, 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963); *Holston v. Pennington*, 225 Va. 551, 304 S.E.2d 287 (1983); *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541 (Wyo. 1980); 1 Samuel Williston, A Treatise on the Law of Contracts § 4:9 (Richard A. Lord 4th ed. 1990); 1 Arthur L. Corbin, Corbin on Contracts § 4.14 (Joseph M. Perillo rev. ed. 1993). We also accept that

> [i]n an auction with reserve, the auctioneer, as agent of the seller, invites bids (offers) with the understanding that no bargain exists until the seller has made a further manifestation of assent; the auctioneer may reject all bids and withdraw the goods from sale until he announces completion of the sale.

Rosin v. First Bank of Oak Park, 126 Ill. App. 3d 230, 235, 466 N.E.2d 1245, 1249 (1984). Moreover, we adopt the rule that in such auctions, the bidder is deemed to be the offeror, while the auctioneer is the offeree. *Pitchfork Ranch Co., supra.* And we agree as well that "all auctions are presumed to be with reserve unless they are expressly stated to be without reserve." *Cuba v. Hudson & Marshall*, 213 Ga. App. 639, 445 S.E.2d 386, 387 (1994). See, *Coleman v. Duncan*, 540 S.W.2d 935 (Mo. App. 1976); *Drew, supra*; *Holston, supra*; *Pitchfork Ranch Co., supra.*

In an auction without reserve, also known as an absolute auction, *Holston, supra*, the rights and obligations of the parties are different. We further accept that

> [i]n the *no reserves* type of sale . . . the legal relationship as between the seller and bidder is reversed. In the *no-reserves* sale, the *seller* becomes the offeror and the *bidder* the offeree by reason of a collateral contract theory . . . . [I]n the *no-reserves* auction, the contract is consummated with each bid, subject only to a higher bid being received. This is so because the seller makes his offer to sell when he advertises the sale will be a no-reserves sale to the highest bidder. Once the first bid has been received, the only acceptance which forms a binding agreement is the one offered by the highest bidder. In this type of sale, the seller may not withdraw his

> property once any legitimate bid has been submitted, as he may do at any time before the hammer falls in the with-reserves auction. In the no-reserves situation, the seller is absolutely committed to the sale once a bid has been entered, no matter what the level of bidding or the seller's notion of the property's true value. . . .
>
> . . . .
>
> . . . "The words 'without reserve' as used in auctions are words of art, as showing prospective bidders *that the property will actually go to the bidder offering the highest price*, and the seller may not nullify this purpose by bidding himself or through an agent, or by withdrawing the property from sale if he is not pleased with the bids."

(Emphasis in original.) *Pitchfork Ranch Co.*, 615 P.2d at 548–49. See, *Wilcher v. McGuire*, 537 S.W.2d 844 (Mo. App. 1976); *Drew, supra*; *Holston, supra*; Harvey Hoshour, *Bids as Acceptances in Auctions "Without Reserve"*, 15 Minn. L. Rev. 375 (1931); 1 Williston, *supra*; 1 Corbin, *supra*; Restatement (Second) of Contracts § 28(1)(b) (1981).

Here, there were no express statements in the advertisements for the auction or at the auction itself which stated that the auction would be without reserve, indicating that the auction was with reserve. See, *Drew, supra*; *Pitchfork Ranch Co., supra*. In addition, Huston stated that there would be a starting bid for each parcel of land. This also indicates that the auction was with reserve. See *Nicholson, supra*. Moreover, the advertisements and the announcement made at the start of the auction stated that the bids were subject to confirmation by the probate court. This, too, indicates that the auction was with reserve. See, *Cuba*, 213 Ga. App. at 640, 445 S.E.2d at 388 ("[w]here the seller explicitly reserves the right to reject or approve, the auctioneer is without authority to accept for the seller"); *Rosin, supra*; *Wilcher*, 537 S.W.2d at 847 ("[t]he provision in the sale bill that the land would sell subject to confirmation by the owner was a recognition of the fact the owner had only authorized a sale 'with reserve' "). Finally, when asked at the auction whether it was an absolute auction, Huston responded that it was not.

While it is true, as the nephew points out, that at the

beginning of the auction Huston stated that the auction was one with no protected bid, Huston testified at trial that his statement meant that the personal representatives were not going to personally bid on the sale. At a hearing prior to the trial, Huston testified that his statement meant that " 'we didn't have anybody that was going to protect the estate at all except the court.' " Allan Woodward, an auctioneer of real estate, testified as an expert that the language "there will be no protected bid" means that the property will absolutely sell to the highest bidder.

Leaving aside the question as to whether Woodward was improperly permitted to testify as to a question of law, see *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995), the fact is that under the evidence there are no less than three different possibilities as to what "no protected bid" may have meant. Under that circumstance, it cannot be said that there was an express statement that the auction was without reserve. That fact, coupled with the other evidence on the issue, leads us on our de novo review to conclude that the auction was one with reserve.

As the auction was one with reserve, the nephew as the bidder is the offeror. The question therefore is whether his bids, or offers, were accepted, resulting in a contract for the sale of the lands. In the usual case, the auctioneer is acting as the seller's agent and may accept a bid on behalf of the seller, thus forming a contract. *Coleman v. Duncan*, 540 S.W.2d 935 (Mo. App. 1976). However, "there is a distinction between auctions which are merely conducted with reserve and those in which the seller explicitly reserves the right to approve, confirm or reject the high bid." *Cuba v. Hudson & Marshall*, 213 Ga. App. 639, 640, 445 S.E.2d 386, 388 (1994).

> Where . . . the seller has reserved the right to refuse to accept any bid made, a binding sale is not consummated until the seller accepts the bid. When the seller reserves the right to reject any and all bids received, he may exercise this right even after the auctioneer has accepted a bid.

Rosin v. First Bank of Oak Park, 126 Ill. App. 3d 230, 235, 466 N.E.2d 1245, 1249 (1984). See, *Cuba, supra*; *Coleman*,

540 S.W.2d at 938 (" 'where a right is reserved in the seller to reject any and all bids received, the right may be exercised by the owner even after the auctioneer has accepted a bid, and this applies to the auction of public as well as private property' "); *City of New York v. Union News Co.*, 222 N.Y. 263, 118 N.E. 635 (1918); *Eugene Stud & Veneer, Inc. v. State Bd. of Forestry*, 3 Or. App. 20, 469 P.2d 635 (1970); *Moore v. Berry*, 40 Tenn. App. 1, 288 S.W.2d 465 (1955); *Continental Can v. Commercial Etc.*, 56 Wash. 2d 456, 347 P.2d 887 (1959).

As it was here made known both through advertisements and the announcement at the auction that any bids on the lands would have to be confirmed by the probate court, the situation is analogous to reserving a right in the seller to confirm, accept, or reject the bids.

In both the instances of an auction with reserve and one in which the seller has reserved the right to refuse any bid, the acceptance of bids by the auctioneer is not the final act, but, rather, the sale is conditioned on confirmation by another party, in this case the court. Even if Huston accepted the bids, and this is by no means certain, his acceptance would not be enough to form a contract for the sale of the lands. Instead, a contract would only be formed by the occurrence of the stated condition, that is, confirmation by the probate court. See *Pluhacek v. Nebraska Lutheran Outdoor Ministries*, 227 Neb. 778, 420 N.W.2d 286 (1988) (agreement to sell land subject to approval of seller's governing board did not create enforceable contract).

As the probate court rejected the nephew's bids, the condition did not occur, and no contract was formed. The district court therefore erred in failing to dismiss the nephew's petition for specific performance.

V. JUDGMENT

The judgment of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS M. MANTICH, APPELLANT.

543 N.W.2d 181

Filed February 9, 1996. No. S-94-1091.

1. **Convictions: Appeal and Error.** On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition.
2. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** Abuse of discretion is the standard of review applicable to an appeal from a district court's denial of a motion to transfer a pending criminal proceeding to the juvenile court.
3. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
4. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
5. **Courts: Juvenile Courts: Jurisdiction.** In weighing the factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1993), there is no arithmetical computation or formula required in the court's consideration of the statutory criteria. In order to retain the proceedings, the court does not need to resolve every factor against the juvenile. There are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
6. **Trial: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in a matter submitted for disposition.
7. **Confessions: Proof: Appeal and Error.** To be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight. The determination of voluntariness is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made, and the determination made by the trial court will not be disturbed on appeal unless clearly wrong.
8. **Confessions: Proof.** In order for a defendant's statement to be entered into evidence, the State must first prove by a preponderance of the evidence that the statement was voluntarily made.
9. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.

10. **Confessions.** In determining whether a confession or statement is voluntary, a court must make its assessment based on an examination of all the circumstances surrounding the confession or statement.
11. **Confessions: Evidence.** The test for determining admissibility of a statement obtained by police deception is whether the deception produced a false or untrustworthy confession or statement.
12. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
13. **Aiding and Abetting.** Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
14. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent.
15. **Homicide: Intent.** Intent to kill is not an element of felony murder. The intent required is the intent to commit the underlying felony.
16. **Jury Instructions: Appeal and Error.** If all the jury instructions read together and taken as a whole correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
17. **Criminal Law: Weapons.** Use of a firearm to commit a felony is an independent criminal offense under Neb. Rev. Stat. § 28-1205 (Reissue 1989).
18. **Aiding and Abetting.** Nebraska's aider and abettor statute, Neb. Rev. Stat. § 28-206 (Reissue 1989), provides that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
19. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
20. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
21. **Homicide: Sentences.** Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the

defendant is entitled to receive credit for time served against the consecutive sentence.

22. **Sentences.** A sentencing judge is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994).

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part vacated and remanded with directions.

Christopher E. Kelly, of Fellman, Moylan, Natvig, Steichen & Kelly, for appellant.

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

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Douglas M. Mantich appeals his convictions for first degree murder and use of a firearm to commit a felony.

SCOPE OF REVIEW

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

Abuse of discretion is the standard of review applicable to an appeal from a district court's denial of a motion to transfer a pending criminal proceeding to the juvenile court. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into

consideration that the trial court has observed the witnesses testifying regarding the motion. See *id.*

FACTS

On December 5, 1993, a group of people gathered at the home of Angelita DeLeon ostensibly to mourn the death of Michael Campbell, a member of an Omaha street gang known as the Lomas. Members of the Lomas attending the party included Mantich, Gary Brunzo, Daniel Eona, Juan Carrera, and Angel Huerta. Mantich testified that there was alcohol and marijuana at the party and that he drank between 5 and 10 beers and smoked portions of 2 marijuana cigarettes between 10 p.m. and 1 a.m.

During the party, there was discussion among the gang members about seeking revenge for Campbell's death. In his tape-recorded statement, Mantich said that Carrera and Eona were discussing stealing a car and doing a drive-by shooting at Ignacio Palma's grandmother's house. Palma was a member of a rival gang. When Carrera suggested stealing a car, Eona waved a gun and stated, "I ain't talkin' about stealin' a car, I'm talkin' about jackin' somebody putting a gun to their head." Huerta also told Mantich that he wanted to do a drive-by shooting of Palma's grandmother's house, and Mantich saw a gun in Huerta's possession at the party.

As people were leaving the party, Diane Barrientos, Mantich's girl friend, offered to give Carrera and Eona a ride home, but they refused. Eona told Barrientos that he intended to get a "G-ride" home. Barrientos understood this to mean that Eona intended to steal a car. Eona and Brunzo then walked toward Dodge Street, and Mantich waited in the street in front of DeLeon's house for them to return.

Eona and Brunzo returned 10 or 15 minutes later in a maroon 1989 Dodge Caravan owned by Michael Blankenau. Blankenau had previously loaned the van to Henry Thompson, who worked for Blankenau's cleaning service. Eona was driving, and Brunzo was in the passenger's seat. Carrera and Huerta got into the van, and Mantich attempted to join them. Barrientos testified that she pled with Mantich to go home with her and attempted to "hang" onto Mantich in order to prevent him from going, but he eventually got into the van. Mantich testified that he knew

when he entered the van that it was probably stolen. After Mantich entered the van, Eona drove toward 33d and Farnam Streets.

Mantich testified that when he entered the van he did not know that Thompson was in the van. Mantich stated that he learned Thompson was in the van soon thereafter. Thompson was seated on the floor of the van between the driver's and the passenger's bucket seats; he was facing the front of the van with his hands behind his head.

In his tape-recorded statement, Mantich said that after he entered the van, the group began taunting Thompson, demanding money, and saying "We're gonna shoot you" and "You're gonna die." Mantich stated that Thompson was crying and pleading with them not to shoot him. At trial, Mantich said that he and the other gang members were chanting things like "Cuz" and "Blood" in order to make Thompson think they were members of the Bloods, another Omaha street gang. Brunzo and Eona repeatedly jabbed the barrels of their guns into the side and back of Thompson's head. Prior to the shooting, Eona and Brunzo searched Thompson's pockets and took his wallet.

Mantich gave conflicting accounts of what subsequently occurred inside the van. In the tape-recorded statement given to Omaha police on January 5, 1994, Mantich recalled that while the group was taunting Thompson, Brunzo handed Carrera a gun, and Carrera handed the gun to Mantich. Members of the gang then began to urge Mantich to shoot Thompson. Mantich stated that at first he did not want to shoot Thompson, but the other members of the gang pressured him to do so. According to Mantich, the others were saying "you ain't down for Lomas," "shoot him," "you ain't got no heart," and "this is for MIKEY." Mantich stated: "I didn't know what to do and then I just got up. And I'm like this and I pull the trigger and then I give the gun back to [Brunzo] and I sat back down." Mantich put the barrel of the gun against the back of Thompson's head and shot him once. Mantich stated that he did not want to kill Thompson. Rather, Mantich claimed that he was thinking about himself and was afraid of the others in the van.

At trial, Mantich gave a different account. He testified that he was seated in the back of the van during the entire episode

and only joined the others as they taunted Thompson. Mantich claimed that the members of the gang did not put pressure on him to shoot Thompson and that no one gave him a gun. Mantich testified that during the taunting, he heard a gunshot and saw a spark from the gun. He denied shooting Thompson and speculated that Brunzo had shot Thompson.

Mantich's explanation of the events that directly followed the killing are, for the most part, consistent in his statement to the police and in his testimony in court. Eona stopped the van at about 13th and Jefferson Streets, where Brunzo opened the sliding van door and Eona and Brunzo pulled Thompson's body out of the van. Mantich stated that as the van drove off, he felt a "little thud" and saw the body rolling. Brunzo explained that the van had just run over the body.

The group drove to Carrera's house to retrieve his gun, and Mantich testified that he considered leaving the van at this time, but he did not because he feared that Brunzo or Eona might shoot him if he attempted to do so. The group then drove to the home of Palma's grandmother and proceeded to fire gunshots into the house. Mantich claimed that he did not participate in the drive-by shooting.

The van was then driven to a dock near the South Omaha Bridge and dumped into the Missouri River. The gang members walked back to 13th Street and then split into two groups. Eona handed his gun to Mantich, and Brunzo and Carrera handed their guns to Huerta. After the others left, Huerta and Mantich walked to Huerta's house.

Mantich later left Huerta's house and eventually walked to Brian Dilly's house. When Mantich arrived, he told Dilly, Dilly's two brothers, and a friend of theirs about the events of the evening and stated that he had shot Thompson. Mantich said that if Dilly did not believe him, he should watch the 6 o'clock news. When the news reported the murder, Mantich exclaimed, "I told you so." Dilly testified that after the news report, Mantich retold his account of the events and again stated that he had shot Thompson. Mantich told Dilly that he shot Thompson because Brunzo called him a "puss" and claimed Mantich would not do it.

Dilly testified that Mantich returned about a week later and

told him that other members of the group were angry with Mantich because they had heard someone was talking about their involvement in the killing. The group believed that Mantich was talking about the crime, and Mantich told Dilly that if he found out who was talking, he would kill the person. Dilly assured Mantich that he had not said anything to anyone, and Mantich left.

At trial, Mantich admitted telling Dilly that he had killed the victim, using the words "I pulled the trigger, and I'm a big shot." Mantich said he was trying to impress Dilly and his brothers. Mantich admitted he had returned to Dilly's house, but denied making any threats and claimed that he was merely warning Dilly that the others in the group might kill Dilly and his brothers if they were talking.

Mantich was arrested at Barrientos' house on January 4, 1994, at approximately 9:30 p.m., and he was transported to central police headquarters. At approximately 10:30 p.m, Officer William Jadlowski and Sgt. William Agnew apprised Mantich of the allegations against him and informed him of his *Miranda* rights using the Omaha Police Division's rights advisory form. Mantich verbally waived his right to counsel and agreed to give a statement. During the interrogation, Mantich first claimed that Brunzo fired the shot that killed Thompson. In a later version of the story, Mantich admitted that his first version of the events was not entirely truthful and that he had shot Thompson. Mantich was then asked to give a tape-recorded statement. Upon completion of that statement, the interrogation ended at 2:13 a.m. on January 5.

Mantich moved to suppress the tape-recorded statement on the grounds that it was not given voluntarily. The motion was overruled. The trial court also overruled Mantich's motion to waive jurisdiction and transfer Mantich's case to juvenile court for adjudication. Mantich was tried before a jury and was convicted of murder in the first degree and use of a firearm to commit a felony. Mantich appeals.

ASSIGNMENTS OF ERROR

Mantich assigns the following errors: (1) The trial court erred in refusing to transfer this case to juvenile court; (2) the court erred in admitting Mantich's tape-recorded statement into

evidence, as the State had failed to prove its voluntariness; (3) the court erred in overruling Mantich's objections to the court's instructions on the law of aiding and abetting and in refusing to instruct the jury as requested by Mantich; (4) the court erred in holding that an unarmed defendant may be convicted as an aider and abettor of using a firearm in the commission of a felony; and (5) the court erred in submitting the case to the jury, as there was insufficient evidence upon which to base a conviction.

ANALYSIS

Transfer to Juvenile Court

Mantich argues that the trial court erred in refusing to transfer this case to juvenile court. The decision of whether to waive jurisdiction over a juvenile and transfer the case to juvenile court is governed by Neb. Rev. Stat. § 43-261 (Reissue 1993), which provides: "In deciding the motion [to transfer to juvenile court] the court shall, after considering the evidence and the reasons presented by the parties and the matters required to be considered by the county attorney pursuant to section 43-276, transfer the case unless a sound basis exists for retaining jurisdiction." Abuse of discretion is the standard of review applicable to an appeal from a district court's denial of a motion to transfer a pending criminal proceeding to the juvenile court. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

The trial court applied factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1993) to determine whether it should waive jurisdiction and send the case to juvenile court. In *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990), we stated that in weighing such factors, there is no arithmetical computation or formula required in the court's consideration of the statutory criteria. In order to retain the proceedings, the court does not need to resolve every factor against the juvenile. There are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id.*

The trial court found that the alleged offense included

violence and was performed in a highly aggressive manner. The motivation for the alleged offense was Mantich's apparent desire to be "upgraded" in the opinion of his peers, and the offense was committed in response to their encouragement. Mantich had previously been involved with the police regarding two property offenses. The court found that Mantich's lifestyle demonstrated a desire to live independently as an adult. He lived with his girl friend frequently and had made his own decision about schooling. The court noted that there were no juvenile facilities appropriate for treatment and rehabilitation of a juvenile who had committed murder. Neb. Rev. Stat. § 43-286 (Reissue 1993) prohibits the placement of juveniles convicted of murder in the Youth Development Center-Kearney. The court found that because of the serious nature of the offense, the security of the public required that Mantich be incarcerated for a period of time extending beyond his minority, which would render the juvenile system inadequate to address these needs.

The trial court held there was a sound basis for retaining jurisdiction and overruled the motion to transfer. We agree. A judicial abuse of discretion exists when the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in a matter submitted for disposition. See *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995). The court did not abuse its discretion.

TAPE-RECORDED STATEMENT

Mantich argues the State failed to prove that his tape-recorded statement was voluntary.

> [T]o be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight. . . . [T]he determination of voluntariness is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made, and the determination made by the trial court . . . will not be disturbed on appeal unless clearly wrong.

State v. Bronson, 242 Neb. 931, 937-38, 496 N.W.2d 882, 889 (1993).

This assigned error presents two issues: (1) whether this error was preserved for appeal and (2) whether Mantich's statement was voluntary. The State argues that Mantich did not preserve his challenge to the voluntariness of the statement because he did not enter a proper objection to the statement at trial. We disagree. At trial, Officer Jadlowski discussed the general outline of the interrogation and began to testify about what Mantich stated during the interrogation. Mantich's counsel said, "At this time I'm going to interpose an objection. Renew all objections previously made with regard to my client's statement." The objection was overruled, and the questioning of Jadlowski continued. The State changed the line of questioning to foundation for admission of the statement. The State offered the tape recording, and Mantich's counsel stated, "Objection; foundation." The objection was overruled, and the tape recording was received and played for the jury.

The State argues that Mantich's first objection—renewing his previous objections to admission of the statement, including the grounds he raised in his motion to suppress—did not carry over to preserve an objection when the statement was offered. The State contends that because Mantich's counsel did not specifically state that his second objection was for lack of voluntariness, he failed to preserve this objection to the tape-recorded statement for appeal.

We find that Mantich's general objection on foundation was sufficient to preserve his objection for appeal. Neb. Rev. Stat. § 27-103 (Reissue 1989) provides:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless . . .
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context . . . .

It would have been reasonably apparent to the trial court that Mantich intended to include an objection to the admissibility of the contents of the tape-recorded statement. Mantich made a proper foundational objection when the statement was offered into evidence. In order for a defendant's statement to be entered into evidence, the State must first prove by a preponderance of

the evidence that the statement was voluntarily made. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). The voluntariness of the statement was a foundational issue, which Mantich articulated to the court.

We next consider whether Mantich's tape-recorded statement was voluntary. Mantich argues that the totality of the circumstances surrounding the interrogation demonstrate the involuntary character of the statement. He emphasizes his age, the emotional pressure of the interrogation, and the fact that he did not have his parents or an attorney present at the interrogation. Mantich also claims the officers who interrogated him obtained information by using deceptive practices.

The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993) (citing *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985)). In determining whether a confession or statement is voluntary, a court must make its assessment based on an examination of all the circumstances surrounding the confession or statement. See *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993). The State bears the burden to prove by a preponderance of the evidence the voluntariness of any statement by a defendant offered into evidence. See *State v. Garza, supra.*

At the suppression hearing, Officer Jadlowski testified that when Mantich was arrested, he was informed that he was being investigated in relation to the homicide of Thompson. The interrogation commenced at 10:30 p.m., and after the officers obtained preliminary biographical information, Mantich was advised of his *Miranda* rights at 10:35 p.m. The officers used a standard rights advisory form, and Jadlowski testified that he recorded each of Mantich's responses to the questions verbatim.

According to Officer Jadlowski, Mantich responded in a coherent manner, was easy to understand, and appeared to understand what was going on. There were no inducements or promises made to Mantich in exchange for his statement. Mantich did not appear to be under the influence of alcohol or drugs at the time he was advised of his rights, and he appeared

to understand what the advisements meant. Jadlowski stated that Mantich was not threatened or coerced. Mantich did not appear to be suffering from any duress under the circumstances and did not request that the interrogation be terminated.

Mantich voluntarily waived his right to counsel being present at the interrogation. Officer Jadlowski testified that Mantich's decision to waive his rights appeared to be intelligently made and that it appeared that Mantich understood what he was doing. After commencement of the interrogation, Mantich did not request to be allowed to consult with an attorney.

Following the advisement of Mantich's rights, Officer Jadlowski informed Mantich that police officers were also interrogating Brunzo, Eona, and Carrera. Jadlowski told Mantich that there was not a lot of mystery as to what had happened and that he believed Mantich was involved in the crime. Jadlowski requested that Mantich explain everything that had happened.

During his first account of the murder, Mantich stated that Brunzo had shot Thompson. The interrogation continued for 1 hour, and the group then took a 30-minute break. At that time, Mantich was allowed to use the restroom, and he was offered a soda, which he accepted. After the break, Officer Jadlowski told Mantich that he had just spoken with Dilly, who said that Mantich had given him a different account of the shooting.

The second segment of the interrogation lasted about 1 hour. In a subsequent account of the killing, Mantich confessed to shooting Thompson. Mantich was asked if he would be willing to make a tape-recorded statement, and he agreed. The group then took a second 30-minute break at approximately 1 a.m. During the break, officers set up the tape-recording equipment. Jadlowski testified that Mantich did not appear to be tired at that time. Mantich then retold the last version of his story for purposes of the tape recording, which took about 43 minutes. After the tape-recorded statement was completed, Mantich asked to call his mother.

Mantich argues that the tape-recorded statement was obtained as a result of the deceptive practices of Officer Jadlowski. At the hearing on the motion to suppress, Jadlowski admitted that he had not spoken to Dilly during the break. In

fact, Jadlowski had received this information from Dilly well before Mantich's interrogation began. The test for determining admissibility of a statement obtained by police deception is whether the deception produced a false or untrustworthy confession or statement. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986). In this instance, the deception cannot be said to have produced Mantich's statement. The only deception was with regard to the time at which Jadlowski obtained the information from Dilly. The trial court was not clearly wrong in finding that the deceptive statement about the time Jadlowski had spoken to Dilly did not produce an untrustworthy confession.

Mantich argues that the fact that the police taped only 43 minutes of the interrogation, which lasted approximately 2 hours 40 minutes, supports his claim that his confession was coerced. We disagree. A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. See *id.* We find nothing in the record to indicate that the trial court's findings of fact were clearly erroneous or that the court should have suppressed the tape-recorded statement given by Mantich. At trial, Mantich testified on direct examination that he was never threatened, mistreated, or promised anything by the police officers. Mantich's assignment of error has no merit.

Jury Instructions and Intent

Mantich argues the trial court erred in overruling his objections to the court's instructions on aiding and abetting and by refusing to give his requested instruction. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the

tendered instruction. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

Mantich claims instruction No. 11 given by the trial court deleted the necessary element of intent from the allegations of aiding and abetting. In *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995), we explained that aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. We also stated that when a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent.

Intent to kill is not an element of felony murder. *Id.* The intent required is the intent to commit the underlying felony. *Id.*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Therefore, in order to find Mantich guilty of felony murder, the jury had to find that Mantich possessed the requisite intent to support the underlying felony. In order for the court's jury instructions to be sufficient on the issue of intent in a prosecution for felony murder under an aider and abettor theory, the jury instructions must instruct the jury that the aider and abettor either personally intended that the underlying felony be committed or aided another person whom the aider knew had such an intent. The intent required was not an intent to kill Thompson, but was an intent to commit robbery or kidnapping.

The trial court gave two instructions which, read together, instruct the jury as to the required proof regarding the prosecution's aiding and abetting theory. With respect to the matter of aiding and abetting, the court gave instruction No. 11:

> To be guilty of the crime charged, it is not necessary that the State prove that the defendant himself committed the unlawful act or acts in question.
>
> Whoever aids, abets, or procures another to commit any

offense may be prosecuted and punished as if he were the principal offender.

If you find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person who was:

1. Engaged by the defendant to commit the unlawful act or acts; or

2. Engaged with the defendant in a common, concerted, unlawful act or acts; or

3. Incited or encouraged by the defendant to commit the unlawful act or acts,

then the defendant is as guilty as if he himself committed the unlawful act or acts, and it is your duty to find the defendant guilty.

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving the defendant guilty.

Instruction No. 9 provided:

Criminal intent is a material and necessary element of the crime of Murder in the First Degree in the commission of a felony as charged against the defendant. But the intent required is not an intent to kill Henry Thompson but is an intent to commit a robbery or kidnapping.

The intent required by Instructions 6 and 7 is a material element of the crime charged against the defendant. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely —if ever— susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and

> whether at such time he had the criminal intent required by Instructions 6 and 7. If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

If all the jury instructions read together and taken as a whole correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995). Instruction No. 11 instructed that Mantich could be found to have committed the underlying felony of robbery or kidnapping as an aider and abettor. Instruction No. 9 specifically stated that the prosecution was required to prove that Mantich intended to commit one of these underlying felonies. Read together, these instructions required the jury to find that Mantich intended to aid and abet the commission of the felony underlying the felony murder charge. Therefore, Mantich was not prejudiced by the use of these instructions instead of the instruction he proffered to the trial court. The court's refusal to give Mantich's proffered instruction was not error.

Use of a Firearm to Commit a Felony

Mantich argues that the trial court improperly instructed the jury that Mantich could be convicted of the crime of using a firearm to commit a felony under an aider and abettor theory. Instruction No. 7 provided:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant Douglas M. Mantich of the crime of use of a firearm to commit a felony, as charged in Count II of the Information, are:
>
> 1. That on or about the 6th day of December, 1993, in Douglas County, Nebraska, the defendant, Douglas M. Mantich, either alone or while aiding and abetting another person did commit Murder in the First Degree in the perpetration of, or attempt to perpetrate a robbery or kidnapping; which is the subject of Count I of the Information;
>
> 2. That in the commission of said Murder in the First Degree in the perpetration of, or attempt to perpetrate a

robbery or kidnapping, a firearm was used; and

3. That such use of a firearm to commit a felony was intentional.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant, Douglas M. Mantich guilty of the crime of use of a firearm to commit a felony as charged in Count II and you shall so indicate by completing Verdict Form 3.

On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the use of a firearm to commit a felony as charged in Count II and you shall so indicate by completing Verdict Form 4.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

Mantich claims instruction No. 7 incorrectly stated that he could be convicted of using a firearm to commit a felony even if the jury believed that he was unarmed.

Use of a firearm to commit a felony is an independent criminal offense under Neb. Rev. Stat. § 28-1205 (Reissue 1989). Nebraska's aider and abettor statute, Neb. Rev. Stat. § 28-206 (Reissue 1989), provides that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender. In *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993), we held that one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. See, also, *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990). Thompson was kidnapped, robbed, and terrorized at gunpoint. The crime of using a firearm to commit these acts is a natural and probable consequence of the

kidnapping, robbery, and terrorizing of Thompson. As a natural and probable consequence of the kidnapping and robbery, Mantich—who intentionally aided and abetted these criminal acts—could properly be convicted of using a firearm to commit a felony even if the jury believed that he was unarmed. Mantich's assignment of error has no merit.

Sufficiency of the Evidence

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995).

The facts taken in the light most favorable to the State are such that a finder of fact could conclude beyond a reasonable doubt that Mantich committed murder while aiding and abetting in the kidnapping and robbery of Thompson and used a firearm to commit a felony. There is sufficient evidence to demonstrate that Mantich aided and abetted the kidnapping and robbery perpetrated against Thompson. When Eona and Brunzo left the party and returned with the stolen van, Mantich joined them over the strong objections and physical restraint of his girl friend. Mantich testified that he heard Eona and Brunzo tell Thompson they were going to kill him, and Mantich watched as Eona and Brunzo repeatedly jabbed Thompson in the head with the barrels of their guns. Mantich's statement to police was sufficient to establish that he was handed a gun, placed the gun against the back of Thompson's head, and pulled the trigger.

Even if the jury was uncertain as to whether Mantich actually

shot Thompson, the evidence supports the jury's finding that Mantich aided and abetted in the kidnapping and robbery of Thompson. It was undisputed that Thompson was killed by someone in the van while the group was kidnapping, robbing, and terrorizing him. The group forcibly restrained Thompson with the express intent of robbing and terrorizing him. The evidence shows that Mantich encouraged these activities and participated in the verbal terrorization of Thompson. This evidence is sufficient to convict Mantich of felony murder and use of a weapon to commit a felony.

THE SENTENCE

Finally, we address the sentence for use of a firearm to commit a felony. Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). We therefore note plain error in Mantich's sentence for use of a firearm to commit a felony.

A sentencing judge is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994). *State v. Marks, supra*. We therefore vacate the sentence imposed for use of a firearm to commit a felony and remand the cause to the trial court with directions to resentence Mantich and give him credit for time served against the firearm conviction.

CONCLUSION

Mantich's convictions for first degree murder and use of a firearm to commit a felony are affirmed. Mantich's sentence for use of a firearm to commit a felony is vacated, and the cause is remanded to the trial court with directions to resentence Mantich, giving him credit for time served.

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

WHITE, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LLOYD DEWEY SCHOONMAKER, APPELLANT.

543 N.W.2d 194

Filed February 9, 1996. No. S-95-401.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. ____: ____: ____. A criminal defendant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Constitutional Law: Postconviction: Proof.** A criminal defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution.
4. **Postconviction.** A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
5. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, a defendant is required to show that counsel's performance was deficient and such deficient performance prejudiced the defense in that there is a high degree of probability that the results of the proceedings would have been different but for counsel's deficient performance.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Richard W. Harter, of Harter Law Office, P.C., for appellant.

Don Stenberg, Attorney General, Jay C. Hinsley, and, on brief, Delores Coe-Barbee for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

Lloyd Dewey Schoonmaker was convicted of second degree murder in the death of Robert Dooley following a second jury trial, which was required due to procedural irregularities in the jury instructions of the original trial. In his postconviction relief motion, Schoonmaker asked the district court for Cass County

to either vacate the judgment of conviction or grant him a new trial. The motion for postconviction relief alleges that trial counsel for Schoonmaker provided ineffective assistance because he failed to directly appeal the conviction, which appeal was warranted on the basis that Schoonmaker was wrongfully denied an evidentiary hearing on a motion to suppress evidence filed prior to the second jury trial. The motion to suppress alleged constitutional rights violations and was denied on the basis that it was identical to a previous motion to suppress overruled by the court prior to the original jury trial. Because we find that Schoonmaker has not shown that he was prejudiced by his trial counsel's failure to directly appeal his criminal conviction, we affirm the order of the district court denying the motion for postconviction relief.

FACTUAL BACKGROUND

Dooley, age 10, was murdered on September 22, 1972, after attending a carnival with his siblings. While at the carnival, Dooley and a friend worked for a short period of time at a game booth under the supervision and permission of Schoonmaker, who was a ticket salesman for the carnival. Dooley did not return home from the carnival on the evening of September 22 and was reported missing to the police. The next day, Schoonmaker entered the yard surrounding Dooley's residence and spoke to Dooley's mother, Evelyn Keyser. Schoonmaker told Keyser that he had seen and talked to Dooley at the carnival and that Dooley told Schoonmaker he was going to run away.

On September 28, 1972, 6 days after Dooley disappeared, Schoonmaker was brought in for questioning. Prior to questioning, Schoonmaker was read an interrogation form informing him of his *Miranda* rights, which he voluntarily signed. Schoonmaker was reread these rights numerous times during extensive questioning, although he did not sign additional interrogation forms which were presented to him, stating that he had already signed a similar form. During questioning, Schoonmaker admitted that he knew who Dooley was and eventually led police to the location where Dooley's body was discovered on September 30.

On January 26, 1973, Schoonmaker was charged by

information with second degree murder in the death of Dooley. From approximately March 1973 until September 1981, Schoonmaker was determined to be incompetent to stand trial. However, on September 30, 1981, Schoonmaker was determined to be competent, and the matter was set for trial before the district court for Cass County. Subsequently, counsel for Schoonmaker filed a motion to suppress evidence, asserting violation of Schoonmaker's constitutional rights as the result of illegal arrests without probable cause and lack of proper advisement of *Miranda* rights or voluntary waiver thereof prior to questioning. After an evidentiary hearing, the district court overruled the motion to suppress. A jury trial was held, and on January 14, 1982, Schoonmaker was convicted of second degree murder. However, on February 26, a motion for new trial was granted because of the failure of the court to properly instruct the jury during the first trial.

A second jury trial was scheduled for May 24, 1982. Counsel for Schoonmaker then filed another motion to suppress, which was identical to the motion to suppress denied by the district court prior to the first trial. In relation to the second motion to suppress, counsel for the State made an oral motion to deny an evidentiary hearing, and both counsel agreed to submit the matter on the record made at the original suppression hearing. There was no new evidence offered or received at the hearing on the second motion to suppress, and Schoonmaker's counsel affirmatively represented that there was no new or different evidence from that offered at the original suppression hearing.

On May 20, 1982, the district court overruled the second motion to suppress, finding that Schoonmaker was not entitled to an evidentiary hearing on "a second Motion to Suppress involving the same issues," because the court had previously held an evidentiary hearing and ruled on a motion to suppress during the course of the proceedings of the first trial. At the second trial, evidence subject to the motion to suppress was received over the objection of counsel for Schoonmaker, and, thereafter, Schoonmaker was convicted of second degree murder. After the trial but prior to sentencing, counsel for Schoonmaker filed a motion for new trial which was denied by the district court. Schoonmaker did not appeal the overruling of

his motion for new trial or the judgment of conviction for second degree murder.

With newly appointed counsel, Schoonmaker filed a motion for postconviction relief, asserting ineffective assistance of counsel in failing to directly appeal the conviction. The district court overruled the motion for postconviction relief without an evidentiary hearing. The district court held that the original trial court properly denied the request for an evidentiary hearing in relation to the second motion to suppress, and, therefore, the claim of ineffective assistance of counsel was without merit. Schoonmaker has appealed this ruling.

ASSIGNMENTS OF ERROR

Schoonmaker alleges, in essence, that the district court erred in (1) failing to find that Schoonmaker was denied effective assistance of counsel at the original trial and (2) refusing to grant an evidentiary hearing.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Russell, supra*; *State v. Barfoot*, 248 Neb. 335, 534 N.W.2d 572 (1995). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution. *State v. Russell, supra*; *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995). Additionally:

> " ' "A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper

> pleadings of fact in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable." ' "

State v. Russell, 239 Neb. 979, 980, 479 N.W.2d 798, 800 (1992).

ANALYSIS

Ineffective Assistance of Counsel.

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Ryan, supra*; *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). This two-pronged test is derived from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The two prongs of the *Strickland* test may be addressed in either order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland v. Washington, supra*; *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

Following the conviction for second degree murder after the second jury trial, trial counsel for Schoonmaker filed a motion for new trial, asserting irregularities in the proceedings, insufficient evidence, and legal errors. The motion for new trial did not specifically allege any errors in regard to the motion to suppress or lack of evidentiary hearing, and the motion was overruled by the trial court. Trial counsel for Schoonmaker did not appeal the conviction or the order denying the motion for new trial. Assuming without deciding that trial counsel's alleged inaction was deficient, we examine whether such inaction prejudiced Schoonmaker.

The motion to suppress at issue in this postconviction motion

is identical to the motion to suppress filed by trial counsel prior to the original jury trial. In regard to the original motion to suppress, an evidentiary hearing was conducted in which testimony and evidence were received pertaining to the arrest and questioning of Schoonmaker. Following this evidentiary hearing, the trial court determined that the constitutional rights of Schoonmaker had not been violated in connection with either his questioning or his arrest.

Schoonmaker's complaint in the postconviction proceedings is that, absent a direct appeal, he was precluded from having an appellate court review the trial court's ruling on the original motion to suppress. While it may be true that Schoonmaker did not receive appellate review of the original suppression issue, it is likewise true that Schoonmaker has not specified how the trial court erred in its original ruling on the motion to suppress. There is no assertion in Schoonmaker's verified motion for postconviction relief specifying the grounds for error in the trial court's original suppression ruling, and, upon questioning, counsel at oral argument did not specify what errors the trial court had made in its suppression ruling.

There is ample evidence in the record to support the trial court's overruling of Schoonmaker's original motion to suppress. Prior to Dooley's disappearance, Schoonmaker was seen associating with Dooley. The day after Dooley disappeared, Schoonmaker voluntarily admitted this association and knowledge of Dooley's actions to his mother. Furthermore, prior to questioning, Schoonmaker was advised on several occasions by different law enforcement officers of his *Miranda* rights. Finally, Schoonmaker voluntarily led police to the location of the body of Dooley. Schoonmaker has not demonstrated that "but for" trial counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Clausen, supra*. On a motion for postconviction relief, an appellate court is not required to guess on which grounds the trial court may have erred in overruling a motion to suppress evidence in the original proceedings. Thus, Schoonmaker failed to meet his burden of proving a prejudicial error.

Schoonmaker also asserts that the trial court should not have considered the testimony from the original suppression hearing when it ruled on his second motion to suppress. Even though Schoonmaker's trial counsel stipulated to the use of the original suppression transcript and affirmatively represented that there was no new or different evidence to be offered, Schoonmaker claims that the evidence elicited in a prior hearing is hearsay absent a showing of witness unavailability. This claim is without merit. Neb. Rev. Stat. § 29-822 (Reissue 1989) provides that a motion to suppress evidence may be filed at any time after an information is filed against a defendant, but the motion must be filed at least 10 days prior to the time of trial. There is no statutory requirement to file a second motion to suppress after the granting of a new trial when the form and substance of the "new" motion to suppress is identical to the motion to suppress originally on file. In short, there was no need to file a second, identical motion to suppress in the instant case, after a new trial had been granted by the trial court. Thus, there was no prejudice to Schoonmaker in utilizing the original suppression transcript when his trial counsel represented that he had no new or additional evidence, and he did not insist on calling new witnesses or reexamining witnesses from the previous hearing.

CONCLUSION

Despite his assertions to the contrary, Schoonmaker has failed to show that he was prejudiced in the defense of his case by the lack of a direct appeal in this matter. The district court correctly refused an evidentiary hearing as " ' " 'the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant . . . .' " ' " *State v. Russell*, 239 Neb. 979, 984, 479 N.W.2d 798, 802 (1992). Schoonmaker's rights under the U.S. and Nebraska Constitutions were neither denied nor infringed so as to render his conviction void or voidable. The district court did not err in refusing to grant relief on the grounds specified by Schoonmaker. We affirm the judgment of the district court.

AFFIRMED.

METRO RENOVATION, INC., APPELLEE, V. STATE OF NEBRASKA DEPARTMENT OF LABOR, APPELLEE, DAN DOLAN, NEBRASKA COMMISSIONER OF LABOR, APPELLANT, AND RUSSELL L. LEININGER, CLAIMANT, APPELLEE.

543 N.W.2d 715

Filed February 16, 1996. No. S-94-047.

1. **Administrative Law: Judgments: Appeal and Error.** Under Nebraska's Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors 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 the 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. **Administrative Law: Judgments: Time: Appeal and Error.** The Administrative Procedure Act provides that proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within 30 days after the service of the final decision by the agency.
4. **Administrative Law: Jurisdiction: Appeal and Error.** The Administrative Procedure Act's phrase "action taken" is defined by the site of the first adjudicated hearing of a disputed claim.
5. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5) (Reissue 1994), when a petition for judicial review of an administrative agency's decision is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
6. **Parties: Appeal and Error.** It is a general rule that a party cannot complain of error which that party was instrumental in bringing about.
7. **Courts: Rules of the Supreme Court.** When an opinion of the Court of Appeals which has been designated for permanent publication is the only Nebraska case which addresses an issue, it may, under the provisions of Neb. Ct. R. of Prac. 2E(4) (rev. 1993), be cited for whatever persuasive force it may have, but it does not constitute binding precedent.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

John F. Sheaff and John H. Albin for appellant and for appellee State.

Mark Quandahl, of Brumbaugh & Quandahl, P.C., for appellee Metro Renovation, Inc.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Nebraska's Commissioner of Labor (Commissioner) appeals a district court ruling that all carpenters utilized by Metro Renovation, Inc. (Metro), between January 1, 1988, and July 31, 1992, were independent contractors and that, therefore, Metro was not liable for unemployment insurance contributions for those carpenters. We reverse, and remand for further proceedings.

ASSIGNMENTS OF ERROR

In substance, the Commissioner's assignments of error claim that the district court for Douglas County erred in (1) finding that it had jurisdiction to hear Metro's petition for judicial review, (2) applying the wrong standard of review, and (3) holding that the Commissioner's decision was arbitrary, capricious, and unsupported by the evidence.

The Commissioner also claims that the district court's final order is contrary to law and unsupported by the evidence.

STANDARD OF REVIEW

Under Nebraska's Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). When reviewing an order of the 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. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994).

FACTS

Following an investigation and a hearing in Omaha, the Commissioner found that certain carpenters utilized by Metro were employees of Metro and that, therefore, Metro was liable

for unemployment insurance contributions on account of those carpenters.

Metro petitioned the district court for Douglas County for judicial review of the Commissioner's decision. The Commissioner demurred to Metro's petition, claiming that the district court for Douglas County lacked jurisdiction to hear Metro's petition for judicial review. That court overruled the demurrer.

The facts are not in dispute. Metro is a general contractor engaged in the remodeling and renovation business. Once a contract has been awarded to it, Metro engages workers to perform the construction work required at various jobsites. One such worker during the period in question was Russell L. Leininger, a representative carpenter in this case.

The evidence is undisputed that some carpenters engaged by Metro were treated as employees. These carpenters were paid an hourly wage. These workers were covered under Metro's insurance policy, workers' compensation, and unemployment insurance. In contrast, other carpenters engaged by Metro, such as Leininger, were treated as independent contractors. They submitted invoices to Metro every 2 weeks for their services provided at each jobsite. Leininger billed Metro for his services at the rate of $10 per hour. Metro did not withhold any taxes from money due these "independent contract" carpenters, nor did it pay any workers' compensation insurance premiums on account of these carpenters. Each of these carpenters was experienced and performed at the jobsites without supervision. Metro only told these "independent contract" carpenters the address of the jobsite, the work needed, and the deadline for their work to be completed. Each such carpenter supplied his or her own vehicle and tools and was not paid any expenses. Metro provided all of the materials for the jobs.

Metro maintained an office and workshop in Omaha. Although some work was done in the workshop by the "independent contract" carpenters, the great majority of Metro's business was conducted at various jobsites.

The district court reversed the decision of the Commissioner that Metro was liable for unemployment tax on the independent contract carpenters and further found that "*all carpenters*

employed by Russell Leininger [sic] *during the period in question were independent contractors and not employees under Nebraska Revised Statute 48-604 (5) (1988).*" (Emphasis supplied.) The Commissioner timely appealed the district court's ruling to the Nebraska Court of Appeals.

Pursuant to our authority to regulate the caseloads of the appellate courts, we removed this case from the Court of Appeals' docket to this court's docket.

ANALYSIS

Initially, we address the Commissioner's restated first assignment of error that the district court for Douglas County lacked jurisdiction to hear Metro's petition for review. The Administrative Procedure Act is dispositive. As applicable here, it provides that "[p]roceedings for review shall be instituted by filing a petition *in the district court of the county where the action is taken* within thirty days after the service of the final decision by the agency." (Emphasis supplied.) Neb. Rev. Stat. § 84-917 (Reissue 1994).

The Commissioner argues that the phrase "where the action is taken" should be interpreted to mean "where the decision is made." The Commissioner's principal office is located in Lincoln, and it is ultimately the Commissioner who adopts or rejects the recommendation of a hearing officer as to whether unemployment insurance premiums are due from an entity utilizing workers. Under the Commissioner's interpretation of § 84-917, every petition for judicial review of whether an entity must pay unemployment insurance premiums must be filed in the district court for Lancaster County. We find the Commissioner's interpretation of § 84-917 is in error.

Before July 1, 1989, Neb. Rev. Stat. § 48-650 (Cum. Supp. 1986) provided that a petition for judicial review of the Commissioner's determination of an employer's unemployment insurance contributions had to be filed in the district court for Lancaster County. See, 1941 Neb. Laws, ch. 94, § 5, p. 392; *United Laboratories, Inc. v. Sorensen*, 220 Neb. 412, 369 N.W.2d 647 (1985); *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983). That is no longer true. Section 48-650 was amended to provide, effective July 1, 1989,

that petitions for judicial review of administrative agency decisions "shall be in accordance with the Administrative Procedure Act." See § 48-650 (Reissue 1993).

We have held that the Administrative Procedure Act's phrase "action taken" is defined by the site of the first adjudicated hearing of a disputed claim. *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb 448, 323 N.W.2d 89 (1982). See, also, *Downer v. Ihms*, 192 Neb. 594, 223 N.W.2d 148 (1974). In *Downer*, the initial denial of welfare benefits and the administrative review hearing occurred in the plaintiff's county of residence. We found that under the internal regulations governing the Department of Public Welfare:

> The sole event that may occur in other than the county of the residence of the affected person is the consideration by the director of his decision. Even that is not mandated by statute for if the hearing is held before the director, as the statute authorizes, then presumably he might also make his decision in the county of the residence of the affected party.

Id. at 600, 223 N.W.2d at 151.

In *Bd. of Ed. of Keya Paha County, supra*, the initial denial of tuition payments by the State Board of Education occurred in Keya Paha County. However, the site of the first adjudicated hearing between the Keya Paha School District and the State Board of Education occurred in Lincoln. Citing to *Downer, supra*, the court found that the district court for Keya Paha County lacked jurisdiction to hear the case and dismissed the appeal.

In the present case, the unemployment tax administrator's decision that Metro is liable for past unemployment insurance contributions for the carpenters involved here was the result of information provided by a Department of Labor field representative sent to investigate Metro in Omaha.

The Commissioner set Omaha as the place of the first adjudicated hearing. A hearing officer appointed by the Commissioner made findings of fact following a hearing and made his recommendation in a three-page opinion. As in *Downer*, the Commissioner's only act in Lincoln was his final decision to adopt the recommendation of both the hearing

officer and the tax administrator. Accordingly, the district court for Douglas County did have jurisdiction to hear Metro's petition for judicial review because Douglas County was where the first adjudicated hearing was held.

The Commissioner's restated second and third assignments of error amount, in substance, to a claim that the district court applied the wrong standard of review.

Under § 84-917(5), when a petition for judicial review of an administrative agency's decision is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.

The Commissioner claims in his brief that in the district court, "[a]lthough it was a *de novo* review, the parties proceeded upon the premise that the employer had satisfied *Neb. Rev. Stat.* § 48-604(5)(a) and (c) [(Reissue 1993)]." Brief for appellant at 12. Thus, the only contested issue was whether the employer had satisfied Neb. Rev. Stat. § 48-604(5)(b) (Reissue 1993). These were the findings of the Commissioner's hearing officer and were adopted by the Commissioner in his final decision.

It is a general rule that a party cannot complain of error which that party was instrumental in bringing about. See, *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995); *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994). Because the Commissioner and Metro proceeded in the district court under the presumption that the hearing officer's findings were correct as to subsections (a) and (c) of § 48-604(5), the Commissioner cannot now complain that the district court did not review those issues de novo on the record, nor can the Commissioner complain that the district court erred in applying the wrong standard of review on those points. The Commissioner's second and third assignments of error are without merit.

The Commissioner's final claim that the district court's decision is contrary to law and unsupported by the evidence has merit. The district court found that "all carpenters employed by Russell Leininger [sic] during the period in question were independent contractors and not employees under Nebraska Revised Statute **48-604 (5) (1988)**." The Commissioner

conceded in his brief and at oral arguments that Metro met the (a) and (c) portions of § 48-604(5). As such, the Commissioner contends that the district court erred in determining that the work performed by all carpenters utilized by Metro was not "performed outside of all the places of business of the enterprise for which such service is performed," as required by § 48-604(5)(b).

Section 48-604(5) defines the term "independent contractor." It reads:

> Services performed by an individual for wages shall be deemed to be employment, unless it be shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services . . . (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written.

We have yet to define "places of business" in the context of § 48-604(5)(b). Although *Commissioner of Labor v. Lyric Co.*, 224 Neb. 190, 397 N.W.2d 32 (1986); *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985); and *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983), deal with § 48-604(5), none specifically address § 48-604(5)(b).

The Commissioner relies on the Court of Appeals' recent decision in *Bay Constr. Co. v. Dolan*, 2 Neb. App. 739, 513 N.W.2d 555 (1994), for the proposition that the places of business of an employer in the construction industry necessarily include all of the worksites where the employer renders its construction services. It should be noted that although an opinion of the Court of Appeals which has been designated for permanent publication may be cited for whatever persuasive force it may have, see Neb. Ct. R. of Prac. 2E(4) (rev. 1993), such an opinion does not constitute binding precedent.

Once a court has been created, it is free, within the administrative directions of this court and the limits of its jurisdiction, to operate as it chooses. Neb. Const. art. V, § 1; *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). The purpose for which a court was established can nonetheless be discerned from the statutes creating it.

Neb. Rev. Stat. § 24-1104 (Cum. Supp. 1994) envisions that decisions of the Court of Appeals be published only in limited circumstances. The foregoing statute provides that opinions of the Court of Appeals be in the form of an order which may be accompanied by a memorandum opinion. According to the statute, memorandum opinions are to be published upon order of the Court of Appeals only if one or more of the following factors are present:

(a) Whether the decision enunciates a new rule of law;

(b) Whether the decision applies an established rule of law to a factual situation significantly different from that in published opinions;

(c) Whether the decision resolves or identifies a conflict between prior Court of Appeals decisions;

(d) Whether the decision will contribute to legal literature by collecting case law or reciting legislative history; and

(e) Whether the decision involves a case of substantial and continuing public interest.

Thus, although § 24-1104 provides guidelines regarding publication of Court of Appeals opinions, it is appropriately silent as to whether those opinions are binding authority, for the answer to that question is to be found in a judicial analysis of the doctrine of stare decisis and the unique structure of appellate courts in this state.

The doctrine of stare decisis requires courts to abide by, or adhere to, decided cases. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall*, 166 Neb. 588, 90 N.W.2d 50 (1958); *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955), *overruled on other grounds, Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966). Precedent is an adjudged case or decision of a court, which furnishes an

example or authority for an identical or similar case afterward arising or a similar question of law. Black's Law Dictionary 1176 (6th ed. 1990).

The doctrine rests upon the notion that the common law is inseparably identified with the decisions of the courts. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984). Adherence to settled law promotes stability and certainty. A Court of Appeals decision cannot be said to have conclusively settled an issue of law because this court is the ultimate authority in fashioning precedential law for Nebraska.

In Nebraska, appeals are generally to the Court of Appeals. However, "capital cases, cases in which life imprisonment has been imposed, and cases involving the constitutionality of a statute" shall be appealed to the Supreme Court. Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 1994). Moreover, appellate jurisdiction to address the constitutionality of a statute is vested in the Supreme Court under Neb. Const. art. V, § 2. That section requires a concurrence of five judges to hold an act of the Legislature unconstitutional.

Since the Court of Appeals lacks the authority to declare a statute unconstitutional, any discussion by that court of the constitutionality of a statute would be dicta at best. Further, the publication of such dicta would cast doubt upon the statute and could plunge those charged with enforcing it into an unsettled state.

As envisioned by the creating statutes, the Court of Appeals makes its decisions not as a court sitting en banc, but in constantly rotating panels of three of its judges. Neb. Rev. Stat. § 24-1101 (Cum. Supp. 1994). Litigants may petition to bypass the Court of Appeals whenever their case presents a question of first impression, a novel legal question, or the validity of a statute, or when it involves a significant public interest. Clearly, the Court of Appeals was designed to function as an error correcting tribunal, not as a doctrinal court.

That the Court of Appeals is an error correcting court is further illustrated by two other facts. First, § 24-1104 has been amended so as to remove language which purported to permit the Court of Appeals to modify, clarify, or criticize an existing rule of law. 1993 Neb. Laws, L.B. 462, § 1. Second, at the

same time, language which originally permitted this court to determine which Court of Appeals decisions should be published was revised such as to give the Court of Appeals the authority to make that determination. This amendment removed any suggestion that the publication of an opinion of the Court of Appeals carried with it the approval of this court of either the decision or its rationale.

Real and certain risks are associated with the grant of precedential authority to an intermediate appellate court. See *Tebo v Havlik*, 418 Mich. 350, 343 N.W.2d 181 (1984). If binding authority were to be granted to published Court of Appeals decisions, then lower courts would be forced to follow a decision even though they were not certain whether this court might ultimately rule similarly.

A panel of the Court of Appeals may be presented with a particular issue which has never been addressed by this court. Therefore, that panel is occasionally forced to enunciate a new rule of law and may deem its opinion worthy of publication. When an opinion of the Court of Appeals which has been designated for permanent publication is the only Nebraska case which addresses an issue, it may be cited. Neb. Ct. R. of Prac. 2E(4) (rev. 1993). If the rationale of a published Court of Appeals decision in a case of first impression is persuasive to a lower court in the discharge of its duty to ascertain and apply the law of Nebraska, the lower court is free to follow the opinion. However, such reliance necessarily carries the risk that another panel of the Court of Appeals may reach a different conclusion. For example, in *State v. Martinez*, 4 Neb. App. 192, 200, 541 N.W.2d 406, 412 (1995), one panel wrote of another panel's interpretation of a decision of this court, "We do not believe that *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), supports the . . . proposition which our respected colleagues set forth in *State v. Quick*, [1 Neb. App. 756, 511 N.W.2d 168 (1993)]," and read *Piskorski* differently than did the *Quick* panel. Additionally, such reliance carries the risk that this court may find that the Court of Appeals misapprehended the law. E.g., *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

As for the present case, the rationale used in *Bay Constr. Co. v. Dolan*, 2 Neb. App. 739, 513 N.W.2d 555 (1994), is not persuasive, and it is rejected. The *Bay Constr. Co.* court's reasoning precludes any construction company from ever meeting the requirements of § 48-604(5)(b) with regard to tradespeople hired for construction work. Such a reading of § 48-604(5)(b) renders the worksite meaningless as a test to determine what constitutes an independent contractor in the construction industry.

In the case at bar, the record reflects that Metro engaged both carpenters who were treated as employees and others who were treated as independent contractors. Metro had offered Leininger the option of becoming an employee, but he chose to continue his independent contractor relationship. The record also reflects that Metro maintained a workshop next to its offices where only a small portion of Leininger's work was carried out. Copies of invoices submitted to Metro show that Leininger worked at as many as eleven different sites over a 2-week period.

Under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). In the case at bar, the district court found in its order that "all carpenters employed by Russell Leininger [sic] during the period in question were independent contractors and not employees." Those findings are in error and not supported by the evidence. First, it is not a question of whether "all carpenters" were independent contractors, but only those carpenters whom Metro claimed to be independent contractors whose status was questioned by the Commissioner. Second, it was Metro rather than Leininger who utilized the carpenters in question.

The cause is remanded to the district court for Douglas County for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

CONNOLLY, J., concurring in the result.

I concur in the result reached by the majority, but write

separately to voice my disagreement with the part of the opinion which states: "It should be noted that although an opinion of the Court of Appeals which has been designated for permanent publication may be cited for whatever persuasive force it may have, see Neb. Ct. R. of Prac. 2E(4) (rev. 1993), such an opinion does not constitute binding precedent."

The majority correctly states that the answer to the question of whether a permanently published opinion of the Court of Appeals is binding authority "is to be found in a judicial analysis of the doctrine of stare decisis." However, instead of conducting this analysis, the majority merely bases its conclusion upon the premise that this court is free to operate as it chooses. While this is true, the majority, by its choice, has gutted the common-law doctrine of stare decisis. Such a choice flies directly in the face of all persuasive authority.

"Vertical stare decisis" compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system. See, *State v. Menzies*, 889 P.2d 393 (Utah 1994); *Barstow v. State*, 742 S.W.2d 495 (Tex. App. 1987). It is my view that under the doctrine of vertical stare decisis, all tribunals in this state exercising inferior jurisdiction must follow the permanently published opinions rendered by the Court of Appeals unless overruled by this court. See *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 103 S. Ct. 842, 74 L. Ed. 2d 924 (1983).

The principal case on the issue of vertical stare decisis is *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962). In that case, an inferior court recognized that a case decided by a California appellate court was directly on point, but refused to follow the rule of the case on the ground that it had been decided incorrectly. The California Supreme Court stated:

> Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. . . . Courts exercising inferior jurisdiction *must* accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. . . .

> . . . It would create chaos in our legal system if these courts were not bound by higher court decisions.

(Emphasis supplied.) *Id.* at 455–56, 369 P.2d at 939–40, 20 Cal. Rptr. at 323–24.

In my search, I have not found any state which has ruled by case law or otherwise that inferior courts are free to ignore or overrule precedent set forth by the state's intermediate appellate court. See *State v. Guzman*, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992) ("a new principle of law announced by the Court of Appeals . . . becomes precedential law of this state, and all tribunals inferior to the Court of Appeals are obligated to abide by decisions issued by the Court of Appeals. To our knowledge, neither a district judge nor a trial judge has ever suggested not being bound by new principles of law, whether they emanate from this Court or from the Court of Appeals") (emphasis omitted). See, also, *Harrel v. Dillards Dept. Stores, Inc.*, 268 Ill. App. 3d 537, 644 N.E.2d 448 (1994); *Tart v. Com.*, 17 Va. App. 384, 437 S.E.2d 219 (1993); *Adamowicz v. Ipswich*, 395 Mass. 757, 481 N.E.2d 1368 (1985); *Martin v. Dist. Ct.*, 191 Colo. 107, 550 P.2d 864 (1976); *Bunn v. Bunn*, 311 So. 2d 387 (Fla. App. 1975).

Stare decisis is the very basis of our judicial system and is inseparably linked to the hierarchial structure of the state and federal courts. See *In re Shattuc Cable Corp.*, 138 B.R. 557 (Bankr. N.D. Ill. 1992). "It played an important part in the development of English common law and its importance has not diminished today." *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976).

Furthermore, there are compelling public policy reasons in support of recognizing permanently published decisions of the Court of Appeals as binding authority, including reliance on equality, stability, and predictability in the law. A fundamental element of Anglo-American jurisprudence is the principle that the law should be stable, fostering both equality and predictability of treatment. See, Paul W. Werner, Comment, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 B.Y.U. L. Rev. 633 (1994); Brian E. Mattis and B. Taylor Mattis, *Erie and Florida Law Conflict at*

the Crossroads: The Constitutional Need for Statewide Stare Decisis, 18 Nova L. Rev. 1333 (1994). In order to preserve equality, stability, and predictability in the law, trial courts must follow the holdings of higher courts regardless of whether they agree with the other court's analysis or conclusion. See *State v. Dwyer, supra*.

The citizens of Nebraska, as well as Nebraska lawyers, should be able to expect, to the greatest extent possible, that trial courts will apply the same law in Scottsbluff, Grand Island, Lincoln, and Omaha, Nebraska. The fundamental value of equal treatment, requiring that persons in like circumstances be treated alike unless some relevant factor distinguishes their cases, is central to traditional notions of Anglo-American justice. See Werner, *supra*. The majority's statement to the contrary promotes the rule of individual judges rather than the rule of law and will foster unnecessary appeals.

"Any court, though required to follow precedent established by a higher court, can set forth the reasons why, in its judgment, the established precedent should be overruled but cannot, on its own, overrule the established precedent set by a higher court." *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). Trial judges are free to vigorously express their disagreement with controlling precedent from the Court of Appeals, but a workable system of jurisprudence requires that they obey that precedent until this court rules otherwise.

The majority has failed to give a rational explanation for its conclusion that permanently published opinions of the Court of Appeals do not constitute binding precedent on courts of inferior jurisdiction. In an attempt to justify its conclusion, the majority states that "[a] Court of Appeals decision cannot be said to have conclusively settled an issue of law because this court is the ultimate authority in fashioning precedential law for Nebraska." Certainly, everyone would agree that this court is the ultimate authority in fashioning precedential law for Nebraska. However, this does not support the majority's conclusion that inferior courts are free to ignore the permanently published opinions of the Court of Appeals.

The majority suggests that "[i]f binding authority were to be granted to published Court of Appeals decisions, then lower

courts would be forced to follow a decision even though they were not certain whether this court might ultimately rule similarly." It is self-evident to any first-year law student that nothing an intermediate appellate court says is set in jurisprudential concrete. If one follows the majority's reasoning to its logical conclusion, then one could argue that binding authority should not be given to this court's decisions on constitutional issues because lower courts would be forced to follow them even though they were not certain whether the U.S. Supreme Court might ultimately rule similarly. The same could be said of the circuit courts of appeals on the federal level.

The majority then states that "[r]eal and certain risks are associated with the grant of precedential authority to an intermediate appellate court" and cites *Tebo v Havlik*, 418 Mich. 350, 343 N.W.2d 181 (1984). However, in *Tebo*, the court held that "[a] decision by any panel of the Court of Appeals is . . . controlling statewide until contradicted by another panel of the Court of Appeals or reversed or overruled by this Court." 418 Mich. at 362, 343 N.W.2d at 185. Clearly, whatever risks the majority claims were of concern to the *Tebo* court were not real and certain enough to cause that court to ignore the doctrine of stare decisis.

The majority also asserts that conflicting decisions from different panels of the Court of Appeals is a risk that justifies their position. However, this alleged risk is simply nonexistent. The simple, risk-free solution to this scenario is that this court will decide the issue when it comes before us.

The majority also argues that the purpose for which a court was established can be discerned from the statutes creating it. They then cite Neb. Rev. Stat. § 24-1104 (Cum. Supp. 1994), which was amended to allow the Court of Appeals to decide what opinions to publish, and draw the conclusion that since this statute is silent as to whether those opinions are binding authority, the opinions do not have any such authority. I am baffled by how a statute that is silent on the issue in question, and was amended to switch the power to determine which opinions will be published from this court to the Court of Appeals, supports the conclusion that such opinions should not be given precedential authority.

Finally, the majority makes reference to the unique structure of the appellate court in this state. The only thing unique about our appellate structure is that the majority of this court refuses to follow the common-law doctrine of vertical stare decisis.

Because there exists no rationale in support of the majority's view, and compelling historical and policy reasons support the view that permanently published opinions of the Court of Appeals should be given the effect of law, I conclude that permanently published opinions should constitute binding precedent on this state's trial courts until this court rules otherwise.

WRIGHT and GERRARD, JJ., join in this concurrence.

ZION WHEEL BAPTIST CHURCH, APPELLANT, V. DAVID L. HERZOG ET AL., APPELLEES.

543 N.W.2d 445

Filed February 16, 1996. No. S-94-177.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Limitations of Actions: Appeal and Error.** 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 wrong.
3. **Limitations of Actions: Negligence.** A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.
4. **Limitations of Actions.** A statute of limitations may begin to run at some time before the full extent of damages has been sustained.
5. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

6. **Limitations of Actions: Words and Phrases.** Discovery occurs when a party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.
7. **Limitations of Actions.** Under the discovery principle, a cause of action accrues and the 1-year discovery provision of Neb. Rev. Stat. § 25-222 (Reissue 1989) begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
8. **Limitations of Actions: Negligence.** If a cause of action is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of Neb. Rev. Stat. § 25-222 (Reissue 1989) as to its discovery of the defendant's alleged negligence.
9. ____: ____. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.
10. **Summary Judgment: Proof.** After the party moving for summary judgment has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
11. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Steven J. Olson and Brian J. Siebken, of Liakos & Olson, for appellant.

John B. Henley, of Katskee, Henatsch & Suing, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Zion Wheel Baptist Church (Zion) sued David L. Herzog; David L. Herzog, P.C.; and Fromkin, Herzog & Becker, a law partnership (collectively referred to as "the defendants"), alleging professional negligence arising out of a real estate

transaction. The defendants moved for summary judgment, asserting that the action was time barred. The district court granted the defendants' motion for summary judgment, and Zion appealed.

SCOPE OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

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 wrong. *Id.*; *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

FACTS

In 1981, Herzog, as trustee for the Michael Adams Trust, acquired a tract of land which was ultimately subdivided into two parcels. We will refer to the land as parcel 1 and parcel 2. On October 29, 1985, the city of Omaha levied a special assessment of $195,345.62 against the parcels for the costs of demolishing the building that previously stood on the parcels.

On January 17, 1987, Zion retained Herzog as its attorney to represent it in the purchase of parcel 2 from the Michael Adams Trust. After the purchase, Zion made improvements to parcel 2 which totaled approximately $106,600. On September 10, Herzog requested from the Douglas County assessor's office a lot split and a religious tax exemption with regard to parcel 2. These requests were denied, but Herzog failed to inform Zion of the denials.

In December 1989, the city served written notice on Herzog and Zion, stating that the city intended to acquire parcels 1 and 2 pursuant to its power of eminent domain for the purpose of redevelopment of blighted areas. Zion alleged that Herzog continued to represent it regarding the city's effort to condemn the property and that Herzog met with representatives of the

city and lobbied other city officials on behalf of Zion.

On March 23, 1990, Zion received a letter from the Omaha Planning Department offering to purchase Zion's interest in parcel 2 for $43,000, but stating that the $43,000 would have to be applied to outstanding taxes and the demolition assessment. Zion consulted with Herzog regarding the March 23 letter, and Herzog opined that the demolition assessment did not apply to parcel 2 because of the administrative subdivision plat approved by the planning board and filed with the Douglas County register of deeds. Zion alleged Herzog advised it that the city had approved the subdivision of parcel 2 from parcel 1 and that the special assessment for demolition costs did not and could not apply to parcel 2. Zion asserted that in reliance on Herzog's legal opinion, it refused the city's offer.

In June 1990, the city commenced condemnation proceedings regarding parcels 1 and 2. Zion alleged that on June 22, Herzog gave Zion his legal opinion that the condemnation of parcel 2 extinguished all claims against it, including taxes. Herzog further advised Zion that the land contract between Zion and Herzog, as trustee, was not extinguished and that Zion should receive a condemnation award of the amount remaining due on the contract. Herzog again restated his legal opinion that the city had approved the subdivision of parcel 2 from parcel 1 and that the demolition assessment lien did not apply to parcel 2. Zion alleged Herzog further advised it that the validity of the demolition assessment lien could not be raised in county court, but would have to be raised in an appeal to the district court. Zion asserted that in reasonable reliance on the aforesaid legal opinions given by Herzog, it continued to retain Herzog and authorized him to represent it in the condemnation proceedings.

On August 17, 1990, the appraisers appointed by the Douglas County Court found that the fair market value of the taking of parcels 1 and 2 was $106,600 and awarded the same to the Douglas County treasurer by virtue of the delinquent general taxes and demolition assessment lien existing against parcels 1 and 2 at the time of the taking. Zion alleged that in reasonable reliance on Herzog's legal opinions, Zion continued to retain Herzog to represent it in the condemnation proceeding and authorized Herzog to perfect an appeal to the Douglas County

District Court challenging the sufficiency of the award of damages in the county court.

On June 17, 1992, in the condemnation proceedings, the district court sustained the joint motion for summary judgment of the Douglas County treasurer and the city. Accordingly, the court dismissed Zion's appeal with prejudice on the grounds that the purported subdivision plat was "defective on its face" because it "fail[ed] to evidence a proper subdivision or lot split of the subject property in accordance with Sections 53-1, et seq. of the Omaha Municipal Code" and because it failed "to exhibit the certification of the County Treasurer that there are no regular or special taxes due or delinquent against the property." On June 30, the district court overruled Zion's motion for new trial.

Zion filed its petition for professional negligence against the defendants on January 11, 1993. Zion alleged, inter alia, that Herzog had breached his duty to exercise reasonable skill, care, and learning ordinarily possessed and exercised by attorneys and had breached the fiduciary duty he owed to Zion in the following respects: (1) by failing to advise Zion to obtain a separate attorney to counsel it regarding the land contract; (2) by failing to obtain a certificate of title insurance for Zion prior to the execution of the land contract; (3) by fraudulently and actively concealing from Zion the existence of a special assessment lien for demolition costs on parcel 2 from the time Zion entered into the land contract until March 23, 1990; (4) by advising Zion that said lien was inconsequential because the city had approved the subdivision of parcel 2 from parcel 1, with the effect being that the special assessment for demolition costs did not and could not apply to parcel 2; and (5) by concealing from Zion the fact that the subdivision plat was defective because it did not meet the requirements of § 53-1 et seq. of the Omaha Municipal Code and, therefore, it did not lawfully separate and subdivide parcel 2 from parcel 1, with the result being that the special assessment lien for demolition costs was a valid lien against parcel 2.

The defendants' answer alleged that Zion's action was barred by Neb. Rev. Stat. § 25-222 (Reissue 1989). The defendants subsequently moved for summary judgment, and on January 18,

1994, the district court sustained the motion. The court found that the "two year statute began to run on Aug. 17, 1990 when the report of the appraisers was adopted by the County Court of Douglas County. Plaintiff's cause of action filed on January 11, 1993, is, therefore, barred by the two year statute of limitations."

ASSIGNMENT OF ERROR

Zion asserts that the district court erred in sustaining the defendants' motion for summary judgment.

ANALYSIS

Section 25-222 provides in pertinent part:

> Any action to recover damages based on alleged professional negligence . . . 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 . . . .

We first examine the pleadings to determine the basis upon which the district court found that the 2-year statute of limitations began to run from August 17, 1990, the date the report of the appraisers was adopted by the Douglas County Court. From our review of the petition, we find that Zion's cause of action accrued on January 17, 1987, which is the date of the execution of the land contract and the date on which Herzog was retained to represent Zion. At the time Zion purchased parcel 2 for $60,000, it was subject to existing demolition assessments in excess of $195,000.

A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action. *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). A statute of limitations may begin to run at some time before the full extent of damages has been

sustained. *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985). In the case at bar, Zion's cause of action accrued when it retained Herzog and executed the contract to purchase the property.

Because Zion's petition shows on its face that its cause of action is barred by the statute of limitations, Zion must allege facts explaining why the statute of limitations was tolled. If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994). Zion must then provide sufficient evidence at the hearing on the summary judgment motion to create a material question of fact on the statute of limitations issue. Since Zion's cause of action accrued more than 2 years from the date it commenced its action against the defendants, Zion's petition must allege why its cause of action was not discovered and could not reasonably have been discovered within such 2-year period. Discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994).

Zion's position is that it had 1 year from June 17, 1992, in which to commence the action against the defendants. Under the discovery principle, a cause of action accrues and the 1-year discovery provision of § 25-222 begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988). If the action is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within the exceptions of this section as to its discovery of the defendant's alleged

negligence. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 433 N.W.2d 509 (1988); *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). Zion alleged a continuing relationship with Herzog which commenced in January 1987 and continued through June 30, 1992, and further alleged that in reasonable reliance on Herzog's legal opinions, it continued to retain Herzog and authorized him to represent it in the condemnation proceedings. Therefore, Zion's petition alleged why its cause of action against Herzog was not and could not reasonably have been discovered within 2 years.

We must next determine whether the record contains sufficient evidence to create a material question of fact as to Zion's allegations why Zion did not discover its cause of action within 2 years of its accrual. A summary judgment is distinguished from a demurrer, in which the court considers the allegations of the pleadings and is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. See *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995). The motion for summary judgment required Zion to present evidence showing why the statute of limitations had not run as to its cause of action. After the party moving for summary judgment has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995).

We review such evidence in a light most favorable to Zion and give it the benefit of all reasonable inferences. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable

inferences deducible from the evidence. *Lindsay Mfg. Co. v. Universal Surety Co., supra.* Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995). 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 statute of limitations will not be set aside by an appellate court unless it is clearly wrong. *McCook Equity Exch. v. Cooperative Serv. Co., supra.*

Zion has pled and presented sufficient facts to create a material issue of fact whether a continuous professional relationship existed between Zion and Herzog from 1987 through 1992, which would toll the statute of limitations. Rev. J.H. Webb testified that on January 17, 1987, the day the purchase agreement was signed, he told Herzog that Herzog would serve as Zion's attorney and that Herzog was to take care of whatever was required for the purchase. Herzog represented Zion in negotiations with the city regarding the liens and continued to represent Zion in the condemnation proceedings and on appeal to the district court. Consequently, there is a material issue of fact whether Zion could reasonably have discovered the facts constituting the basis for its cause of action, or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, until June 17, 1992, the date the Douglas County District Court dismissed Zion's appeal.

CONCLUSION

Having found that there exist material issues of fact which must be resolved as to the statute of limitations, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD J. BRUCKNER, RESPONDENT.

543 N.W.2d 451

Filed February 16, 1996. No. S-94-628.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where credible evidence is in conflict on a material issue of fact, the court may consider and give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
3. **Disciplinary Proceedings: Words and Phrases.** Misappropriation is defined as any unauthorized use of client funds, including not only stealing, but also any other unauthorized temporary use by the attorney for personal purposes, whether or not he derives any personal gain or benefit therefrom.
4. **Disciplinary Proceedings: Intent.** Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.
5. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law.
6. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
7. **Disciplinary Proceedings: Presumptions.** Mitigating factors will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances.
8. **Disciplinary Proceedings.** The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
9. ____. Multiple acts of attorney misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents.

Original action. Judgment of suspension.

Judith A. Schweikart, of Kutak Rock, for relator.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for respondent.

CAPORALE, LANPHIER, CONNOLLY, and GERRARD, JJ., and FUHRMAN, D.J., and NORTON and WARREN, D. JJ., Retired.

PER CURIAM.

The Nebraska State Bar Association Disciplinary Review Board filed formal charges against attorney-respondent Richard J. Bruckner as a result of complained violations of Canon 9, DR 9-102, of the Code of Professional Responsibility. The record shows, and Bruckner has not taken exception to, the following facts: In March 1990, Gary J. Anthony engaged Bruckner to represent Anthony in two separate workers' compensation matters. While representing Anthony, Bruckner endorsed Anthony's name to five workers' compensation checks payable to Anthony and Bruckner. Bruckner cashed the five checks without depositing the funds into his law firm trust account. Bruckner expended the money received from the five checks on his own personal and business expenses.

Upon these facts, Anthony filed a complaint with the Nebraska Counsel for Discipline. The complaint was dismissed by the Counsel for Discipline, and this dismissal was affirmed on appeal to the Committee on Inquiry of the Second Disciplinary District. The matter was then appealed to the Disciplinary Review Board, and the review board determined that there were reasonable grounds for discipline and filed a formal charge in this court. At this point, the matter was referred to a referee for hearing, who, after conducting a hearing on the merits, found that Bruckner had violated DR 9-102 and recommended that Bruckner be publicly reprimanded and placed on probation for 1 year. The relator filed a written exception to the recommendation, asking this court to impose a more severe sanction. Bruckner requests that this court accept the recommendation of the referee.

SCOPE OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of

the facts rather than another. *State ex rel. NSBA v. Woodard, ante* p. 40, 541 N.W.2d 53 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995).

To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

FACTS

Bruckner, a sole practitioner in Douglas County, Nebraska, was hired in March 1990 to represent Anthony in two workers' compensation matters. Bruckner agreed to represent Anthony in these matters on a one-third contingency basis. In relation thereto, Bruckner and Anthony entered into a fee agreement entitled "Authority to Represent," which, among other things, granted Bruckner a power of attorney to execute legal documents and authorized Bruckner to deduct fees and costs from any proceeds received as a result of the representation. A settlement was reached in one of the workers' compensation cases, and Anthony was granted an award by the Workers' Compensation Court in the other, which award was to be paid in weekly installments of $245 for 53.75 weeks. In connection with these awards, Bruckner received six workers' compensation checks jointly payable to Anthony and Bruckner, one check in the amount of $3,951.85 and five separate checks in the amount of $245 each. The $3,951.85 check was received in late February or early March 1991; it was not deposited in a client trust account until early June 1991. The five checks in the amount of $245 were endorsed and cashed by Bruckner without the knowledge of Anthony and without first being deposited in a client trust account. Bruckner admitted that the proceeds from these checks were utilized by him for personal and business expenses. At an undetermined later date, Bruckner made accounting entries correspondent to the amount of the workers' compensation checks in his client trust account.

As possible justification for his conduct, Bruckner offered two explanations. The first explanation is that Bruckner, at all

times, maintained a balance of his personal funds in the client trust account sufficient to cover obligations to his clients, including Anthony. As a second justification, Bruckner claimed that he was entitled to the money as a fee for representation in the second workers' compensation case.

ANALYSIS

Bruckner does not take exception to the referee's findings of fact or conclusions of law. DR 9-102 of the Code of Professional Responsibility is entitled "Preserving Identity of Funds and Property of a Client" and reads, in relevant parts, as follows:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank . . . accounts . . . and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> (1) Promptly notify a client of the receipt of his or her funds, securities, or other properties.
>
> (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The evidence in this case revealed violations of DR 9-102 by Bruckner in negotiating for cash, checks payable to Anthony and Bruckner (DR 9-102(A)); in failing to notify Anthony of the receipt of funds (DR 9-102(B)(1)); and in failing to account to Anthony for funds received (DR 9-102(B)(3)). Bruckner's claim that he may have had personal funds in client trust account(s) sufficient to cover the checks at issue does not constitute compliance with the requirements of DR 9-102(A) that "[a]ll funds . . . shall be deposited" in an identifiable bank account. The intent of DR 9-102 is to provide a rule for lawyers in "*Preserving Identity of Funds.*" The use of personal funds to cover money potentially due to clients would significantly cloud the identity of funds and is no different than utilizing overdraft protection to cover obligations to clients, except that the lawyer would pay no interest or banking fees. The fact that Bruckner may have had personal funds or other clients' funds on deposit sufficient to cover the Anthony checks is not a defense to a violation of DR 9-102(A).

We have clearly defined misappropriation as " 'any unauthorized use . . . of clients' funds entrusted to [a lawyer], including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.' " *State ex rel. NSBA v. Veith*, 238 Neb. 239, 245, 470 N.W.2d 549, 554 (1991). Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing. *Id.*

We have consistently held that an attorney has a duty to keep separate and properly account for client trust funds entrusted to the attorney and to promptly pay over and deliver such funds to the client upon request. *State ex rel. NSBA v. Veith, supra.* See *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984). See, also, DR 9-102. An attorney may not use client trust funds to cover business expenses. *State ex rel. NSBA v. Veith, supra.* Further, the referee correctly found that Bruckner's cashing of the checks as payment on a fee is not a defense to a violation of DR 9-102(B)(1) and (3), where there was not full disclosure to the client and full agreement by the client as to the attorney's right to a fee.

Based upon Bruckner's admissions and other clear and convincing evidence in the record, this court finds that Bruckner, by knowingly commingling and misappropriating trust funds, inexcusably breached his oath of office and his duty to Anthony.

DISCIPLINE

While we accept the referee's findings of fact relevant to the formal charges, we do not accept the referee's recommendation that Bruckner be publicly reprimanded and placed on probation for 1 year. The relator is correct in asserting that straight probation is too lenient a discipline under the facts and circumstances of this case. To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995); *State ex rel. NSBA v. Veith, supra*.

Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Woodard, ante* p. 40, 541 N.W.2d 53 (1995); *State ex rel. NSBA v. Gleason, supra*; *State ex rel. NSBA v. Veith, supra*. Mitigating factors will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances. See *State ex rel. NSBA v. Gleason, supra*. Illustrative of the seriousness of these offenses is *State ex rel. NSBA v. Gleason, supra*, wherein we suspended the offender's license to practice law even though he had been diagnosed as suffering from depression prior to the time of the misappropriation, and *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992), wherein we suspended for 1 year the offender's license to practice law, notwithstanding that he had his client's permission to use the client's money.

With the foregoing in mind, we turn to a consideration of whether there are factors present in this case which would mitigate the usual sanction of disbarment.

There is no question that misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment. *State ex rel. NSBA v. Woodard, supra*; *State ex rel. NSBA v. Gleason, supra*; *State ex rel. NSBA v. Ogborn, supra*. Bruckner admits that he failed to maintain the integrity of client funds. The offense involved in this case is very serious and warrants severe discipline.

We give no weight to the fact that Bruckner provided an accounting and client fund distribution to Anthony. The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction. *State ex rel. NSBA v. Woodard, supra*; *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

The referee found, and we acknowledge, that Bruckner has instituted procedures to ensure that his trust accounting system will comply with the letter of the disciplinary rules and the ethical considerations of the Code of Professional Responsibility. While Bruckner's actions are commendable in this regard, these actions should have been taken nearly 40 years ago when Bruckner began practicing law and shall be given little weight as a mitigating factor at this point in time.

We, however, accept the referee's finding that the conduct at issue is an isolated incident and does not represent a pattern of conduct by the respondent. Bruckner has practiced law in the State of Nebraska since 1956, and no other complaints have been filed against Bruckner prior to or after the charged conduct. The record reflects that Bruckner has been a longstanding member of the bar association committee on alcoholism and drug abuse, and he has been a consistent advocate of attorney rehabilitation for over 20 years. While an isolated incident of misappropriation is very serious, it is axiomatic that multiple acts of misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents. Compare, e.g., *State ex rel. NSBA v. Woodard, supra*

(attorney misappropriated and commingled funds of four clients and failed to maintain complete records and render appropriate accounts for two clients—penalty of disbarment), with *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987) (attorney charged with single, isolated incident of misappropriation made full accounting and restitution to client and terminated alcohol abuse prior to disciplinary proceedings—penalty of suspension).

We also take into account the affidavits submitted which detail Bruckner's extraordinary involvement and conscientious service to the bar and to his clients during a lengthy legal career. The same affidavits attest to Bruckner's good reputation in the community and his competence as a lawyer. See *State ex rel. NSBA v. Miller, supra*. In addition to those affidavits avowing Bruckner's present and future fitness to continue in the practice of law, we also take into account Bruckner's full cooperation with the referee and Counsel for Discipline as evidence of his remorseful attitude in these proceedings. See *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

Bruckner's violation of his oath of office as an attorney and his violation of the ethical standards governing the conduct of attorneys are serious matters. Although the misconduct charged was an isolated incident and there was no specific monetary damage to a client, a mere reprimand and 1-year probation would be too lenient a sanction. We must impose a disciplinary sanction to deter others from misconduct similar to Bruckner's in order to protect the public and to maintain the reputation of the bar as a whole. Disbarment is certainly warranted for the type of misappropriation that occurred in this case, even though Bruckner provided an accounting and client fund distribution to Anthony. However, this court has found suspension to be the proper punishment in situations where the violation was grievous but the totality of the circumstances warranted some leniency. See, *State ex rel. NSBA v. Gleason, supra*; *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992); *State ex rel. NSBA v. Miller, supra*.

Under the totality of the circumstances in this case, the mitigating factors substantially outweigh the isolated, single

aggravating circumstance of misappropriation sufficiently to overcome the presumption of disbarment. After a de novo review of the record, including the recommendation of the relator and a balancing of all mitigating factors against the need to protect the public and the maintenance of the reputation of the bar as a whole, we conclude that the appropriate sanction is to suspend Bruckner from the practice of law effective immediately.

CONCLUSION

It is therefore the judgment of this court that Richard J. Bruckner be suspended from the practice of law in the State of Nebraska effective immediately. Bruckner is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1991).

JUDGMENT OF SUSPENSION.

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

STATE OF NEBRASKA, APPELLEE, V. CARL E. SINSEL, APPELLANT.

543 N.W.2d 457

Filed February 16, 1996. No. S-95-139.

1. **Pleadings.** An issue presented regarding a denial of a plea in bar is a question of law.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
4. **Pleadings: Final Orders.** The denial of a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989).
5. **Criminal Law: Indictments and Informations: Double Jeopardy.** If a criminal defendant is to avoid exposure to double jeopardy, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

6. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity.
7. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
8. **Jurisdiction: Appeal and Error.** An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.
9. **Constitutional Law: Search and Seizure.** The Fourth Amendment protects the right of a person to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures.
10. ____: ____. Capacity to claim the protection of the Fourth Amendment to the U.S. Constitution depends upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded space.
11. ____: ____. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.

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

Charles D. Brewster, of Butler, Voigt & Brewster, P.C., for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Carl E. Sinsel appeals his conviction for knowingly or intentionally possessing more than 1 pound of marijuana, for which he was sentenced to 2 years' probation.

ASSIGNMENTS OF ERROR

In this appeal, Sinsel claims that the trial court erred when it failed (1) to dismiss, before trial, the criminal charge against him because a penalty for the same offense had already been imposed upon him by the Nebraska Department of Revenue, and (2) to sustain his motion to suppress certain evidence used against him that Sinsel claims was obtained by law enforcement officers through an illegal search.

FACTS

At all relevant times involved in this lawsuit, Sinsel was the

sole employee at a landfill site owned by the city of Minden. In June 1993, because he was moving, Sinsel obtained permission from Minden's city administrator, Brenton Lewis, to temporarily store some items of personal property in the shop building at the landfill site. Sinsel was the only employee given permission to store personal items in the building. Among the items Sinsel testified he stored in the shop building was a white electric stove that had an oven with a tinted glass door. Keys to the building were distributed only to Sinsel, Lewis, and the Minden street department. The street department's key would be used by an employee of that department if Sinsel were on vacation or leave.

Early in 1993, Lewis learned that alcohol was being stored on the landfill site. Subsequently, Lewis reported to the Minden City Council, sitting in executive session, the information he had acquired concerning alcohol being stored on city property. The city council ordered Lewis to meet with all city employees and direct them to remove from city property any alcoholic beverages or any other items that should not be stored on city property.

On October 21, Lewis met with virtually all full-time employees of the city of Minden, including Sinsel. He warned the employees that all city property would be searched for alcohol and "anything else that shouldn't be stored there." Prior to the landfill-site search, searches were made of several other buildings owned by the city of Minden.

On the evening of October 28, Lewis, several law enforcement officers, and a drug detection dog searched the landfill-site shop building. Lewis testified he saw the city's front-end loader, an electric stove, a bed, a motorcycle, and various other items in the building. The stove was not plugged into electricity. Lewis testified that he did not know to whom the property belonged. None of the property was tagged or marked with any sort of ownership identification except for the motorcycle, which bore a license plate. Minden's chief of police testified that he did not know whether the license plate was current or to whom it belonged.

During the search, the drug detection dog "hit" three times on the electric stove. This was the only object in the building to

which the drug detection dog reacted. Minden's chief of police participated in the search and testified that he could not see inside the stove's oven because of its tinted glass front. The chief testified he opened the door of the oven and saw a green garbage bag with holes in it. The holes permitted the officer to view the bag's contents without opening the bag. The officer suspected the bag contained marijuana. It was photographed, and a video camera was positioned to film the stove.

The next morning, Lewis telephoned Sinsel at the landfill site and told him that he would be coming out to do the inspection he referred to on October 21. Shortly after Lewis' call, Sinsel was placed under arrest while he was attempting to dispose of the bag of marijuana that had been hidden in the stove. Sinsel was subsequently charged with knowingly or intentionally possessing marijuana weighing more than 1 pound.

Prior to his trial on the marijuana charge, Sinsel moved to suppress as evidence the garbage bag containing marijuana that law enforcement officers found in the stove and any samples taken therefrom as the fruit of an illegal search. After a hearing, the motion was overruled.

On May 6, 1994, the Nebraska Department of Revenue notified Sinsel that pursuant to Neb. Rev. Stat. § 77-4316 (Cum. Supp. 1994), he owed the State $15,511.91 in tax, penalty, and interest for unpaid drug stamp taxes. The State filed a tax lien in its favor with the Kearney County register of deeds against real estate and personal property owned by Sinsel. At trial, the State stipulated that the Nebraska Department of Revenue had withheld Sinsel's 1993 state income tax refund because the drug stamp tax levied against him was still owing.

Before his trial, on July 13, Sinsel filed a plea in bar and motion to dismiss the charges against him. He claimed that because the Nebraska Department of Revenue took action against him for the unpaid tax due on the marijuana involved in this case, any further criminal prosecution by the State for the same conduct would violate the Double Jeopardy Clause of both the U.S. and Nebraska Constitutions. On September 13, the district court overruled Sinsel's plea in bar and motion to dismiss. No appeal was filed until February 10, 1995.

On November 21, 1994, Sinsel was found guilty, after a

bench trial, upon a stipulation of facts. He was sentenced to 2 years' probation and appealed his conviction to the Nebraska Court of Appeals. To adjust the caseloads of the Court of Appeals and this court, we removed the case to our docket for disposition.

STANDARD OF REVIEW

An issue presented regarding a denial of a plea in bar is a question of law. See *State v. Grimm*, 240 Neb. 863, 484 N.W.2d 830 (1992). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995). See *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995).

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

ANALYSIS

SINSEL'S DOUBLE JEOPARDY CLAIM

In his first assignment of error, Sinsel claims that the trial court erred when it failed to dismiss, before trial, the criminal charge against him because a penalty for the same offense had already been imposed upon him by the Nebraska Department of Revenue. Sinsel's assigned error presents a question of law, which we review de novo on the record. See *State v. Grimm, supra*.

Before addressing the merits of Sinsel's double jeopardy claim, it is necessary to address the State's contention that this court is without jurisdiction to consider Sinsel's assignment of error challenging the denial of his plea in bar.

The record reflects that on July 13, 1994, Sinsel filed his plea in bar to dismiss the criminal charge on the ground of double jeopardy. On September 13, the trial court issued an order denying Sinsel's plea in bar. Sinsel filed his notice of appeal on February 10, 1995.

The denial of a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). *State v. Lynch*, 248 Neb.

234, 533 N.W.2d 905 (1995). This is especially true in regard to claims of double jeopardy because " 'if a criminal defendant is to avoid exposure to double jeopardy . . . his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.' " (Emphasis omitted.) *State v. Milenkovich*, 236 Neb. 42, 45, 458 N.W.2d 747, 749 (1990) (quoting *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977)).

Because a plea in bar is a final order, Sinsel had 30 days from its denial to file his notice of appeal. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994). Timeliness of an appeal is a jurisdictional necessity. *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. *State v. Kelly*, 200 Neb. 276, 263 N.W.2d 457 (1978).

Due to Sinsel's procedural default, this court does not have jurisdiction to consider the trial court's final order denying his plea in bar.

Sinsel's Motion to Suppress

Sinsel claims that the trial court erred in failing to sustain his motion to suppress evidence, the marijuana he was charged with possessing, because the officers illegally searched the stove he stored in the Minden landfill shop building.

To resolve Sinsel's claim of an illegal search, it must first be determined whether Sinsel has standing to raise a U.S. Constitution Fourth Amendment challenge to the officers' search of the stove. The Fourth Amendment protects the right of a person to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures. Capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded space. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). A subjective expectation of privacy is legitimate if it is

" ' " 'one that society is prepared to recognize as reasonable.' " ' " *State v. Cortis*, 237 Neb. at 103, 465 N.W.2d at 138. The inquiry, then, is whether Sinsel had a legitimate subjective expectation of privacy in the stove.

The record reflects that the unplugged and dusty stove was stored in the Minden landfill shop building amid numerous items ranging from a tire changer and bedding, to a tree stand, a Foosball machine, and a motorcycle, items that are likely to be found around a landfill site. Sinsel made no effort to mark any of the items stored in the building to indicate that any of them belonged to him. The only item that may have identified the owner was the motorcycle that carried some type of license plate. All the items were accessible to anyone who had a key to the building. In addition to Sinsel, this included Minden's city administrator and personnel of Minden's street department. This, together with the fact that he had not identified the stove as belonging to him, negates his claim that he had an expectation of privacy in the stove where the marijuana was found. Even more importantly, any legitimate expectation of privacy that Sinsel had in the stove was eliminated on October 21, when he, along with other city employees, was told that all city property would be searched for alcohol and "anything else that shouldn't be stored there." Even with that warning, Sinsel did not mark the stove as being owned by him. Because Sinsel did not have a legitimate expectation of privacy in the stove, he lacks standing to assert a Fourth Amendment challenge to the search of the stove by law enforcement officers.

The trial court was not clearly wrong in overruling Sinsel's motion to suppress because the record clearly supports a finding that the search of the stove was lawful.

CONCLUSION

Because of lack of jurisdiction, we do not address the merits of Sinsel's claim that the trial court erred in denying his plea in bar. The trial court's judgment overruling Sinsel's motion to suppress was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES T. HALL, ALSO KNOWN AS THOMAS DUANE STRAWDER, APPELLANT.

543 N.W.2d 462

Filed February 16, 1996. No. S-95-271.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. ____: ____: ____. A defendant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
4. **Constitutional Law: Postconviction.** The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable.
5. **Homicide: Intent.** The essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously.
6. **Indictments and Informations: Homicide: Intent.** For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously.
7. **Indictments and Informations: Homicide: Intent: Appeal and Error.** An information which alleges that the defendant committed second degree murder but does not allege that the act was committed with malice fails to allege an essential element of the crime and is plain error and entitles the defendant to a new trial.
8. **Homicide: Intent: Postconviction: Appeal and Error.** The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief.
9. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
10. **Postconviction: Waiver: Appeal and Error.** To use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless.

Appeal from the District Court for Hall County: JOHN P. ICENOGLE, Judge. Reversed and remanded with direction.

L. William Kelly, of Kelly & Schroeder, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Because the information charging him with second degree murder failed to allege that he caused the death of George D. Allen, also known as Joe Allen, with malice, James T. Hall, also known as Thomas Duane Strawder, in a postconviction relief action, asked the district court for Hall County to set aside his conviction of second degree murder.

Finding there was a procedural default on the part of Hall, the district court denied Hall the relief he requested. Hall then appealed to this court.

We find that Hall was charged in a fatally defective information which violated Hall's constitutional rights and prejudiced him. Therefore, the postconviction court's judgment is reversed, the cause is remanded to the district court, and that court is ordered to grant Hall a new trial.

ASSIGNMENTS OF ERROR

Hall claims the postconviction trial judge erred in not finding that the omission of malice as a material element of second degree murder in the charging information was plain error and in denying his motion for postconviction relief on procedural grounds.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995).

A defendant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995). The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or

infringement of constitutional rights that the judgment is void or voidable. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

FACTS

This court detailed the facts of the crime of which Hall was convicted in *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992). On January 2, 1991, Hall was camouflaging a stolen automobile in Hall County when the victim and his 5-year-old son happened on the scene while inspecting animal traps on their property. Hall fired five .357-Magnum revolver shots into the victim's body, causing the victim's death. The victim's 5-year-old son watched the murder.

Hall was arrested in Kansas and charged in Hall County with murder in the first degree and use of a weapon in commission of a felony. Upon a plea agreement, the State reduced Hall's charge from first degree murder to second degree murder and use of a weapon to commit a felony. The amended information stated that Hall killed "intentionally, but without premeditation." Hall pled guilty to second degree murder and use of a weapon to commit a felony. The court sentenced Hall to life imprisonment for second degree murder and a consecutive 20-year sentence for use of a weapon to commit a felony.

In his direct appeal, Hall claimed that he received an excessive sentence. In affirming the trial court, we held that the life sentence was not an abuse of discretion. *State v. Hall, supra*.

On October 1, 1993, Hall moved for postconviction relief, alleging that due to medical treatment he was incompetent at the time of his guilty plea. The district court denied Hall postconviction relief. Hall appealed, and we summarily affirmed the district court judgment.

On February 2, 1995, Hall filed a second motion for postconviction relief. He alleged that his guilty plea to second degree murder was void because the charging information to which Hall pled guilty did not include "malice" as a material element of the crime. Hall further alleged that his conviction was void because the information's omission of a material element of the crime was plain error.

The district court denied Hall postconviction relief. In its order, the district court noted that Hall's conviction "may well be voidable" because of the flawed information. However, according to the district court, Hall could have brought to the court's attention the erroneous information either on direct appeal or in the initial postconviction proceeding. Therefore, on grounds of procedural default, the district court denied Hall postconviction relief.

ANALYSIS

The essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* ____ U.S. ____, 116 S. Ct. 563, 133 L. Ed. 2d 488. For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously. *State v. Lowe, supra.*

The amended information to which Hall entered a plea of guilty was insufficient to charge Hall with second degree murder because it did not allege that Hall acted maliciously. As Hall correctly points out in his postconviction relief motion, in its 1992 brief on direct appeal in Hall's case, the State acknowledged that "[s]econd degree murder is the intentional *and malicious* taking of a human life which is a serious crime of violence and demonstrates a total disregard for human life." (Emphasis supplied.) Brief for appellee in case No. S-91-919 at 7. As we have previously held, an information which alleges that the defendant committed second degree murder but does not allege that the act was committed with malice fails to allege an essential element of the crime and is plain error, *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994), and entitles the defendant to a new trial. See *State v. Barfoot*, 248 Neb. 335, 534 N.W.2d 572 (1995). It is undisputed that the amended information charging Hall with second degree murder failed to allege that he caused Allen's death maliciously.

The constitutional violation alleged by Hall was plain error and prejudicial to him because the error resulted in Hall pleading guilty to an information that did not sufficiently charge

him with a crime. The postconviction court erred in denying Hall relief from an unconstitutional conviction on procedural grounds.

The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief. *State v. Barfoot, supra*. An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995).

Hall's second degree murder conviction is premised upon an insufficient information which does not allege one of the essential elements that constitutes the crime of second degree murder. To use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless. *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995).

CONCLUSION

We reverse the postconviction judgment of the district court and set aside Hall's conviction of second degree murder. Because Hall's conviction of use of a weapon to commit a felony is predicated upon his conviction of second degree murder, it must also be reversed. The cause is remanded to the district court with direction to grant Hall a new trial.

REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., concurring.

I vote for the majority opinion. In addition, I would point out that the concerns of the dissenters in this case have been amply addressed in the majority opinion here and in the majority opinion and in my concurrence in *State v. Ryan, ante* p. 218, 543 N.W.2d 128 (1996).

WHITE, C.J., and CAPORALE and LANPHIER, JJ., join in this concurrence.

WRIGHT, J., dissenting.

The majority concludes Hall was prejudiced because his conviction was premised upon an insufficient information which did not allege that malice is one of the essential elements which constitutes the crime of second degree murder. Malice is defined as the intentional doing of an unlawful act without just cause or excuse. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

Hall caused the victim's death by shooting him five times with a .357-Magnum revolver while the victim's 5-year-old son watched. Under what conceivable theory was Hall prejudiced when he entered his plea of guilty to second degree murder?

CONNOLLY and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. CALVIN J. WHITE, APPELLANT.

543 N.W.2d 725

Filed February 16, 1996. No. S-95-342.

1. **Jury Instructions: Appeal and Error.** Jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
2. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
3. **Self-Defense.** To successfully assert the claim of self-defense, one must have both a reasonable and good faith belief in the necessity of using deadly force.
4. **Homicide: Intent.** Malice, like intent, concerns the state of mind of the slayer.
5. **Intent: Words and Phrases.** Malice denotes a condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse.
6. **Homicide: Intent.** Second degree murder is distinguishable from first degree murder only in the absence of the requirement of deliberation and premeditation.
7. **Self-Defense: Intent: Case Overruled.** To the extent *State v. Blackson*, 245

Neb. 833, 515 N.W.2d 773 (1994), can be read to imply that the rejection of a self-defense claim equated to a finding that the defendant therein acted with malice, it is overruled.

8. **Constitutional Law: Due Process: Trial: Juries: Convictions.** The provisions of Neb. Const. art. I, § 3, that no person shall be deprived of liberty without due process of law, and Neb. Const. art. I, § 11, that the accused in a criminal prosecution shall have the right to trial by an impartial jury, operate together to require that criminal convictions rest upon a jury determination that a criminal defendant is guilty beyond a reasonable doubt of every element of the crime with which the defendant is charged.
9. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
10. **Constitutional Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.
11. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
12. **Trial: Juries: Appeal and Error.** While trial error can be harmless, structural error, that is, error which vitiates all the jury's factual findings, cannot be harmless.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded for a new trial.

Vicky L. Johnson, Fillmore County Public Defender, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Having had his convictions for second degree murder, use of a firearm to commit the murder, and theft of an automobile affirmed on direct appeal in *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (*White I*), the defendant-appellant, Calvin J. White, filed in the district court the subject motion for postconviction relief. He asserted therein that he was denied his

rights under both the Constitutions of the United States and of this state in that the convicting jury was not instructed that malice is an essential element of second degree murder and that trial counsel's failure to raise that issue on direct appeal rendered counsel ineffective. The district court overruled the postconviction motion, and White appealed. Because the sentence for the murder was imprisonment for life, the appeal, pursuant to the provisions of Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 1994), was docketed in this court.

Inasmuch as White does not argue any claim of error with respect to the theft conviction, we confine ourselves to a consideration of his second degree murder and related use of a firearm convictions.

JURY INSTRUCTIONS

As the facts of the crime are set forth in *White I*, they are not repeated here. Suffice it to say that the plaintiff-appellee, State of Nebraska, concedes that no jury instruction specifically advised the jury that malice is an element of second degree murder. However, it urges that the instructions as a whole sufficiently informed the jury of the elements of second degree murder, including the element of malice.

One of the trial court's instructions advised the jury that malice is that condition of the mind shown by "intentionally doing a wrongful act without just cause or excuse"—a "willful or corrupt intention of the mind." It then, in a single step instruction, directed the jury to consider first whether White was guilty of first degree murder. The jury was told that if it determined that White was not guilty of first degree murder, it was then to determine whether White was guilty of second degree murder. In pertinent part, the step instruction further read:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [White] of murder in the first degree are:
>
> 1. That [he] did unlawfully kill Patricia Cool;
>
> 2. That [he] did so purposely and with deliberate and premeditated malice;
>
> . . . .

> 5. That [he] did not act in self defense . . . .
>
> . . . .
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [White] of the crime of murder in the second degree are:
>
> 1. That [he] caused the death . . . .
>
> 2. That [he] did so intentionally but without premeditation;
>
> 3. That [he] did not act in self defense.

Effect of Step and Criminal Intent Instructions.

It is true, of course, that jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995).

The separate criminal intent instruction, which defined the intent referred to in the step instruction as a mental process determinable from White's words, acts, and the facts surrounding his conduct, merely referred the jury to the step instruction to determine if White had the criminal intent required by the step instruction. The fact that malice was included as an element of first degree murder does not overcome the deficiency in defining second degree murder. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *Schluter v. State*, 151 Neb. 284, 37 N.W.2d 396 (1949); *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110 (1948). Under that presumption, the jury would have understood that once it determined that White was not guilty of first degree murder, it was no longer concerned with the matter of malice.

Rejection of Self-Defense Claim.

The State further argues, however, that the jury found the equivalent of malice when it rejected White's self-defense claim.

The jury was instructed that one of the elements of the crime of second degree murder was that White did not act in self-defense. Consequently, by finding him guilty of second

degree murder, the jury necessarily rejected White's claim that he acted in self-defense. From that, the State goes on to conclude that the jury's rejection of White's self-defense claim, the only justification or excuse offered at trial, is the same as a finding that White acted with malice. Thus, according to the State, as self-defense and malice are mutually exclusive terms, the absence of one implies the existence of the other.

In support of its theory, the State directs our attention to *Carleton v. State*, 43 Neb. 373, 61 N.W. 699 (1895), in which the defendant who was convicted of first degree murder complained that the jury instructions would have allowed the jury to convict him of a malicious killing even though the jury found that he had killed in self-defense. The *Carleton* court stated:

> We cannot see how self-defense and malice could combine, nor how, under the instructions, it was possible for the jury to believe they could co-exist. The jury was instructed that in order to make out a case of self-defense the shooting must be for the purpose of self-preservation, and they were also told that in order to be malicious the shooting must have been from an unlawful and unjustifiable motive. We think that these rules are correct; and to say that a shooting is in self-defense and at the same time malicious is a contradiction in terms.

43 Neb. at 407, 61 N.W. at 710. The State argues that the reason the concepts are a "contradiction in terms" is that when a person's actions are guided by fear for oneself, they are not guided by malice.

The State also points for support to *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994). In *Blackson*, a case where malice was not included as an element in the second degree murder instruction, we affirmed a conviction for second degree murder, resting our decision in part on the fact that the trial court had instructed the jury through a separate instruction as to justification for the use of force by the defendant. But the jury's rejection of White's self-defense claim is not the equivalent of a finding of malice. While it is true that self-defense cannot coexist in a murder case with malice, the converse is not true. The absence of self-defense may coexist

with the absence of malice. This is so because in order to successfully assert the claim of self-defense, one must have both a reasonable and good faith belief in the necessity of using deadly force. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

It is important to remember that malice, like intent, concerns the state of mind of the slayer. *Id.* It denotes a condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Since one who acts in self-defense does so with a protective intent rather than with a criminal intent devoid of justification or excuse, such person does not act with malice and cannot be convicted of second degree murder.

We have acknowledged in our prior holdings, beginning with *Carleton, supra*, that self-defense can negate malice. See, *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962). In *Carleton*, the defendant sought to introduce evidence concerning the temper and disposition of the victim in order to support his claim of self-defense. The court stated that in a homicide case, after the defendant has introduced evidence tending to show self-defense, evidence of the ferocity or violent disposition of the victim is admissible for the purpose of showing either " 'that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or . . . that he was in such apparent extremity as to make out a case of self-defense; or . . . that the deceased's purpose in encountering the defendant was deadly.' " *Carleton v. State*, 43 Neb. 373, 397, 61 N.W. 699, 707 (1895).

Although *Carleton* and its progeny speak in terms of negating the malice necessary for a conviction of first degree murder, the statement is equally applicable to second degree murder. Second degree murder is distinguishable from first degree murder only in the absence of the requirement of deliberation and premeditation. *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980). Both offenses require the State to prove that the defendant acted with malice.

Thus, to the extent *Blackson, supra*, can be read to imply that the rejection of a self-defense claim equated to a finding that

the defendant therein acted with malice, it is overruled.

The *White I* jury was instructed that White did not act in self-defense if the State proved beyond a reasonable doubt that he had not "reasonably believed that his use of deadly force was immediately necessary to protect him against death or serious bodily harm." Because the instruction thereby embodied the concepts of "reasonableness" and "good faith belief" in the single phrase "reasonably believed," the jury could reject White's self-defense claim on the ground that while unreasonable, he did in fact believe in the necessity of using deadly force. The existence of such unreasonable but actual, or good faith, belief would negate the existence of malice. Thus, it becomes clear that the jury's negative finding as to self-defense in this case is not the equivalent of a finding that White acted with the requisite malice.

In sum, contrary to the view of the State, the instructions as a whole failed to adequately convey to the jury that malice was a material element of second degree murder.

NONHARMLESS ERROR

In claiming that because of the trial court's error in instructing the jury, he is entitled to a new trial on his second degree murder and use of a firearm convictions, White invokes provisions of both the federal Constitution and the Constitution of this state. Because the analysis which follows establishes that White is entitled to a new trial on the aforesaid convictions under the Constitution of Nebraska, we do not reach the question as to whether such is also the case under the federal Constitution.

While in making our analysis of White's rights under the Nebraska Constitution, we cite to U.S. Supreme Court and Nebraska cases which rely on U.S. Supreme Court and other federal cases, we do so only for the purpose of guidance in interpreting our own Constitution, not because we consider any U.S. Supreme Court or other federal case to compel the result we reach.

Neb. Const. art. I, § 3, provides that no person shall be deprived of liberty "without due process of law," and Neb. Const. art. I, § 11, provides that the accused in a criminal

prosecution shall have the right to "trial by an impartial jury." These provisions require that criminal convictions rest upon a jury determination that a criminal defendant is guilty beyond a reasonable doubt of every element of the crime with which the defendant is charged. See, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (interpreting similar provisions of U.S. Constitution); *State v. Ryan, ante* p. 218, 543 N.W.2d 128 (1995); *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995); *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* ____ U.S. ____, 116 S. Ct. 563, 133 L. Ed. 2d 488.

We have said that in a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). And we have held that even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. See *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

We have also recognized, however, that harmless error review looks to the basis on which the jury actually rested its verdict. Thus, the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

In considering the matter of harmless error in the context of the due process and jury trial requirements of the federal Constitution, the U.S. Supreme Court, in *Sullivan, supra*, distinguished between trial error, which can be harmless, and structural error, that is, error which vitiates all the jury's factual findings, which cannot be harmless, and concluded that the giving of a constitutionally deficient reasonable doubt instruction constituted nonharmless structural error. In explaining why this is so, the *Sullivan* Court wrote:

> Once the proper role of an appellate court engaged in

> the [*Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967),] inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since . . . there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

(Emphasis in original.) 508 U.S. at 280.

We conclude that where the jury has not been instructed as to a material element of a crime, there is no verdict within the meaning of Neb. Const. art. I, § 11. Consequently, there is here no object on which a harmless error analysis can operate. The most that an appellate court could say would be that a jury would surely have found White guilty beyond a reasonable doubt, not that the jury's actual finding of guilt beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough; Neb. Const. art. I, §§ 3 and 11, require more than appellate speculation about a hypothetical jury's action, or directed verdicts for the State would be sustainable on appeal. There must be an actual jury finding of guilt.

CONCLUSION

The foregoing makes it unnecessary for us to determine whether trial counsel's failure to have questioned the second degree murder instruction rendered him ineffective. Consistent with our prior holdings that the failure to instruct a jury that malice is an element of second degree murder requires the granting of postconviction relief, *State v. Plant*, 248 Neb. 52,

532 N.W.2d 619 (1995), and *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* ____ U.S. ____, 116 S. Ct. 563, 133 L. Ed. 2d 488, we reverse the judgment of the district court and remand the cause for a new trial on the second degree murder and use of a firearm charges in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

GERRARD, J., dissenting.

I dissent from the result reached by the majority for the reasons set forth in my dissenting opinion in *State v. Ryan, ante* p. 218, 543 N.W.2d 128 (1996), Justice Connolly's dissenting opinion in *State v. Ryan, supra*, and Justice Wright's dissenting opinions in *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* ____ U.S. ____, 116 S. Ct. 563, 133 L. Ed. 2d 488; *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995); and *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995).

I write separately because the majority is departing from a part of its previous rationale in second degree murder jurisprudence. The majority concludes in this case that the trial court erred by not specifically instructing the jury that "malice" is an element of second degree murder and that this error is a structural one not amenable to a harmless error analysis. In arriving at these conclusions, the majority discusses (1) a concept of "protective intent," not found in our justification statutes, and (2) introduces a harmless error analysis for second degree murder cases based solely on the Constitution of Nebraska. I disagree with the holding and the expanded rationale of this case.

JURY INSTRUCTIONS

The majority holds that the instructions given failed to adequately convey to the jury that malice was a material element of second degree murder.

In my opinion, even if malice is a judicially supplied element of second degree murder, the instructions given in this case, when read as a whole, adequately convey to the jury the very definition of malice in conjunction with the crime of second

degree murder. Malice is defined as that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. *State v. Ryan, supra.*

Criminal Intent.

In this case, instruction No. 9 informed the jurors that they must find Calvin J. White acted with the requisite *criminal intent* when they were told:

> Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. . . . It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. *But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that defendant had the required intent.* . . . It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the *criminal intent required* by [the] Instruction [for first or second degree murder].

(Emphasis supplied.)

Thus, the jury was instructed that only a finding of *criminal intent* would support a guilty verdict and that they must exclude every other reasonable conclusion, except that White acted with criminal intent. Accordingly, when the jury convicted White of second degree murder, it necessarily found, beyond a reasonable doubt, White acted with criminal intent, and only criminal intent, when he intentionally caused the death of Patricia Cool.

Lack of Justification or Excuse.

In Nebraska, the use of deadly force in self-defense is a statutorily defined affirmative defense. Neb. Rev. Stat. § 28-1409(4) (Reissue 1989) mandates that "[t]he use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat . . . ." In addition, this court has held that in order to successfully assert the claim of self-defense, one must have both a reasonable and good faith

belief in the necessity of using deadly force. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Instruction No. 5 in this case informed the jury that a material element of second degree murder was that White did not kill in self-defense and that the State had the burden of proving the lack of self-defense, beyond a reasonable doubt. Instruction No. 10 told the jurors that in order for White to act in self-defense, he must

> reasonably [believe] that his use of deadly force was immediately necessary to protect him against death or serious bodily harm . . . .
>
> . . . .
>
> The fact that [White] may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably under the circumstances as they existed at the time[.]

Thus, these instructions, when read as a whole, correctly state the law, are not misleading, and adequately cover the issues, as the instructions tell the jury it must find, beyond a reasonable doubt, White subjectively believed that the use of deadly force in self-defense was immediately necessary and that this subjective, good faith belief was reasonable. See *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995). Accordingly, when the jury convicted White of second degree murder, it necessarily concluded either that White did not subjectively believe that the use of deadly force in self-defense was immediately necessary or that he was unreasonable in his belief, or both.

The majority asserts that there are circumstances when "[t]he absence of self-defense may coexist with the absence of malice." It is suggested that when one acts in self-defense "with a protective intent" rather than with "a criminal intent devoid of justification or excuse," such person does not act with malice and cannot be convicted of second degree murder. I disagree.

There are times when a killer claims a subjective honest belief that his actions were necessary for his safety ("protective intent"), even though, on an objective appraisal by a judge or a

jury, the circumstances are found to be otherwise. In Nebraska, such a mistaken subjective belief that results in the intentional killing of another human being is not justified by statute and, under the law of this state, is murder. See, *State v. Thompson, supra*; *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992).

An intentional killing is either justified, as defined by statute, or it is murder, as defined by statute. See, Neb. Rev. Stat. §§ 28-1406 through 28-1416 (Reissue 1989); Neb. Rev. Stat. §§ 28-303 and 28-304 (Reissue 1989). There are no in-between crimes, nor are there any subjective, in-between justifications for an intentional killing. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). The principle which underlies these rules is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any person that he or she is in danger of death or bodily harm. *State v. Thompson, supra*; *State v. Stueben, supra*.

Therefore, an *unreasonable*, albeit subjective, good faith belief in the necessity of using deadly force does not negate the existence of "malice," as that term is defined, in Nebraska. The jury was correctly instructed regarding the elements of second degree murder and White's statutory claim of self-defense.

HARMLESS ERROR ANALYSIS

The majority, for the first time, conducts a harmless error analysis in a second degree murder case under the Constitution of Nebraska and does not reach the question of whether such an analysis is consistent with cases under the federal Constitution. For the reasons delineated in my dissent in *State v. Ryan, ante* p. 218, 543 N.W.2d 128 (1996), the majority's harmless error analysis under the Constitution of Nebraska is not consistent with the U.S. Supreme Court's harmless error analysis under the federal Constitution. The U.S. Supreme Court's harmless error analysis, having been developed and refined over 29 years since *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), is consistent and persuasive, and I would not depart from it.

The majority found that the error in this case is a structural one, not amenable to a harmless error analysis. Quoting extensively, but "only for the purpose of guidance," from

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), the majority concludes that since the jury was not told malice is an element of second degree murder,

> there is here no object on which a harmless error analysis can operate. The most that an appellate court could say would be that a jury would surely have found White guilty beyond a reasonable doubt, not that the jury's actual finding of guilt beyond a reasonable doubt would surely not have been different absent the constitutional error.

However, *Sullivan* must be read in the context of a "deficient reasonable-doubt instruction," and a unanimous U.S. Supreme Court went on to guide us that

> [i]nsofar as the possibility of harmless-error review is concerned, the jury-instruction error in this case is quite different from the jury-instruction error of erecting a presumption regarding an element of the offense. A mandatory presumption . . . violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. [Citations omitted.] But "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." [Citation omitted.] And when the latter facts "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." [Citations omitted.] A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt.

113 S. Ct. at 2082.

The majority's bare conclusion that the error in this case is a "structural" one, not amenable to a harmless error analysis, is not consistent with Supreme Court precedent under the federal Constitution and is not persuasive. The instant case clearly falls into the "trial error" category of cases and is amenable to a harmless error analysis under the Supreme Court's interpretation of the federal Constitution. See, *Sullivan v. Louisiana, supra*; *Rose v. Clark*, 478 U.S. 570, 106 S. Ct.

3101, 92 L. Ed. 2d 460 (1986).

In conducting a harmless error analysis under the federal Constitution, concerning the presumption of malice in this case, we must determine whether there are facts that are so closely related to the ultimate fact to be presumed (malice) that no rational jury could find those facts without also finding that ultimate fact. *Sullivan v. Louisiana, supra*. If so, then making those findings is functionally equivalent to finding the element required to be presumed (malice). *Id.*

In this case, the ultimate fact to be presumed is malice, the intentional doing of a wrongful act without just cause or excuse. Clearly, the jury found several facts, beyond a reasonable doubt, which make those findings the functional equivalent to a finding of malice.

First, the jury found, beyond a reasonable doubt, White intentionally caused the death of Cool; that is, White acted solely with criminal intent as defined in instruction No. 9. White engaged in the intentional doing of a wrongful act.

Second, the jury found, beyond a reasonable doubt, White did not act in self-defense. The effect of this finding was to say either that White did not subjectively believe that the use of deadly force in self-defense was immediately necessary, or that he was unreasonable in his belief of the need to use deadly force, or both.

Third, no evidence appears in the record which would allow a rational jury to even consider the existence of some other justification or excuse other than self-defense.

Thus, the jury found the existence of all the necessary facts to support the conclusion, beyond a reasonable doubt, White was without just cause or excuse when he intentionally killed Cool. These findings are so closely related to the ultimate fact, the existence of malice, that the findings are the functional equivalent of a finding of malice. Accordingly, the State was not relieved of its burden to prove beyond a reasonable doubt every element of the crime charged, and White received a full and fair jury trial regarding each element of second degree murder.

The essence of a harmless error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict

actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). It can surely be stated that beyond a reasonable doubt, this verdict was unattributable to the purported instruction error when every element of malice was found against White, notwithstanding the fact that the word "malice" was not included in the instructions as a "material element" of the crime of second degree murder.

WRIGHT and CONNOLLY, JJ., join in this dissent.

GLADYS WILSON, APPELLEE, V. LARKINS & SONS AND CONTINENTAL WESTERN INSURANCE COMPANY, APPELLANTS.

543 N.W.2d 735

Filed February 16, 1996. No. S-95-534.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law.
2. ____: ____. An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court.
3. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, an appellate court reviews the findings of the single judge who conducted the original hearing.
4. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact by a Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
5. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
6. **Workers' Compensation.** 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.

7. ____. A preexisting disease and an accident or an aggravation of the disease may combine to produce a compensable disability under the Workers' Compensation Act.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Dallas D. Jones and Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

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

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This case arises out of appellee Gladys Wilson's claim for workers' compensation for personal injuries she allegedly sustained in the course of her employment with appellant Larkins & Sons. Appellant Continental Western Insurance Company is Larkins & Sons' workers' compensation insurance carrier. Wilson claims she developed hypersensitivity pneumonitis (farmer's lung disease) when she was exposed to molds and dust as she transported milo for Larkins & Sons. The Workers' Compensation Court concluded that Wilson had failed to show, by a preponderance of the evidence, that her disease arose out of or in the course of her employment with Larkins & Sons and dismissed Wilson's petition. Wilson appealed to the Workers' Compensation Court review panel, which affirmed the lower court's finding that Wilson had failed to show that her disease arose out of her employment. However, the review panel remanded this matter to the trial court for further findings of fact regarding whether employment conditions caused Wilson to suffer increased symptoms of a preexisting disease. In their timely appeal, Larkins and Continental assert that the review panel erred in remanding this matter for further findings of fact. We affirm the review panel's judgment in all respects.

BACKGROUND

Wilson has been employed primarily as a truckdriver during her adult life. At the time of the incidents discussed below,

Wilson was approximately 51 years of age.

Wilson began driving a grain truck and a flatbed for Larkins in approximately 1990 or 1991. On April 19, 1993, Wilson hauled milo for Larkins from a roller mill to an elevator. In order to load the grain truck, Wilson positioned the vehicle under the mill's elevator hopper. Wilson remained in the cab of the truck with her window partially open in order to hear commands to move the truck forward or backward. As the milo flowed into the truck, an extreme amount of dust filled the air so that at times, Wilson was unable to see the length of her truck's trailer. Some dust entered the cab of the truck.

To unload the truck at the elevator, Wilson had to open chutelike hoppers on the bottom of the trailer and monitor the situation as the truck emptied. Wilson testified that April 19 was an extremely windy day, and as she stood by the truck as it emptied, it was "very, very dusty."

Wilson hauled three loads of milo from the grain mill to the elevator on April 19. Before Wilson began work on April 19, she thought she had a cold. After the first load, Wilson's physical condition began to deteriorate. Wilson testified that by the third load, "I couldn't hardly breathe at all. My chest was extremely tight, and I was in a great deal of chest pain." When Wilson arrived home after work, she needed assistance walking from the car to the house. Wilson made an immediate appointment with her physician, Dr. Robert Liebel.

Dr. Liebel's office notes from April 19 indicate that Wilson had marked bilateral wheezing and was in obvious respiratory distress. Dr. Liebel admitted Wilson to the county hospital. According to the hospital's records, Wilson said she had suffered from shortness of breath and a harsh, nonproductive cough for the past several days. Wilson was treated and discharged on April 22 with a primary diagnosis of asthmatic bronchitis, but the possibility of pneumonitis was noted.

Wilson had experienced respiratory problems before April 19. Wilson had smoked approximately two packs of cigarettes per day for more than 20 years. In 1985, Wilson was treated for a broken leg. Her medical records indicated that when she was admitted to the hospital for the broken leg, she had an upper respiratory infection and bronchitis and complained of shortness

of breath upon exertion. The respiratory problems were attributed to her smoking. It was also noted that Wilson was quite obese.

In May 1988, Wilson underwent a routine physical in order to maintain her commercial driver's license. Wilson's smoking and obesity were documented, and she was admonished to quit smoking. However, Wilson was not placed on any work restrictions.

In May 1989, Wilson was tested for a variety of allergies, and those tests indicated that she was sensitive to grasses, ragweed, trees, shrubs, house dust, epidermals, and fungi.

In July 1990, Wilson had a respiratory reaction after picking chokecherries. Wilson was admitted to the county hospital with chest pain, shortness of breath, and wheezing. Wilson remained in the hospital for 3 days and was discharged with a diagnosis of respiratory distress and reactive airways disease.

We now return to the events following Wilson's April 1993 hospitalization. Wilson was referred to Dr. Anup Chakraborty for further evaluation and was examined on May 12, 1993. Dr. Chakraborty noted that Wilson complained of having had a chronic cough all winter long and shortness of breath upon slight exertion. It was further noted that Wilson had quit smoking after April 19, but continued to suffer respiratory problems. Dr. Chakraborty stated that his impressions of Wilson's problems included hypersensitivity pneumonitis, probably secondary to her exposure to corn and milo dust or moldy hay; hypertension; significant obesity; and past heavy tobacco use. Dr. Chakraborty prescribed treatment with high doses of steroids.

Dr. Chakraborty saw Wilson again on May 25, 1993. Wilson had improved, but some restrictive defects affecting her pulmonary functions were still present.

When Dr. Chakraborty evaluated Wilson's progress on July 6, 1993, Wilson's pulmonary functions had improved. At that time, it was felt that Wilson could go back to work slowly, but she was advised to avoid exposure to grain dust and was encouraged to lose weight. Dr. Chakraborty noted that Wilson's "[p]resent pulmonary function shows a restrictive defect which is probably because of her obesity rather than anything else."

On October 5, 1993, Wilson filed a petition in the Nebraska Workers' Compensation Court alleging that she had sustained injuries to her lungs in an accident arising out of and in the course of her employment with Larkins. She alleged that she had developed hypersensitivity pneumonitis precipitated by exposure to molds and dust and that she was permanently partially disabled. In their answer, Larkins and Continental denied that Wilson suffered from any disability and further stated that if she did have a disability, such disability was not the result of or attributable to any accident or occupational disease arising out of the course of her employment.

At the request of Larkins and Continental's attorney, Wilson was examined by Dr. John Connolly on January 24, 1994. Dr. Connolly concluded that there was no evidence of hypersensitivity pneumonitis. In Dr. Connolly's opinion, Wilson had chronic bronchitis, which was probably the result of her intense cigarette smoking for many years. Dr. Connolly stated that as a result of her chronic bronchitis, Wilson had reactive airways, which might cause her to respond with increased symptoms to corn and milo dust, but that he did not believe that exposure to corn and milo dust was the underlying cause of her disease.

On February 2, 1994, Dr. Chakraborty examined Wilson on behalf of Wilson's attorney. Wilson had not lost any weight, was considerably short of breath, and had not been able to drive a truck or perform any strenuous activities. Dr. Chakraborty noted that Wilson's chest x ray looked "almost as bad as the first chest X-ray on May 12, 1993 or maybe even slightly worse." He concluded that his "final impression was that she does have severe restrictive lung disease, probably interstitial fibrosis secondary to 'farmer's lung' secondary to exposure to grain dust, etc, in her job."

After a hearing, the Workers' Compensation Court entered an order of dismissal on May 17, 1994. In its order, the court stated that the primary issue was one of causation:

> [Wilson] alleges in her petition that she contracted hypersensitivity pneumonitis on April 19, 1993, when she was exposed to molds and dust while in the employ of [Larkins]. The defendants respond that any condition for

which she suffers is not the result of an accident or occupational disease arising of or in the course of employment . . . . The medical evidence with respect to this issue is in conflict.

[Wilson] in her briefs cites the Court to the opinion of Dr. Anup Chakraborty who on February 2, 1994, stated that "she does have severe restrictive lung disease, probably interstitial fibrosis secondary to 'farmer's lung' secondary to exposure to grain dust, etc, in her job". . . . [Larkins and Continental] in turn cite the Court to the opinion of Dr. John Connolly who on February 14, 1994, stated that "the patient's diagnosis is not totally clear. There is no evidence for hypersensitivity pneumonitis in this case" . . . .

The Court must therefore review the entire evidence for the purpose of resolving this conflict of opinion regarding causation.

Of particular concern to the Court is the internal inconsistency of Dr. Chakraborty's opinion. Exhibit 9 consist[s] of the various reports of Dr. Chakraborty. It reflects that Dr. Chakraborty saw [Wilson] on three occasions in May and June [sic] of 1993. Thereafter, he did not see [Wilson] again until February, 1994, on a referral from [Wilson's] attorney. In Dr. Chakraborty['s] notes from [Wilson's] third visit with him on June [sic] 6, 1993, he states that "present pulmonary function shows a restrictive defect which is probably because of her obesity rather than anything else" . . . . Of course, this opinion with respect to causation is significantly different than that provided in February, 1994. No explanation is provided by Dr. Chakraborty addressing or otherwise explaining this inconsistency.

The Workers' Compensation Court reviewed Dr. Connolly's opinion that Wilson's illness was in response to a variety of stimuli, including her allergies, weight, and smoking. The court concluded that based on the evidence as a whole, it found Dr. Connolly's opinion was more credible than Dr. Chakraborty's opinion. The court concluded that Wilson had failed to show, by a preponderance of the evidence, that the disease from which

she suffered arose out of or in the course of her employment. Accordingly, the court dismissed Wilson's petition.

On April 14, 1995, the review panel of the Workers' Compensation Court affirmed the lower court's finding that Wilson had failed to show that her condition arose out of and in the course of her employment. However, the review panel remanded the matter for a determination as to whether Wilson suffered "increased symptoms" due to exposure to corn and milo dust during her employment with Larkins. Larkins and Continental timely appealed to the Court of Appeals, and we removed the case to our docket.

ASSIGNMENTS OF ERROR

Larkins and Continental assign as error the review panel's remand of this matter for a determination as to whether Wilson's alleged exposure to grain dust caused her to have increased symptoms and whether Wilson, in fact, experienced increased symptoms.

STANDARD OF REVIEW

The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995); Neb. Rev. Stat. § 48-179 (Reissue 1993).

Neb. Rev. Stat. § 48-185 (Reissue 1993) precludes an appellate court from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Surratt v. Watts Trucking, ante* p. 35, 541 N.W.2d 41 (1995). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing. *Hemmerling v. Happy Cab Co., supra*; § 48-185.

When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the

benefit of every inference reasonably deducible from the evidence. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

With respect to questions of law in workers' compensation cases, the appellate court is obligated to make its own determination. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

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). See *Surratt v. Watts Trucking, supra*. It is for the compensation court to determine which, if any, of the expert witnesses to believe. *Surratt v. Watts Trucking, supra*.

ANALYSIS

Given the applicable standards of review, we must review the findings of fact made by the Workers' Compensation Court trial judge to determine whether the record contains evidence to substantiate his or her factual conclusions. In so doing, we must consider the evidence in the light most favorable to Larkins and Continental and give Larkins and Continental the benefit of every inference reasonably deducible from the evidence. The trial court gave weight to Dr. Connolly's expert opinion and rejected Dr. Chakraborty's opinion. We must do the same. However, with respect to questions of law, we are obligated to make our own determination.

The trial court made no specific finding of fact regarding whether Wilson's preexisting lung condition had been aggravated by her exposure to grain dust on the job. Although Dr. Connolly rejected a diagnosis of hypersensitivity pneumonitis, he did conclude that Wilson had chronic bronchitis and stated that he would "expect that she would respond with increased symptoms to exposure of dust of any type including corn and milo dust . . . ."

> The law is well settled that a preexisting disease and an accident may combine to produce a compensable disability under the Workers' Compensation Act. . . .

> Similarly, a preexisting disease and an aggravation of that disease may combine to produce a compensable injury, as we held in *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 74, 112 N.W.2d 531, 533 (1961), where we stated: "The law of this state has consistently recognized that the lighting up or acceleration of preexisting conditions by accident is compensable. We see no difference in principle in the situation before us. A disability brought about by employment conditions and a preexisting weakness or disease, may be compensable if the conditions bringing it about are characteristic of and peculiar to the employment and do not result in a common disease to which the general public is exposed."

Miller v. Goodyear Tire & Rubber Co., 239 Neb. 1014, 1019-20, 480 N.W.2d 162, 166-67 (1992).

Pursuant to *Miller v. Goodyear Tire & Rubber Co., supra*, and *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961), Wilson may have a compensable disability. The workers' compensation trial court could have and should have made a finding of fact as to whether Wilson's employment conditions aggravated her preexisting weakness under the analysis expressed in the above cases.

CONCLUSION

We affirm the order of the Workers' Compensation Court review panel remanding this matter for further findings of fact.

Wilson's motion for attorney fees of $5,125 is granted.

AFFIRMED.

WHITE, C.J., participating on briefs.

NEBRASKA METHODIST HEALTH SYSTEM, INC., APPELLANT, V. DEPARTMENT OF HEALTH OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

543 N.W.2d 466

Filed February 23, 1996. No. S-94-356.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
2. **Actions.** Generally speaking, a suit against a state agency is a suit against the State itself.
3. **Jurisdiction: Administrative Law: Service of Process.** In order to vest a district court with personal jurisdiction over a state agency in a case arising under the Administrative Procedure Act, the petitioner must serve summons upon the Attorney General.
4. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
5. **Actions: Jurisdiction: Legislature: Waiver: Immunity: Service of Process: Agents.** In those instances where the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of in personam jurisdiction.
6. **Jurisdiction: Service of Process: Waiver.** Lack of personal jurisdiction over a state agency due to a petitioner's failure to serve summons on the Attorney General may be waived if the department, as represented by the Attorney General, makes a voluntary appearance.
7. **Service of Process.** Neb. Rev. Stat. § 25-510.02 (Reissue 1989) provides the acceptable methods of service of summons upon the Attorney General; although § 25-510.02 provides a petitioner some discretion as to the mode of service, it grants no discretion as to the entity to be served.
8. **Actions: Jurisdiction: Administrative Law: Agents: Waiver.** Only the State's designated agent, the Attorney General, has authority to enter a voluntary appearance and waive the issue of personal jurisdiction in actions brought under the Administrative Procedure Act.

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

John R. Holdenried and Steven D. Davidson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Don Stenberg, Attorney General, and Roger S. Brink,

Special Assistant Attorney General; Charles M. Pallesen, of Cline, Williams, Wright, Johnson & Oldfather; and Charles V. Sederstrom, Jr., of Erickson & Sederstrom, P.C., for appellees.

WHITE, C.J., FAHRNBRUCH, LANPHIER, and CONNOLLY, JJ., and TROIA and GLESS, D. JJ.

LANPHIER, J.

This is an appeal from the district court for Lancaster County in an action pursuant to the Administrative Procedure Act to review an order of the director of the Department of Health. As stated in the following analysis, in order to vest the district court with personal jurisdiction over a state agency in a case arising under the Administrative Procedure Act, the petitioner must serve summons upon the Attorney General. However, lack of personal jurisdiction over a state agency due to failure to serve such summons may be waived if the agency or department, as represented by the Attorney General, makes a general appearance. In this case, the Attorney General was not served. The Attorney General did file special appearances on behalf of the respondent Department and its director, alleging lack of jurisdiction. Before the special appearances were filed, however, the Department of Health (Department) filed in the district court the official record of its administrative proceedings, as required by Neb. Rev. Stat. § 84-917(4) (Reissue 1994). Appellant, Nebraska Methodist Health System, Inc., argues that the Department's filing of the administrative record was a voluntary, general appearance on behalf of the Department, waiving the lack of personal jurisdiction and thus binding the State. Appellant also urges that the court should have allowed an extension of time for service of summons, as no prejudice resulted. We hold that only the State's designated agent for service of summons, the Attorney General, has authority to waive personal jurisdiction in an action arising under the Administrative Procedure Act.

BACKGROUND

The substantive issue in this case involved a certificate of need review for a medical facility. Appellant requested a determination from the Department that a proposed medical

office and retail complex was not subject to a certificate of need review. Community Health Vision, Inc. (CHV), intervened in the proceedings. On September 24, 1993, the director of the Department issued an order concluding that the proposed project was subject to a certificate of need review under Neb. Rev. Stat. § 71-5830(7)(c) and (8) (Cum. Supp. 1994).

Appellant filed its petition for review of the director's order on October 11, 1993, in the district court for Lancaster County and named as respondents the Department, its director, and CHV. A praecipe for issuance of summons was filed with the petition, requesting service upon the named respondents. The record contains appropriate proofs of service upon all three respondents. Appellant admits that it failed to request or serve a copy of the summons on the Attorney General, as required by § 84-917(2)(a) and Neb. Rev. Stat. § 25-510.02 (Reissue 1989).

Section 84-917(4) requires an agency to prepare and file a certified record of the administrative proceedings before the agency within 30 days of service of the petition. On November 9, 1993, the division director of the Department's section of hospital and medical facilities filed the record in the district court.

On November 16, 1993, each respondent filed a special appearance, claiming a defect in service upon the Department and the director. Appellant argued that by filing the administrative record, the Department had entered a general appearance. In an order dated February 1, 1994, the district court sustained the special appearances of the Department and the director. The court found that CHV, which is not a state agency, had been properly served and overruled its special appearance.

Appellant filed a motion for leave to serve summons out of time, asking the court to permit late service upon the Department and the director through the Attorney General. In support of its motion, appellant relied upon Neb. Rev. Stat. § 25-853 (Reissue 1989), which requires that a court disregard defects in all stages of the proceedings which do not affect substantial rights of adverse parties, given the absence of any prejudice or harm due to the error in service.

CHV filed a motion to dismiss the case, alleging that the case

could not proceed without the presence of necessary parties, the Department and the director.

In an order dated March 15, 1994, the district court overruled appellant's motion, finding that the court was without authority to expand the 30-day time period. The court granted CHV's motion and dismissed the case. Appellant timely filed an appeal to the Court of Appeals. We removed the appeal to our docket.

ASSIGNMENTS OF ERROR

Appellant asserts that the district court erred in holding that the filing of the certified administrative record by the Department was insufficient to satisfy the Administrative Procedure Act's requirement of service in the manner provided in a civil action. Secondly, appellant asserts that the district court erred in refusing to allow it to serve summons on the Attorney General out of time under § 25-853 when the alleged error did not affect the substantial rights of any party.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Becker v. Nebraska Acct. & Disclosure Comm., ante* p. 28, 541 N.W.2d 36 (1995).

ANALYSIS

Generally speaking, a suit against a state agency is a suit against the State itself. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995); *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985).

In order to vest a district court with personal jurisdiction over a state agency in a case arising under the Administrative Procedure Act, the petitioner must serve summons upon the Attorney General. See, *Becker v. Nebraska Acct. & Disclosure Comm., supra*; *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995); *Twiss v. Trautwein*, 247

Neb. 535, 529 N.W.2d 24 (1995); *Beatrice Manor v. Department of Health, supra*. In each of these four cited cases, the petitioner served summons on the state agency but failed to serve summons on the Attorney General. Accordingly, we held that due to the failure to serve the Attorney General, the district court lacked personal jurisdiction over the state agency.

In *Anstine v. State, supra*, we held that the Attorney General could not bind the State by making a voluntary, general appearance if the Attorney General had not been properly served. One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Becker v. Nebraska Acct. & Disclosure Comm., supra*; *Glass v. Nebraska Dept. of Motor Vehicles, supra*.

The holding of *Anstine v. State* has been specifically overruled.

> [I]n those instances where the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, *that person or official* validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction.

(First emphasis supplied.) *Pointer v. State*, 219 Neb. 315, 318, 363 N.W.2d 164, 166 (1985).

In *Glass v. Nebraska Dept. of Motor Vehicles*, we held that lack of personal jurisdiction over a state agency due to a petitioner's failure to serve summons on the Attorney General may be waived if the department, as represented by the Attorney General, makes a voluntary appearance.

Pursuant to *Glass v. Nebraska Dept. of Motor Vehicles* and *Pointer v. State*, the Attorney General, as the State's designated agent, may enter a voluntary appearance and waive the issue of personal jurisdiction. Apparently, the question of whether someone other than the Attorney General is authorized to enter a voluntary appearance for the State is raised for the first time in this appeal. See *Armstrong v. Higgins*, 241 Neb. 833, 491 N.W.2d 331 (1992) (recognizing but not deciding issue).

Section 25-510.02 provides the acceptable methods of service of summons upon the Attorney General. In *Twiss v. Trautwein, supra*, we held that although § 25-510.02 provides a petitioner some discretion as to the mode of service, it grants no discretion as to the entity to be served. We said that under the Administrative Procedure Act, the entity to be served is the Attorney General. A voluntary appearance of a party is equivalent to service and, in effect, is another mode of service. Neb. Rev. Stat. § 25-516.01 (Reissue 1989). To permit another entity to make a voluntary appearance would undermine the legislative provisions requiring service on the Attorney General.

We hold that only the State's designated agent, the Attorney General, has authority to enter a voluntary appearance and waive the issue of personal jurisdiction in actions brought under the Administrative Procedure Act.

We need not reach the issue of whether the act of filing the administrative record in the district court could comprise a voluntary appearance or a submission of the cause on the merits. The Department lacked any authority to enter a voluntary appearance on behalf of the Attorney General. Therefore, the Department's act of filing the administrative record can have no jurisdictional effect.

We also reject appellant's second assignment of error, which asserts that the district court erred in denying its motion for leave to serve summons out of time. Appellant urges that a court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. See § 25-853. The right to notice is a substantial right affecting personal jurisdiction, and the district court properly denied appellant's motion for leave to serve summons out of time.

CONCLUSION

The orders of the district court dismissing this action for want of personal jurisdiction and denying appellant leave to serve summons out of time are hereby affirmed.

AFFIRMED.

CAPORALE, WRIGHT, and GERRARD, JJ., not participating.

TIM DUGGAN ET AL., APPELLANTS, V. ALLEN J. BEERMANN, SECRETARY OF STATE, ET AL., APPELLEES.

544 N.W.2d 68

Filed February 23, 1996. No. S-94-1112.

1. **Equity: Appeal and Error.** In an equitable proceeding, an appellate court makes an independent determination of both the facts and the applicable law.
2. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
3. **Constitutional Law: Initiative and Referendum.** The people have the power to amend the Constitution of Nebraska pursuant to Neb. Const. art. III, § 1.
4. **Constitutional Law: Initiative and Referendum: Appeal and Error.** In a case involving the people's amendment to their Constitution, this court makes no attempt to judge the wisdom or the desirability in enacting such amendments.
5. **Constitutional Law: Initiative and Referendum.** In adopting the Nebraska Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law.
6. **Initiative and Referendum: Pleadings: Injunction: Declaratory Judgments.** A prayer for injunctive relief under Neb. Rev. Stat. § 32-706 (Reissue 1993) can properly be joined with a prayer for declaratory relief.
7. **Actions.** There may be several rights of action arising out of a cause of action; a single cause of action may give rise to more than one theory upon which recovery may be had.
8. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination.
9. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
10. **Constitutional Law: Public Officers and Employees.** State-imposed term limits upon congressional offices violate the Constitution of the United States.
11. **Constitutional Law: Statutes: Legislature: Intent.** This court has identified several factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.
12. **Constitutional Law: Initiative and Referendum: Intent.** There is no meaningful way to determine the intent which motivates voters to sign a petition for the

submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment.

13. **Constitutional Law: Judicial Construction.** The Nebraska Supreme Court may use historical or operative facts in connection with the adoption of a constitutional amendment in order to interpret the meaning of the language of the Nebraska Constitution.
14. **Initiative and Referendum: Statutes.** The Secretary of State must review a petition for a proposed initiative measure to determine whether the petition satisfies statutory prescriptions regarding the form of an initiative measure.
15. **Initiative and Referendum.** The Secretary of State's duties in the review of initiative petitions are ministerial in nature.
16. ____. The Secretary of State cannot pass on the merits of the initiative measure and can reject the measure only if it is facially invalid or unconstitutional.
17. **Constitutional Law: Statutes.** The Revisor of Statutes has authority, in preparing supplements to and reissued or replacement volumes of the Revised Statutes, to renumber and rearrange sections, but the Revisor cannot change the substantive meaning of any adopted constitutional amendment.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Alan E. Peterson and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, and Mark D. McGuire and Scott J. Norby, of McGuire & Norby, for appellants.

Don Stenberg, Attorney General, L. Steven Grasz, and L. Jay Bartel for appellee Allen J. Beermann.

Todd E. Frazier, of Frazier & Garrett, for appellees Guy Curtis and Nebraskans for Term Limits.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ., and MCGILL, D.J.

PER CURIAM.

This is an appeal from an order of the district court for Lancaster County denying injunctive and declaratory relief. In the lower court, appellants sought a declaration that a term limits initiative petition was fatally invalid and defective and sought to enjoin the Secretary of State from placing the measure on the official ballot for the November 8, 1994, general election. The initiative petition (Measure #408) proposed to amend the Constitution of the State of Nebraska by imposing term limits on a variety of federal and state elective offices. The district court denied all relief. The district court did not address

the constitutionality of the measure, since the measure had not been adopted and an opinion on its constitutionality would be advisory. Measure #408 was placed on the ballot, and the voters of Nebraska approved the proposed amendments. After the election, appellants filed a motion for a new trial, seeking a declaration that the amendments were unconstitutional. Appellants' motion for a new trial was denied. In this appeal, appellants continue to assert that the term limits initiative measure was defective and that the resulting amendments are unconstitutional. Pursuant to *U.S. Term Limits, Inc. v. Thornton*, ____ U.S. ____, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), the amendment which imposes term limits upon members of the House of Representatives and the U.S. Senate is unconstitutional. While declining to pass on the constitutionality of the amendments relating to state term limits, we hold that the remaining amendments resulting from Measure #408 must also be struck down because the unconstitutional amendment was so interwoven with the other amendments that the entire measure must now fail. Accordingly, we reverse the judgment of the district court.

BACKGROUND

On May 13, 1994, this court held that a term limits proposal (Measure #407) had been improperly submitted to the voters in November 1992. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994) (*Duggan v. Beermann I*). *Duggan v. Beermann I* held that the amendments contained in Measure #407 had improperly been placed on the ballot and were therefore void, despite the fact that they had received the approval of Nebraska voters.

Supporters of Measure #407 decided to submit a second term limits proposal, Measure #408, to Nebraska voters. Guy Curtis, who had been involved with and had supported Measure #407, drafted the "new" initiative petition. Curtis substantially followed the form and substance of the Measure #407 petition, although he added provisions which would impose term limits on certain local officials, including school boards and county attorneys.

On May 24, 1994, Curtis filed a sample of the term limits

initiative petition with Secretary of State Allen J. Beermann. Neb. Rev. Stat. § 32-704(2) (Reissue 1993) requires a sponsor of an initiative measure to file a "copy of the form to be used" with the Secretary of State prior to obtaining any signatures to the petition. The sample petition was prepared on standard letter-size paper. It was not a final copy of the form which was ultimately circulated, as required by statute.

Parenthetically, we note that chapter 32, article 7, of the Nebraska Revised Statutes has been amended and recodified at chapter 32, article 14. However, such revisions were effective January 1, 1995, and are not pertinent to the initiative measure before us.

In May 1994, Curtis sought the assistance and cooperation of U.S. Term Limits, a national term limits proponent. Upon the advice of U.S. Term Limits, Curtis filed an amended petition on May 27 in which the provisions relating to local school boards and county officials were deleted. The amended petition submitted was again a sample draft, rather than a final form.

After the sample amended term limits initiative petition was filed, the actual petition was prepared. The text of the actual petition is identical to that in the sample amended petition, but the final petition differs from the sample form in its use of type size, boldface, and paper size. The actual petition was two-sided and printed on 11- by 17-inch paper. The front side of the petition stated the petition's objectives and the statutory prohibitions regarding who may sign and circulate petitions, and provided 20 lines for the supporters' signatures. The proposed constitutional amendments were printed on the back side of the petition.

Neb. Rev. Stat. § 32-703 (Reissue 1993) provides that each initiative petition shall contain a "concise statement in large type of the objects sought to be secured by submitting the measure to the voters." The object statement for Measure #408 provides:

> **THE OBJECTIVE OF THIS INITIATIVE PETITION IS**: To amend the constitution of Nebraska to provide for a maximum number of consecutive terms to which the Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, elected members of the Public Service Commission, elected members of the

> Board of Regents, elected members of the State Board of Education; and elected members of the governing boards of any city of the metropolitan class, primary class, or first class, and elected members of any county Board of Commissioners or Supervisors, shall be eligible to file for election and to serve in such offices, To amend the Constitution of Nebraska to limit the number of elections in which a candidate for election to the Office of Representative in Congress or United States Senator shall be eligible to file for election or to be listed on a Nebraska official ballot; to provide for appointments; to allow the voters of any city, county, Board of Regents, or State Board of Education referred to above, to lengthen, shorten, or eliminate such limitations on such terms of office; to provide for effective dates; to provide that the Secretary of State and all election officers in the state shall be subject to penalty for violation of a provision of this amendment.

The object statement does not list the office of state legislator among the offices subject to the proposed term limits. However, in fact, Measure #408 did seek to impose term limits on the Legislature. Measure #408's proposed constitutional amendments, printed on the back side of the initiative petition, provide, in pertinent part:

> **The Constitution of the State of Nebraska shall be amended as indicated; or placed in articles and sections as determined by competent authority of the State as follows:**
>
> Article III Section 8 is repealed and amended to read:
>
> Section 8. **Legislators; qualifications; one year residence in district; removal from district; effect; ineligibility.** No person shall be eligible to the office of member of the Legislature unless on the date of the general election at which he is elected, or on the date of his appointment he is a registered voter, has attained the age of twenty-one years and has resided within the district from which he is elected for the term of one year next before his election, unless he shall have been absent on the public business of *the United States* or of this state. And

no person elected as aforesaid shall hold his office after he shall have removed from such district. No person shall be eligible to file for election to or to serve as a member of the Legislature for a period of four years after the expiration of the second of two consecutive terms for which they were previously elected and as further provided in Article XV Section 20.

Article IV Section 3 is repealed and amended to read as follows:

Section 3. The Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General and members of the Public Service Commission shall be ineligible to file for reelection to those respective offices and shall be ineligible to serve in those respective offices for a number of years equal to the number of years in the term for which they were last elected, next after the expiration of the second of two consecutive terms for which previously elected, and as further provided in Article XV Section 20.

Article VII of the Constitution of Nebraska is amended by the adoption of Section 15 to read as follows:

Section 15. **Elected Officials; ineligibility.** (1) The members of the Board of Regents and the State Board of Education shall be ineligible to file for reelection to their respective offices and shall be ineligible to serve in their respective offices for a number of years equal to the term for which they were last elected next after the expiration of the second of two consecutive terms for which they were previously elected after the general election and as further provided in Article XV Section 20.

(2) The voters of the state may lengthen, shorten, or eliminate the limitations on terms of office for the State Board of Education or the governing board of a state institution of higher education imposed by this Section 15.

Article XV of the Constitution of Nebraska is amended by the adoption of Sections to read as follows:

Section 19. **Elected government officials—limitation on terms.** (1) In order to broaden the opportunities for

public service and to assure that elected officials of governments are responsive to the citizens of those governments, no elected member of any governing board of any city of the metropolitan class, primary class, or first class, and no elected member of any County Board of Commissioners or Supervisors, shall serve more than two consecutive terms in office, except that with respect to terms of office which are two years or shorter in duration, no such elected official shall serve more than three consecutive terms in office. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1995. For purposes of this Section, terms are considered consecutive unless they are at least four years apart.

(2) The voters of any city or county referred to above in Article XV, Section 19(1), may lengthen, shorten, or eliminate the limitations on terms of office imposed by this Section 19.

Section 20. **Representatives in Congress; United States Senator; filing ineligibility.** Any person who shall have been elected to serve three consecutive terms in the office of Representative in Congress shall not be listed on any official ballot at any primary or general election to seek a fourth consecutive term; and any person who shall have been elected to serve two consecutive terms in the office of United States Senator shall not be listed on any official ballot at any primary or general election to seek a third consecutive term and neither may be listed on an official ballot as a candidate for a period of years equal to the number of years in the term for which that person was last elected as Representative in Congress or as a United States Senator. The term held and being served as the result of an election prior to the effective date of this amendment shall not be included in the number of consecutive terms referred to in stipulating ineligibility to file for election or to be listed on an election ballot.

[Sections 21 and 22, which contain provisions relating to

persons appointed to office rather than elected and which provide for penalties, are omitted.]

Severability. If any of the provisions hereby adopted shall be held void for any reason, the remaining provisions shall continue in full force and effect.

Curtis and a ballot committee (Nebraskans for Term Limits) supporting the measure filed the sample amended petition with Secretary of State Beermann. They then conducted a drive to obtain the necessary signatures to the petition. Approximately $205,000 was raised in support of the campaign. U.S. Term Limits provided over $190,000. Petition signatures were collected, and on July 8, 1994, the signed petitions were filed with Secretary of State Beermann's office.

On August 30, Secretary of State Beermann certified Measure #408 for placement on the ballot. Section 32-704(5) provides that the Secretary of State shall place a measure on the general election ballot if the petition is found to be valid and sufficient after he or she has determined that the applicable constitutional and statutory requirements have been met.

On September 9, appellants, Duggan, John Hasenauer, Ernie Chambers, and Ken Haar, filed a petition in the district court for Lancaster County, seeking an injunction and a declaratory judgment that the initiative petition filed with the Secretary of State was illegal, invalid, and unconstitutional in its entirety. The sponsor of the term limits measure, Curtis, was also named as a defendant.

At the time of trial, appellants were Nebraska citizens and registered voters. Chambers was an elected member of the Nebraska Unicameral, and Haar was an elected member of the Lincoln City Council.

In their petition, appellants alleged the initiative petition was defective in fatal ways: (1) It had insufficient valid signatures; (2) the petition called for a change in the law pertaining to Nebraska's representation in the U.S. Congress and various state and local offices, and such changes were invalid as unconstitutional on their face; (3) the petition form was invalid because it was misleading and incomplete in that its object statement omitted one or more important effects created in the

event the initiative should pass; (4) the petition was not legally sufficient; and (5) the same measure, in form or essential substance, had been submitted to the people within the last 3 years, and article III, § 2, of the Nebraska Constitution bars submission more often than once every 3 years.

For the foregoing reasons, appellants requested a temporary and permanent injunction barring Secretary of State Beermann from placing the measure on the official ballot. In addition, appellants requested that the district court grant declaratory relief declaring that the entirety of the initiative measure was invalid in form, lacking in sufficient signatures, and unconstitutional.

Trial was held in the district court on October 26, 1994. By its order of November 7, the district court held generally in favor of the appellees. The district court entered an order dismissing appellants' petition.

Meanwhile, Secretary of State Beermann had proceeded with preparations to place Measure #408 on the ballot for the November 8 general election. A ballot was prepared, and it put this question to the voters:

> Shall the Nebraska Constitution be amended to: (1) set limits of two consecutive terms in office for Nebraska Legislators, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, Public Service Commissioners, State Board of Education members, and University of Nebraska Board of Regents members; and (2) limit the number of consecutive terms in office for certain local officials; and (3) prohibit persons who have served three consecutive terms as a Representative in Congress or two consecutive terms in the U.S. Senate from being listed on any official ballot for re-election? Terms currently being served would not be counted.

In accordance with Neb. Rev. Stat. § 32-711 (Reissue 1993), a true copy of the title and full text of Measure #408 was published in legal newspapers throughout the state.

The term limits measure was put to a vote at the November 8 general election. Approximately 357,015 people voted in favor of term limits, and approximately 170,394 voted against the measure.

By proclamation of the Governor, the approved amendments became part of the Constitution of Nebraska. The Revisor of Statutes used the text of the proposed amendments but renumbered some of the amendments prior to publication. See Neb. Const. art. III, § 8; art. IV, § 3; art. VII, § 15; and art. XV, §§ 20, 21, 22, 23, and 24 (Supp. 1995). The initiative measure had proposed that the Constitution be amended to add a new article XV, § 19. However, the Constitution had already been amended in 1992 to add an article XV, § 19, pertaining to liquor licenses. The Revisor of Statutes elected to renumber the amendments rather than "repeal" the existing article XV, § 19. For simplicity's sake, in this opinion we refer to the amendments as they were numbered in the initiative petition rather than as renumbered by the Revisor.

After the November 8 election, appellants timely filed a motion for a new trial. A hearing was conducted on November 15 and 16. On November 16, the district court overruled appellants' motion for a new trial.

On November 16, appellants filed a notice of their intent to appeal to the Nebraska Court of Appeals the orders of the district court dismissing their action and overruling their motion for a new trial. By order of this court, we removed the case to our docket.

ASSIGNMENTS OF ERROR

Appellants assert the district court erred in (1) finding that the initiative petition was legally sufficient; (2) finding the object statement was sufficiently detailed and accurate; (3) failing to find that submission of Measure #408 within 2 years of a previous vote on a nearly identical provision violated article III, § 2, of the Nebraska Constitution; (4) concluding before the election that the constitutionality of the proposed amendments was not a justiciable issue, and after the election, failing to grant the motion for a new trial and find the issue then clearly justiciable for purposes of the declaratory relief appellants prayed for; (5) failing to conclude that Measure #408 and the corresponding amendments were facially unconstitutional; (6) declining to enter the injunctive relief prayed for by appellants; and (7) failing to grant appellants' motion for a new trial.

STANDARD OF REVIEW

This is an equitable proceeding, and the court makes an independent determination of both the facts and the applicable law. See, Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1994); *Duggan v. Beermann I*.

ANALYSIS

We begin our analysis with recognition that the task before us requires us to respect and to give effect to the power the people have reserved to themselves to amend the Nebraska Constitution through initiative measures.

"[A] constitution represents the supreme written will of the people regarding the framework for their government." *Duggan v. Beermann I*, 245 Neb. at 915, 515 N.W.2d at 794. See, *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Laverty v. Cochran*, 132 Neb. 118, 271 N.W. 354 (1936).

The people have the power to amend the Constitution of Nebraska pursuant to Neb. Const. art. III, § 1, which provides in part:

> The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.

Further, article III, § 2, provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."

"[I]n a case involving the people's amendment to their Constitution, we make no attempt to judge the wisdom or the desirability in enacting such amendments." *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 213, 389 N.W.2d 269, 273 (1986). See, also, *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948). However, "in adopting the Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law." *Duggan v. Beermann I*, 245 Neb. at 915, 515 N.W.2d at 794. See, *State v. Winnett*, 78 Neb. 379, 110 N.W. 1113 (1907).

If the people choose to amend their Constitution and comply with their self-imposed limitations, then this court will not encroach upon the people's power. Assuming these self-imposed limitations are complied with, the people of Nebraska may amend their Constitution in any way they see fit, provided the amendment does not violate the Constitution of the United States. *Omaha Nat. Bank v. Spire, supra.*

District Court Jurisdiction

In the district court, appellants prayed for injunctive and declaratory relief. The court held that it did not have jurisdiction to grant declaratory relief regarding the constitutionality of Measure #408 because its jurisdiction was limited to consideration of whether the initiative petition was "legally sufficient" under Neb. Rev. Stat. § 32-706 (Reissue 1993). In so doing, the district court relied upon its analysis in the earlier *Duggan v. Beermann* case in which it had found that " '[j]urisdiction under § 32-706 is for a special, expedited, and summary proceeding', and that proceedings under § 32-706 '. . . cannot be joined with other actions.' "

The district court's holding that a cause of action arising under § 32-706 cannot be joined with a declaratory judgment action is erroneous. As we implicitly stated in *Duggan v. Beermann I*, and now explicitly state here: A prayer for injunctive relief under § 32-706 can properly be joined with a prayer for declaratory relief.

Section 32-706 provides a statutory basis by which the Secretary of State's determination as to the legal sufficiency of an initiative measure and its placement on the ballot can be challenged. Section 32-706 provides that any citizen may challenge the Secretary of State's determination regarding an initiative measure by filing a petition for a writ of mandamus or an injunction in the district court for Lancaster County. See, also, *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988). There is nothing within § 32-706 itself which precludes it from being joined with a prayer for declaratory relief.

In *Fitzgerald v. Kuppinger*, 163 Neb. 286, 79 N.W.2d 547 (1956), we were presented with an analogous situation. In that

case, the plaintiff was the Douglas County Attorney. While acting as county attorney, the plaintiff became a candidate for a judicial position. Both positions were elective offices. The controlling statute, Neb. Rev. Stat. § 32-503 (Cum. Supp. 1955), provided that when an incumbent filed nomination papers for another elective office, a vacancy was created in the incumbent's current office. Accordingly, after the county attorney filed his nomination papers for the judicial position, two other individuals filed as candidates for the county attorney position. The plaintiff withdrew his nomination papers for the judicial position and commenced an action to enjoin the Douglas County election commissioner from placing the names of the two other candidates on the ballot, and to obtain a declaratory judgment that his office as the county attorney had not become vacant by his filing for nomination for the judicial position. The plaintiff named the election commissioner and the two challengers for the county attorney office as defendants.

We said: "The theory of the action as to these defendants and the ground upon which the plaintiff contends that he is entitled to the declaratory relief prayed is substantially the same as that interposed as the ground for injunction against the election commissioner, that is, that section 32-503 . . . is unconstitutional." *Fitzgerald v. Kuppinger*, 163 Neb. at 290, 79 N.W.2d at 551.

The two prayers for relief formed one cause of action.

> [A] "cause of action" is the operative facts which give rise to a "right of action" or the remedial right affording redress. Thus, there may be several rights of action arising out of a cause of action. . . . A single cause of action may give rise to more than one theory upon which recovery may be had.

Mindt v. Shavers, 214 Neb. 786, 790, 337 N.W.2d 97, 100 (1983). Here, there was only one cause of action generating two remedial rights. There is no improper joinder.

Petitioners often combine a prayer for injunctive relief with a prayer for declaratory relief. See, e.g., *DeCoste v. City of Wahoo*, 248 Neb. 463, 534 N.W.2d 760 (1995); *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991); *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d

685 (1988); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

The district court also refused to address appellants' prayer for declaratory relief because it concluded that the constitutionality of the proposed amendments was not a justiciable issue. The court correctly declined to enter an advisory opinion or any declaratory judgment unless and until the initiative measure was adopted.

"A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination." *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 253, 518 N.W.2d 124, 126 (1994). "[D]eclaratory judgment proceedings do not ' "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." ' " *Id.* at 254, 518 N.W.2d at 127. To the degree that appellants sought a declaration that Measure #408, if adopted, would enact amendments which violated the U.S. or the Nebraska Constitution, appellants were seeking an advisory opinion.

After Measure #408 was adopted, appellants filed a motion for a new trial. Appellants stated that because Measure #408 had passed, its provisions were enacted as part of Nebraska's Constitution. They asserted that an opinion of the district court regarding Measure #408's constitutionality would thus not be advisory. A hearing was conducted on November 15 and 16, 1994. On November 16, the district court overruled appellants' motion for a new trial.

The district court's order denying the motion for a new trial was improper. The issue of whether the Measure #408 proposed amendments were unconstitutional was justiciable and properly before the district court as a result of appellants' motion for a new trial as to the prayer for declaratory relief.

SUPREME COURT JURISDICTION

We turn now to our appellate jurisdiction. In *Duggan v. Beermann I*, the Secretary of State asserted that the case should be dismissed as moot. We noted that a case becomes moot when the issue initially presented in the litigation ceases to exist. Since an injunction cannot prevent what has already occurred,

the fact that the measure had already been placed on the ballot, that issue was moot. See, also, *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). Nonetheless, in *Duggan v. Beermann I*, we were able to address the issues, since appellants had also requested declaratory relief.

Similarly, by the time the appeal was before us in the matter of *Fitzgerald v. Kuppinger*, 163 Neb. 286, 79 N.W.2d 547 (1956), one of the two challengers had won the election for the office of the county attorney. Therefore, we held that the appeal as to the injunction seeking to prevent the election commissioner from placing the challengers on the ballot had become moot. We then proceeded to address the plaintiff's prayer for declaratory relief.

Pursuant to *Duggan v. Beermann I* and *Fitzgerald v. Kuppinger*, we have jurisdiction to address appellants' assignments of error regarding the district court's denial of declaratory relief. We also have jurisdiction to address the assignments of error regarding the denial of injunctive relief. Although the issue of whether the injunction should issue is now moot,

> "[t]here is an exception to the general rule regarding moot questions which should be examined. That exception applies to cases involving matters of public interest. . . . The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem."

Bamford v. Upper Republican Nat. Resources Dist., 245 Neb. at 304–05, 512 N.W.2d at 647.

The issues arising from the denial of injunctive relief involve matters of public interest, and it is clearly desirable to provide future guidance in that these issues have already proven themselves capable of repetition. Therefore, we will also address these issues to the degree that we must in order to resolve this case.

MEASURE #408 UNCONSTITUTIONAL AS TO CONGRESSIONAL OFFICES

The Supreme Court of the United States has held that state-imposed term limits upon congressional offices violate the Constitution of the United States. *U.S. Term Limits, Inc. v. Thornton*, ____ U.S. ____, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

The eligibility requirements for Congress are straightforward. A candidate for the House of Representatives must be at least 25 years old, have been a U.S. citizen for at least 7 years, and be a resident of the state from which he is seeking election. U.S. Const. art. I, § 2, cl. 2. A candidate for the U.S. Senate must be at least 30 years old, have been a U.S. citizen for at least 9 years, and be a resident of the state from which he is seeking election. U.S. Const. art. I, § 3, cl. 3.

In *U.S. Term Limits, Inc. v. Thornton*, the Court held that the Constitution forbids the states from adding to or altering these specifically enumerated qualifications. The qualifications for members of Congress set forth in the U.S. Constitution are the sole qualifications. The Supreme Court held that before individual states can be allowed to adopt their own qualifications for congressional service, the U.S. Constitution must be amended. The Court stated that it was

> firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V.

115 S. Ct. at 1871.

Secondly, the Supreme Court rejected term limits supporters' arguments that even if the states may not add qualifications, term limits are a permissible exercise of state power under the Elections Clause, article I, § 4, clause 1, of the U.S. Constitution. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law

make or alter such Regulations, except as to the Places of chusing Senators."

The Court held that the Elections Clause grants the states authority to enact procedural requirements and safeguards but not authority to impose substantive qualifications that exclude candidates from the ballot. Term limits are substantive qualifications, and the states lack authority to impose them under the Elections Clause.

Therefore, to the degree that the amendments to the Nebraska Constitution impose term limits on holders of congressional offices, they must necessarily be held unconstitutional.

MEASURE #408'S UNCONSTITUTIONAL PORTIONS ARE NOT SEVERABLE

U.S. Term Limits, Inc. v. Thornton invalidates Measure #408's imposition of term limits upon federal offices. However, Measure #408 also resulted in amendments which imposed term limits upon a variety of state offices. We now address whether the portions of Measure #408 pertaining to state offices can be severed from that portion pertaining to federal offices. We conclude that Measure #408 presents a single concept and that that concept is not severable.

This is the first time that this court has addressed the issue of whether the unconstitutional portions of a voter initiative measure can be severed from the remaining portions. The Nebraska electorate voted for or against Measure #408 in its entirety. We are now asked to guess whether the voters would have supported or opposed that portion of Measure #408 which sought to impose term limits on state offices.

We have previously addressed whether the valid portions of unconstitutional *statutes* can be severed from the invalid portions. In that situation,

> [t]his court has identified several factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed

> without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Jaksha v. State, 241 Neb. 106, 129, 486 N.W.2d 858, 873 (1992). See, *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995); *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991); *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988); *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983).

Here, the Legislature is not involved. We are addressing constitutional amendments adopted by voter initiative rather than legislation. The intent of a majority of state senators leaving a written record is far different from the intent of hundreds of thousands of individual voters. Nonetheless, the analysis found in the *Jaksha v. State* line of cases may be instructive.

Workable, Enforceable Plan

Under the *Jaksha v. State* analysis, the first and second factors examine whether, absent the invalid portion, a workable and independently enforceable plan remains. "The rule is that when invalid portions [of a statute] are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated, the whole act fails." *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 524, 294 N.W.2d 330, 334 (1980). Accord *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970). If part of a statute is held unconstitutional, "the remainder must likewise be held unconstitutional unless the unconstitutional portion can be separated from the provision, leaving the remaining portion or portions independently enforceable." *Fitzgerald v. Kuppinger*, 163 Neb. 286, 295, 79 N.W.2d 547, 554 (1956).

The drafters of Measure #408 interwove term limits applicable to federal offices with term limits applicable to state offices. The petition purported to amend four existing sections of the Constitution and to add four new sections. In amending

the sections of the Constitution dealing with the terms of office for legislators, the Lieutenant Governor, the Secretary of State, and various other elected officials, the petition drafters incorporated by reference the proposed constitutional amendment, article XV, § 20, pertaining to federal offices. See text of petition, article III, § 8; article IV, § 3; and article VII, § 15. As enacted, the amendments pertaining to state offices continue to incorporate by reference the constitutional amendment relating to congressional offices. However, under *U.S. Term Limits, Inc. v. Thornton*, ____ U.S. ____, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), we have declared article XV, § 20, to be void.

Thus, the constitutional amendments imposing term limits upon state offices expressly intertwine the clearly unconstitutional language of article XV, § 20, with the amendments relating to state offices. After article XV, § 20, is stricken in its entirety, are the remaining amendments independently workable and enforceable?

If we were to strike all references to article XV, § 20, from the amendments relating to state offices, those amendments might become more intelligible than as written. In fact, the drafters of Measure #408 were unable to explain what they hoped to accomplish by incorporating congressional term limits in amendments relating to the Legislature, executive offices, et cetera. Only the last sentence of article XV, § 20, has any possible relevance to the amendments imposing term limits on state offices, since that sentence provides a "grandfather" clause for incumbents.

Appellees argue that the references to article XV, § 20, were merely clerical errors in an initiative petition and that the references should be disregarded. Whether the appellees would wish us to disregard the grandfather clause as well was not argued.

The purpose of the *Jaksha v. State* severability analysis is to save the constitutional portions of a workable, independently enforceable statutory plan after a portion of the plan has been found unconstitutional. The severability analysis has not been used to revise careless drafting or to correct clerical errors.

INDUCEMENT

Under the *Jaksha v. State* severability analysis, we must also examine whether the unconstitutional portion was such an inducement that the constitutional portions would not have passed without it. Assuming that we could revise and edit the remaining amendments after striking article XV, § 20, those amendments may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining amendments. See *Fitzgerald v. Kuppinger, supra*.

"Inducement as contemplated by the decisions of this court has not been clearly defined. It is thought that it may not be accurately defined but that it must depend upon the character and quality of the action of the Legislature as it appears in the legislation under scrutiny." *Id.* at 294, 79 N.W.2d at 553. Where the expressed legislative intent is not severable, then the inducement cannot be anything less than entire. *Id.*

We are mindful that we are not trying to determine the intent of the Legislature; rather, we are trying to determine the intent of term limits voters. "There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment." *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 224-25, 389 N.W.2d 269, 279 (1986).

Even if there were a meaningful method to determine the intent of those who signed petitions in support of Measure #408, that method might be defeated by a plain reading of that document. In addition to the confusing references to federal offices in the proposed amendments seeking to impose term limits on state offices, the petition's object clause failed to inform signers that the measure applied to state legislators. The amendments were misnumbered, and one of the proposed "new" amendments was already part of our Constitution. How are we to determine the intent of over 350,000 voters in the face of this?

Further, we note the history and operative facts behind the enactment of Measure #408 and the substantial involvement of U.S. Term Limits. We may use historical or operative facts in

connection with the adoption of a constitutional amendment in order to interpret the meaning of the language of the Constitution. *Omaha Nat. Bank v. Spire, supra.* For example, where a legislative act during the Depression to reduce the salaries of more than 50 state officers was invalid as to some, we refused to presume that the Legislature would have intended the act to take effect in part. We stated that had certain officeholders been left out of the proposed legislation, " 'its promoters would have regarded it much as they would have regarded the play of Hamlet with Hamlet left out.' " *State, ex rel. Taylor, v. Hall*, 129 Neb. 669, 697, 262 N.W. 835, 849 (1935). The dominant purpose of the salary reduction act was to effect an immediate and drastic reduction in salaries. Since the act was defeated in its substantial entirety, the entire act had to fall. *Id.*

The record indicates that the imposition of term limits on federal offices was the primary inducement which gained voter support for Measure #408. During oral arguments before this court in this matter, appellees conceded that term limits was one total concept. Clearly, the substantial part of that concept was to place term limits on congressional representatives rather than on local city councils, boards of regents, et cetera.

This conclusion is borne out by the fact that the constitutional amendments imposing term limits upon certain state and local offices can be overridden by the voters. The proposed amendment to article VII, § 15, permits the voters of the state to lengthen, shorten, or eliminate the limitations on the terms of office for the State Board of Education. Proposed amendment article XV, § 19, permits the voters of any city or county to change the term limitations imposed upon city councils and county boards. How these local "overrides" would operate is uncertain, but they do indicate that the term limits initiative was more concerned about federal offices than state and local offices. Further, we note that Measure #408 was amended by its sponsors to entirely remove some state offices from being subjected to term limits.

SEVERABILITY CLAUSE

The fifth factor under *Jaksha v. State*, 241 Neb. 106, 486

N.W.2d 858 (1992), gives deference to any declaration of separability which would indicate that the Legislature would have enacted the bill absent the invalid portion. Measure #408 does contain a severability clause. It reads: "If any of the provisions hereby adopted shall be held void for any reason, the remaining provisions shall continue in full force and effect."

Although the presence of a severability clause is a factor to be considered, it is not, in itself, determinative. "Where sections constituting an inducement for the passage of an act are unconstitutional, the entire act must fall, notwithstanding the saving clause." *Laverty v. Cochran*, 132 Neb. 118, 127, 271 N.W. 354, 359 (1936). See, *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994) (*aff'd sub nom. U.S. Term Limits, Inc. v. Thornton*, ____ U.S. ____, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995)).

In *Laverty v. Cochran*, the Legislature had passed an act changing the manner in which various constitutional officers and state employees could post a bond for their office. We held portions of a state bonding act to be unconstitutional as applied to constitutional officers. We then determined that the unconstitutional portions of the bonding act could not be severed from the remaining portions. In so doing, we noted that the act contained a severance clause which provided: " 'Should any section or provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof, other than the part so decided to be unconstitutional.' " *Id.* at 126–27, 271 N.W. at 359. We deemed the severability clause to be expressive of legislative intent as to the separability of the various parts of the bonding act and found it to be an aid to judicial interpretation, but not controlling.

We do not find Measure #408's severability clause to be determinative. First, the severability clause was not printed on the ballots and so was not directly before the voters who approved the amendments. Unless a voter had read the full text of the proposed amendments in a newspaper or had reviewed one of the petitions, that voter was probably unaware of the severability clause.

Second, the severability clause provides that if any of the "provisions" are held void, the remaining "provisions" shall "continue in full force and effect." We are uncertain as to how the drafters meant the term "provision" to be applied to constitutional amendments. We held article XV, § 20, relating to federal offices to be void. Should we try to save the last sentence, the grandfather clause, as a "provision" which shall continue in full force and effect? Or should we strike all references to article XV, § 20?

We conclude that the portions of Measure #408 relating to state offices cannot be severed from those portions found unconstitutional under *U.S. Term Limits, Inc. v. Thornton*, because the unconstitutional portions were a substantial inducement to the enactment of the whole measure and because the unconstitutional portions were intertwined with the allegedly valid portions. Measure #408 must therefore be declared unconstitutional in its entirety.

Legal Sufficiency of the Petition Form

In their prayer for declarative and injunctive relief, appellants challenged the legal sufficiency of Measure #408's initiative petition due to its numerous technical and clerical errors.

Among the alleged errors are the actions of appellees in (1) failing to file an actual copy of the initiative petition to be used with the Secretary of State prior to circulation as required by § 32-704(2); (2) failing to print a concise statement in large type of the objects to be sought on the petition as required by § 32-703; (3) failing to conform the petition's signature and name lines and spacing to the requirements of Neb. Rev. Stat. § 32-4,156 (Reissue 1993); (4) failing to print in boldface type required warnings to potential supporters regarding the penalties for wrongfully signing a petition as required by Neb. Rev. Stat. § 32-705 (Reissue 1993); (5) failing to provide a signature line for circulators as required by § 32-705; (6) attempting to amend various constitutional articles without specifically setting forth the sections being amended or repealed; (7) using internal references in the petition which incorporated federal term limits, thus rendering Measure #408 unintelligible and garbled; (8) using an object statement which deceptively and inaccurately

identified Measure #408's goal by failing to include state legislators; and (9) failing to file with the Secretary of State a sworn statement containing the names and addresses of all of Measure #408's sponsors as required by § 32-704(2).

The Secretary of State must review a petition for a proposed initiative measure to determine whether the petition satisfies statutory prescriptions regarding the form of an initiative measure. See, *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984); § 32-705. We have previously described the Secretary of State's duties in the review of initiative petitions to be ministerial in nature. See, *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988); *State ex rel. Brant v. Beermann, supra*. The Secretary of State cannot pass on the merits of the initiative measure and can reject the measure only if it is facially invalid or unconstitutional. *State ex rel. Brant v. Beermann, supra*. Generally, the Secretary of State will approve a proposed petition if the statutorily prescribed forms are substantially complied with. *Id.* See § 32-705(5) for statutory provisions regarding initiative petitions.

This general leniency is carried through the entire initiative process in order to preserve the full spirit of the precious right of the people to revise their Constitution. After a successful initiative measure, the Governor of Nebraska simply issues a proclamation and the proposed amendments become part of the Constitution. The Revisor of Statutes then publishes the amendments as they were drafted by the initiative's sponsors. Although the Revisor of Statutes has authority, in preparing supplements to and reissued or replacement volumes of the Revised Statutes, to renumber and rearrange sections, the Revisor cannot change the substantive meaning of any adopted constitutional amendment. See, e.g., *Stuthman v. Stuthman*, 245 Neb. 846, 515 N.W.2d 781 (1994); *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986); Neb. Rev. Stat. § 49-705 (Reissue 1993). The Revisor of Statutes is powerless to make substantive corrections and revisions to approved amendments resulting from a successful initiative. For example, the Revisor could not correct the internal cross-references described above.

Our review of the record indicates that at least some of the

alleged errors regarding the legal sufficiency of Measure #408 had also been complained of when the previous term limits proposal, Measure #407, was challenged. For example, Measure #407's object statement also failed to include state legislators, despite the fact that Measure #407 sought to impose term limits upon the Legislature.

We note that sample forms, rather than drafts of the actual petitions to be circulated, were submitted for the Secretary of State's review. The Secretary of State contends that an initiative's sponsors should not be required to retain a printer and prepare a final draft before obtaining his approval. Although the text on the sample petition was identical to that on the circulated petition, we question how the Secretary of State could ascertain that the circulated petition substantially complied with statutory provisions regarding the use of boldface, type size, and spacing if he never saw it prior to circulation. Many of the alleged errors could have been corrected during a ministerial review for substantial compliance without violation of the prohibition against passing on the merit or wisdom of the proposed amendments.

Our disposition of this case makes it unnecessary to rule on the effect of the carelessness evident in the drafting of Measure #408. As demonstrated by this case, any textual error due to careless drafting can become part of our Constitution. Expressing the written will of the people, the Constitution, demands that initiative supporters exercise due care and caution appropriate to the significance of that task.

CONCLUSION

The district court erred when it failed to grant declaratory relief in favor of appellants. The amendment promulgated by Measure #408 is unconstitutional as it applies to federal offices, and the remaining amendments are so intertwined with the unconstitutional amendment that they, too, must be declared void. The judgment of the district court is reversed.

REVERSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICKEY M. STUBBLEFIELD, APPELLANT.

543 N.W.2d 743

Filed February 23, 1996. No. S-95-396.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
3. **Double Jeopardy: Statutes: Proof.** Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).
4. ____: ____: ____. In both the multiple punishment and multiple prosecution contexts, the double jeopardy bar applies if the two offenses for which a defendant is punished or tried cannot survive the *Blockburger* test.
5. **Statutes: Controlled Substances: Intent: Proof.** A violation of Neb. Rev. Stat. § 28-416 (Reissue 1989) requires proof of intent to manufacture, distribute, deliver, or dispense a controlled substance, but a violation of the marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1990 & Cum. Supp. 1992), does not require proof of the same element.
6. **Statutes: Controlled Substances: Taxes: Proof.** A violation of the marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1990 & Cum. Supp. 1992), requires proof that the excise tax has not been paid and that the dealer possessed at least 6 or more ounces of marijuana, but a violation of Neb. Rev. Stat. § 28-416 (Reissue 1989) does not require proof of the same element.
7. **Double Jeopardy: Statutes: Controlled Substances: Proof.** Violations of Neb. Rev. Stat. § 28-416 (Reissue 1989) and the marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1990 & Cum. Supp. 1992), do not constitute the same offense, because each requires proof of an element the other does not, and thus, the Double Jeopardy Clause does not prohibit prosecution and/or punishment for each of the two offenses.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

We have granted the State's petition to bypass the review of the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994). We are asked to determine whether prosecuting Mickey M. Stubblefield for possession of marijuana with intent to deliver (Neb. Rev. Stat. § 28-416 (Reissue 1989)), after a tax for the same marijuana has been assessed against him pursuant to Nebraska's marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1990 & Cum. Supp. 1992), violates the constitutional prohibition against double jeopardy.

Stubblefield appeals from an order of the district court for Lancaster County, overruling his plea in bar to criminal possession of marijuana with intent to deliver charges. The district court found that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions are not applicable because the drug tax assessed against Stubblefield pursuant to the drug tax statutes did not constitute punishment for purposes of double jeopardy. We affirm the district court's finding that double jeopardy does not bar the criminal prosecution of Stubblefield for possession with intent to deliver, but we reach this conclusion on the basis of different reasoning.

We find that the criminal possession with intent to deliver charge does not constitute the same offense as the tax assessment under the drug tax statutes. Thus, we conclude that Stubblefield's plea in bar to the criminal prosecution on the grounds that it would constitute a second prosecution and/or multiple punishment for the same offense is without merit. We therefore affirm.

ASSIGNMENTS OF ERROR

Stubblefield alleges the district court erred in not finding that the criminal possession of marijuana with intent to deliver charge was barred by the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions, because that charge, in addition to the tax assessment, subjects him to: (1) multiple punishment and/or (2) successive criminal prosecution for the same offense.

The State contends that Stubblefield's first assignment of error is premature because he has not paid any of the drug tax and, thus, has not been punished for purposes of double jeopardy. Since we are affirming the district court's judgment for other reasons, we need not consider whether Stubblefield's multiple punishment claim is ripe.

SCOPE OF REVIEW

Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

BACKGROUND

On March 19, 1993, Stubblefield was stopped by officers from the Lincoln Police Department while operating a motor vehicle in Lincoln, Nebraska. The officers discovered a sealed package in Stubblefield's car which contained 320 ounces (20 pounds) of marijuana. As a result, Stubblefield was arrested for unlawful possession of marijuana with intent to deliver. No drug tax stamp was affixed to the marijuana.

Pursuant to the drug tax statutes, officers from the police department submitted to the Tax Commissioner a Nebraska drug tax assessment information sheet informing the commissioner of the seizure of 320 ounces of marijuana from Stubblefield's vehicle. The marijuana was taxed at a rate of $100 per ounce for a total tax of $32,000. In addition, the commissioner assessed a 100-percent penalty for nonpayment of the tax in the amount of $32,000, and interest in the amount of $257.75. The assessment of the tax, penalty, and interest created a tax lien in favor of the State against property in possession or owned by Stubblefield in the amount of $64,257.75. Neb. Rev. Stat. §§ 77-3901 to 77-3909 (Reissue 1990). The commissioner filed a notice of state tax lien with the Lancaster County register of deeds and a notice of levy in the district court for Lancaster County.

After the Tax Commissioner initiated tax collection efforts under the Uniform State Tax Lien Registration and Enforcement Act, the State, through the Lancaster County Attorney, initiated criminal prosecution against Stubblefield for the felony offense

of possession of marijuana with intent to deliver. The marijuana, which is the subject matter of the current criminal prosecution against Stubblefield, was the same marijuana which was the subject matter of the tax assessment by the Tax Commissioner.

Stubblefield filed a plea in bar alleging that the possession with intent to deliver charge was barred by the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions because he had already been prosecuted and punished for the same offense by having the tax, penalty, and interest assessed against him. The district court overruled Stubblefield's plea in bar, and he was found guilty by a jury.

OVERVIEW OF NEBRASKA'S MARIJUANA AND CONTROLLED SUBSTANCES TAX STATUTES

Preliminarily, we believe it helpful to give a description of Nebraska's marijuana and controlled substances tax statutes. The statutes were enacted as 1990 Neb. Laws, L.B. 260, and are now codified at §§ 77-4301 to 77-4316. They impose a tax on marijuana at a rate of $100 on each ounce or portion of an ounce in the dealer's possession. § 77-4303(1)(a). The tax imposed by § 77-4303 shall be due and payable immediately upon acquisition or possession of marijuana in this state by a dealer. § 77-4305. A "dealer" is defined in part as one who "acquires or possesses six or more ounces of marijuana." § 77-4301(2). Thus, one must possess at least 6 ounces of marijuana to be subject to the tax.

Section 77-4302 prohibits a dealer from possessing marijuana unless the tax has been paid as evidenced by an official stamp or label affixed to the marijuana. Official stamps or labels are to be purchased from the Department of Revenue. § 77-4304(1). Each stamp is valid for 6 months after issuance. § 77-4304(2). In applying for a tax stamp, a dealer shall not be required to give his or her name, address, Social Security number, or other identifying information. § 77-4304. See, also, *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993) (statutes as interpreted do not violate prohibition against self-incrimination).

Based on personal knowledge or information available to the

Tax Commissioner, the commissioner must assess the tax and penalty upon any dealer who has not paid the tax when due. § 77-4310. Any dealer violating the drug tax statutes is subject to a penalty of 100 percent of the tax in addition to the tax imposed by § 77-4303. § 77-4309(1). The penalty shall be collected as part of the tax. *Id.* If the amount of the deficiency is not paid, the deficiency shall accrue interest for the period from the date the tax was due until the date such deficiency is paid. § 77-4312(8).

If payment is not immediately made after notifying the dealer of the tax, penalty, and interest due and demanding payment, the Tax Commissioner shall collect the tax and penalties by any method prescribed in the Uniform State Tax Lien Registration and Enforcement Act. § 77-4310(3). However, the dealer may petition for a hearing regarding the assessment pursuant to the Administrative Procedure Act. § 77-4312(1).

Information obtained in compliance with the drug tax statutes is confidential and may not be used against the dealer in any criminal proceeding, except proceedings involving taxes due under the drug tax statutes. § 77-4315. However, the statutes do not give a dealer immunity from criminal prosecution. § 77-4308. In addition to the aforementioned civil penalties, § 77-4309(2) provides that a dealer distributing or possessing marijuana without affixing the official stamp or label shall be guilty of a Class IV felony. The tax shall not be imposed upon a person registered or otherwise lawfully in possession of marijuana or a controlled substance pursuant to chapter 28, article 4, of the Nebraska Revised Statutes.

ANALYSIS

Double Jeopardy—Its Contours

The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense."

The U.S. Supreme Court has interpreted the Fifth Amendment's Double Jeopardy Clause to protect against three

distinct abuses: (1) a second prosecution for the *same offense* after acquittal, (2) a second prosecution for the *same offense* after conviction, and (3) multiple punishments for the *same offense*. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2089, 23 L. Ed. 2d 659 (1969). This court has not construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the federal Constitution.

In *United States v. Halper*, the Supreme Court addressed the issue of whether a civil-administrative sanction could constitute punishment for purposes of double jeopardy. The Court held:

> In making this assessment [of whether a sanction constitutes punishment for double jeopardy purposes], the labels "criminal" and "civil" are not of paramount importance. . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

490 U.S. at 447-48.

In deciding whether a civil penalty constitutes "punishment" for double jeopardy purposes, it is immaterial whether the civil penalty precedes or follows the criminal proceeding. *U.S. v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), *cert. denied* 506 U.S. 841, 113 S. Ct. 123, 121 L. Ed. 2d 78 (1992). See, also, *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 1958, 128 L. Ed. 2d 767 (1994) (Scalia, J., dissenting) ("if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference"); *State v. Hanson*, 532 N.W.2d 598 (Minn. App. 1995) (Randall, J., concurring).

Stubblefield assigns as error that because he has already had a tax assessed against him on the marijuana he possessed, to criminally prosecute him for possession of the same marijuana with intent to deliver would subject him to multiple punishment and/or a second prosecution for the same offense. Thus, we must determine whether the assessment of a tax, penalty, and

interest pursuant to the drug tax statutes and the charge of possession of marijuana with intent to deliver under § 28-416 constitute the same offense for purposes of double jeopardy.

NOT SAME OFFENSE

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. In both the multiple punishment and multiple prosecution contexts, the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the "*Blockburger*" test. *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In applying this test, the "same offense" phrase has an identical meaning whether the punishments or prosecutions are successive. *Id.*

In other words, the *Blockburger*, or "same-elements," test asks whether each offense contains an element not contained in the other. *Id.* If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.*; *Blockburger v. United States, supra.* If so, they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution. *U.S. v. Dixon, supra.*

Under Nebraska's penal code, a person commits the offense of possession of marijuana with intent to deliver when the person knowingly or intentionally manufactures, distributes, delivers, dispenses, or possesses with intent to manufacture, distribute, deliver, or dispense marijuana. § 28-416. A violation of § 77-4302 of the drug tax statutes occurs when a dealer possesses 6 ounces or more of marijuana upon which a tax is imposed unless the tax has been paid on the marijuana as evidenced by an official stamp or label.

A comparison of the two statutes shows that a violation of § 28-416 requires proof of intent to manufacture, distribute, deliver, or dispense a controlled substance, but a violation § 77-4302 of the drug tax statutes does not require proof of the

same element. A violation of § 77-4302 requires proof that the excise tax has not been paid and that the dealer possessed at least 6 or more ounces of marijuana, but a violation of § 28-416 does not require proof of the same element.

Moreover, proof of intent to deliver does not require a finding that the defendant possessed a certain quantity of marijuana. The fact that an individual possessed 6 or more ounces does not, in and of itself, necessitate a finding of intent to deliver. Moreover, even if a person is found guilty of possession with intent to deliver, the drug tax statutes are inapplicable unless he or she possessed 6 or more ounces.

Thus, we find that violations of §§ 28-416 and 77-4302 do not constitute the same offense, because each requires proof of an element the other does not. See, *State v. Perez*, 906 S.W.2d 558 (Tex. App. 1995); *State v. Morgan*, 118 N.C. App. 461, 455 S.E.2d 490 (1995). As a result, the Double Jeopardy Clause does not prohibit prosecution and/or punishment for each of the two offenses.

INAPPLICABILITY OF *KURTH RANCH*

Stubblefield argues that the question of whether a tax assessment against an individual for possession of a controlled substance constitutes a "punishment" and/or a "prosecution" for purposes of double jeopardy has been answered by the U.S. Supreme Court in *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In *Kurth Ranch*, the Supreme Court held that a tax imposed under Montana's Dangerous Drug Tax Act after the State had imposed a criminal penalty for the same conduct constituted a second punishment and was the functional equivalent of a successive criminal prosecution, in violation of the Double Jeopardy Clause.

However, Nebraska's and Montana's drug tax statutes differ in material respects. Under Nebraska's statutes, a tax is levied on the possession of drugs regardless of whether the taxpayer has been arrested for criminal conduct. The tax is due immediately upon acquisition or possession of marijuana in the state. A dealer possessing 6 or more ounces is prohibited from possessing marijuana unless the tax has been paid as evidenced

by an official stamp or label affixed to the marijuana. In applying for a tax stamp from the Department of Revenue, a dealer is not required to give any of his or her identifying information. Information obtained in compliance with the statutes is confidential and may not be used against the dealer in any criminal proceeding except proceedings involving taxes due under the drug tax statutes.

However, under Montana's act, a taxpayer had no obligation to file a return or pay any tax unless and until the taxpayer was arrested. The act did not provide any opportunity for taxpayers to purchase stamps or labels from the Montana Department of Revenue to evidence that the tax had been paid. Instead, the act expressly provided that taxpayers were required to file a return within 72 hours of arrest. Thus, the tax assessment not only hinged on the commission of a crime, it also was exacted only after the taxpayer had been arrested for the precise conduct that gave rise to the tax obligation in the first place. Persons who had been arrested for possessing marijuana constituted the entire class of taxpayers subject to the Montana tax.

In *Kurth Ranch*, the Supreme Court never addressed the issue of whether the tax assessment under Montana's act and the criminal prosecution for the drug offense constituted the same offense. However, because Montana's act required the drug offense to precede and underlie the tax assessment, it is clear that neither offense required proof of an element that the other did not. See, *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In *Kurth Ranch*, the criminal charge would necessarily be a lesser-included offense of the tax assessment. Because we find that the Supreme Court's decision in *Kurth Ranch* is fact specific to Montana's act, and Nebraska's statutes are distinguishable from Montana's act in material respects, we conclude *Kurth Ranch* is inapplicable.

CONCLUSION

We conclude that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions do not bar prosecuting Stubblefield for possession of marijuana with intent to deliver after assessing a tax against him pursuant to the marijuana and controlled

substances tax statutes, because the prosecution does not constitute the same offense as the tax assessment.

AFFIRMED.

ITT HARTFORD, APPELLEE, V. ISIDRO RODRIGUEZ, APPELLANT.
543 N.W.2d 740

Filed February 23, 1996. No. S-95-547.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Workers' Compensation: Garnishment.** A garnishment proceeding to enforce an award of the Nebraska Workers' Compensation Court is separate and distinct from the underlying workers' compensation case.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

James E. Harris, of Harris, Feldman, Stumpf Law Offices, for appellant.

Joseph E. Andres and Terrence J. Salerno for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The applicant-appellant garnishor, Isidro Rodriguez, sought the district court's determination of the liability in garnishment on an award entered in his favor by the Nebraska Workers' Compensation Court against the respondent-appellee garnishee, ITT Hartford. Determining that it lacked subject matter jurisdiction, the district court released Hartford from the operation of the summons in garnishment, thereby effectively dismissing Rodriguez' petition. Claiming error in the district court's ruling, Rodriguez then appealed to the Nebraska Court

of Appeals. On our own motion we, in order to regulate the caseloads of the two courts, removed the matter to our docket. We now reverse, and remand with directions.

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *Payne v. Nebraska Dept. of Corr. Servs., ante* p. 150, 542 N.W.2d 694 (1996).

The compensation court awarded Rodriguez benefits because of injuries he sustained in an accident arising out of and in the course of his employment. As part of the compensation award, Hartford was ordered to pay Rodriguez

> the sum of $244.04 per week from and including November 10, 1992 to . . . January 25, 1994, for temporary total disability compensation and thereafter and in addition thereto, the sum of $244.04 per week for so long in the future as [Rodriguez] shall remain temporarily totally disabled as a result of said accident. If [Rodriguez'] temporary total disability ceases, he shall be entitled to the statutory amounts of compensation for any permanent disability resulting from this accident and injury.

Rodriguez' treating physician later wrote Hartford that Rodriguez had reached maximum medical improvement. Shortly thereafter, Hartford stopped paying temporary total disability benefits to Rodriguez and commenced paying him permanent partial disability benefits.

Rodriguez then transcribed the award to the district court under the provisions of Neb. Rev. Stat. § 48-188 (Reissue 1993), which reads:

> Any order, award, or judgment . . . for compensation pursuant to the Nebraska Workers' Compensation Act may . . . be filed with the district court of any county or counties in the State of Nebraska upon the payment of a fee . . . . Upon filing, such order, award, or judgment shall have the same force and effect as a judgment of such district court or courts and all proceedings in relation thereto shall thereafter be the same as though the order, award, or judgment had been rendered in a suit duly heard and determined by such district court or courts.

He next instituted this proceeding to recover the temporary total disability benefits he alleged were due and owing under the foregoing award.

In concluding that it lacked subject matter jurisdiction, the district court relied on Neb. Rev. Stat. § 48-161 (Reissue 1993), which provides in pertinent part: "All disputed claims for workers' compensation shall be submitted to the [compensation court] for a finding, award, order, or judgment. Such compensation court shall have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits . . . ." Thus, the district court reasoned that the statute lodged exclusive jurisdiction to determine such amount in the compensation court, and as a result, the district court lacked subject matter jurisdiction to decide Rodriguez' garnishment action.

However, the issue presented by this proceeding is not whether Rodriguez had attained maximum medical improvement so as to be ineligible for further temporary total disability payments, but whether Hartford as the garnishee was "(1) indebted to [Rodriguez], or (2) had any property or credits of [Rodriguez], in [its] possession or under [its] control at the time of being served with the notice of garnishment . . . ." Neb. Rev. Stat. § 25-1030.02 (Reissue 1989).

Nonetheless, Hartford contends that there was no debt owing, as the award upon which the garnishment is based contains unmet conditions precedent to the receipt of temporary total disability benefits. Notwithstanding that there is nothing in the record which indicates that Hartford sought or obtained a modification of the compensation court award, Hartford appears to be of the view that because Rodriguez' treating physician wrote that Rodriguez had attained maximum medical improvement, he was no longer entitled to temporary total disability benefits, and there was thus no debt to enforce.

But the fact is that at the time of Rodriguez' garnishment action, there was an award by the compensation court commanding Hartford to pay Rodriguez $244.04 per week until he was no longer temporarily totally disabled. As a general matter, whether a claimant has attained maximum medical improvement is a question of fact. *Foreman v. State*, 240 Neb.

716, 483 N.W.2d 752 (1992). Thus, absent the agreement of the parties, whether Rodriguez had attained maximum medical improvement so as to no longer be eligible for temporary total disability benefits was an issue to be decided by the compensation court, not independently by a physician or Hartford.

The proper procedure is set forth in Neb. Rev. Stat. § 48-141 (Reissue 1993):

> [T]he amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .

Because Rodriguez' award had not been modified at the time it was filed with the district court, the award of the compensation court was still in full force and effect as originally entered.

The garnishment statutes furnish a judgment creditor a means through which to satisfy a judgment, not a means through which to modify the underlying judgment. See *NC + Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988). In short, because a garnishment proceeding to enforce an award of the compensation court is separate and distinct from the underlying workers' compensation case, it is not encompassed by § 48-161.

Accordingly, the district court erred in concluding it lacked subject matter jurisdiction to enforce the compensation court's award; its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DIANA ELLEN SMITH-HELSTROM, FORMERLY KNOWN AS DIANA ELLEN YONKER, APPELLANT, V. DAVID LOREN YONKER, APPELLEE.

544 N.W.2d 93

Filed March 1, 1996. No. S-95-256.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the inferior courts.
2. **Child Custody: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1993), establishes a strong jurisdictional preference for the state which originally determined custody to exercise its continuing jurisdiction, provided the requirements of § 43-1203(1)(b) are satisfied.
3. **Child Custody: States: Federal Acts: Kidnapping.** The federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (1994), imposes upon the states a duty to enforce a child custody determination entered by the court of a sister state if that determination is consistent with the terms of the act.
4. **Child Custody: Federal Acts: Kidnapping: States: Jurisdiction.** For a state court's custody decree to be consistent with the federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (1994), the state must have jurisdiction under its own local law and must meet one of five conditions set out in § 1738A(c)(2).
5. **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; 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.
6. **Child Custody: Proof.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. The party seeking modification of child custody bears the burden of showing such a change in circumstances.
7. **Child Support.** The proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's earning capacity.

Appeal from the District Court for Gosper County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Katherine Karuschkat, P.C., and Michael E. Piccolo, of Clough Dawson & Piccolo, for appellant.

Jeffrey M. Wightman and James E. Doyle IV, of Cook, Wightman & Doyle, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

This interstate child custody dispute challenges the order of the Nebraska dissolution court modifying its earlier decree so as to remove the custody of the parties' minor son, Michael Douglas Yonker, from the petitioner-appellant mother, Diana Ellen Smith-Helstrom, who resides in Colorado, and place it with the respondent-appellee father, David Loren Yonker, who resides in Nebraska. In appealing to the Nebraska Court of Appeals, the mother asserted that the dissolution court erred in (1) taking jurisdiction, (2) ruling as it did with regard to custody, and (3) determining her child support obligation. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the matter to our docket. We now, for the reasons hereinafter set forth, reverse, and remand for further proceedings.

II. FACTS

The parties married on December 27, 1986; their son was born on March 8, 1988; and the marriage was dissolved on June 8, 1989. The decree permitted the mother to permanently relocate to Colorado with her son and granted the father reasonable visitation rights.

On July 13, 1990, the father filed an application in the dissolution court seeking modification of the custody provisions of its decree. The mother filed a responsive pleading and counterclaim seeking to have the motion dismissed. She also filed a pleading seeking to have the father held in contempt. After the dissolution court appointed a guardian ad litem for the son and held a number of hearings, a 2-day trial commenced on October 9, 1991. Both parties were present and represented by counsel, and both parties presented evidence. However, on October 10, the trial judge declared a mistrial and, for reasons the record does not disclose, recused himself.

The parties thereafter continued to conduct discovery, and on April 1, 1992, the father served upon the mother, her attorney, and the guardian ad litem notice that a hearing would be held on June 8 on the father's application to modify the custody arrangement. In addition, the father filed a motion asking for an order directing the mother to show cause why she should not be held in contempt for failing to abide by the court's visitation orders. The mother neither filed a response nor appeared at the hearing.

Upon the testimony of only the father and the Nebraska guardian ad litem, the dissolution court, on June 8, 1992, entered an order changing custody of the son, as set forth in part I. The court also ordered the mother to pay child support in the amount of $345 per month.

In the meantime, the mother had, on February 28, 1992, commenced an action in Colorado, asking the Colorado court to exercise jurisdiction over her, her son, and the issues concerning custody of him. On April 24, the Colorado court, in proceedings at which the father was represented by counsel and the son by a Colorado guardian ad litem, exercised jurisdiction. It determined that notwithstanding the pending proceedings in Nebraska, under Colorado's version of the Uniform Child Custody Jurisdiction Act, Colo. Rev. Stat. Ann. § 14-13-101 et seq. (West 1989), hereinafter referred to as the Colorado child custody act, the son's "home state" was Colorado, as he had lived there continuously since January 1989.

In its order of June 3, 1992, the Colorado court continued custody of the son with the mother. Because of the ongoing jurisdictional dispute, the court forbade the father from removing the son from Colorado and required that any visitation be under supervised conditions until the jurisdictional dispute was resolved. For reasons which the record does not reveal, the father's effort to appeal the Colorado court's order was unsuccessful.

The father initially refused to abide by the restrictions the Colorado court placed upon his visitation with his son. As a result, he did not see his son for approximately 2½ years. Finally, in February 1994, the father notified the Colorado

guardian ad litem that he would agree to the supervised visitation. The first Colorado visit was supervised by a police officer and took place in mid-March 1994.

A second visit occurred at a Colorado mall on March 30, 1994. The supervising police officer brought the son to the mall parking lot to meet with the father. The father gave the keys to his automobile to the officer and then went inside the mall with his son. The child's grandfather was also present for this visit. While the officer and the grandfather were drinking coffee, the father purchased a rabbit for his son at a mall store. Shortly thereafter, the father told the officer that he was going to take his son to look in one of the stores for some other items. Unbeknownst to the officer, the father had another automobile at the mall, which he used to drive his son to the airport. The father, a licensed pilot, then put his son and the rabbit in a private plane and flew to Nebraska. Enclosing a picture of his son and the rabbit, the father then sent a letter to the Colorado guardian ad litem thanking her for her help in arranging to have the visitation in a public place, since this facilitated the "release" of his son from Colorado.

On June 24, 1994, the mother filed in the dissolution court an application to modify the court's custody order of June 8, 1992. She later questioned whether the dissolution court had subject matter jurisdiction enabling it to enter the order, and still later filed an application for custody of her son. Following the taking of evidence from the parties and the Nebraska guardian ad litem, the dissolution court denied the mother any relief.

III. ANALYSIS

With that background, we turn our attention to the mother's assignments of error.

1. JURISDICTION

In challenging the dissolution court's finding that it had subject matter jurisdiction to entertain these proceedings, the mother argues that its exercise of such jurisdiction conflicts with the federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (1994), hereinafter referred to as the kidnapping act. She points out that the kidnapping act confers

jurisdictional priority to the home state unless there is an emergency, or unless there is a case still pending in a jurisdiction in which at least one party resides. § 1738A(c) and (d). Since, according to the mother, neither of the exceptions to home state jurisdictional priority existed at the time she filed the Colorado custody action, Colorado is the proper forum to exercise jurisdiction over the custody dispute.

(a) Scope of Review

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the inferior courts. *Payne v. Nebraska Dept. of Corr. Servs., ante* p. 150, 542 N.W.2d 694 (1996); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

(b) Application of Law to Facts

"Home state," as defined under the kidnapping act, the Colorado child custody act, and the Nebraska Child Custody Jurisdiction Act, hereinafter referred to as the Nebraska child custody act, Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1993), is the state where the son lived for 6 months immediately prior to filing the matter before the court. § 1738A(b)(4); § 14-13-103(5); § 43-1202(5). As the son had lived exclusively and continuously with the mother in Colorado from at least June 1989 through March 30, 1994, it is clear that under each of the aforementioned acts, Colorado was indeed the son's home state. This was the case not only at the time of the mother's filing of the custody action in Colorado, but also at the time the father filed his application in Nebraska.

However, this determination is not dispositive of the jurisdictional issue. *Range v. Range*, 232 Neb. 410, 414, 440 N.W.2d 691, 694 (1989), held that a Nebraska court had jurisdiction over a custody modification proceeding instigated in Nebraska, even though the child had moved to Georgia, which had become the child's home state, noting:

> " 'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of

> the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. *Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.*' . . ."

(Emphasis in original.) Quoting *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982), quoting Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203 (1981). We have thus recognized that the Nebraska child custody act establishes a strong jurisdictional preference for the state which originally determined custody to exercise its continuing jurisdiction, provided the requirements of § 43-1203(1)(b), detailed hereinafter, are satisfied. *State ex rel. Grape, supra.* This continuing jurisdiction concept is in accord with the purpose of the general Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988), to achieve greater stability of custody arrangements and to avoid forum shopping. *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992).

In this case, there can be no question that on the day the Nebraska dissolution court entered its initial decree on June 8, 1989, it took undisputed jurisdiction over matters relating to the custody of the son. As the decree-issuing state, Nebraska has continuing jurisdiction over these matters so long as the requirements of § 43-1203 are satisfied. That section provides:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> . . . .
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . .

In considering the mother's challenge to its exercise of jurisdiction, the dissolution court concluded that the

requirements of § 43-1203(1)(b) were met because the son and the father had significant connections with Nebraska and because substantial evidence concerning the child's present or future care, protection, training, and personal relationships was available within Nebraska. The facts that the dissolution decree had been entered in Nebraska; that the son had lived in Nebraska; that the father, as well as a significant number of other relatives, lived in Nebraska; and that the mother had returned to Nebraska to litigate the father's application for child custody modification, which ended in a mistrial, make it apparent that the threshold requirements of § 43-1203(1)(b) were met.

In so determining, we are not unmindful that in *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983), we, upon determining that Nebraska was the home state, refused to enforce a foreign custody judgment. While in so ruling we observed that the home state position was of "utmost importance," 215 Neb. at 648, 341 N.W.2d at 312, it is also worthy of note that the foreign court in *Mace* had not exercised jurisdiction in substantial conformity with an act similar to the Nebraska child custody act, as required by § 43-1206, and its decree was thus not enforceable in Nebraska in any event. Moreover, as noted in *Range v. Range*, 232 Neb. 410, 440 N.W.2d 691 (1989), as all the evidence concerning the lives of the young children in *Mace* was in Nebraska, Nebraska had become their home state.

(i) Kidnapping Act

The question therefore becomes whether the dissolution court's exercise of jurisdiction was in conformity with the requirements of the kidnapping act.

That act is aimed at combating the problem of parental child snatching and forum shopping in interstate child custody disputes. At the time it was enacted, sponsors of the act estimated that between 25,000 and 100,000 children were kidnapped by parents who had lost a custody battle in one state and moved to another state in order to relitigate the issue. *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988). The act was intended to provide uniformity

that the general uniform child custody act had failed to produce, as many states had modified it. *Meade v. Meade*, 812 F.2d 1473 (4th Cir. 1987).

The kidnapping act imposes upon the states a duty to enforce a child custody determination entered by the court of a sister state if that determination is consistent with the terms of the act. *Thompson, supra*. For a state court's custody decree to be consistent with the kidnapping act, the state must have jurisdiction under its own local law and must meet one of five conditions set out in § 1738A(c)(2). If a state has exercised jurisdiction consistent with the kidnapping act, no other state may exercise concurrent jurisdiction, even if it would have been empowered to take jurisdiction in the first instance. *Thompson, supra*.

As the dissolution court exercised jurisdiction in accordance with the Nebraska child custody act, the first requirement of the kidnapping act is satisfied, and we need only determine whether the exercise of jurisdiction meets one of the other aforementioned five conditions. The one most applicable is subparagraph (E) of § 1738A(c)(2), which provides that a court has continuing jurisdiction pursuant to subsection (d), which reads:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section [that the state have jurisdiction under its own law] continues to be met and such State remains the residence of the child or of any contestant.

All three of the requirements of § 1738A(d) are satisfied in the present case. First, the dissolution court had previously, on June 8, 1989, made a child custody determination in the form of its dissolution decree. Second, under the provisions of the Nebraska child custody act, Nebraska continued to have subject matter jurisdiction over the case. *Range, supra*; *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Third, Nebraska remained the residence of the father, one of the contestants. It is thus clear that the dissolution court's exercise

of jurisdiction was fully consistent with the provisions of the kidnapping act.

(ii) Emergency Jurisdiction

The mother also raises a final different but related argument as to why it was error for the dissolution court to hold that it had jurisdiction in this case. According to the mother, when the Colorado court found in its April 24, 1992, order that an emergency situation existed which required Colorado to take jurisdiction to prevent mistreatment and abuse of the son with regard to visitation with the father, the dissolution court was, under both the Nebraska child custody act and the kidnapping act, required to relinquish jurisdiction and permit Colorado to litigate the emergency issue. It is true, of course, that both of those acts contain provisions which allow a court to exercise jurisdiction if the child is present in the state and the child has been abandoned or it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse. § 43-1203(1)(c); § 1738A(c)(2)(C). However, emergency jurisdiction under those provisions is by its very nature limited. As we noted in *In re Interest of L.W.*, 241 Neb. at 101, 486 N.W.2d at 498, quoting Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203 (1981):

> "[T]his special power to take protective measures does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction. Emergency jurisdiction confers authority to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the [general uniform child custody act]."

Thus, while the Colorado court may have had the authority to enter a temporary custody order for a limited period of time, it did not have the power to make a permanent custody determination.

(c) Resolution

Consequently, the dissolution court properly exercised its subject matter jurisdiction.

2. Custody Determination

However, the mother challenges the dissolution court's custody determination, claiming that the award of custody to the father was an abuse of discretion.

(a) Scope of Review

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. 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. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

(b) Application of Law to Facts

We begin by recalling that ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. The party seeking modification of child custody bears the burden of showing such a change in circumstances. *State ex rel. Reitz, supra.*

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

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member. For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903.

We have held that in determining a child's best interests in custody matters, a court may consider, in addition to the statutory factors, matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference is based on sound reasons; and the general health, welfare, and social behavior of the child. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

The record establishes that prior to the abduction of the son on March 30, 1994, the mother had been the child's primary caretaker. She provided a loving, nurturing, and stable environment for him and his half brother, Zachary, with whom the son has a close relationship. The mother has now remarried and is living in Englewood, Colorado, employed as a stockbroker.

It is true that due to the abduction of her son, the mother is receiving treatment for posttraumatic stress syndrome; however, her problems in this regard are not expected to interfere with her ability to parent. The mother has shown remarkable character and maturity in dealing with a difficult situation. Despite the time and expense involved, as well as the inconvenience of having the visits supervised, the mother has not missed one visit with the son since the abduction.

This court is aware that the mother has admitted violating a provision of the dissolution decree which prohibited her

cohabitation with men not her husband. The violation of a court decree is unquestionably a serious matter. But it is the best interests of the son which must be our paramount concern. While it is true that evidence concerning the moral fitness of the parents, including sexual conduct, can be considered as a factor in determining a child's best interests, *Ritter, supra*, absent a showing that the mother's cohabitation adversely affected her son, we do not give this factor much weight, *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986).

In contrast, two factors weigh heavily against awarding custody to the father. First, as a result of his refusal to exercise supervised visitation in Colorado, he did not have any contact with his son for approximately 2½ years. While we understand the father's frustration with the fact that Colorado did not have authority to issue such restrictions, his failure to submit to the restrictive conditions nonetheless indicates much about his judgment and the priority he places on his son's well-being. Certainly, visitation in Colorado was open to the father. The Colorado guardian ad litem submitted 68 pages of correspondence at trial between herself and the father in which she attempted to arrange supervised visitation in compliance with the Colorado order. Second, in abducting his son, the father brazenly placed ego over the child's best interests. As the dissolution court itself noted, "the actions of the [father] were not based on a proper reflection of what was in the best interest of the minor child . . . ." Indeed, when compared to the father's violation of the Colorado order, the mother's violation of the dissolution decree pales into relative insignificance.

Moreover, the record demonstrates that the father's lack of judgment in abducting his son is by no means an isolated instance, but, rather, part of an underlying pattern. He generally refuses to follow rules and submit to authority. In January 1991, he, in violation of the dissolution decree, extended visitation without giving the mother advance notice. On other occasions, the assistance of a Nebraska sheriff was needed to deal with problems concerning visitation. Moreover, the father appears to have an almost Machiavellian ability to rationalize his actions. He is proud of the fact that he abducted his son and insists that he did the right thing. He is also able to rationalize other

instances of breaking the law. For example, the father lost his driver's license because of speeding violations and has only a work permit, which permits him to drive for work reasons only. Yet, he testified that he is able to drive his son to school every day and that he "arranges" to do something for his work during each trip.

(c) Resolution

Therefore, we must conclude on our de novo review that it is in the best interests of the son that his care, custody, and control be again placed in and with the mother, subject to reasonable visitation by the father. The dissolution court shall establish a schedule for visits between the father and son to take place in or near Englewood, Colorado, such visits to be conducted in the presence of a third party in such a manner as to assure that the father cannot once again abduct his son. The dissolution court shall also set an appropriate amount of child support for the father to pay, a determination which makes further comment on the mother's assignment of error in that regard unnecessary. In calculating the father's child support obligation, the dissolution court shall take into account that the father by choice works only 5½ months per year. The proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's "earning capacity." § 42-364(6); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991) (dissolution of husband's partnership and employment at lesser-paying job did not warrant reduction of child support obligation); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). Thus, the dissolution court shall impute income to the father commensurate with his earning capacity.

IV. JUDGMENT

The judgment of the dissolution court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LEROY J. PARMAR, APPELLANT.

544 N.W.2d 102

Filed March 1, 1996. No. S-95-337.

1. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
2. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
3. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.
4. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
5. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
6. **Postconviction: Proof.** An evidentiary hearing on a postconviction motion 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.
7. **Postconviction.** A court is not required to grant an evidentiary hearing on a motion for postconviction relief which does not contain sufficient factual allegations concerning a denial or violation of constitutional rights.
8. **Postconviction: Right to Counsel.** A district court may appoint competent and effective counsel in postconviction proceedings. However, the State is not required to supply the inmate a lawyer in postconviction proceedings.
9. **Criminal Law: Right to Counsel.** A criminal defendant has the right to represent himself.

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

Mark A. Weber and Scott A. Calkins, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Claiming that (1) the trial court failed to properly instruct the jury and (2) his trial counsel failed to object to the court's instructions, LeRoy J. Parmar, through a motion for postconviction relief, sought to have his felony murder conviction and life sentence for that crime set aside.

The postconviction court denied Parmar an evidentiary hearing and refused to grant him postconviction relief. Parmar appeals from the judgment of the postconviction court and in addition claims that the postconviction relief court should have appointed counsel to represent him on his postconviction relief motion.

We affirm the postconviction court's judgment because Parmar's motion for postconviction relief does not allege facts entitling him to relief and because he did not request appointment of counsel to assist him with his postconviction relief motion.

ASSIGNMENTS OF ERROR

Parmar claims that the trial court erred in (1) giving a confusing and misleading jury instruction which invaded the province of the jury to judge the credibility of the witnesses, and (2) attempting to clarify a confusing and misleading jury instruction by reference to a conflicting jury instruction already in the possession of the jury. Parmar further claims that the postconviction court erred in failing to appoint counsel for him, in failing to grant him an evidentiary hearing, and in failing to rule on the merits of Parmar's motion for postconviction relief.

STANDARD OF REVIEW

A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995). A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively

show that the defendant is entitled to no relief. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994).

Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Russell, supra.* Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *Id.*

FACTS

Parmar was convicted by a jury of first-degree murder for a felony murder committed on April 17, 1987, in Douglas County. The trial court sentenced Parmar to life imprisonment. At trial, Parmar was represented by the Douglas County public defender's office.

On direct appeal, Parmar, again represented by the Douglas County public defender's office, assigned only that the trial court erred in overruling his motion to suppress certain evidence seized from Parmar's residence. We affirmed Parmar's conviction, holding that although the trial court erred in failing to suppress the evidence in question, the evidence was of slight relevance and the error was harmless beyond a reasonable doubt. *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989).

On February 27, 1995, Parmar sought postconviction relief in the district court for Douglas County, alleging that his constitutional rights were violated when the trial court gave confusing and misleading jury instructions and gave oral jury instructions which were not in writing. Parmar also alleged ineffective assistance of counsel because of his counsel's failure to object to jury instructions. Parmar's motion for postconviction relief did not explain which jury instructions were objectionable nor how he was prejudiced. Parmar requested an evidentiary hearing but did not request appointment of counsel in his postconviction proceeding.

The postconviction court denied Parmar's request for an evidentiary hearing and denied his motion for postconviction relief. The court held that Parmar did not allege facts indicating which jury instructions were confusing or misleading, what oral

instructions were given, and to which jury instructions his trial counsel made no objection. At Parmar's request, the district court did appoint counsel for him upon his appeal to this court.

ANALYSIS

We initially address whether the postconviction court erred in not granting Parmar an evidentiary hearing. An evidentiary hearing on a postconviction motion 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. Russell, supra.* However, in the case at bar, Parmar's postconviction motion does not contain factual allegations. The motion merely concludes that there were confusing written and oral jury instructions to which trial counsel did not object. Parmar's motion did not inform the postconviction court as to the substance or prejudice of the jury instructions. A court is not required to grant an evidentiary hearing on a motion for postconviction relief which does not contain sufficient factual allegations concerning a denial or violation of constitutional rights. See *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

Because Parmar's postconviction motion did not appropriately allege facts entitling him to relief, we need not address the merits of his motion. Thus, the only remaining assigned error is Parmar's claim that the postconviction court erred in not appointing counsel for him.

A district court may appoint competent and effective counsel in postconviction proceedings. See Neb. Rev. Stat. § 29-3004 (Cum. Supp. 1994). However, the State is not required to supply the inmate a lawyer in postconviction proceedings. See *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), *cert. denied* 510 U.S. 829, 114 S. Ct. 97, 126 L. Ed. 2d 64. Furthermore, a criminal defendant has the right to represent himself. See Neb. Const. art. I, § 11. See, also, *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995); *State v. Sack*, 239 Neb. 690, 477 N.W.2d 921 (1991); *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991).

In the case at bar, Parmar did not request the appointment of counsel in his postconviction proceedings, and therefore, the postconviction court did not abuse its discretion by not appointing Parmar counsel when he did not request such an appointment.

CONCLUSION

Parmar's postconviction motion is deficient on its face because it does not sufficiently allege facts entitling him to relief. Thus, the postconviction court did not err in denying Parmar relief without an evidentiary hearing. Moreover, the postconviction court did not abuse its discretion in not appointing counsel because Parmar did not request the appointment of counsel in his postconviction proceeding in the district court.

AFFIRMED.

GARRET C. SWANSON, PETITIONER, V. STATE OF NEBRASKA DEPARTMENT OF EDUCATION ET AL., RESPONDENTS.

544 N.W.2d 333

Filed March 1, 1996. No. S-95-380.

1. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
2. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
3. ____: ____: ____. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
4. **Constitutional Law: Schools and School Districts: Taxes.** A commutation occurs in violation of the Nebraska Constitution when tax funds raised in one school district are diverted entirely to the benefit of another district.
5. **Constitutional Law: Schools and School Districts: Taxation.** Laws which impose unfair or unequal burdens of taxation upon one school district for the benefit of another are commutations in violation of the Nebraska Constitution.

6. **Legislature: Taxation.** The decision of whether to create an elective body to govern a particular taxing district is vested in the discretion and competence of the Legislature.
7. **Constitutional Law: Taxation: Property.** Neb. Const. art. VIII, § 1, requires a uniform rate of taxation on all real property and franchises within a taxing district.
8. **Taxation.** The mere fact that a state-authorized tax supports a governmental purpose does not render it a tax for state rather than local purposes.
9. **Constitutional Law: Statutes: Special Legislation.** A legislative act can violate the provisions of Neb. Const. art. III, § 18, prohibiting special legislation in one of two ways: by creating a totally arbitrary and unreasonable method of classification, or by creating a permanently closed class.
10. **Taxation: Words and Phrases.** The nonconstitutional maxim of government declaring that there should be no taxation without representation is to be given a very restricted meaning; it does not mean that no person can be taxed unless that person is represented, in the body that determines the amount of the tax to be levied, by someone for whom that person has a right to vote.
11. **Legislature: Statutes: Taxation: Words and Phrases.** Those represented in the Legislature enacting a taxation law have the representation required by the maxim that there should be no taxation without representation.

Original action. Judgment for respondents.

Donald L. Dunn and Alan D. Slattery, of Rembolt Ludtke & Berger, for petitioner.

Edwin C. Perry, James B. Gessford, and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., and Robert D. Coupland, Cherry County Attorney, for respondents.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

This is an original action brought by Garret C. Swanson, a property owner and taxpayer in Cherry County, Nebraska. Each respondent is charged with duties relating to the implementation of 1993 Neb. Laws, L.B. 839, of the Ninety-third Legislature, First Session. As enacted, L.B. 839 adds Neb. Rev. Stat. § 79-438.13 (Reissue 1994) and amends Neb. Rev. Stat. §§ 79-101.01, 79-438.12, 79-446, 79-1303, and 79-3806 (Reissue 1994), effective as of the 1995-96 school year. In substance, the laws affect the amount of property taxes assessed against Swanson's property, as well as the distribution of those taxes, for the support of the public schools. Swanson seeks a

declaratory judgment from this court, stating that L.B. 839 violates certain provisions of the Nebraska Constitution, and further asks this court to enjoin its implementation.

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chrysler Motors Corp., supra*; *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Pick, supra*; *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995); *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995).

Swanson raises four arguments that L.B. 839 violates the Constitution of the State of Nebraska. Swanson argues first that the common levy of L.B. 839 is a classic example of a commutation of property tax, enacted in violation of Neb. Const. art. VIII, § 4; second, that the common levy results in a nonuniform levy to be assessed against taxable property in school district 31, in violation of Neb. Const. art. VIII, § 1; third, that L.B. 839 establishes a property tax for state purposes, in violation of Neb. Const. art. VIII, § 1A, because it requires the use of a common levy for determining the amount of state aid to education to be paid to individual school districts; and fourth, that the common levy constitutes a special law that solely benefits certain owners of taxable property in violation of Neb. Const. art. III, § 18. For the following reasons, we reject each of Swanson's arguments and uphold the validity of L.B. 839.

ORGANIZATION AND FUNDING UNDER L.B. 839

Nebraska school districts are statutorily divided into three primary categories: a school district maintaining only

elementary grades under the direction of a single school board (Class I); a school district maintaining both elementary and high school grades under the direction of a single school board (Classes II, III, IV, and V); and a school district maintaining only a high school under a single school board (Class VI). In 1991, the Legislature enacted bills requiring that Class I districts either be made a part of a Class VI district or affiliate with a Class II, III, IV, or V district providing K-12 education. See Neb. Rev. Stat. § 79-426.28(1) (Reissue 1994). Pursuant to this enactment, property taxes are collected within the various groupings that amount to K-12 education, such that each property owner helps to support the K-12 education that each child in the public school system ultimately receives. *Id.*

Some Class I districts have chosen to comply with § 79-426.28(1) by becoming part of an "affiliated school system," which includes a Class VI high school district and each of the Class I school districts whose students will attend that particular Class VI high school. Revenue for affiliated school systems is raised in the same way used by other K-12 school districts, in that a "common levy" is assessed within the entire affiliated school system as if it were a single district. § 79-438.12(1). Those Class I districts which have not joined an affiliated school district are required to be part of a Class VI district. Neb. Rev. Stat. § 79-402.17(1) (Reissue 1994). Prior to the passage of L.B. 839, the unaffiliated Class I districts were not treated like either the affiliated Class I districts or the K-12 districts for property tax purposes. Rather, each property owner in a Class I district paid only that amount of property tax necessary to support that particular Class I district and the Class VI district into which it "feeds."

Under L.B. 839, a Class VI school district is grouped together with each Class I school district which is part of the Class VI district to create a "Class VI school system." § 79-101.01(1)(c). The Class VI school system comprises one high school and each of the schools whose children will attend that high school. The Class VI school district and the Class I school districts maintain their independent school boards, and all continue to operate as entities independent of each other. See Neb. Rev. Stat. § 79-401 (Reissue 1994).

L.B. 839 further provides that funding for Class VI school systems will come, in part, from a common levy:

> Commencing with the 1995-96 school year, the general fund property tax requirement of the Class VI school district and each Class I school district or portion thereof in a Class VI school system shall be certified to the county superintendent and county clerk for computation of a Class VI school system tax levy. The proceeds of such levy, upon collection by the county, shall be distributed to the districts in the Class VI school system in amounts which are in proportion to the amounts of the general fund property tax requirement certified by such districts to the county superintendent and county clerk.

§ 79-438.13.

Another section of L.B. 839 impacts state equalization aid. Thereunder, the formula for establishing the amount of equalization aid due each individual Class I district within a Class VI school system is based on the resources and needs of all individual Class I and VI districts within a Class VI school system as a group, rather than on the actual resources and needs of each individual district. § 79-3806(5)(b). The practical effect is to make Class VI school systems similar to affiliated school systems with regard to equalization aid, and to render all Class I districts alike for equalization aid purposes.

Swanson owns property in school district 31, a Class I school district in Cherry County, Nebraska, located about 30 miles outside the town of Valentine. School district 31 is not part of an affiliated school system. Rather, it is part of school district 6 (Valentine High School district), an unaffiliated Class VI district. Swanson's property is thus located in both school district 31 and the Valentine High School district and is within what has become, under L.B. 839, the Valentine Class VI school system.

Under L.B. 839, each individual and autonomous district within the Valentine Class I school system will establish its budget as it did prior to L.B. 839, including the amount of state aid it will receive and its resulting general fund property tax requirements. Each district will then certify those property tax requirements to the county clerk and superintendent. The

county clerk and superintendent, after totaling all tax valuations and tax requirements of all districts within the Valentine Class VI school system, set a common levy in an amount sufficient to generate the aggregate property tax requirements for *all* districts within the system. The tax revenues are then disbursed to each Class I district based on its budgeted tax requirement, irrespective of the amount of tax dollars actually generated from property within that individual district.

COMMUTATION OF TAX

Swanson's first argument as to how L.B. 839 violates the Constitution of the State of Nebraska is that it is a commutation of property tax, enacted in violation of Neb. Const. art. VIII, § 4. That section provides, in relevant part:

> [T]he Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

A commutation occurs in violation of the Nebraska Constitution when tax funds raised in one district are diverted entirely to the benefit of another district. *State ex rel. School Dist. v. Ellis*, 160 Neb. 400, 70 N.W.2d 320 (1955). Under the provisions of the Nebraska Constitution relating to equality in taxation, laws which impose unfair or unequal burdens of taxation upon one school district for the benefit of another qualify as commutations in violation of the Constitution. *State, ex rel. Groves, v. School District*, 101 Neb. 263, 162 N.W. 640 (1917).

Swanson argues that the common levy of L.B. 839 has the practical and prohibited effect of imposing an "unfair or unequal" burden on him and the other property owners of school district 31 by commuting the taxes of property owners in other school districts. As authority, Swanson relies chiefly on this court's decision in *Peterson v. Hancock*, 155 Neb. 801, 54 N.W.2d 85 (1952). In *Peterson*, this court invalidated a statute imposing a "blanket mill tax levy," which was imposed on all

taxable property in the elementary school districts of a county in addition to the regular school levy. *Id.* at 804, 54 N.W.2d at 88. Only school districts enrolling five or more students were eligible to receive the revenues from that tax. Under the provision of the blanket mill tax levy, most of the revenue raised came from school districts enrolling fewer than five students; those school districts, by virtue of their minimal enrollment, received no benefits of the taxes their property owners paid. The revenues of the blanket mill tax levy were distributed to larger school districts "*solely for their respective local purposes*, . . . thus proportionately [reducing] their regular school district levy." (Emphasis supplied.) *Id.* at 806, 54 N.W.2d at 89.

The *Peterson* court struck down the blanket mill tax levy, finding that

> [t]he only conclusion that can logically be drawn is that districts having less than five pupils are required to pay the blanket levy on all their property into the fund for the sole benefit of districts with five or more pupils. As a result, the regular school district taxes in such districts are thereby released, discharged, or commuted at the expense of districts having less than five pupils, who are required not only to pay the blanket tax levy in full to others *without any benefit to them*, but *also* to pay all regular school taxes required to maintain the school in their own respective districts.

(Emphasis supplied.) *Id.* at 812, 54 N.W.2d at 92.

Peterson is inapposite to Swanson's argument because the property owners therein paid two separate and distinct property taxes, established under different statutes for different purposes: one regular school levy to support all school districts in the county, and one blanket mill tax levy to support only districts enrolling at least five students. Swanson attempts to analogize his case to *Peterson* by claiming that he is subject to two property taxes—the tax he paid prior to L.B. 839 and the estimated amount of increase he will incur under L.B. 839. This division, however, creates two taxes in only the most contrived sense. Swanson is subject to one tax, the proceeds of which support both his own district and others within the same Class

VI school system, all of which "feed" into the Valentine High School district. As such, Swanson cannot claim that the common levy supports only a local purpose of districts other than school district 31.

That notwithstanding, Swanson seeks to apply *Peterson* on the grounds that a Class VI school system is not a legitimate taxing district and that, as such, no public benefit exists to redeem the increase in taxes assessed against Swanson to support other Class I districts. In support of this contention, Swanson points to the structural differences between Class I school districts and Class VI school systems. Class I school districts, for example, are independent political subdivisions with a certain degree of statutory autonomy. § 79-401. Each Class I district operates under the direction of a single school board, Neb. Rev. Stat. § 79-102(1) (Reissue 1994); each district holds its own school board elections, Neb. Rev. Stat. § 79-402.09 (Reissue 1994); and each district adopts its own budget, Neb. Rev. Stat. § 13-504 (Cum. Supp. 1994). The boundaries of each Class I district are distinct and separate and are drawn by the county superintendent. Neb. Rev. Stat. § 79-402 (Reissue 1994).

Admittedly, a Class VI school system is distinguishable from a Class I district insofar as the latter lacks those characteristics. However, these characteristics are not dispositive of whether a taxing district exists. Although the Legislature has not statutorily defined a "taxing district," by practical definition the Legislature creates a taxing district when it grants an entity the power to require the county clerk to levy a tax for the support of the district. Neither the federal nor the state Constitution requires an elected or representative board to oversee an assessment or levying process authorized by the Legislature. See *Ratigan v. Davis*, 175 Neb. 416, 122 N.W.2d 12 (1963). The decision of whether to create an elective body to govern a particular taxing district is vested in the discretion and competence of the Legislature. See *id.* That the Legislature declined to create such an elective body does not impair the constitutional legitimacy of a Class VI school system as a taxing district.

Swanson also argues that he should be absolved of the burdens and benefits of schools within the Class VI school system because he has no children in school district 1. This argument is no more effective than an argument that Swanson should pay no property tax at all to support public schools if he has no school-age children. Tax laws, including L.B. 839, represent the Legislature's definition of the measure of every citizen's duty in support of the public burdens. See *State, ex rel. Spelts, v. Rowe*, 108 Neb. 232, 188 N.W. 107 (1922).

Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952), outlawed any tax levied for a purpose in which those from whom the taxes are exacted have no interest. Swanson cannot make that claim of L.B. 839. A tax levy does not equal a commutation merely because the taxing district is broadened to reflect the actual benefits to the public. So long as all taxpayers receive the benefit of the taxes they remit, the taxing district passes constitutional muster without offending the prohibition against commutation. *State, ex rel. City of Omaha, v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922).

UNIFORMITY IN TAX RATES

Swanson's second argument as to how L.B. 839 violates the Constitution of the State of Nebraska is that the common levy results in a nonuniform levy to be assessed against taxable property in school district 31. The prohibition against a nonuniform levy derives from Neb. Const. art. VIII, § 1, as amended in 1992, which states in part: "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution." This provision requires a uniform rate of taxation on all real property and franchises within a taxing district. *State ex rel. Douglas v. State Board of Equalization and Assm't*, 205 Neb. 130, 286 N.W.2d 729 (1979). The parties to this case stipulate that within the Class VI school system, all Class I districts will be taxed at an estimated rate of $1.2096 per $100 assessed valuation under the 1995-96 common levy.

Swanson argues that L.B. 839 violates the uniformity clause, irrespective of the fact that the common levy by its very

definition taxes all Class I districts at the same rate. This argument derives from Swanson's theory that some Class I districts must support through taxes other districts without any return of benefit. This argument is meritless. The amount of the common levy is computed according to the fair value of all property within the Class VI school system. Within and without each Class I district, the common levy affects each property owner in a Class VI school system equally.

Swanson contends that L.B. 839 violates the uniformity clause by indirectly compelling certain property to bear more than its just proportion of the tax requirement. This argument derives from the same reasoning as Swanson's commutation challenge—that is, the district where Swanson's property is located putatively receives no benefit for the revenue in excess of its own property tax requirement. As authority, Swanson cites *State, ex rel. Ahern, v. Walsh*, 31 Neb. 469, 48 N.W. 263 (1891). Although the disputed property tax in *State, ex rel. Ahern,* had been imposed on all property within a school district to support a school general fund, taxes assessed against only railroad-owned property were diverted from the school general fund and used to fund railroad improvements in other districts. That diversion, of course, required the district to tax nonrailroad property at a level to compensate the loss. In diverting part of the total revenue from the school general fund to the support of other taxing districts and then requiring public compensation, the Legislature had compelled the nonrailroad property to bear more than its share of another district's railroad improvements, thereby violating both the commutation and uniformity clauses of the Nebraska Constitution.

State, ex rel. Ahern, presented this court with a question quite different from that presented by this case. In *State, ex rel. Ahern,* the lack of uniformity was inherent within one taxing district, wherein some property owners incurred higher rates of taxation than other property owners within the same district in order to support both their own district and a wholly separate district. In this case, the Class I districts in the Class VI school system are part of the same taxing district, and, thus, L.B. 839 does not involve an increased tax imposed on one taxing district

to be diverted to another. Therefore, in enacting L.B. 839, the Legislature has not violated the uniformity clause.

TAXATION OF REAL PROPERTY FOR STATE PURPOSES

Swanson's third argument as to how L.B. 839 violates the Constitution of the State of Nebraska is that it establishes a property tax for state purposes because it requires the use of a common levy for determining the amount of state aid to education to be paid to individual school districts. Neb. Const. art. VIII, § 1A, provides that "[t]he state shall be prohibited from levying a property tax for state purposes." The purpose of this section was to require the state, after the adoption of sales and income taxes, to leave the realm of property taxation. *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 244 N.W.2d 183 (1976) (*Tallon II*). Inherent in the adoption of this section was the idea that the State would continue to carry out its traditional functions and finance them by means other than a property tax. The State cannot, however, avoid or circumvent this constitutional mandate by converting the traditional state functions into local functions supported by property taxes.

Swanson contends that L.B. 839 represents that sort of circumvention of the constitutional mandate. State equalization aid to some districts, including the Valentine Class VI school system, decreases under L.B. 839. Given that school districts may increase their property tax requirements to compensate for that loss, Swanson argues that the Legislature has in effect established a property tax for a state purpose, to expand property tax bases so as to make possible the redistribution of equalization aid.

Authority on this issue comes from the cases of *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974) (*Tallon I*), and *Tallon II*. *Tallon I* arose under a section of the Nebraska Technical Community College Area Act that provided for the raising of funds in support of the technical community college system by way of a property tax levy. Neb. Rev. Stat. § 79-2626 (Supp. 1973). Under that section, each college area was required to

levy a local property tax and remit the proceeds to the State in order to receive state funding for the area's college. *Tallon I*. This court struck down that section as unconstitutional in light of the prohibition against a property tax for a state purpose. Two years later, *Tallon II* challenged the amended version of the Nebraska Technical Community College Area Act, Neb. Rev. Stat. §§ 79-2636 through 79-2662 (Supp. 1975), which had been drafted to conform with this court's holding in *Tallon I*. This court found that the amended act no longer offended article VIII, § 1A.

Under the original version of the act challenged in *Tallon I*, the State had assumed direct control of all major policy decisions that affected the operation of each of the seven community college areas. *Tallon I*. The State controlled each college's capital expenditures, each college's ability to contract for acquisitions, and the direction of which facilities and training and curricula were available in the various areas, and directly controlled the individual budgets of each area. These facts "demonstrate the dominance of the State as opposed to the local areas in all major matters of control and operation of the statutory system." *Id.* at 211, 219 N.W.2d at 460.

Additionally, the tuition for a prospective technical community college student depended only on whether that student was a state resident, rather than on whether the student was a resident of the area where he or she wished to attend college. That provision, in complement of the above-listed indicia of control, showed that the statute reflected a legislative purpose to control the operation of all seven community college areas for the benefit of the state as a whole. Herein lies the dispositive inquiry for this case: where state and local purposes are statutorily commingled, this court must determine whether the controlling and predominant purposes of the statute are state purposes or local purposes. *Tallon I*.

Tallon I cautions against the possibility of legislative subterfuge, stating that within the prohibition of a property tax levy for state purposes, "where the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local

governmental unit." *Id.* at 212, 219 N.W.2d at 460. We find no such evidence of subterfuge in L.B. 839. Nothing in L.B. 839 grants to the State control over individual budgets, capital expenditures, availability of programs, whether and how to hire personnel, or administrative rules and regulations. All of these decisions remain within the province of the individual Class I and Class VI school districts.

The statutory scheme in *Tallon II* is more analogous to L.B. 839 than is the statutory scheme in *Tallon I*. In response to *Tallon I*, the Legislature revamped the Nebraska Technical Community College Area Act to create a system that was essentially local in character. The new system did not condition receipt of state funding on the amount of property taxes generated; each college area was a separate and distinct corporate body; each college area was empowered to levy property taxes if it so desired; and each college area decided its own curriculum, personnel, and administrative rules and regulations. *Tallon II*. The state board served in an advisory capacity only and had negligible authority over local college areas. On these facts, the court held that the act was constitutional. These indicia of local control correspond to the Class I and VI school districts, which maintain their autonomy and independence in all respects except their grouping for property tax support.

The mere fact that a state-authorized tax supports a governmental purpose does not render it a tax for state rather than local purposes. *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990). Even given some commingling of state and local purposes, a statute that requires a political subdivision to levy a property tax does not contravene article VIII, § 1A, so long as the tax is levied for substantially local purposes. *Rock Cty., supra*. The State has assumed neither control nor the primary burden of financial support of Class I districts, nor has the State conditioned state funding on the performance of some act, or the levying of some tax, to benefit the State. Authority from the State to levy a tax does not necessarily translate into a state purpose behind that tax.

SPECIAL LEGISLATION BENEFITING CERTAIN CLASSES

Swanson's fourth argument as to how L.B. 839 violates the Constitution of the State of Nebraska is that the common levy constitutes a special law that solely benefits certain owners of taxable property. Neb. Const. art. III, § 18, prohibits the Legislature from passing local or special laws that grant "to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. . . . In all other cases where a general law can be made applicable, no special law shall be enacted." When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). A legislative act can violate article III, § 18, in one of two ways: by creating a totally arbitrary and unreasonable method of classification, or by creating a permanently closed class. *Haman, supra.*

Although Swanson does not specify by which of those means L.B. 839 constitutes "special legislation," he appears to assert that L.B. 839 creates an "arbitrary and unreasonable method of classification." Swanson argues that L.B. 839 establishes two classes of taxpayers within every Class VI school system: those who will pay property taxes in excess of the requirements of their Class I and Class VI school districts, and those taxpayers whose districts receive the benefits of the former class' overpayments. This argument fails for the same reason that Swanson's previous arguments of commutation and uniformity fail: because the Class VI school system, and not the individual Class I and Class VI school districts within it, is the taxing district in question.

Swanson also suggests another illegal classification ostensibly created by L.B. 839: those taxpayers located in integrated K-12 districts with a single board of education, and those located in Class I and Class VI districts which have multiple districts and multiple boards of education, but which are tied together for

property tax support purposes. Swanson does not, however, explain how this classification violates article III, § 18.

Even if treated as a claim that L.B. 839 permits taxation without representation, the claim fails. In *Ratigan v. Davis*, 175 Neb. 416, 122 N.W.2d 12 (1963), the plaintiffs lived in a part of the city where they were not entitled to vote for the school board which appointed the regents who governed the city's university, as established under state law. The plaintiffs objected to paying the taxes to support the university levied by the regents on the ground that they were being taxed without representation. In rejecting the plaintiffs' claim, the *Ratigan* court observed that the maxim of government declaring that there should be no "taxation without representation" is not contained in the Constitution and is to be given a very restricted meaning. The court further wrote that the maxim does not mean that "no person can be taxed unless, in the body that determines the amount of the tax to be levied, he is represented by someone for whom he has a right to vote." *Id.* at 419, 122 N.W.2d at 15. Rather, the *Ratigan* court reasoned, "[S]ince plaintiffs were represented in the Legislature that enacted the law . . . they had the representation required by the maxim . . . ." *Id.* at 420, 122 N.W.2d at 15.

Because no unreasonable classification arises from L.B. 839, this law does not contravene the prohibition against special legislation.

Inasmuch as none of Swanson's arguments have merit, we declare L.B. 839 to be constitutional.

JUDGMENT FOR RESPONDENTS.

FAHRNBRUCH, J., concurs.

WRIGHT, J., dissenting.

The purpose of L.B. 839 is to reapportion state aid from one school district to another. Within the Class VI system, which is defined as a Class VI school district and each Class I school district or portion thereof which is a part of the Class VI district, a common levy is set sufficient to generate the aggregate property tax requirements for districts within the system. The tax revenues are then disbursed to each Class I district based on its budgeted tax requirement irrespective of the

amount of tax dollars actually generated from property within that individual district.

State equalization aid to the Valentine Class VI school system decreases under L.B. 839. The reapportionment is accomplished with a Class VI system by using the same mill levy for all the Class I districts within the Class VI system. L.B. 839 therefore requires certain Class I districts to provide financial aid to other Class I districts within the Class VI system. By increasing property taxes to certain Class I districts within the Class VI system, the amount of state aid to the Valentine Class VI system is reduced. Thus, certain Class I districts compensate for such reduction by having an increase in property taxes.

Class I school districts are independent political subdivisions which operate under the direction of elected school boards which adopt the budget for the district. The boundaries are distinct and separate. A Class VI school system lacks these characteristics. When the supporting Class I district has determined its expenditures, it must also support expenditures of other Class I districts. The result is the imposition of an unequal burden of taxation upon one school district for the benefit of another under the disguise of "equal" mill levies. "Under the provisions of our Constitution relating to equality in taxation, any law imposing an unfair or unequal burden of taxation upon one school district for the benefit of another would be unconstitutional." *State, ex rel. Groves, v. School District*, 101 Neb. 263, 264, 162 N.W. 640, 641 (1917). See, also, *High School District v. Lancaster County*, 60 Neb. 147, 82 N.W. 380 (1900). In my opinion, creating the Class VI system imposes an unequal burden of taxation upon one school district for the benefit of another. Under the disguise of an equal mill levy, the Legislature unconstitutionally attempts to do indirectly what it could not do in *Peterson v. Hancock*, 155 Neb. 801, 54 N.W.2d 85 (1952).

"[W]here the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local governmental unit." *State ex rel. Western Nebraska Technical Com. Col. Area*

v. Tallon, 192 Neb. 201, 212, 219 N.W.2d 454, 460 (1974). The creation of a local taxing district does not alter the state purpose of redistribution of state aid.

The use of local property taxes for state purposes is unconstitutional. Article VIII, § 1A, of the Nebraska Constitution provides: "The state shall be prohibited from levying a property tax for state purposes." Where state and local purposes are commingled, the crucial issue turns upon a determination of whether the controlling purposes are state or local. See *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

The obvious purpose of L.B. 839 is to reallocate state aid. This reallocation is possible because property taxes in certain Class I districts are increased to compensate for the redistribution of state aid. I fail to see this as anything but a levy of property tax for state purposes, which is unconstitutional.

CONNOLLY, J., dissenting.

The common levy created by L.B. 839 constitutes a commutation of tax in violation of article VIII, § 4, of the Nebraska Constitution. The constitutional proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of tax. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992). A tax burden lifted from one group of taxpayers must necessarily be shouldered by another group of taxpayers. *Id.* An example of the injustice underlying a commutation of taxes was expressed by William Jennings Bryan at the constitutional convention of 1919–20, "If you will take from one man ten dollars when you should only take five, and then take from some other man only five when you should take ten . . . you simply take five dollars from one man's pocket and put it into another man's pocket." 1 Journal of the Nebraska Constitutional Convention at 310 (1919–1920). The result of the majority opinion is that the taxpayers of district 31 have had their pockets picked.

By consolidating separate school districts into one "system," L.B. 839 causes the "system" as a whole to lose state equalization aid, and places the burden of making up the shortfall on the other separate school districts within the system,

rather than on the districts which experience the loss in equalization aid. This "system" places unequal burdens of taxation upon some Class I districts for the benefit of the other Class I districts. Simply put, L.B. 839 takes $10 from Swanson when he should pay only $5 and gives it to the Class I districts, thereby reducing their contribution and, thus, putting $5 into their pockets.

In the instant case, Swanson's district 31 tax levy for school purposes will increase from 0.6287 per $100 assessed valuation, generating $46,485 to a common levy of 1.2096 per $100 assessed valuation, generating $89,436. The excess $42,951 of property tax revenue generated on property located solely within district 31 will be distributed to other districts within the Valentine Class VI school system to satisfy a portion of their property tax requirements. In dollars, the impact on Swanson's property is that out of a total tax of $465.21, of which $241.80 is required for district 31 and Valentine High School, the excess $223.41 will be distributed to the other districts within the Valentine Class VI school system to assist the other districts. The obvious result is that Swanson's taxes are used to reduce the taxes to be paid by owners of taxable property in the other districts, particularly district 1.

As the majority recognizes, prior to L.B. 839, taxpayers within an unaffiliated Class I district paid tax only for their own Class I district and the Class VI district which students from their Class I district attend. What has changed under L.B. 839 is the additional burden placed upon the taxpayer in an unaffiliated Class I district. Swanson continues to fund his Class I and Class VI districts and must also support the other Class I districts with tax revenue derived from his property, although his property is not located in those districts.

The majority erroneously contends that the whole amount of the common levy must affect solely local purposes of the other Class I districts in order to constitute an unconstitutional commutation of tax. However, this court has held that a law imposing an unfair or unequal burden of taxation upon one school district for the benefit of another is unconstitutional. *State, ex rel. Groves, v. School District*, 101 Neb. 263, 162 N.W. 640 (1917).

By funding district 31's schools and then redistributing the excess property tax revenue to the other Class I districts within the legislatively created system, the majority concludes that the Legislature is within its power to divert the funds because it has created a legitimate "taxing district." Following the tax district concept to its logical conclusion, one could envision a "super taxing district" which could encompass the entire state, and utilize the property tax revenue raised in that "district" to finance expenditures only in Lincoln. The State could argue that the constitutional prohibition against commutation of tax is not violated by arguing that a "benefit" accrues to the entire state because the expenditure takes place in one portion of the taxing district.

Swanson will receive no benefit for his tax dollars. Class I districts adopt their own budgets, conduct their own elections for the Department of Education, and possess separate and distinct boundaries. That portion of Swanson's tax dollar spent within district 31 benefits Swanson, whether he has children in the district or not, partly because Swanson may vote for board members and be represented. However, for that portion of tax paid which exceeds the need of district 31, Swanson receives no benefit. The excess funds will fall under the control of a board of education for which he has no right to cast a vote.

Under L.B. 839, any amount of tax collected by levy against property located in district 31 which exceeds the property tax requirements of district 31 will reduce or have the effect of reducing the tax burden of individuals residing in the other Class I districts which are a part of the artificially created "system." The common levy of L.B. 839 results in a commutation no matter how it is disguised.

WRIGHT, J., joins in this dissent.