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THIS BOOK CONTAINS THE OFFICIAL REPORTS OF CASES

DECIDED BETWEEN

JANUARY 29, 1999 and MAY 27, 1999

IN THE

Supreme Court of Nebraska

VOLUME CCLVI

PEGGY POLACEK

OFFICIAL REPORTER

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT
AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

TABLE OF CONTENTS
For this Volume

MEMBERS OF THE APPELLATE COURTS v
JUDICIAL DISTRICTS AND DISTRICT JUDGES vi
JUDICIAL DISTRICTS AND COUNTY JUDGES viii
SEPARATE JUVENILE COURTS AND JUDGES x
WORKERS' COMPENSATION COURT AND JUDGES x
ATTORNEYS ADMITTED xi
TABLE OF CASES REPORTED xiii
LIST OF CASES DISPOSED OF BY
FILED MEMORANDUM OPINION xix
LIST OF CASES DISPOSED OF WITHOUT OPINION xxi
LIST OF CASES ON PETITION FOR FURTHER REVIEW xxv
CASES REPORTED 1
HEADNOTES CONTAINED IN THIS VOLUME 967

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

JOHN V. HENDRY, Chief Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge

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

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
		Paul W. Korslund	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	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
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Alan G. Gless Michael Owens Mary C. Gilbride	Columbus Seward Aurora Wahoo
	Thurston, and Washington	Darvid D. Quist Maurice Redmond F.A. Gossett III	Blair Dakota City Fremont
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 B. 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	Stephen Illingworth	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, 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, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe Brian Silverman Randall L. Lippstreu	Chadron Gering Alliance Gering

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
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary R. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

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
		Patrick G. Rogers	Dakota City
		Paul R. Robinson	Hartington
		C. Matthew Samuelson	Blair
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, Hitchcock, 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
	John J. McGrath	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
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
Michael K. High	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 255

DAVID M. ADAMS
MICHAEL ANDERSON
DAWN M. ANTONIAK-MITCHELL
ERIC ARNESON
DELILA S. BERGAN
WILLIAM PAUL BOUDA II
DEBRA FIALA BREEN
CHRISTIAN E. BRYAN
JAMES S. BURGER
JOEL CARLSON
PATRICK CAVANAUGH
LAURA CULLISON
SHERRI L. EVELETH
DEBRA J. FERGEN
DWIGHT D. FISCHER
MATTHEW F. GAFFEY
TORRIANO GARLAND
ANN M. GROTTVEIT
MARILYN HAGBERG
KENNETH ROYCE HARBISON
BURKE HARR
BRENT HARVEY
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JUDITH H. HOLMES
JULIANNA S. JENKINS
JENNIFER JOHNSON
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MATTHEW L. MCBRIDE
STEVEN LESTER MEINTS
DEANA K. MEISINGER
MURL EDWARD MILLER
RICHARD H. MOELLER
GERALD W. MONK
LYNN E. MOORER
CLARA J. OHR
JOSEPH S. PARTAIN
JENNIFER R. PETERSEN
PATRICK JON PFALTZGRAFF
ADAM T. RAMSEY
NANCY BARBARA RAPOPORT
KURT W. RATZLAFF
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TALANA SAYRE
MARGARET SCHAEFER
TIMOTHY ALBERT SCHERLE
JERRY J. SENA
ANDREW J. SLAIN
JEFFREY B. SMITH
WOOJUN SON
AMY C. SUTLIFF
TROY THOMPSON
SCOTT TINGELHOFF
KEITH D. VANCE
LYNNETT M. WAGNER
BRIAN JAMES WALLMAN

BRIAN B. WELLS
CHASTITY WILSON
WARREN WILSON
RUSSELL SCOTT WITTSTRUCK
LISA LATOYA WOODBURY
JEFF W. WRIGHT

TABLE OF CASES REPORTED

A & L Insulation; Frank v. 898
Ackerman v. Nebraska Dept. of Corr. Appeals Bd. 896
Acme Rug Cleaner, State ex rel. v. Likes 34
Action Elec. Co.; Allied Mut. Ins. Co. v. 691
Agnew; Father Flanagan's Boys' Home v. 394
Allied Mut. Ins. Co. v. Action Elec. Co. 691
American Family Ins. Co.; Shivvers v. 159
American Nat. Red Cross; Schweitzer v. 350
Andre W., In re Interest of 362
Application of SID No. 384, In re 299
Aupperle; State ex rel. NSBA v. 953

Balka; Central States Found. v. 369
Becker v. Hobbs 432
Bennett; State v. 747
Bishop Clarkson Mem. Hosp.; Crabb v. 636
Blackson; State v. 104
Board of Ed. of Lincoln Cty.; Johanson v. 239
Board of Ed. of Morrill Cty.; Daily v. 73
Bohannon; Mueller v. 286
Bongers; Haag v. 170
Boyd Cty. Bd. of Equal.; US Ecology v. 7
Boyle v. Welsh 118
Branon, In re Estate of 713
Bunge Corp.; Dvorak v. 341
Burlington Northern RR. Co.; Holste v. 713

Central States Found. v. Balka 369
Citizens for Resp. Judges; Neb. Account. & Disc. v. 95
City of Lincoln; Woodard v. 61
City of Omaha; Nelson v. 303
Clarklift of Nebraska; Divis v. 384
Clayton v. Lacey 282
Corcoran v. Lovercheck 936
Crabb v. Bishop Clarkson Mem. Hosp. 636
Cushman; State v. 335

Daily v. Board of Ed. of Morrill Cty. 73
Daub; Ritchhart v. 801
DeCamp v. State 892

Department of Corr. Servs.; Henderson v. 314
Department of Motor Vehicles; Kroll v. 548
Department of Motor Vehicles; Schindler v. 782
Deuth v. Ratigan 419
Dial Corp.; Variano v. 318
Divis; State v. 328
Divis v. Clarklift of Nebraska 384
Dillon Tire, Inc. v. Fifer 147
Doe v. Gunny's Ltd. Partnership 653
Dorcey; State v. 795
Dvorak v. Bunge Corp. 341

Eli's, Inc. v. Lemen 515
Estate of Branon, In re 713
Estate of Myers, In re 817

Farm Bureau Ins. Co. v. Witte 919
Father Flanagan's Boys' Home v. Agnew 394
Fifer; Dillon Tire, Inc. v. 147
Fortenberry; Putnam v. 266
Frank v. A & L Insulation 898

Garza; State v. 752
General Fiberglass Supply v. Roemer 810
Goff-Hamel v. Obstetricians & Gyns., P.C. 19
Gunny's Ltd. Partnership; Doe v. 653

Haag v. Bongers 170
Ham; National Bank of Commerce v. 679
Hansmeyer v. Nebraska Pub. Power Dist. 1
Harrold; State v. 829
Hayes; Reinke Mfg. Co. v. 442
Hellbusch; McLaughlin v. 615
Henderson v. Department of Corr. Servs. 314
Hobbs; Becker v. 432
Holste v. Burlington Northern RR. Co. 713

In re Application of SID No. 384 299
In re Estate of Branon 713
In re Estate of Myers 817
In re Interest of Andre W. 362
In re Interest of Joshua M. et al. 596
In re Interest of Kelley D. & Heather D. 465
In re Interest of William G. 788

Jacob; State v. 492
Johanson v. Board of Ed. of Lincoln Cty. 239
Johnson; State ex rel. NSBA v. 495
Johnson; State v. 133

Jones v. Meyer 947
Joshua M. et al., In re Interest of 596

Kelley D. & Heather D., In re Interest of 465
Kinser; State v. 56
Koltes v. Visiting Nurse Assn. 740
Kroll v. Department of Motor Vehicles 548

Lacey; Clayton v. 282
Lancaster Cty. Sch. Dist. No. 001; Parker v. 406
Lemen; Eli's, Inc. v. 515
Leuenberger; Shearer v. 566
Likes; State ex rel. Acme Rug Cleaner v. 34
Lincoln, City of; Woodard v. 61
Lincoln Cty., Board of Ed. of; Johanson v. 239
Lovercheck; Corcoran v. 936

McGrath, North; Wood v. 109
McLaughlin v. Hellbusch 615
Meyer; Jones v. 947
Morrill Cty., Board of Ed. of; Daily v. 73
Mueller v. Bohannon 286
Myers, In re Estate of 817

NSBA, State ex rel. v. Aupperle 953
NSBA, State ex rel. v. Johnson 495
NSBA, State ex rel. v. Schmeling 275
National Bank of Commerce v. Ham 679
Neb. Account. & Disc. v. Citizens for Resp. Judges 95
Nebraska Dept. of Corr. Appeals Bd.; Ackerman v. 896
Nebraska Pub. Power Dist.; Hansmeyer v. 1
Nebraska Pub. Power Dist.; Nebraska Pub. Serv. Comm. v. 479
Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist. 479
Nelson v. City of Omaha 303
Nguyen v. Rezac 458
Norwest Bank Neb.; Vann v. 623

Obstetricians & Gyns., P.C.; Goff-Hamel v. 19
Omaha, City of; Nelson v. 303

Parker v. Lancaster Cty. Sch. Dist. No. 001 406
Paul; State v. 669
Poll v. Poll 46
Ponec; ProData Computer Servs. v. 228
Professional Bus. Servs. v. Rosno 217
ProData Computer Servs. v. Ponec 228
Putnam v. Fortenberry 266
Ratigan; Deuth v. 419
Rauch v. Rauch 257

Reinke Mfg. Co. v. Hayes 442
Rezac; Nguyen v. 458
Ritchhart v. Daub 801
Roemer; General Fiberglass Supply v. 810
Rosno; Professional Bus. Servs. v. 217

SID No. 384, In re Application of 299
Schindler v. Department of Motor Vehicles 782
Schindler v. Walker 767
Schmeling; State ex rel. NSBA v. 275
Schweitzer v. American Nat. Red Cross 350
Scottsbluff Public Schools; Teters v. 645
Shearer v. Leuenberger 566
Shivvers v. American Family Ins. Co. 159
Smith; State v. 705
State; DeCamp v. 892
State ex rel. Acme Rug Cleaner v. Likes 34
State ex rel. NSBA v. Aupperle 953
State ex rel. NSBA v. Johnson 495
State ex rel. NSBA v. Schmeling 275
State v. Bennett 747
State v. Blackson 104
State v. Cushman 335
State v. Divis 328
State v. Dorcey 795
State v. Garza 752
State v. Harrold 829
State v. Kinser 56
State v. Jacob 492
State v. Johnson 133
State v. Moore 553
State v. Paul 669
State v. Smith 705
State v. Torres 380
State v. Urbano 194
State v. White 536
State; Woollen v. 865

Talkington v. Womens Servs. 2
Teters v. Scottsbluff Public Schools 645
Torres; State v. 380
Truman v. Truman 628

US Ecology v. Boyd Cty. Bd. of Equal. 7
Urbano; State v. 194

Vann v. Norwest Bank Neb. 623
Variano v. Dial Corp. 318
Visting Nurse Assn.; Koltes v. 740

Walker; Schindler v. 767
Welsh; Boyle v. 118
White; State v. 536
William G., In re Interest of 788
Witte; Farm Bureau Ins. Co. v. 919
Womens Servs.; Talkington v. 2
Wood v. McGrath, North 109
Woodard v. City of Lincoln 61
Woollen v. State 865

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-97-1103: **Prokop v. Moyer**. Affirmed. Gerrard, J.

No. S-98-053: **Qualsett v. Kracl**. Appeal dismissed. Miller-Lerman, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-96-750: **State v. Simpson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-97-351: **Central Farmers Co-op Nonstock v. DLC, Ltd**. Motion of appellee for summary dismissal filed March 12, 1999, sustained. See rule 7B(1).

No. S-98-078: **Crocker, Huck v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-117: **State v. Vraspir**. Court of Appeals' memorandum opinion and judgment on appeal summarily affirmed under rule 7A(1). See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. S-98-123: **Essman v. Nebraska Law Enforcement Training Ctr**. Motion of appellee for summary dismissal sustained on grounds that the issues in the case are moot.

Nos. S-98-166, S-98-167: **State v. Freeman**. Court of Appeals' memorandum opinion and judgment on appeal summarily affirmed under rule 7A(1). See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Nos. S-98-251, S-98-252: **State v. Devaney**. Court of Appeals' modified summary affirmance is summarily affirmed under rule 7A(1). See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. S-98-315: **State v. Sutton**. Court of Appeals' memorandum opinion and judgment on appeal affirmed as modified. By operation of law, appellant's indeterminate sentence is 0 to 30 months' imprisonment. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999).

No. S-98-335: **State v. Caddy**. Appeal dismissed. See rule 7A(2) and *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. S-98-339: **Joyner v. Farmland Foods**. Stipulation allowed; appeal dismissed.

No. S-98-359: **State v. Williams**. Court of Appeals' memorandum opinion and judgment on appeal summarily affirmed under rule 7A(1). See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. S-98-359: **State v. Williams**. Letter for appellee considered. Motion for rehearing in S-98-555, see *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), having been overruled, mandate in this matter to issue forthwith.

No. S-98-413: **Nebraska Pub. Emp. v. County of York**. Stipulation sustained; appeal dismissed.

No. S-98-543: **Felderman v. Felderman**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-98-637: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-98-671: **Stevens v. Erbe**. Stipulation allowed; appeal dismissed.

No. S-98-693: **State v. Hauck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-816: **State v. Kalisek**. Affirmed. See rule 7A(1); *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999); and *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999).

No. S-98-816: **State v. Kalisek**. By order of the court, February 10, 1999, order affirming lower court decision is vacated.

No. S-98-816: **State v. Kalisek**. Affirmed. See rules 7A(1) and 9E and *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998).

No. S-98-822: **Strategic Staff Mgmt. v. Aston Park Health Care Ctr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-839: **State v. Delgado**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-864: **Cave v. Maler**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-98-965: **State v. Sapanajin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-1021: **State ex rel. NSBA v. Lee**. Respondent suspended from the practice of law in the State of Nebraska for a period of 2 years.

No. S-98-1048: **Christiansen v. Moore**. Appeal summarily dismissed as moot.

No. S-98-1115: **State v. Pierce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-98-1311: **State ex rel. NSBA v. Reedy**. Judgment of suspension. Respondent suspended from practice of law in the State of Nebraska for 30 days, effective upon service of order.

No. S-98-1338: **Gall v. Gall**. By order of the court, appeal dismissed for failure to file briefs.

No. S-99-095: **In the Matter of Grand Jury re Jones v. Hartigan**. Motion of appellant to dismiss as moot sustained; appeal dismissed.

No. S-99-127: **Matthews v. Abramson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-277: **State ex rel. NSBA v. Runge**. Respondent suspended from the practice of law in the State of Nebraska for 6 months.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-96-407: **State v. Lute**. Petition of appellant for further review overruled for lack of jurisdiction on March 8, 1999.

No. A-96-1151: **Jessen v. Jessen**. Petition of appellant for further review overruled on February 10, 1999.

No. A-96-1151: **Jessen v. Jessen**. Petition of appellee for further review overruled on February 10, 1999.

No. S-97-162: **Norwest Bank Neb. v. Bellevue Bridge Comm.**, 7 Neb. App. 750 (1998). Petition of appellee for further review dismissed on March 16, 1999, as having been improvidently granted.

No. A-97-280: **Peters v. Wakefield**. Petition of appellant Wakefield for further review overruled on January 27, 1999.

No. A-97-280: **Peters v. Wakefield**. Petition of appellee Peters for further review overruled on January 27, 1999.

No. A-97-534: **State v. Silva**, 7 Neb. App. 480 (1998). Petition of appellant for further review overruled on March 16, 1999.

No. A-97-578: **Shilling v. Downs**. Petition of appellant for further review overruled on March 31, 1999.

No. A-97-617: **Hughes v. Grahm**. Petition of appellee for further review overruled on April 21, 1999.

No. A-97-643: **Tyler v. Clarke**. Petition of intervenor for further review overruled on April 14, 1999.

No. A-97-662: **Saylor v. Nebraska Dept. of Corr. Servs.** Petition of appellee for further review overruled on April 23, 1999.

Nos. A-97-666, A-97-667: **Quick v. Quick**. Petition of appellee for further review overruled on March 10, 1999.

No. A-97-720: **Kricsfeld v. Kricsfeld**, 8 Neb. App. 1 (1999). Petition of appellant for further review overruled on April 14, 1999.

Nos. A-97-821, A-97-822: **State v. Ebert**. Petition of appellant for further review overruled on January 22, 1999.

No. A-97-826: **F & T, Inc. v. Nebraska Liquor Control Comm.**, 7 Neb. App. 973 (1998). Petition of appellant for further review overruled on February 18, 1999.

No. A-97-831: **SID No. 347 v. City of Omaha**, 8 Neb. App. 78 (1999). Petition of appellee for further review overruled on March 17, 1999.

No. A-97-845: **Zoucha v. Zoucha**. Petition of appellee for further review overruled on March 10, 1999.

No. A-97-858: **Embury v. Peasley**. Petition of appellant for further review overruled on March 17, 1999.

No. A-97-861: **Bordelon v. Bordelon**. Petition of appellant for further review overruled on March 31, 1999.

No. A-97-872: **Norton v. Parkway Ob-Gyn, P.C.** Petition of appellee for further review overruled on February 5, 1999.

No. A-97-884: **Shaw v. Nebraska Dept. of Revenue**. Petition of appellant for further review overruled on April 21, 1999.

No. A-97-884: **Shaw v. Nebraska Dept. of Revenue**. Petition of appellee Prenosil for further review overruled on April 21, 1999.

No. A-97-885: **Piersel v. Piersel**. Petition of appellee for further review overruled on April 21, 1999.

No. S-97-892: **Elstun v. Elstun**, 8 Neb. App. 97 (1999). Petition of appellee for further review sustained on March 17, 1999.

No. A-97-923: **James Neff Kramper Family Farm v. Dakota Cty**. Petition of appellant for further review overruled on March 17, 1999.

No. A-97-946: **Waite v. Empson**. Petition of appellant for further review overruled on March 17, 1999.

No. A-97-967: **Fun World v. Big Red Keno**. Petition of appellee for further review overruled on April 28, 1999.

No. A-97-1102: **State v. Hopkins**, 7 Neb. App. 895 (1998). Petition of appellee for further review overruled on January 22, 1999.

No. A-97-1110: **In re Estate of Schwartz**. Petition of appellant for further review overruled on April 14, 1999.

No. A-97-1112: **Darnall v. Petersen**, 8 Neb. App. 185 (1999). Petition of appellee for further review overruled on April 23, 1999.

No. A-97-1135: **State ex rel. Wagner v. Klamt**. Petition of appellee for further review overruled on April 21, 1999.

No. S-97-1150: **State v. Rieger**, 8 Neb. App. 20 (1999). Petition of appellant for further review sustained on April 14, 1999.

No. A-97-1264: **Riggs v. Riggs**. Petition of appellant for further review overruled on April 14, 1999.

No. A-97-1336: **Woods v. Woods**. Petition of appellant for further review overruled on May 12, 1999.

No. A-97-1339: **In re Interest of Courtney S. & Daniel S.** Petition of appellant for further review overruled on April 14, 1999.

No. A-98-015: **State v. Bartlett**. Petition of appellant for further review overruled on February 18, 1999.

No. A-98-055: **State v. Matthews**, 8 Neb. App. 167 (1999). Petition of appellant for further review overruled on April 21, 1999.

No. A-98-061: **Reagan v. Sarpy Cty. Bd. of Equal**. Petition of appellant for further review overruled on March 17, 1999.

No. S-98-080: **State v. Owens**, 8 Neb. App. 109 (1999). Petition of appellee for further review sustained on April 14, 1999.

No. A-98-093: **Geiger v. Johnson**. Petition of appellant for further review overruled on February 10, 1999.

No. S-98-169: **Henderson v. Department of Corr. Servs.** Petition of appellant for further review overruled for lack of jurisdiction.

No. A-98-173: **Belitz v. Belitz**, 8 Neb. App. 41 (1999). Petition of appellant for further review overruled on March 10, 1999.

No. A-98-189: **State v. Magilton**. Petition of appellant for further review overruled on February 25, 1999.

No. A-98-209: **Siliphet v. IBP, inc.**, 8 Neb. App. 48 (1999). Petition of appellant for further review overruled on March 17, 1999.

No. A-98-259: **Baughman v. United-A.G. Co-op**, 7 Neb. App. 936 (1998). Petition of appellee for further review overruled on January 27, 1999.

No. A-98-341: **In re Interest of Chester B**. Petition of appellee for further review overruled on February 16, 1999. See rule 2F.

No. S-98-352: **State v. Brown**. Petition of appellant for further review sustained on May 19, 1999.

No. A-98-355: **State v. Alexander**. Petition of appellant for further review overruled on March 31, 1999.

No. A-98-404: **Amen v. Custom Countertop, Inc**. Petition of appellant for further review overruled on March 1, 1999.

No. A-98-405: **Huryta v. Huryta**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-410: **Jensby v. Jensby**. Petition of appellant for further review overruled on April 28, 1999.

No. A-98-447: **State v. Herngren**, 8 Neb. App. 207 (1999). Petition of appellant for further review overruled on April 23, 1999.

No. A-98-462: **Claussen v. Tender Heart Treasures**. Petition of appellant for further review overruled on April 21, 1999.

No. A-98-467: **State v. Gray**. Petition of appellee for further review overruled on April 14, 1999.

No. A-98-508: **State v. Bennett**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-526: **In re Interest of Stephon R**. Petition of appellant for further review overruled on March 17, 1999.

No. A-98-531: **State v. Creek**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-535: **State v. Bewley**. Petition of appellant for further review overruled on February 18, 1999.

No. A-98-563: **State v. Paulsen**. Petition of appellant for further review overruled on February 10, 1999.

No. A-98-634: **Gerber v. Gerber**. Petition of appellee for further review overruled on April 14, 1999.

Nos. A-98-715, A-98-716: **State v. Garza**. Petition of appellant for further review overruled on March 10, 1999.

No. A-98-720: **In re Interest of Samuel W. & Sophia W.** Petition of appellant for further review overruled on May 19, 1999.

No. A-98-732: **State v. Blair**. Petition of appellant for further review overruled on May 12, 1999.

Nos. A-98-765, A-98-766: **In re Interest of Mikayla H. & Amber H.** Petition of appellant for further review overruled on May 19, 1999.

No. A-98-767: **State v. Boyd**. Petition of appellant for further review overruled on February 10, 1999.

No. A-98-831: **Wiek v. Mynster**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-838: **Perry v. Perry**. Petition of appellee for further review overruled on May 12, 1999.

Nos. A-98-843, A-98-844, A-98-845: **State v. Droppleman**. Petition of appellant for further review overruled on March 10, 1999.

Nos. A-98-854, A-98-855: **State v. Steinbach**. Petition of appellant for further review overruled on January 27, 1999.

No. S-98-878: **State v. Boslau**, 8 Neb. App. 275 (1999). Petition of appellant for further review sustained on May 12, 1999.

No. A-98-902: **State v. Brown**. Petition of appellant for further review overruled on February 10, 1999.

No. A-98-921: **Smith v. Brown**. Petition of appellant for further review overruled on April 28, 1999.

No. A-98-967: **State v. Svoboda**. Petition of appellant for further review overruled on March 17, 1999.

No. A-98-1047: **State v. Reents**. Petition of appellant for further review overruled on March 10, 1999.

Nos. A-98-1053, A-98-1054: **State v. Rodriquez**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-1122: **Coulson v. Nebraska Bd. of Parole**. Petition of appellant for further review overruled on April 14, 1999.

No. A-98-1136: **State v. Mitchell**. Petition of appellant for further review overruled on January 27, 1999.

No. A-98-1200: **State v. Grigg**. Petition of appellant for further review overruled on February 18, 1999.

No. A-98-1215: **Ditter v. Nebraska Dept. of Corr. Servs. Appeals Bd**. Petition of appellant for further review overruled on March 17, 1999.

No. A-98-1246: **1504 Harney Assocs., L.P. v. GHMC, Inc**. Petition of appellant for further review overruled on April 14, 1999.

No. A-99-029: **Ackerman v. Nebraska Dept. of Corr. Appeals Bd**. Petition of appellant for further review overruled on May 7, 1999.

No. A-99-032: **Tyler v. Tyler**. Petition of appellant for further review overruled on April 14, 1999.

No. A-99-054: **State v. Grigg**. Petition of appellant for further review overruled on February 18, 1999.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

ELDEAN E. HANSMEYER AND DIANE K. HANSMEYER, APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE AND CROSS-APPELLANT.

588 N.W. 2d 589

Filed January 29, 1999. No. S-96-1164.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed.

Donald J. Pepperl, of Pepperl & McMahon-Boies Law Offices, for appellants.

James A. Eske, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, and Bonnie J. Hostetler for appellee.

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

MCCORMACK, J.

This cause is affirmed on the published opinion of the Nebraska Court of Appeals found at *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998). The order of the Court of Appeals, affirming in part and in part reversing and remanding with directions, is affirmed.

AFFIRMED.

SIOUX SUN TALKINGTON, APPELLEE, V. WOMENS SERVICES, P.C., AND C. J. LABENZ, M.D., APPELLANTS.

588 N.W. 2d 790

Filed January 29, 1999. No. S-97-461.

1. **Motions to Vacate: Appeal and Error.** The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Courts: Dismissal and Nonsuit.** Pursuant to Neb. Rev. Stat. § 25-1149 (Reissue 1995), a district court has discretionary power to dismiss a case without prejudice for want of prosecution. Such a dismissal is also within the inherent power of the court.
4. ____: ____. The power to dismiss a case for want of prosecution is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts.
5. **Courts: Motions to Vacate.** A district court has the inherent authority to vacate or modify its decision within the same term in which the initial decision was rendered.
6. **Motions to Vacate: Appeal and Error.** The decision to vacate an order is within the discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. However, the decision to vacate will be reversed if it is shown that the district court abused its discretion.
7. **Courts: Motions to Vacate.** Although a court's decision to vacate an order is discretionary, this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record.
8. **Judgments: Evidence.** A much stronger showing is required to substantiate an abuse of discretion when a judgment is vacated than when it is not.
9. **Courts: Pretrial Procedure: Time.** Because of the individualized nature of the administration of justice, trial courts must necessarily be given wide discretion to ensure that the goal of timely disposition of cases is reached in a manner consistent with fairness to all parties. Assurance of quality in the judicial process is as important as speedy disposition.
10. **Dismissal and Nonsuit: Appeal and Error.** Concerning an order of dismissal, each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Mark E. Novotny, of Lamson, Dugan & Murray, for appellants.

Martin A. Cannon for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Court of Appeals reversed the trial court's decision to vacate the dismissal of appellee, Sioux Sun Talkington's medical malpractice case against appellants, Womens Services, P.C., and C. J. Labenz, M.D. (hereinafter jointly referred to as Womens Services). We granted Talkington's petition for further review. We reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to affirm the trial court's order vacating the dismissal.

BACKGROUND

On August 25, 1995, Talkington filed a petition alleging that on August 27, 1993, Womens Services committed medical malpractice. Womens Services' subsequent demurrer was partially sustained and partially overruled on March 8, 1996. Womens Services filed an answer on March 11. About 3 months later, the trial court's computer automatically dismissed the case, as it had been pending for over 180 days without a certificate of readiness being filed. Talkington moved to reinstate the case, contending that discovery should be completed by March 31, 1997. A hearing was held on December 31, 1996, at which time Talkington's counsel stated to the trial court that advancement of the medical expert's opinion was estimated to cost $15,000, and Talkington had been attempting to figure out ways to cover that cost. The trial court vacated the previously entered dismissal and entered an order excusing a filing of a certificate of readiness until March 31, 1997.

On April 1, 1997, the case was automatically dismissed for want of prosecution a second time. A hearing was held on April 7. At this hearing, Talkington's counsel stated:

> I've got a very unfortunate, very unusual situation here. This is a case that we filed when we had an expert's opinion on it that he thought we had a liability case, but, to assess damages, he needed to do another surgery.

> [Talkington has] never been able to do that surgery, so the case kind of got stale and got shelved and nothing much went on with it.
>
> About two months back, we were here on a Motion to Reinstate and I think you reinstated it on the condition that we get our expert on board, which I said, about doing, took a long time doing. I'll be damned if Friday he didn't call me back, after I've been playing phone tag with him for quite awhile, and told me he would step up to the plate and be deposed and give me a final opinion on it. So, obviously, the case is in an awkward posture, but if we can reinstate it and I can get [defendant's attorney] his discovery by the end of the week and get a deposition pretty quickly, I think that's the only sensible thing to do.

Over Womens Services' objection, the trial court vacated the April 1, 1997, dismissal, reinstated the case, gave Talkington 1 month to complete discovery, and ordered that a certificate of readiness be filed by May 7. Womens Services timely appealed to the Court of Appeals. The Court of Appeals determined that because the bill of exceptions contains only Talkington's counsel's unsworn statements to the trial court and no evidence was offered by Talkington at the hearing on April 7, for the purposes of its review, it was essentially left with a record containing only the pleadings and docket entries. See *Talkington v. Womens Servs.*, 7 Neb. App. 378, 583 N.W.2d 68 (1998). The Court of Appeals concluded that based on the pleadings and docket entries, the trial court's decision to vacate the dismissal on April 1 was an abuse of discretion and reversed the trial court's order, thereby dismissing the case.

The trial docket sheet shows the following entries, each signed or initialed by the trial court judge:

> 3/8/96 By agrement [sic] of counsel, the demurrer as to first cause of action is overruled. [sic] and demurrer as to second cause of action sustained. Defendant given ten days to answer
>
> JUN 28 1996 CASE DISMISSED W/O PREJUDICE - PROGRESSION LETTER
>
> 12/31/96 Counsel for parties appeared and argued. Plaintiff's motion to reinstate this case argued and sus-

tained. Plaintiff given to March 31, 1997 to complete discovery by signed order. Signed order requiring parties to certify this case by 3-31-97.

APR 01 1997 CASE DISMISSED W/O PREJUDICE - PROGRESSION LETTER

4/7/97 On motion of plaintiff and over objection of defendant this case is ordered reinstated. Parties given 1 mo[.] to complete discovery certificate of readiness ordered by 5-3-97. Signed order setting date.

We granted Talkington's petition for further review.

ASSIGNMENTS OF ERROR

Talkington assigns that the Court of Appeals erred in ruling (1) in effect, that a trial court exercising broad discretion to reinstate a case may consider only formally offered evidence and that on appeal, such evidence is the only pertinent part of the record; (2) that the trial court's reinstatement of the case based on the assertions of counsel contained in the record constituted an abuse of discretion; and (3) that "the record" and "the evidence" are exactly the same thing.

SCOPE OF REVIEW

The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Jarrett v. Eichler, supra.*

ANALYSIS

A district court has discretionary power to dismiss a case without prejudice for want of prosecution. Neb. Rev. Stat. § 25-1149 (Reissue 1995). Such a dismissal is also within the inherent power of the court. *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982). The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial

courts. *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978).

Likewise, a district court has the inherent authority to vacate or modify its decision within the same term in which the initial decision was rendered. *Jarrett v. Eichler, supra*; *A. Hirsh, Inc. v. National Hair Co., supra*. The decision to vacate an order is within the discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. However, the decision to vacate will be reversed if it is shown that the district court abused its discretion. *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975). Although a court's decision to vacate an order is discretionary, "this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record." *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. at 398-99, 315 N.W.2d at 238. A much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated than when it is not. *Fanning v. Richards, supra*.

Because of the individualized nature of the administration of justice, trial courts must necessarily be given wide discretion to ensure that the goal of timely disposition of cases is reached in a manner consistent with fairness to all parties. Assurance of quality in the judicial process is as important as speedy disposition. *Fanning v. Richards, supra*. Each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal. *Schaeffer v. Hunter, supra*.

In the case at hand, we conclude that the Court of Appeals erred in concluding that the trial court abused its discretion when it vacated the dismissal of Talkington's case. There is a record in this case, the trial docket. The period between Womens Services' answer and the first dismissal was approximately 3½ months. The period between the first dismissal and the second dismissal was 10 months. The period between when Womens Services filed its answer and the last reinstatement was 13 months. It was Womens Services' burden to prove an abuse of discretion. Based upon the record consisting of the trial docket, we find that Womens Services failed to prove an abuse of discretion on the part of the trial court when this case was reinstated on April 7, 1997.

CONCLUSION

Based on the record, we cannot conclude that the trial court abused its discretion in vacating the dismissal and reinstating the case for trial. Therefore, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to affirm the trial court's order vacating the dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

US ECOLOGY, INC., APPELLANT, V. BOYD COUNTY BOARD OF EQUALIZATION, BOYD COUNTY, NEBRASKA, APPELLEE.

588 N.W. 2d 575

Filed January 29, 1999. No. S-97-802.

1. **Taxation: Judgments: Appeal and Error.** Appellate review of a final decision of the Nebraska Tax Equalization and Review Commission shall be conducted for errors on the record of the commission. When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Appeal and Error.** The Supreme Court will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief, unless plain error exists. In this context, plain error exists where there is an error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause.
3. **Taxation: Valuation: Appeal and Error.** The Tax Equalization and Review Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action taken by the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.
4. **Taxation: Valuation: Presumptions: Evidence: Proof: Appeal and Error.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
5. **Taxation: Valuation: Proof: Appeal and Error.** In an appeal from a county board of equalization, the burden of persuasion imposed on the complaining taxpayer is not

met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

6. **Property: Valuation: Witnesses.** An owner who is familiar with his property and knows its worth is permitted to testify as to its value.
7. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
8. ____: ____. The purchase price of a property, standing alone, is not conclusive of the actual value of property for assessment purposes; it is only one factor to be considered in determining actual value.
9. ____: ____. Pursuant to Neb. Rev. Stat. § 77-112 (Reissue 1996), the statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its market value in the ordinary course of trade.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the Nebraska Tax Equalization and Review Commission. Judgment of Court of Appeals affirmed.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Carl Schuman, Boyd County Attorney, for appellee.

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

STEPHAN, J.

This case involves a dispute with regard to the valuation for purposes of taxation of a tract of land in Boyd County which US Ecology, Inc., purchased in July 1990 for $320,000 as a potential site for a low-level radioactive waste disposal facility. From 1990 through 1995, the assessed value of the land was never more than $113,875, but in 1996 the Boyd County Board of Equalization (Board) increased the valuation to $320,000. US Ecology appealed to the Nebraska Tax Equalization and Review Commission (TERC), which affirmed the Board's 1996 valuation based upon a 2-to-1 determination that US Ecology failed to prove that the Board acted arbitrarily or capriciously in increasing the valuation for 1996. US Ecology sought review by

the Nebraska Court of Appeals, which reversed, based upon its determination that there was sufficient evidence to establish that the Board had acted arbitrarily and capriciously in establishing the 1996 valuation. The Court of Appeals further determined that the property was agricultural land not being used for agricultural purposes and therefore should be valued at 100 percent of its actual value. It reversed, and remanded the cause to the TERC for further proceedings consistent with the Court of Appeals' opinion. *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). We granted the Board's petition for further review and now affirm the judgment of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts and procedural background of this case which are set forth in greater detail in the published opinion of the Court of Appeals. US Ecology is a California corporation engaged in radioactive and hazardous waste handling, processing, and disposal. In July 1990, it purchased the subject property in Boyd County because of its suitability as a site for a low-level radioactive waste disposal facility which US Ecology intends to build and operate if it obtains the necessary license from the State of Nebraska. See Neb. Rev. Stat. § 81-1578 et seq. (Reissue 1994 & Cum. Supp. 1998). The license application has been pending since 1990. The subject property consists of approximately 317.99 acres located 3 miles west of Butte, Nebraska. If the license is obtained, approximately 110 acres of the subject property will be used for construction of the actual facility and the remaining acres will be used for site-monitoring and testing. Since 1989, between $82 and $83 million has been spent on the project to develop the waste disposal facility in Boyd County. However, the only improvements on the proposed site include a small structure, several monitoring wells, and other technical improvements used for testing for the anticipated future use of the property.

US Ecology paid approximately $1,000 per acre for the subject property. At the time of purchase, it was aware that similar property was selling for about $400 per acre; however, it was willing to pay a premium price because of the suitability of the

property as a potential site for the waste disposal facility. Although it had previously been used as farmland, the subject property has not been used for agricultural purposes since 1990.

From 1990 through 1995, the subject property was assessed as agricultural land, and its highest assessed value during this period was $113,785 in 1995. However, on July 22, 1996, the Board determined that the assessed value should be increased to $320,000. US Ecology perfected a timely appeal to the TERC pursuant to Neb. Rev. Stat. § 77-1510 (Reissue 1996). The TERC held a hearing at which counsel for the Board and US Ecology appeared. The Board did not call any witnesses but offered five exhibits which included the minutes of its July 22 meeting, the option contract pursuant to which US Ecology purchased the subject property, the July 1990 deed transferring title of the subject property to US Ecology, and tax-assessment documents pertaining to a licensed landfill facility in Dakota County and an operational hazardous waste disposal facility in Kimball County.

US Ecology called two witnesses, John DeOld and Wayne Kubert. Since 1988, DeOld has been employed by US Ecology as manager for its Nebraska Central Interstate project. His duties include management of US Ecology's efforts to comply with contracts which it has with the Central Interstate Compact Commission to site, develop, license, operate, and close the low-level radioactive waste disposal facility for which the subject property is the proposed site. He stated that a decision on the pending license application was expected no earlier than the last few months of 1999 and that US Ecology did not know with any degree of certainty whether it would ever receive a license for the proposed facility. DeOld testified that since the cessation of farming operations on the property in 1990, US Ecology has been conducting on-site environmental and monitoring activities, including ground water and atmosphere studies to establish a baseline of information showing the condition of the property with respect to any hazardous or radiological materials that may be found on the site. He stated that the subject property is primarily grassland and that US Ecology pays to have the grass mowed and hauled away once or twice a year. DeOld testified

that in his opinion, the property had a fair and reasonable market value of $450 per acre on January 1, 1996.

Wayne Kubert, a real estate appraiser retained by US Ecology, also testified as a witness before the TERC. Kubert stated that because of the uncertainty regarding the acceptance of US Ecology's license application, the highest and best use of the property in 1996 was for agricultural purposes. Kubert performed an appraisal of the property using the market or comparative value approach. He determined that the real property should be valued at $154,710 and improvements at $11,290, for a total of $166,000. Valuing the property at 80 percent, which is the way agricultural land is valued, the property had a value of $123,710 and the improvements a value of $11,290, for a total value of $135,000. Kubert certified that in conducting the appraisal he complied with the "Uniform Standards of Professional Practice . . . as promulgated by the Appraisal Foundation."

At the close of US Ecology's case, the Board made a motion to dismiss the case, alleging that US Ecology failed to establish a reasonable basis upon which the TERC could reverse the action of the Board. The TERC filed a decision setting forth its findings of fact and conclusions of law as required by Neb. Rev. Stat. § 77-5018 (Cum. Supp. 1998).

The TERC found, in summary, that US Ecology failed to present credible evidence to support its claim that the Board's valuation of the property was unreasonable or arbitrary. The TERC found that DeOld's opinion regarding the value of the property was unsupported by the evidence. It further found that Kubert's appraisal was not credible evidence of the value of the property because (1) the appraisal determined that the highest and best use of the property was as agricultural land; (2) the property cannot be used as agricultural land under the provisions of Neb. Const. art. XII, § 8, and consequently cannot be valued as such; (3) the appraisal was based on the sales comparison approach and no consideration was given to the income approach, although standard appraisal practices dictate that a second approach to value is essential to support the opinion; and (4) US Ecology expended more than $80 million in testing and appli-

cation proceedings in order to obtain a license for its radioactive and hazardous waste processing facility. Thus, the TERC granted the Board's motion for dismissal and affirmed the Board's determination, finding there was no showing that the Board's valuation was unreasonable or arbitrary. US Ecology timely appealed to the Court of Appeals.

The Court of Appeals determined that the TERC erred in disregarding the testimony of DeOld and Kubert regarding the value of the subject property. *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). The court also held that the TERC improperly considered the constitutional prohibition of corporate ownership of farmland because that issue was not raised before the Board. *Id.* The Court of Appeals concluded that the subject property was agricultural land not being used for agricultural or horticultural purposes and, thus, was to be valued at 100 percent of its actual value. It therefore reversed the decision of the TERC affirming the determination of the Board, and remanded the cause to the TERC for further proceedings consistent with its opinion. *Id.*

ASSIGNMENTS OF ERROR

In its opinion, the Court of Appeals summarized US Ecology's assignments of error with respect to the determination of the TERC as follows:

> (1) The [TERC] erred in finding that since the subject property cannot be used as agricultural land under the Nebraska Constitution, the subject property cannot be valued as agricultural land pursuant to the provisions of Neb. Rev. Stat. § 77-1343 (Reissue 1996) and related statutes, and (2) the [TERC] erred in finding that US Ecology failed to meet its burden of establishing that the valuation of the subject property as assessed by the Board was unreasonable or arbitrary.

US Ecology v. Boyd Cty. Bd. of Equal., 6 Neb. App. at 961, 578 N.W.2d at 881-82.

In its petition for further review, the Board asserts that the Court of Appeals erred (1) by failing to hold that US Ecology bears the burden of proving by "credible" evidence that the value of the property has been arbitrarily or unlawfully fixed by

the Board in an amount greater than its actual value and (2) by failing to hold that when credible evidence conflicts on appeal from a county board of equalization, an appellate court may give weight to the fact that the TERC observed the witnesses and accepted one version of the facts over the other.

SCOPE OF REVIEW

An appeal may be taken from any action of a county board of equalization to the TERC in accordance with the TERC Act (TERCA). § 77-1510. The TERCA, which is currently codified at Neb. Rev. Stat. §§ 77-5001 to 77-5031 (Reissue 1996 & Cum. Supp. 1998), originally became effective on January 1, 1996, and at the time of the instant action, was codified at Neb. Rev. Stat. §§ 77-5001 to 77-5021 (Reissue 1996). The TERC shall hear such appeals

> as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The [TERC] shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.

Neb. Rev. Stat. § 77-1511 (Reissue 1996).

Any person aggrieved by a final decision in a case appealed to the TERC, whether the decision is affirmative or negative in form, shall be entitled to judicial review in the Court of Appeals. § 77-5019(1). In such an appeal, the Court of Appeals reviews for errors appearing on the record of the TERC. § 77-5019(5). When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

ANALYSIS

This is the first case in which we have reviewed a decision of the Court of Appeals arising under the TERCA. Review of such actions by this court is not a matter of right, but is governed by

Neb. Rev. Stat. § 24-1107 (Reissue 1996) and Neb. Ct. R. of Prac. 2F, pursuant to which this court may in its discretion grant further review of a decision of the Court of Appeals upon petition of a party. Therefore, our task is to determine whether the Court of Appeals correctly reviewed the cause for errors appearing on the record of the TERC, as required by § 77-5019(5). Our review is further narrowed by our established rule that we will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief, unless plain error exists. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). In this context, "plain error" exists where there is

> an error in an opinion of the Court of Appeals concerning which no complaint is made in a petition for further review, but which is encompassed within the errors raised before the Court of Appeals and which, if uncorrected, would result in an erroneous direction for retrial of a cause . . . .

Id. at 691, 502 N.W.2d at 433. We find no plain error on the record of this case and, therefore, address only the two assignments of error specified and argued in the petition for further review and supporting brief.

In its first assignment, the Board challenges the statement of the Court of Appeals that as the appellant in proceedings before the TERC, US Ecology had "the burden of proving that the value of the subject property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value." *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 964, 578 N.W.2d 877, 883 (1998). The Board argues that US Ecology should have been specifically required to meet its burden of proof *by competent evidence.* To resolve this question, we first examine the applicable statutory language.

US Ecology's appeal to the TERC was governed by § 77-1511, which requires the TERC to affirm action taken by a board of equalization "unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low." Prior to the enactment of the TERCA,

Nebraska law provided that appeals from actions taken by a county board of equalization were to be taken to the district courts, which had the same statutory scope of review which § 77-1511 now confers upon the TERC. §§ 77-1510 and 77-1511 (Reissue 1990). We held that in such appeals,

> [t]here is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.

Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal., 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989). In rebutting the aforementioned presumption,

> the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Bumgarner v. County of Valley, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981). Although it did not specifically adopt these rules in the present case, the Court of Appeals did so in subsequent cases in which it considered appeals from the TERC. See, *Forney v. Box Butte Cty. Bd. of Equal.*, 7 Neb. App. 417, 582 N.W.2d 631 (1998); *Lancaster Cty. Bd. of Equal. v. Condev West, Inc.*, 7 Neb. App. 319, 581 N.W.2d 452 (1998); *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998). We agree that these principles define the burden of persuasion in appeals to the TERC.

The central issue of fact in this case is the actual value of the subject property in 1996. "Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade." Neb. Rev. Stat. § 77-112 (Reissue 1996). We agree with the determination of the Court of Appeals that the TERC erred in disregarding DeOld's testimony that in his opinion, the subject property had an actual value of $450 per acre. This testimony constituted competent evidence under the rule that an owner who is familiar with his property and knows its worth is permitted to testify as to its value. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Johnson's Apco Oil Co. v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979). See, also, *Chudomelka v. Board of Equalization*, 187 Neb. 542, 544, 192 N.W.2d 403, 405 (1971) (holding lay witness may testify as to value of property if he or she has "an acquaintance with the property" and is "informed as to the state of the market").

We also agree with the Court of Appeals' determination that the TERC erred in disregarding the testimony of Kubert, whose expertise as a real estate appraiser was stipulated to by the Board. Actual value of real property for purposes of taxation "may be determined using professionally accepted mass appraisal techniques, including, but not limited to: (a) Comparison with sales of real property of known or recognized value, taking into account location, zoning, and current functional use; (b) Earning capacity of the real property; and (c) Reproduction cost less depreciation." § 77-112(1). This statute does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine actual value of real estate for tax purposes. *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992); *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989). Kubert testified that he used the sales comparison approach but did not use an income analysis because "buyers and sellers of farmland do not attach great significance to the net income produced." Thus, Kubert used one of the statutorily prescribed methods in arriving at his appraisal of the subject property and articulated a reason why another was inapplicable. His appraisal

was therefore competent evidence which was entitled to weight in determining the actual value of the subject property.

We have recognized that in tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. *Dowd v. Board of Equal., supra*; *First Nat. Bank v. Otoe Cty., supra*. The opinions of DeOld and Kubert that the actual value of the subject property was less than 50 percent of the 1996 valuation determined by the Board constituted competent evidence which caused the presumption of validity of the Board's valuation to disappear. Therefore, the reasonableness of the Board's valuation was a question of fact based upon all the evidence presented, with US Ecology having the burden of showing such valuation to be unreasonable. See *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). As discussed below, the testimony of DeOld and Kubert is the only competent evidence of actual value contained in this record.

In its second assignment of error, the Board argues that the Court of Appeals erred "by failing to hold that when credible evidence conflicts on appeal from the County Board of Equalization the Appellate Court may give weight to the fact that the [TERC] observed the witnesses and accepted one version of the facts over the other." Memorandum brief for appellee in support of petition for further review at 3. In this case, however, the facts presented by US Ecology are essentially undisputed. At the hearing before the TERC, the Board did not call any witnesses or offer any professional appraisal of the subject property. Its evidence consisted entirely of five exhibits, which included copies of the option agreement and warranty deed through which US Ecology acquired title, a document showing the taxable valuation of the subject property for the years 1990 through 1995, the minutes of the meeting at which the Board set the 1996 valuation, and documents reflecting the valuation of a licensed landfill in Dakota County and a waste treatment facility in Kimball County. These exhibits do not contain facts which support the 1996 valuation set by the Board or contradict the evidence presented by US Ecology.

For example, there is no evidence contradicting Kubert's testimony that the subject property was used exclusively for agri-

cultural purposes prior to its acquisition by US Ecology. We agree with the determination of the Court of Appeals that the applicability of art. XII, § 8, of the Nebraska Constitution was not raised before the Board and therefore could not have been considered by the TERC under § 77-1511. See *US Ecology v. Boyd Cty. Bd. of Equal.*, 6 Neb. App. 956, 578 N.W.2d 877 (1998). Without deciding the issue, we question whether a county board of equalization or the TERC could ever adjudicate issues involving art. XII, § 8, which contains specific provisions for judicial determination of compliance and enforcement. See *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998).

The record contains uncontroverted evidence that the expenditure of funds by US Ecology on site-testing and licensing did not add value to the land and that at the present time, it would be virtually impossible to sell the property as a site for a radioactive waste disposal facility. Likewise, the record discloses no correlation between the value of the subject property and the Dakota County and Kimball County properties. Thus, the Court of Appeals' determination that the subject property should be considered agricultural property which is not currently being used for agricultural purposes is supported by uncontroverted evidence.

The purchase price of property, standing alone, is not conclusive of the actual value of the property for assessment purposes; it is only one factor to be considered in determining actual value. *Potts v. Board of Equalization*, 213 Neb. 37, 328 N.W.2d 175 (1982). The record contains no evidence contradicting DeOld's testimony that US Ecology paid what it knew was a premium price of approximately $1,000 per acre for the property in 1990, nor is there evidence of circumstances which would explain the increase in valuation from $113,785 in 1995 to $320,000 in 1996. The statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its "market value . . . in the ordinary course of trade." § 77-112. On this record, therefore, we agree with the Court of Appeals' determination that the 1989 purchase price of $320,000 was not determinative of the market value of the subject property in 1996.

In sum, the record contains no facts which would justify setting the 1996 actual value of the subject property at nearly three times its 1995 valuation and more than twice the value established by the only appraisal contained in the record. Thus, we conclude that under the standard of review prescribed by § 77-5019(5), the Court of Appeals did not err in determining that US Ecology presented sufficient evidence before the TERC to establish that the Board acted arbitrarily and capriciously in setting the 1996 valuation and that the correct valuation for that year is $166,000, representing 100 percent of its actual value.

AFFIRMED.

MILLER-LERMAN, J., not participating.

JULIE GOFF-HAMEL, APPELLANT, V.
OBSTETRICIANS & GYNECOLOGISTS, P.C., APPELLEE.
583 N.W. 2d 798

Filed January 29, 1999. No. S-97-1007.

1. **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.
2. **Judgments: Appeal and Error.** In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Employer and Employee: Termination of Employment.** When employment is not for a definite term and there are no contractual, statutory, or constitutional restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses.
4. **Estoppel: Damages.** Promissory estoppel provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain.
5. **Estoppel.** A cause of action for promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.
6. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court acquires jurisdiction over both motions and may determine the controversy which is the subject of those motions.
7. **Summary Judgment.** 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.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for further proceedings.

Stephanie R. Hupp, of McHenry, Haszard, Hansen & Roth, for appellant.

Margaret E. Stine, of Harding, Shultz & Downs, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Julie Goff-Hamel brought this action against Obstetricians & Gynecologists, P.C. (Obstetricians), seeking damages for breach of an alleged oral employment contract or, in the alternative, damages for detrimental reliance on a promise of employment. The trial court granted summary judgment in favor of Obstetricians, and Goff-Hamel appeals.

SCOPE OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Foreman v. AS Mid-America*, 255 Neb. 323, 586 N.W.2d 290 (1998).

In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

FACTS

Goff-Hamel worked for Hastings Family Planning for 11 years. Prior to leaving Hastings Family Planning, Goff-Hamel was earning $24,000 plus the following benefits: 6 weeks' paid maternity leave, 6 weeks' vacation, 12 paid holidays, 12 sick days, an educational reimbursement, and medical and dental insurance coverage.

In July 1993, Goff-Hamel met with representatives of Obstetricians regarding the possibility of employment. Present at the meeting were Janet Quackenbush, the office manager; Dr.

George Adam, a part owner of Obstetricians; and Larry Draper, a consultant of Obstetricians involved in personnel decisions. Adam had approached Goff-Hamel in June 1993 about working for him as a patient relations and outreach coordinator at Obstetricians. Goff-Hamel initially declined the offer, explaining that she had made commitments to do some training in the fall and to hire and help train a new bookkeeper. Adam spoke to Goff-Hamel approximately 1 month later, asking her to reconsider and whether she was ready to "jump ship and come work for him." Goff-Hamel told Adam she would be interested in hearing some details, and an interview was set for July 27 at Adam's office.

At the meeting, Adam represented to Goff-Hamel that the position would be full time and would start at a salary of $10 per hour and that she would be provided 2 weeks' paid vacation, three or four paid holidays, uniforms, and an educational stipend. A retirement plan would start after the end of the second year, retroactive to the end of the first year. The job would not provide health insurance.

Goff-Hamel was offered a job with Obstetricians during the July 27, 1993, meeting, and she accepted the job offer at that time. She expressed concern that she be given time to finish some projects at Hastings Family Planning, and it was agreed that she would start her employment on October 4. Goff-Hamel gave notice to Hastings Family Planning in August, informing them that she would be resigning to take a job with Obstetricians.

Subsequently, Goff-Hamel went to Obstetricians' office and was provided with uniforms for her job. She was given a copy of her schedule for the first week of work, but did not receive a copy of the employee handbook.

On October 3, 1993, Goff-Hamel was told by Draper that she should not report to work the next morning as had been planned. Draper told her that Janel Foote, the wife of a part owner of Obstetricians, Dr. Terry Foote, opposed the hiring of Goff-Hamel.

The trial court found that there were no facts in dispute and that Goff-Hamel had not turned down any other employment opportunities between July and October 1993. The court found that she had terminated her employment at Hastings Family

Planning in reliance on an offer of employment from Obstetricians; however, the prospective employment agreement was not for a specific term of employment. The court noted that Goff-Hamel sought replacement employment, but was unable to obtain employment until April 1995, when she was employed part time at the rate of $11 per hour.

The trial court concluded that since Goff-Hamel was to be employed at will, her employment could be terminated at any time, including before she began working. The court concluded that under either contract law or promissory estoppel, Obstetricians was entitled to a judgment as a matter of law.

ASSIGNMENTS OF ERROR

Goff-Hamel asserts that the trial court erred in sustaining Obstetricians' motion for summary judgment and in overruling her motion for summary judgment.

ANALYSIS

In sustaining Obstetricians' motion for summary judgment, the trial court concluded as a matter of law that since Goff-Hamel's employment could have been terminated after 1 day without Obstetricians incurring liability, logic dictated that her employment could also be terminated before it started without liability.

It is undisputed that on July 27, 1993, Obstetricians offered Goff-Hamel employment and that she accepted. The oral agreement did not specify that the employment was for a definite period. We have consistently held that when employment is not for a definite term and there are no contractual, statutory, or constitutional restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses. See, *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). Therefore, the trial court correctly determined as a matter of law that Goff-Hamel could not bring a claim for breach of an employment contract.

Goff-Hamel's second cause of action was based upon promissory estoppel. "'[T]he development of the law of

promissory estoppel "is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings."'" *Rosnick v. Dinsmore*, 235 Neb. 738, 751, 457 N.W.2d 793, 801 (1990).

Promissory estoppel provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. *Id.* It requires only that reliance be reasonable and foreseeable. It does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994); *Rosnick v. Dinsmore, supra.*

We have not specifically addressed whether promissory estoppel may be asserted as the basis for a cause of action for detrimental reliance upon a promise of at-will employment. In *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994), the employee was terminated from her job approximately 4 months after she had been hired. We determined that because the employee had worked for a time, the employer had kept his promise to employ the plaintiff and that promissory estoppel was not available. We did not consider whether a cause of action based upon promissory estoppel could be stated by a prospective at-will employee who had been induced to leave previous gainful employment based upon the promise of other employment, but who did not commence employment at the new job.

Other jurisdictions which have addressed the question of whether a cause of action for promissory estoppel can be stated in the context of a prospective at-will employee are split on the issue. Some have held that an employee can recover damages incurred as a result of resigning from the former at-will employment in reliance on a promise of other at-will employment. They have determined that when a prospective employer knows or should know that a promise of employment will induce an employee to leave his or her current job, such employer shall be liable for the reliant's damages. Recognizing that both the prospective new employer and the prior employer could have fired the employee without cause at any time, they have concluded that the employee would have continued to work in his

or her prior employment if it were not for the offer by the prospective employer. Although damages have not been allowed for wages lost from the prospective at-will employment, damages have been allowed based upon wages from the prior employment and other damages incurred in reliance on the job offer.

In contrast, other jurisdictions have held as a matter of law that a prospective employee cannot recover damages incurred in reliance on an unfulfilled promise of at-will employment, concluding that reliance on a promise consisting solely of at-will employment is unreasonable as a matter of law because the employee should know that the promised employment could be terminated by the employer at any time for any reason without liability. These courts have stated that an anomalous result occurs when recovery is allowed for an employee who has not begun work, when the same employee's job could be terminated without liability 1 day after beginning work.

Promissory Estoppel Allowed

The following cases have held that a prospective employee had a cause of action for damages incurred in reliance upon a promise of employment. In *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), a pharmacist working at a drugstore desired employment with a hospital or clinic. He accepted employment with a clinic and gave 2 weeks' notice to the drugstore. During this period, he declined a job with a hospital because he had accepted employment with the clinic. Upon reporting to work, he was told that someone else had been hired because the pharmacist did not satisfy certain hiring requirements of the clinic. He had difficulty obtaining other full-time employment and suffered wage loss as a result.

The clinic argued that the application of promissory estoppel would create an anomalous rule such that an employee who is told not to report to work the day before he is scheduled to begin has a remedy, while an employee who is discharged after the first day does not. In rejecting the clinic's argument and allowing recovery, the court concluded that under the circumstances it would be unjust not to hold the clinic to its promise. The court stated:

> [A]ppellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job. He was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which respondent tendered him.

Id. at 116.

The court also recognized that under appropriate circumstances, promissory estoppel could apply even if the employee was fired after he had commenced employment, thus concluding that its ruling would not necessarily create an anomalous result. Since the prospective employment could have been terminated at any time, the court explained that the damages were not what the pharmacist would have earned from the clinic, but, rather, what he lost by quitting the job he held and declining at least one offer of employment elsewhere. See, also, *Gorham v. Benson Optical,* 539 N.W.2d 798 (Minn. App. 1995); *Rognlien v. Carter*, 443 N.W.2d 217 (Minn. App. 1989).

In *Gorham*, summary judgment was granted against the employee, who sued the employer for breach of contract, fraud, and promissory estoppel. The appellate court reversed the summary judgment on the promissory estoppel claim. The employee had been called in September 1993 about a job opportunity with Benson Optical. At the time, he earned $38,000 annually as a manager for LensCrafters. He was offered a position for $50,000 with Benson Optical, and he accepted and gave notice of resignation to LensCrafters. The employee's last day of work for LensCrafters was October 1, and on October 3, he attended Benson Optical's national sales meeting. On October 4, he attended a "getting to know you" meeting which left him with the impression that his employment had been or would be terminated, and on October 15, his employment was officially terminated.

Relying upon *Grouse*, the *Gorham* court found no relevant difference between the prospective Benson Optical employee, who reported for work and was terminated 1 day later, and the employee in *Grouse*, who was denied even 1 day on the job. Both men had relied to their detriment on the promise of a new

job. Neither man had a good faith opportunity to perform his duties.

In *Ravelo v. County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983), a police officer resigned from his position in reliance on an offer of employment in another city. His wife resigned her job, and they informed the private school where their children were enrolled that they were being removed from school. Subsequently, the police officer was told that he was not going to be hired, and he and his wife were unsuccessful in attempting to get back their previous jobs. Relying upon the Restatement of Contracts § 90 (1932), the Supreme Court reversed the trial court's dismissal and concluded that promissory estoppel could be applied in the case of a promise of at-will employment.

In *Bower v. AT & T, Technologies, Inc.*, 852 F.2d 361 (8th Cir. 1988), the court distinguished between an at-will employer who fires an employee 1 day after beginning work and an at-will employer who withdraws the offered employment before the employee is given an opportunity to perform. The court stated that an employer who withdraws the offered employment before the employee is given an opportunity to perform fails to keep its promise in any respect. The court concluded that the prospective employee whose offer was withdrawn had a cause of action.

In *Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 679 A.2d 745 (1996), the court stated that the application of promissory estoppel to prospective at-will employees recognizes that there may be losses incident to reliance upon a job offer itself, even though the employer can terminate the relationship at any time. The court concluded that reliance on the promise of at-will employment gave rise to a cause of action for damages flowing from the prospective employee's giving up her prior business and moving to another state. The court stated that the prospective employer's delay in informing the employee of its decision not to employ could give rise to damages based upon the employer's lack of good faith and fair dealing.

In *Sheppard v. Morgan Keegan & Co.*, 218 Cal. App. 3d 61, 266 Cal. Rptr. 784 (1990), the court held that under a theory of either breach of implied covenant of good faith and fair dealing

or promissory estoppel, an investment banker could recover for damages incurred when a prospective employer failed to fulfill its promise of at-will employment. In reliance upon the promise of employment, the banker had resigned his previous employment and arranged to move to another city, signing a lease on an apartment there. Adopting the reasoning of *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), the court stated: "[A]n employer cannot expect a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job." *Sheppard*, 218 Cal. App. 3d at 67, 266 Cal. Rptr. at 787. See, also, *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990).

PROMISSORY ESTOPPEL NOT ALLOWED

The following cases have held as a matter of law that prospective at-will employees cannot state a claim for promissory estoppel. In *Bakotich v. Swanson*, 91 Wash. App. 311, 957 P.2d 275 (1998), the court rejected the prospective employee's claim for damages incurred in reliance upon a promise of at-will employment. Although the employee alleged that he terminated his prior employment in reliance on the job offer, the court held that the supposed promise was only of at-will employment and that there was no promise or reasonable expectation of permanent employment. Therefore, the court declined to extend contract principles to at-will employment absent a clear and definite promise of permanent employment which would support promissory estoppel.

In *White v. Roche Biomedical Laboratories, Inc.*, 807 F. Supp. 1212 (D.S.C. 1992), the court held that reliance on a promise consisting solely of at-will employment was unreasonable as a matter of law, since the promise created no enforceable rights in favor of the employee other than the right to collect wages accrued for work performed. The court held that to hold otherwise would create an anomalous result insofar as the prospective employee would be placed in a better position than an employee whose at-will employment was terminated at some point after the employee began working.

Similarly, in *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670 (Mo. App. 1988), the court found that allowing claims of promissory estoppel in cases of unfulfilled promises of at-will employment would create an anomalous result to prior holdings which denied recovery to at-will employees who had commenced work. See, also, *Faust v. Ryder Commercial Leasing & Serv.*, 954 S.W.2d 383 (Mo. App. 1997); *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639 (Mo. App. 1961).

In *Heinritz v. Lawrence University*, 194 Wis. 2d 606, 535 N.W.2d 81 (Wis. App. 1995), the court rejected the claim of promissory estoppel by a prospective employee who had terminated his prior employment in reliance upon an employment offer. The court stated that such reliance did not change the nature of the promise, which was for an at-will relationship that could be terminated at any time by either party without cause.

In *Meerman v Murco, Inc*, 205 Mich. App. 610, 517 N.W.2d 832 (1994), the court stated that to support a claim of promissory estoppel upon an unfulfilled promise of at-will employment, there must be a distinguishing feature which would remove the case from the general rule of at-will employment. The court determined that an employee who was sought out by a prospective employer and induced to leave other employment failed to establish reliance of a kind that would remove the case from the general rule regarding at-will employment. Rather, the court opined that such reliance merely involved the customary and necessary incidents of changing jobs and was not consideration to support a promissory estoppel claim. Compare, *Filcek v Norris-Schmid, Inc*, 156 Mich. App. 80, 401 N.W.2d 318 (1986); *Hackett v Foodmaker, Inc*, 69 Mich. App. 591, 245 N.W.2d 140 (1976).

Having reviewed and considered decisions from other jurisdictions, we conclude under the facts of this case that promissory estoppel can be asserted in connection with the offer of at-will employment and that the trial court erred in granting Obstetricians summary judgment. A cause of action for promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or

forbearance. Here, promissory estoppel is appropriate where Goff-Hamel acted to her detriment in order to avail herself of the promised employment.

We next consider whether the trial court should have granted summary judgment in favor of Goff-Hamel. Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court acquires jurisdiction over both motions and may determine the controversy which is the subject of those motions. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998).

In the present context, the questions are (1) whether Obstetricians made a definite promise of employment to Goff-Hamel which Obstetricians reasonably expected or should have expected would induce Goff-Hamel to terminate her present employment; (2) whether Goff-Hamel was, in fact, induced to act by such offer; (3) whether the action taken by Goff-Hamel was detrimental to her; and (4) whether justice requires that Obstetricians reimburse Goff-Hamel for damages incurred as a result of the promise of employment. See *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. App. 1983).

The facts are not disputed that Obstetricians offered Goff-Hamel employment. Apparently, at the direction of the spouse of one of the owners, Obstetricians refused to honor its promise of employment. It is also undisputed that Goff-Hamel relied upon Obstetricians' promise of employment to her detriment in that she terminated her employment of 11 years. Therefore, under the facts of this case, the trial court should have granted summary judgment in favor of Goff-Hamel on the issue of liability.

However, there remains a material issue of fact regarding the amount of damages sustained by Goff-Hamel. 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. *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998); *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998). Promissory estoppel provides for damages as jus-

tice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). For example, the damages sustained by an employee who quits current employment to accept another job are different than the damages sustained by an employee who had no prior employment but may have moved to a new location in reliance upon a job offer. In the latter case, wages from prior employment are not considered in the determination of damages because the party did not give up prior employment in reliance upon the new offer. In neither case are damages to be based upon the wages the employee would have earned in the prospective employment because the employment was terminable at will.

In any event, the amount of damages to be awarded, if any, is a question of fact to be determined from the circumstances of each case, i.e., as justice requires.

We therefore reverse the judgment of the trial court and remand the cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., dissenting.

I respectfully dissent. In my opinion, the district court correctly determined as a matter of law that Goff-Hamel could not proceed under either a breach of contract or a promissory estoppel theory of recovery. I cannot reconcile the result reached by the majority or its rationale with our firmly established legal principles governing at-will employment. As succinctly and, in my view, correctly stated by the district court: "Since plaintiff could have been terminated after one day's employment without the defendant incurring liability, logic dictates she could also be terminated before the employment started."

The majority relies in part on *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), which concluded that the principles of promissory estoppel set forth in the Restatement of Contracts § 90 (1932) could apply to a termination of at-will employment which occurred before the employee actually started working because "under appropriate circumstances we

believe [Restatement of Contracts] section 90 would apply even after employment has begun." *Grouse*, 306 N.W.2d at 116. However, we held in *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994), that an at-will employee who was discharged a short time after she began working could not, as a matter of law, assert a promissory estoppel claim for damages resulting from resignation of her previous employment. Thus, this essential premise of the holding in *Grouse* is directly contrary to our law. Another basis for the decision in *Grouse,* as quoted in the majority opinion, is that one who is offered employment has "a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction" of the employer. 306 N.W.2d at 116. This concept is foreign to our law and entirely inconsistent with the established principle, acknowledged by the majority, that in the absence of contractual, statutory, or constitutional restrictions, an employer may discharge an at-will employee "whenever and for whatever cause it chooses." *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 163, 582 N.W.2d 362, 368 (1998). Accord *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995). See, also, *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). Thus, whether an at-will employee performs in a satisfactory manner is immaterial to the employer's right to discharge, and there is no basis under our law for an assumption that satisfactory performance by such an employee would create an entitlement to continued employment.

The majority also includes *Bower v. AT & T, Technologies, Inc.*, 852 F.2d 361 (8th Cir. 1988), among those decisions recognizing potential liability of the employer under a theory of promissory estoppel, notwithstanding the fact that the promised employment was at will. The federal court in *Bower* applied the substantive law of Missouri. Three months after *Bower* was decided, its reasoning was repudiated by the Missouri Court of Appeals in *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670 (Mo. App. 1988), which found *Bower* to be in direct conflict with Missouri law established in *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639 (Mo. App. 1961). Referring to the holding in *Bowers* upon which the majority relies in this case, the court in *Rosatone* stated:

> If we were to accept the holding in *Bower*, then we would be faced with the prospect of anomalous results such as the following: Suppose plaintiff in this case had not been told not to report to work. Instead, suppose plaintiff packed his belongings, sold his house, and moved himself and his family to a new location to commence employment with defendant. After working one day, plaintiff is discharged. The plaintiff in this example would be denied recovery altogether, although he incurred considerably more "reliance" damages than were alleged by the plaintiff in the case at bar, who, under *Bower* would be allowed to recover.

761 S.W.2d at 673. See, also, *Faust v. Ryder Commercial Leasing & Serv.*, 954 S.W.2d 383 (Mo. App. 1997), holding that under *Morsinkhoff* and *Rosatone*, a promise to hire an at-will employee could not form the basis for promissory estoppel regardless of the nature of damages claimed. The logical inconsistency cited in *Rosatone* as the basis for rejecting *Bower* now exists in our jurisprudence by virtue of the holding of the majority in this case and our prior holding in *Merrick v. Thomas, supra.*

The conflict between the court's decision today and the law of at-will employment is further demonstrated by the manner in which the majority addresses the issue of damages. Goff-Hamel's damage claim is based entirely upon her allegation that after learning on October 3, 1993, that appellee had withdrawn its offer of employment, she was unable to find "comparable" full-time employment until May 15, 1995. The majority acknowledges that under the theory of recovery which it recognizes in this case, damages cannot be "based upon the wages the employee would have earned in the prospective employment because the employment was terminable at will." Following the same logic, damages based upon wage loss during any *interval* between withdrawal of a promise of at-will employment and the securing of "comparable" employment would not be recoverable, because the promised employment could have been terminated by either party at any time after it had begun. Thus, the record reflects no factual basis upon which damages claimed by Goff-Hamel could be awarded under the remedy which the majority recognizes.

I would follow what I consider to be the better reasoned view, that promissory estoppel may not be utilized to remedy an unfulfilled promise of at-will employment. See, *White v. Roche Biomedical Laboratories, Inc.*, 807 F. Supp. 1212 (D.S.C. 1992); *Bakotich v. Swanson*, 91 Wash. App. 311, 957 P.2d 275 (1998); *Faust v. Ryder Commercial Leasing & Serv., supra*; *Heinritz v. Lawrence University*, 194 Wis. 2d 606, 535 N.W.2d 81 (Wis. App. 1995); *Meerman v Murco, Inc*, 205 Mich. App. 610, 517 N.W.2d 832 (1994); *Rosatone v. GTE Sprint Communications, supra*; *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., supra*. I acknowledge that this reasoning would produce a seemingly harsh result from the perspective of Goff-Hamel under the facts of this case, but to some degree, this is inherent in the concept of at-will employment. For example, in *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 158, 517 N.W.2d 382, 385 (1994), a 22-year employee was discharged " 'without any notification, cause or reason,' " and although this action may seem harsh, we held that it was permissible where there was no contractual provision for employment of specific duration. Similarly, an employer which has made a significant expenditure in training an at-will employee may feel harshly treated if, upon completing the training, the employee immediately utilizes his or her newly acquired skills to secure more remunerative employment with a competitor. If the law of at-will employment were regularly bent to circumvent what some may consider a harsh result in a particular case, its path would soon become hopelessly circuitous and impossible to follow.

Employment for a specific duration imposes certain benefits and burdens upon each party to the relationship. Under our established law, parties wishing to create such a relationship must do so by contract. Where, as in this case, the parties have not chosen to impose contractual obligations upon themselves, it is my view that a court should not utilize the principle of promissory estoppel to impose the subjective expectations of either party upon the other. I agree with the view that in the context of an employment relationship, promissory estoppel "should be construed 'in such a way that it compl[e]ments, rather than undermines, traditional contract principles.' " *White v. Roche Biomedical Laboratories, Inc.*, 807 F. Supp. at 1220,

quoting *Blanton Enterprises, Inc. v. Burger King Corp.*, 680 F. Supp. 753 (D.S.C. 1988). In my opinion, the majority has done just the opposite in this case.

For these reasons, I would affirm the judgment of the district court.

CONNOLLY, J., joins in this dissent.

STATE OF NEBRASKA EX REL. ACME RUG CLEANER, INC., AND ROGER W. PETTIT, RELATORS, V. HONORABLE MARY G. LIKES, JUDGE, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

588 N.W.2d 783

Filed January 29, 1999. No. S-97-1160.

1. **Mandamus: Words and Phrases.** Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
2. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
3. **Pretrial Procedure: Evidence: Impeachment.** A trial court has discretion in the matter of discovery where material is sought for impeachment purposes.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
5. **Pretrial Procedure: Evidence: Impeachment.** A trial court must balance the competing interests and the relevance of the information sought by discovery for impeachment purposes against the burdensomeness of its production.
6. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.

Original action. Peremptory writ issued.

Thomas J. Culhane and Kevin R. McManaman, of Erickson & Sederstrom, P.C., for relators.

E. Terry Sibbernsen and Mandy L. Stringenz, of E. Terry Sibbernsen, P.C., for amicus curiae Jayne Kanger.

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

WRIGHT, J.

NATURE OF CASE

The relators, Acme Rug Cleaner, Inc., and Roger W. Pettit, seek a writ of mandamus, compelling the district court to vacate its overruling of their motion to quash a subpoena duces tecum. We granted leave to file this original action and now issue a peremptory writ of mandamus.

FACTS

Jayne Kanger sued Acme Rug Cleaner, Inc., and Roger W. Pettit (collectively referred to as Acme) in Douglas County District Court. On October 9, 1997, as part of pretrial discovery, Kanger served notice of her intent to take the deposition of Dr. Joel Cotton, a physician who was to testify on behalf of Acme as an expert witness. A subpoena duces tecum was served, directing Cotton to produce certain information and materials at the time of his scheduled deposition. In response, Acme moved to quash the subpoena and requested a protective order. Acme objected to paragraphs 5, 6, and 7 of the subpoena for the reason that the items requested therein were not relevant or material and would be unduly burdensome and expensive to produce. The paragraphs at issue requested the following:

> 5. The names of all individuals that you have examined on behalf of insurance carriers or defense attorneys within five (5) years preceding this deposition.
>
> 6. The amount of charges for each individual as set forth in No. 5 above.
>
> 7. The names of any case, the court case number, the name of the person examined, and the names of the attorneys involved and charges for any deposition or court testimony within a period of five (5) years preceding October 21, 1997.

At the hearing on the motion to quash, Acme offered the affidavit of Karen Breen, office manager for Cotton's medical partnership. The relevant part of the affidavit stated:

3. The subpoena requests the names of all individuals who have been examined on behalf of insurance carriers or defense attorneys within the last five years by Dr. Cotton. Our office opens approximately 3,500 new patient files every year. New files are not opened under a particular doctor's name and no separate record is kept of those files which are opened for the purpose of an examination requested by an insurance carrier or defense attorney. To ascertain the information requested in paragraphs 5 and 6 of the subpoena it would be necessary to review the contents of each file opened by this office during the last five years to determine whether it involved an examination on behalf of an insurance carrier or defense attorney.

4. I have also reviewed paragraph 7 of the subpoena, which requests the court case number, the name of the person examined, and the names of the attorneys involved and charges for any deposition or court testimony given by Dr. Cotton within the last five years. Our office does not maintain separate records of court or deposition testimony given by Dr. Cotton during the last five years. It would not be possible to ascertain the information requested without a review of each patient file opened during the last five years, with the exception that our office has maintained a list, by date and patient name, which shows those patients with regard to whom Dr. Cotton has testified by deposition or at trial since July 1, 1996.

The district court judge overruled Acme's motion to quash and for a protective order. Cotton declined to further participate or testify as an expert witness rather than produce the information specified in paragraphs 5, 6, and 7 of the subpoena, and his deposition was canceled. We granted Acme's application to file an original action for a peremptory writ of mandamus compelling the judge to vacate her order overruling the motion to quash and for a protective order. We also granted an alternative writ of mandamus, ordering the judge to show cause why a peremptory writ should not be issued, and we stayed the underlying proceedings. The judge reaffirmed her prior order, and subsequently, a hearing was held in front of a special master for findings of fact relevant to Acme's petition for writ of man-

damus. At the hearing, in addition to Breen's affidavit, Cotton's affidavit was offered, which adopted Breen's explanation regarding the difficulty in obtaining the requested information.

The special master found:

> Dr. Cotton's medical partnership office opens approximately 3,500 new patient files every year. New files are not opened under a particular doctor's name, and no separate record is kept of those files which are opened for the purpose of an examination requested by an insurance carrier or defense attorney. To ascertain the information requested in paragraphs 5 and 6 of the subpoena, it would be necessary for someone to review the contents of each file opened by the partnership during the last five years, a total of approximately 17,500 files, to determine whether the file involved an examination at the request of an insurance carrier or defense attorney.

Further, the special master found that Cotton's office had not made separate records regarding court and deposition testimony given by Cotton during the prior 5 years or regarding the names of individuals examined on behalf of insurance carriers or defense attorneys and that it would not be possible to ascertain the information requested in paragraphs 5, 6, and 7 of the subpoena without a review of each patient file opened during the prior 5 years. An exception was that Cotton's office has maintained a list, by date and patient number, which shows those patients with regard to whom Cotton has testified by deposition or at trial since July 1, 1996. No showing was made that it would have been impossible or impractical for Acme to obtain the services and testimony of another physician willing to comply with the requirements of the subpoena.

ASSIGNMENTS OF ERROR

Acme contends, in summary, that the district court erred in failing to grant the motion to quash and in failing to issue a protective order pursuant to Neb. Ct. R. of Discovery 26(c) (rev. 1996). Acme asserts that mandamus is the only adequate remedy and that unless the subpoena is quashed or a protective order issued limiting the scope or methods of discovery, Cotton will refuse to testify rather than attempt to comply with the subpoena.

ANALYSIS

Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998).

Rule 26 sets forth the general provisions governing discovery. Under rule 26(b)(1),

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Under rule 26(c),

> [u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the district court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had;
>
> . . . .
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters[.]

Generally, the control of discovery is a matter for judicial discretion. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). We have more specifically stated that a trial court has discretion in the matter of discovery where material is sought for impeachment purposes. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998); *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998).

The subpoena duces tecum requests documentation regarding all individuals Cotton has examined on behalf of insurance carriers and for defense attorneys within the past 5 years; the charges therefor; and the names and numbers of cases, the persons examined, and the attorneys involved. This information is sought for purposes of discovering bias which might affect Cotton's credibility as an expert witness.

In our determination of whether mandamus applies to an issue of discovery, we consider whether the trial court clearly abused its discretion in not quashing the subpoena or issuing a protective order which limited the nature of the discovery. Whether the trial court abused its discretion is determined by whether Acme has a clear legal right to the relief sought and whether there is a corresponding duty on the part of the trial court to quash or limit the scope of the discovery. Absent a clear legal right, the trial court's refusal to quash the subpoena is left to the discretion of the court. In addition, Acme must establish that it has no other plain and adequate remedy available.

In *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995), we issued a peremptory writ of mandamus, directing the trial court to vacate its order denying FirsTier's motion to compel discovery and to sustain FirsTier's motion to

compel discovery. FirsTier sought discovery of a fee arrangement between the law firm which had been disqualified from representing the relator and the relator's successor counsel. The question of whether the disqualified firm was participating with successor counsel was highly relevant to a pending action. We explained that the trial court had a clear and absolute duty to allow the discovery requested. We noted that although the discovery order could be reviewed from a final judgment, such remedy was inadequate because to wait for an appeal on the issue would mean that any divulgences of relevant confidences and secrets of disqualified counsel would have already occurred and the parties thus could not be returned to the status quo.

Heretofore, we have not addressed whether a writ of mandamus will lie to direct a trial court to quash a subpoena and issue a protective order on the basis that the requested discovery constitutes an undue burden upon the witness. An examination of cases from other jurisdictions is helpful to our analysis.

In *Syken v. Elkins*, 644 So. 2d 539 (Fla. App. 1994), the plaintiff sought, inter alia, to compel the defendant's expert witness physician to produce documentation of income earned by the expert from independent medical exams (IME's) since January 1, 1990; the percentage of IME income relative to private patient income since January 1; the number of IME's performed for insurance carriers and defense attorneys since January 1; the amount charged for IME's; and the number of impairment ratings, court appearances, and attorney conferences since January 1990, and the charges for these.

In response, the physician stated that his patient files were kept alphabetically and would have to be reviewed individually in order to gather the requested information. Prior to the hearing, the physician submitted a notarized affidavit which stated in part that on an average he saw 15.33 patients per day, of which 1.5 were seen for performing IME's. He worked approximately 48 weeks per year and estimated that he saw 2,944 patients, of which 288 were for IME's. The average charge for an IME was $500, and a reasonable estimate of his income from IME's was $144,000 per year. At a hearing on the defendant's motion for a protective order, the physician stated that his patient files numbered some 15,000 in the past 25 years, and he

objected to the burden imposed and claimed that his 1099 forms were not probative. After the hearing, the trial court required the compilation of reports, the implementation of new procedures for recording IME's, the creation of new documents evidencing the time spent on IME's, and the production of the physician's tax forms for the last 3 years.

The appellate court accepted certiorari to harmonize divergent opinions of the court involving the scope of discovery reasonably necessary to impeach the testimony of an opponent's medical witness. While the discovery rules were broadly written so as to allow discovery of any relevant matter not privileged, the appellate court noted that in the context of medical expert witnesses, the courts in Florida have long held that the trial court must balance the competing interests of the relevancy of the discovery information sought as impeachment against the burdensomeness of its production. En banc, the court concluded that to demonstrate the probability of bias, it was sufficient for a physician to give an honest estimate of IME's and total patients seen in a year, and not an exact number. The court reasoned that a doctor should not be required to disclose the amount of money he or she earned from expert witness work or disclose total income.

The appellate court set forth the following guidelines:

> [D]iscovery of an opposing medical expert for impeachment is limited by the following criteria:
>
> 1. The medical expert may be deposed either orally or by written deposition.
>
> 2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
>
> 3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
>
> 4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she

performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.

5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.

6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.

7. The patient's privacy must be observed.

8. An expert may not be compelled to compile or produce nonexistent documents.

Syken v. Elkins, 644 So. 2d 539, 546 (Fla. App. 1994).

The appellate court concluded that the data suggested by its guidelines would normally be sufficient to show the jury the expert's background and orientation and that the opponent could with minimal cross-examination make it perfectly clear to a jury that "a defense doctor testifies as a defense doctor, and [a] plaintiff's doctor testifies as a plaintiff's doctor, and that each may spend considerable time doing just that." *Id.* at 547. The court noted that if it were disclosed that the witness had falsified or misrepresented the required data, the witness could be excluded from testifying and receive other sanctions, and that discretion to vary the guidelines could be exercised where appropriate.

Unit Rig & Equipment Co. v. East, 514 P.2d 396 (Okla. 1973), was an original action to prohibit the enforcement of an order directing the defendant's medical expert to appear with certain records so that the plaintiff's attorney could take his deposition. The court held that the plaintiff was entitled to take the deposition and examine the records of the defendant's medical expert who had examined the plaintiff as long as they did not require the doctor to violate his patient-physician relationship with other patients.

In *Jones v. Bordman*, 243 Kan. 444, 759 P.2d 953 (1988), the Supreme Court of Kansas held that the denial of a motion to quash a subpoena duces tecum for a witness' medical and tax

records was improper. The plaintiffs had sought to obtain extensive documentary materials from the defendant's medical expert, including all medical reports made by him for the past 6 years, income tax returns, and a list of all cases in which he served as an expert witness for the defendant's attorneys.

Kansas law permitted the discovery of material that was reasonably calculated to lead to the discovery of admissible evidence. However, the court opined that the medical records pertaining to persons who were not parties to the action were not relevant and, therefore, inadmissible. The court stated that it was proper to ask what percentage of a physician's practice involved examining, diagnosing, and/or testifying for defendants and what amount the physician was paid for such work. A showing of bias or prejudice did not require that the details of those medical reports be disclosed, and the law did not contemplate the discovery of medical records of persons who were not parties to the lawsuit for the sole purpose of obtaining evidence which might show a bias or prejudice. Since the information sought did not appear reasonably calculated to lead to the discovery of admissible evidence, the subpoena was not allowed.

In *Allen v. Superior Court of Contra Costa County*, 151 Cal. App. 3d 447, 198 Cal. Rptr. 737 (1984), the appellate court held that the trial court had erred in granting a subpoena duces tecum requiring a medical expert witness appearing for the defendant to produce, among other things, records of any kind that would reveal what portion of the doctor's total income was from treatment of patients, as opposed to evaluation of persons for defense for the prior 5 years; records related to depositions in cases over the prior 5 years when he was asked by the defense to examine someone; and all reports of examinations and evaluations prepared at defense request over the prior 5 years.

Concluding there was no showing that the information sought could not be obtained through other means, such as by conducting a deposition without the production of records, the appellate court found that the trial court had abused its discretion when it failed to require a less intrusive method of discovery. The appellate court stated that the medical expert could be asked questions directed toward disclosing what percentage of his practice involved examining patients for defense and how

much compensation he derived from defense work. To show bias or prejudice, the party seeking discovery need not learn the details of the expert's billing and accounting or other specifics of his prior testimony and depositions. Exact information as to the number of cases and amounts of compensation paid to medical experts was unnecessary for the purpose of showing a bias. The court thus issued a "writ of mandate" to protect the witness.

In *Davis v. Hinde*, 141 Ill. App. 3d 664, 490 N.E.2d 1049 (1986), the court held that the defendant in a personal injury action was not entitled to discover a list of names and addresses of clients of plaintiff's attorney who had been treated by plaintiff's physicians for the past 3 years. Despite the contention that the names were needed for purposes of showing bias and attacking the credibility of the physician, the request was too broad and should have been limited to the number and frequency of referrals and any financial benefit derived therefrom.

From our examination of the above cases, we conclude that the trial court must balance the competing interests and the relevance of the information sought by discovery for impeachment purposes against the burdensomeness of its production. This reasoning is used in our consideration of whether the trial court had a clear legal duty to limit the discovery and whether Acme had a corresponding legal right. Rule 26 recognizes the balancing of such interests. Parties may obtain discovery regarding any matter, not privileged, which is relevant, and the district court may make any order which justice requires to protect a party from undue burden or expense. See rule 26(b)(1) and (c).

Kanger has a right to discover information that might impeach Acme's expert witness. Acme has a corresponding right to choose its expert witness and not have such witness burdened to the extent that the witness will refuse to testify. The district court's refusal to balance such interests and establish guidelines for the discovery was an abuse of discretion. The clear legal right to have the discovery limited and the failure of the trial court to perform its duty by limiting the discovery establishes the first two criteria for a peremptory writ of mandamus. In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is

legally obligated to act. *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998); *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995).

With regard to whether Acme has an adequate remedy at law, we note that Acme failed to establish that it could not proceed without the use of its designated expert or that it was impossible to obtain the testimony of another physician who was willing to comply with the subpoena. However, we conclude that under the facts of this case, no other remedy was available to Acme because no other remedy would prevent Acme from losing the expert of its choice. Because Acme had a clear legal right to a protective order, the trial court had a clear duty to issue such protective order, and because there is no other plain and adequate remedy available in the ordinary course of the law, mandamus will lie to protect Acme's expert witness from the extensive discovery sought in this case.

With regard to discovery of the opposing medical expert for purposes of impeachment, the following are intended as guidelines: (1) The expert may be asked what he or she has been asked to do in the pending case and the compensation paid to the expert. (2) The expert may be examined in general about his or her expertise and the nature of his or her work. (3) The expert may be asked to give an approximation of the amount of work performed as an expert for plaintiffs and for defendants and the percentage of each. (4) The expert may be asked what portion of his or her total work is performed as an expert witness, including an approximation of hours expended, percentage of income earned as an expert, and the approximate number of independent medical exams performed per year. (5) The expert shall not be required to disclose the amount of income earned as an expert, but must disclose the percentage of total income received for work performed as an expert. (6) In all cases, the privacy of the patients seen and treated by such expert shall be observed. (7) The expert shall not be required to compile or produce documents that are nonexistent other than the information that is required in these guidelines. (8) To the extent that the expert has such information reasonably available, the expert shall be required to identify each case in which the expert has testified at trial or by deposition, performed an IME, or other-

wise furnished evidence in such case and whether the expert was retained by the plaintiff or the defendant. Such information shall be furnished for the prior 3 years.

The special master found that Cotton has compiled certain patient information since July 1, 1996. As to such information so compiled, in the event that Cotton testifies, he shall first produce the name of any case in which he has testified, given a deposition, performed an IME, or otherwise furnished information or evidence in such case and shall disclose whether he furnished such information on behalf of the plaintiff or the defendant. He shall also disclose the total number of individuals in each of the above categories that he has examined on behalf of insurance carriers, defense attorneys, and plaintiffs' attorneys since July 1, 1996.

In the event that the expert elects not to furnish such information, then he or she may be excluded from testifying or being a witness in the case. The trial courts shall have discretion to vary such guidelines where appropriate and where the facts of the case so dictate. To the extent that such guidelines will have application to future witnesses, they shall serve as a basis for the trial courts' rulings for discovery.

CONCLUSION

We order that a peremptory writ of mandamus be issued, directing the respondent to vacate the order denying the motion to quash and to enter an order sustaining the motion to quash subject to the guidelines set forth herein.

PEREMPTORY WRIT ISSUED.

MARTHA M. POLL, APPELLEE, V. MARK A. POLL, APPELLANT.

588 N.W.2d 583

Filed January 29, 1999. No. S-97-1324.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Appeal and Error.** Errors assigned but not argued will not be addressed.

3. **Equity: Judges: Appeal and Error.** In an equity suit, the denial by a trial court of a motion for disqualification of the trial judge is immaterial on appeal, since the case is tried de novo in the reviewing court.
4. **Due Process.** Due process does not guarantee an individual any particular form or method of procedure.
5. ____. The requirements of due process are satisfied if an individual has reasonable notice and reasonable opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it.
6. **Visitation.** Although limits on visitation are an extreme measure, they may be warranted where it is in the child's best interests.

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

Robert Wm. Chapin, Jr., for appellant.

Lisa A. Liekhus, of Willet, Liekhus & Carothers, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This appeal arises from postdissolution modification of visitation and contempt proceedings. The proceedings were brought on by the application to modify visitation filed by Martha M. Poll, the mother, to which Mark A. Poll, the father, responded by seeking an order of contempt.

The father appeals certain orders of the district court for Gage County. On appeal, the father, who contends he is indigent, claims that the trial court denied him procedural due process by refusing to appoint counsel to represent him and erred by granting the mother's application to limit visitation to supervised visitation. For the reasons set forth below, we affirm. In reaching our decision, we conclude, inter alia, that due process does not require the appointment of counsel in this postdissolution modification of visitation case.

FACTS

According to the pleadings, the marriage of the parties was dissolved on September 7, 1995, and the mother was awarded custody of the parties' minor child, Brandon Scott Poll, born

September 10, 1987, subject to visitation by the father. Visitation proceeded until December 15, 1995.

The mother testified that on December 16, 1995, she was pinned down against her will by the father at her apartment. The father denied the event occurred but was convicted of criminal trespass and false imprisonment, for which he was imprisoned from August 28, 1996, to January 25, 1997.

As to another incident, the mother testified that the father took the child from day care on January 16, 1996, without her permission. The mother eventually retrieved the child from the Sarpy County sheriff's office on January 19.

The mother obtained a protection order against the father for herself and the child on March 18, 1996. The mother denied the father visitation following expiration of the protection order. In June 1997, the mother and child moved to a protective shelter, where they were residing at the time of the trial.

The mother filed an application to modify visitation in the district court for Gage County on February 3, 1997. In the application, the mother sought an end to the father's visitation or, in the alternative, a provision for supervised visitation.

The father denied the majority of the mother's allegations and on April 21, 1997, applied for a contempt citation against the mother for denial of visitation in contravention of the divorce decree.

Trial was held on September 12 and 17 and October 8, 1997. The father proceeded pro se. Thirteen witnesses testified, including the mother and father. The bill of exceptions is 559 pages in length. Numerous exhibits were received pertaining to diaries, the father's criminal convictions, the child's schoolwork, and other documentary evidence.

The mother called witnesses who supported her contentions that, inter alia, she attends church with the child, she and the child have received counseling, the child has indicated that the father is physically aggressive, the false imprisonment occurred as she had related, the child was abducted from day care by the father, and she properly cares for the child.

The father called witnesses who supported his contentions that, inter alia, he properly cares for the child and the mother denied him visitation.

During the course of the trial, the father asked the court to appoint counsel, which the trial court denied. Upon conclusion of the trial, the court took the mother's application to modify and the father's motion for contempt under advisement.

On October 23, 1997, the trial court filed its written order, which is eight pages in length. In it, the trial court, inter alia, grants the mother's application for supervised visitation and denies the father's motion for contempt. The father appeals. Other testimony and facts relevant to our consideration of the father's assignments of error will be set forth in our analysis of the appeal.

ASSIGNMENTS OF ERROR

As his assignments of error, the father claims that the trial judge erred (1) by not finding the mother in contempt, (2) by not recusing himself, (3) by not appointing counsel for the father, and (4) by restricting the visitation of the father.

STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998).

ANALYSIS

Contempt.

The father assigns as error the trial court's failure to find the mother in contempt. The father does not argue this assignment of error in his brief. Errors assigned but not argued will not be addressed. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

Recusal.

The father assigns as error the trial judge's refusal to recuse himself. The father argues that the trial judge was not impartial due primarily to the trial judge's familiarity with the criminal proceedings against the father.

In an equity suit, the denial by a trial court of a motion for disqualification of the trial judge is immaterial on appeal, since

the case is tried de novo in the reviewing court. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980). Where a case on appeal is tried de novo, refusal by the trial judge to disqualify himself or herself is immaterial. *Garrett v. Garrett*, 3 Neb. App. 384, 527 N.W.2d 213 (1995). In this case, the decision of the trial judge in refusing to disqualify himself was not an abuse of discretion. See *Deacon, supra.*

Appointment of Counsel in Proceeding to Modify Visitation.

The father claims that he is indigent and that the trial court erred in failing to appoint counsel to represent him in this case involving the mother's application to modify visitation. The father claims he was denied procedural due process. We do not agree.

In response to the father's claim, the mother asserts that the father received the process he was due and observes parenthetically that the father may not be indigent and, therefore, that counsel need not be appointed.

We assume for the sake of argument that the father is indigent. Accordingly, we proceed to analyze the father's due process claim that he was entitled to the appointment of counsel at the hearing on the mother's application to modify visitation.

The father argues on appeal that the relationship between a parent and a child is constitutionally protected and cannot be affected without procedural due process. The father claims that he was entitled to appointment of counsel in this case by virtue of the due process requirements of the 14th Amendment. The father misperceives the scope and nature of the proceedings herein and the limited consequences of the trial court's ruling modifying visitation.

It is axiomatic that due process does not guarantee an individual any particular form or method of procedure. *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987). See, U.S. Const. amend. V and XIV; Neb. Const. art. I, § 3. The requirements of due process are satisfied if an individual has reasonable notice and reasonable opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it. *Hroch, supra*; *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

In a case involving the dissolution of a marriage, given the significant interest at stake, the U.S. Supreme Court has held that due process prohibits a state from denying access to its courts solely because of inability to pay court fees. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). Similarly, in *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the U.S. Supreme Court held that a Mississippi statute that required a mother to pay in advance for record preparation to perfect her appeal from the termination of her parental rights violated the mother's equal protection and due process rights.

In evaluating the constitutional claims, the Court observed in *M.L.B.* that termination of parental rights decrees are among the most severe forms of state action, that the label "civil" should not entice an appellate court into refusing to evaluate the due process claim regarding termination of parental rights, and that decrees terminating parental rights work a unique kind of deprivation which sets them "apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody." 519 U.S. at 127. The *M.L.B.* court continued: "In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.' " 519 U.S. at 127-28.

In Nebraska jurisprudence, it has been held that the appointment of counsel may be required in either criminal or civil cases where a party may be deprived of his or her physical liberty. *Allen v. Sheriff of Lancaster Cty.*, 245 Neb. 149, 511 N.W.2d 125 (1994). In *Allen*, we concluded in a habeas corpus appeal that an indigent litigant had a right to appointed counsel in a contempt action for failure to pay a debt assigned to him in a dissolution decree, where he was jailed for contempt. In *Allen*, we relied on *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989).

In *Carroll*, we concluded that a putative father in a paternity action had a due process right to court-appointed counsel in that case where the county attorney's office assisted the mother in prosecuting her claim. In addition, we concluded that due pro-

cess requires that an indigent defendant have an absolute right to court-appointed counsel in state-initiated paternity proceedings. *Id.* We observed in *Carroll* that paternity cases raise the monumental issue of the creation of parent-child relationships, that a paternity determination is res judicata as to later proceedings, and that upon a finding of paternity, a father is exposed to the potential threat of imprisonment in the event of nonpayment of support. In *Carroll*, we concluded that under the facts of that case, "[t]he concepts of 'fundamental fairness' and 'meaningful opportunity to be heard' which are integral to the notion of due process make the right to counsel mandatory." 228 Neb. at 579, 423 N.W.2d at 767. Thus, under Nebraska law, in either a criminal or a civil action, due process may require appointment of counsel where a significant right is at stake in a case ordinarily brought on by the State or where a deprivation of liberty is threatened.

We have reviewed the literature regarding appointment of counsel in dissolution cases, including cases cited by the parties on appeal. It is the majority rule that a party is not entitled to appointment of counsel in a dissolution action. See, e.g., *Harmon v. Harmon*, 943 P.2d 599 (Okla. 1997) (holding that husband did not have constitutionally protected right to counsel, although case involved property issues and issues concerning custody and visitation with minor child); *Gibbs v. Gibbs*, 941 P.2d 1014 (Okla. Civ. App. 1997) (holding no right to counsel in marital dissolution because civil in nature); *In re Marriage of Smith*, 537 N.W.2d 678 (Iowa 1995) (holding that absence of counsel satisfied due process where pro se litigant did not contest petition for dissolution of marriage); *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977) (holding no right under 6th or 14th Amendment to counsel in divorce action, evidently because civil in nature); *South v. South*, No. 02A01-9703-CV-00054, 1997 WL 426975 (Tenn. App. July 30, 1997) (holding that there is no right to appointment of counsel in dissolution action, because it is civil case); *Yeh v. Kisaka*, No. 3111-96-4, 1997 WL 310061 (Va. App. June 10, 1997) (holding that right to counsel does not extend to civil domestic cases of divorce and child custody, relying on *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)); *Calhoun v. Calhoun*, No.

CA95-11-024, 1996 WL 307128 (Ohio App. June 10, 1996) (holding no right to counsel in civil case between individual litigants); *Roth v. Roth*, 65 Ohio App. 3d 768, 585 N.E.2d 482 (1989) (holding no right of counsel in dissolution cases involving custody, because civil case between individual litigants); *Haller v Haller*, 168 Mich. App. 198, 423 N.W.2d 617 (1988) (holding no due process right to counsel in dissolution involving custody, because custody decree is subject to modification). Compare *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (holding that where father was represented by Alaska legal services corporation, mother had due process right to court-appointed counsel). For the sake of completeness, we note that we are aware that the appointment of counsel in a dissolution action may be discretionary with the court where custody is at issue and the statutes provide for such appointment. See N.Y. Judiciary-Court Acts-Family Court § 262(a)(v) (McKinney 1999). Nebraska has no such statutory provision.

With respect to visitation issues following a dissolution such as are raised in the case before us, the clear majority of courts hold that there is no right to court-appointed counsel. See, e.g., *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980) (holding no due process right to counsel in proceeding to terminate father's visitation rights); *Jocius v. Jocius*, 218 Wis. 2d 103, 580 N.W.2d 708 (Wis. App. 1998) (holding that there is no authority for appointment of counsel in postjudgment phase of dissolution proceeding involving physical placement of children). In *Meyer, supra*, the Maine Supreme Court noted that the proceeding to extinguish the father's visitation rights following divorce was not brought about by the state but was primarily a dispute between parents. Quoting *Danforth v. State Department of Health & Welfare*, 303 A.2d 794 (Me. 1973), the *Meyer* court noted that the analysis of whether to appoint counsel differs from proceedings such as neglect proceedings where " 'the full panoply of the traditional weapons of the state are marshalled against the defendant parents.' " 414 A.2d at 238.

In the instant case, the father claims that he is entitled to appointed counsel because a fundamental liberty interest is affected by the mother's application to modify visitation. The

father misperceives the scope and impact of the mother's application.

The instant proceeding is one brought on by an individual involving a dispute between parents. The "weapons" of the state have not been marshalled against the father. The subject matter of the proceeding is the adjustment of visitation, not the initiation or termination of parental rights. Indeed, the issues of custody and visitation remain subject to modification following dissolution by statute, see Neb. Rev. Stat. § 42-351 (Cum. Supp. 1996), and upon a proper showing, visitation more favorable to the father could be ordered. The father has not, as a result of the modification of the postdissolution visitation, suffered the severe deprivation that triggers the appointment of counsel in civil and criminal cases. The father's legal interest in his child is unaffected. The father received reasonable notice and an opportunity to be heard commensurate with the rights affected by the proceedings. We conclude that the father did not have a due process right to appointment of counsel in these proceedings involving the mother's application to modify visitation. The trial court did not err in not appointing counsel for the father.

Order Restricting Visitation.

In its order of October 23, 1997, the trial court suspended the father's visitation subject to a subsequent application by the father showing the existence of an arrangement for structured, monitored, supervised visitation. On appeal, the father argues that the order of supervised visitation is not supported by sufficient evidence and that his visitation should be unfettered. We do not agree.

As noted above in this opinion, although our standard of review is de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). In reviewing the decision of the trial court regarding visitation, we find no abuse of discretion.

There was ample evidence in the record that the child suffered from posttraumatic stress disorder and that the abduction incident when he was taken from day care was one of the trig-

gering factors. We understand the testimony to mean that the child suffers separation anxiety associated with physical placement with the father. The child told Ruth Ann Placek, a licensed mental health therapist and his counselor, that he fears the father. The child expressed these fears to Placek and has flashbacks of abusive events. Placek testified that the child's prognosis was guarded, that he should not be exposed to "triggering events," and that supervised visitation was indicated. The record shows that the mother and the child lived at a protective shelter at the time of trial in an effort to avoid the father.

With respect to the incident of December 16, 1995, there is conflicting testimony. However, it is undisputed that the father was convicted of second degree false imprisonment and trespass and served a sentence from August 28, 1996, to January 25, 1997, as a result thereof.

The mother has had custody of the child since the decree of dissolution, and they have a good relationship. The child expresses certain fears about being with the father. Although limits on visitation are an extreme measure, they may be warranted where they are in the child's best interests. *Koch v. Koch*, 219 Neb. 195, 361 N.W.2d 548 (1985). Based on this record, we find that the child's best interests were served by an order of supervised visitation. The trial court did not err in ordering supervised visitation.

CONCLUSION

The father's assignments of error are without merit. The father did not argue the assigned error that the trial court failed to grant his motion for contempt, and we do not consider it. The trial judge did not err in refusing to recuse himself. The trial court did not err in refusing to appoint counsel for the father in this case involving the application of the mother to modify visitation. The trial court's order of supervised visitation was proper. We, therefore, affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM D. KINSER, JR., APPELLANT.

588 N.W.2d 794

Filed January 29, 1999. No. S-98-469.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Final Orders: Speedy Trial: Appeal and Error.** Resolution of a nonfrivolous motion to discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995) is a ruling affecting a substantial right made in a special proceeding and is therefore final and appealable.
4. **Courts: Speedy Trial: Time: Appeal and Error.** For purposes of Neb. Rev. Stat. § 29-1207(3) (Reissue 1995), the date of the "mandate on remand" is the date on which the district court first takes action pursuant to the mandate.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed and remanded for further proceedings.

James R. Mowbray, of Nebraska Commission on Public Advocacy, and, on brief, Robin W. Hadfield for appellant.

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

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

STEPHAN, J.

Following a jury trial in the district court for Box Butte County, William D. Kinser, Jr., was convicted of first degree assault, second degree assault, and use of a weapon in the commission of a felony. Based upon its determination that the trial court erred in refusing to instruct the jury on the issue of self-defense, the Nebraska Court of Appeals reversed Kinser's convictions and remanded the cause for a new trial. We affirmed the judgment of the Court of Appeals in *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). Following remand to the district

court, Kinser filed a motion to discharge based upon his contention that he was denied his statutory right to a speedy trial pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995). The motion was denied, and Kinser perfected this appeal. We affirm.

BACKGROUND

The judgment of the Court of Appeals reversing Kinser's convictions and remanding the cause for new trial was entered on June 5, 1996. See *State v. Kinser*, 4 Neb. App. xxi (case No. A-95-922, June 5, 1996). We granted the State's petition for further review and affirmed the judgment of the Court of Appeals in an opinion filed on June 6, 1997. *State v. Kinser, supra.* We overruled the State's motion for rehearing on July 16, 1997.

We issued our mandate to the Court of Appeals on October 23, 1997, and the mandate of the Court of Appeals directed to the district court for Box Butte County was issued on the same date. It was received by the clerk of the district court on October 27. The mandate was spread upon the record of the district court on November 18. On December 10, the district court set trial for February 2, 1998. However, on January 12, 1998, the trial was continued to May at Kinser's request. Kinser filed his motion to discharge on April 28. Following a hearing, the district court denied the motion on May 5, and Kinser perfected this timely appeal, which was placed directly on our docket.

ASSIGNMENT OF ERROR

Kinser assigns that the district court erred in overruling his motion to discharge.

STANDARD OF REVIEW

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). However, statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998).

ANALYSIS

Kinser's motion to discharge was filed pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995), which affords a mechanism for enforcement of the statutory right to speedy trial conferred by § 29-1207. See *State v. Gibbs, supra.* Resolution of a non-frivolous motion to discharge pursuant to § 29-1208 is a ruling affecting a substantial right made in a special proceeding and is therefore final and appealable. *State v. Gibbs, supra.*

Kinser argues that his right to a speedy trial following reversal of his convictions was violated by delays that are "attributable to the State and to the judicial system." Brief for appellant at 10. He contends that the State "dragged out the appeals process," *id.*, by its unsuccessful motion for rehearing following issuance of our opinion in *State v. Kinser, supra*, and that the mandate was not issued until approximately 3 months after our disposition of that motion. Because of these delays, Kinser contends that the 6-month period in which the State was required to retry him should be counted from June 6, 1997, the date on which our opinion was issued.

Kinser's argument is contrary to the statutory language which controls the issues presented in this appeal. Section 29-1207(1) provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." The statute specifies two categories of events from which the 6-month period may be computed: The date the indictment is returned or the information filed, see § 29-1207(2), or "[i]f such defendant is to be tried again following a mistrial, an order for a new trial, or *an appeal* or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, *or the mandate on remand.*" (Emphasis supplied.) § 29-1207(3). Section 29-1207(4) specifies various periods of delay which "shall be excluded in computing the time for trial," including any "period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." § 29-1207(4)(b). Clearly, § 29-1207(4) does not specify when the 6-month clock begins to run, but, rather, those periods during which its running is tolled.

Kinser relies on *State v. Wilcox*, 224 Neb. 138, 140, 395 N.W.2d 772, 774 (1986), in which we stated: "Neither does judicial delay, absent a showing by the State of good cause, toll the [speedy trial] statute . . . ." *Wilcox* addressed the issue of whether delays by a trial court could be excluded from the 6-month period under § 29-1207(4). *Wilcox* is distinguishable from the present case, however, in that the clock was running at the time of the alleged delay. Here, Kinser is claiming that alleged delays occurring during the pendency of an appeal triggered the commencement of the 6-month period for retrial. We reject this argument because it is clear from the language of § 29-1207(3) that this 6-month period is triggered by the appellate court's mandate, not by the opinion which precedes the mandate. We need not determine whether any portion of the time during which Kinser's appeal was pending was an excludable period of delay under § 29-1207(4) because under the plain language of § 29-1207(3), the 6-month period was not running at the time of the alleged delays. Likewise, we need not determine whether delay during the pendency of an appeal would be relevant to a constitutional speedy trial claim, since Kinser asserts no such claim in this action.

The 6-month period in which the State was required to retry Kinser following his successful appeal therefore must be fixed by reference to the mandate which was issued pursuant to the appeal. Although § 29-1207(3) specifies that the period "shall commence to run from the date of . . . the mandate on remand," the statute does not state whether this refers to the date the mandate was issued by the appellate court, the date it was received by the district court to which the action is remanded for retrial, or the date on which such court first took action pursuant to the mandate.

In *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), without commenting on the issue, we computed the 6-month period for retrial following remand from the date when the mandate was received by the district court. In *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), we noted that retrial was scheduled well within 6 months from issuance of the mandate. However, in *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255

(1998), we recognized a distinction between the date when the district court receives a mandate from an appellate court and the date when it acts on the mandate. We stated: "It is the general rule that once the trial court acts upon a mandate issued by this court, this court loses jurisdiction over the cause except upon a subsequent appeal." *Id.* at 441, 577 N.W.2d at 258. Relying upon the following language in *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929), we stated:

> "It is not conceivable that both the supreme court and the district court could at the same time have jurisdiction of this cause. On the filing of the mandate in the district court, *and some action being taken thereon by it*, that court acquired jurisdiction, and this court lost any power thereafter to act in the case except upon a subsequent appeal."

(Emphasis supplied.) *State v. Belmarez*, 254 Neb. at 441, 577 N.W.2d at 258. Based upon these principles, we concluded that this court lacked jurisdiction to reinstate a previously dismissed appeal because the district court had conducted proceedings in the case following receipt of the mandate. We specifically noted that "the district court and this court could not have jurisdiction simultaneously." 254 Neb. at 443, 557 N.W.2d at 259.

In the present case, the mandate was issued by the clerk of this court on October 23, 1997, and filed in the district court on October 27. The district court first took action on the mandate by spreading it on the record on November 18, thus reacquiring jurisdiction from the appellate courts under our analysis in *Belmarez*. Since the district court could not retry Kinser until it had jurisdiction to do so, we hold that for purposes of § 29-1207(3), the date of the "mandate on remand" is the date on which the district court first takes action pursuant to the mandate, which in this case was November 18, 1997.

The original date established for Kinser's retrial was February 2, 1998, well within the 6-month period commencing on November 18, 1997. An excludable period of delay began on January 12, 1998, when the district court granted Kinser's motion to continue his trial to May 18. Thus, the 6-month period had not expired when Kinser filed his motion to discharge on April 28, and the district court did not err in overrul-

ing the motion. The judgment of the district court is therefore affirmed, and the cause is remanded for further proceedings.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

PHILIP H. WOODARD AND BESSIE WOODARD, APPELLANTS, v. CITY OF LINCOLN AND VIRGIL L. WELLS, APPELLEES.

588 N.W.2d 831

Filed February 5, 1999. No. S-97-241.

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. **Estoppel: Time.** A party can estop itself from relying on time-based defenses if it induces its opponent's delay in prosecuting the action.
4. **Estoppel: Political Subdivisions.** The state or one of its political subdivisions may be subject to equitable estoppel under compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice.
5. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
6. **Limitations of Actions: Political Subdivisions.** There is no duty on the part of political subdivisions or any other party to inform an adversary of the existence of a statute of limitations.
7. **Political Subdivisions Tort Claims Act: Notice.** With regard to a claim's content, substantial compliance with the statutory provisions supplies the requisite and sufficient notice to a political subdivision under the Political Subdivisions Tort Claims Act pursuant to Neb. Rev. Stat. § 13-905 (Reissue 1991).

8. ____: ____. Pursuant to Neb. Rev. Stat. § 13-905 (Reissue 1991), in order for a written notice to substantially comply with the requirements of the Political Subdivisions Tort Claims Act, such written notice must be filed with an individual or office designated in the act as the authorized recipient of claims.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded for further proceedings.

Richard Collin Mangrum, of Creighton University School of Law, for appellants.

Stephen L. Ahl and Michael A. England, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellees.

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

MCCORMACK, J.

This is a negligence action brought pursuant to the Nebraska Political Subdivisions Tort Claims Act (Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992). The suit arose out of a collision between appellee City of Lincoln's "Handi-Bus," driven by appellee Virgil L. Wells, and appellant Philip H. Woodard. Philip was struck by the Handi-Bus while riding his bicycle in a crosswalk at the intersection of 28th and D Streets and Capitol Parkway in Lincoln. Philip is suing the City of Lincoln (City) and Wells for damages arising from the collision. Bessie Woodard, Philip's wife, is also suing for loss of consortium.

The trial court granted summary judgment for the City and Wells, finding that the Woodards' petition had been filed after the running of the statute of limitations and that the City was not equitably estopped from raising the statute of limitations as a defense. The trial court also found that Bessie had failed to give written notice of her claim to the City within 1 year of the accident, as required by the Act.

The Nebraska Court of Appeals affirmed the judgment of the trial court, and we have taken the case on petition for further

review. We affirm in part, and in part reverse, and remand the cause for further proceedings.

BACKGROUND

Philip alleges that on May 28, 1992, he was riding his bicycle in the crosswalk across 28th Street at the intersection of 28th and D Streets and Capitol Parkway. A City Handi-Bus, driven by Wells, was stopped at the stop sign on 28th Street. The Handi-Bus began to turn onto Capitol Parkway and struck Philip, who suffered serious injuries as a result. Bessie claims a loss of consortium resulting from this same incident.

Shortly thereafter, Kent Imig, a claims specialist from the City's risk management office, met with the Woodards regarding the facts and circumstances of the accident. During this interview, Imig allegedly encouraged the Woodards not to retain counsel, but instead to negotiate directly with the City. This interview ultimately resulted in a "Letter of Understanding" dated July 7, 1992, which provided that voluntary payments would be made by the City to the Woodards, but that these payments would stop if either side retained counsel "for the purpose of representation for the May 28, 1992 accident." The letter further stated that it was not an admission of liability by the City, and it "reserves the rights of Mr. and Mrs. Philip Woodard to claim damages in the future on account of the . . . accident."

Pursuant to this letter, the City reimbursed Philip for various medical expenses and lost wages. The last voluntary payment was made on April 28, 1993, which included lost wages through April 15, when Philip returned to work. On May 12, Philip filed a written notice of claim with the City by a certified letter to James Faimon in the city attorney's office.

The City made several written settlement offers to the Woodards during 1994 and 1995, none of which were accepted. These offers were attached to the Woodards' reply as exhibits and reflect the following offers: an offer for $100,000 dated December 22, 1994, with the City obtaining credit for payments already made; a structured settlement, dated March 15, 1995, with an immediate cash payment of $50,000 and $500 payable monthly for life, guaranteed for 10 years; a structured settlement, dated April 19, 1995, with an immediate cash payment of $29,000, $1,000 payable monthly for 12 years, and $20,000

payable in 12 years as a future capital payment; and a structured settlement, dated August 7, 1995, with an immediate cash payment of $75,000, $500 payable monthly for 12 years, and $20,000 payable in 12 years as a future capital payment.

In November 1995, settlement negotiations between Imig and the Woodards broke down. At that time, the City turned the matter over to its insurance carrier and the Woodards first retained legal counsel. Only after the claim was turned over to the insurance carrier, some 3½ years after the accident, was the 2-year statute of limitations raised as an issue.

On March 22, 1996, the Woodards filed a petition against the City and Wells in the district court for Lancaster County, Nebraska. Philip asked for damages for past and future medical care and lost wages, and Bessie asked for damages for loss of consortium. In their answer, the City and Wells raised the affirmative defense that the case was barred by the statute of limitations, as well as that Bessie failed to submit a written claim to the City within 1 year after the claim accrued, as required by the Act. On these grounds, the City and Wells moved for summary judgment.

The Woodards responded that the City, through the letter of understanding and other conduct, had induced them to not retain counsel, had reserved their rights to make a future claim notwithstanding the Act, and was equitably estopped from asserting the statute of limitations as a defense. The trial court, relying on *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997), found that the Woodards had not established equitable estoppel and that their petition had been filed after the running of the Act's statute of limitations. The trial court additionally found that Bessie's loss of consortium claim was barred for lack of filing notice of the claim with the City within 1 year of the accident, and that neither Philip's written notice nor Bessie's signing of the letter of understanding constituted substantial compliance by Bessie with the notice requirement. Accordingly, the trial court granted summary judgment to the City and Wells.

The Woodards appealed the trial court's decision to the Court of Appeals, which, with one judge dissenting, affirmed the grant of summary judgment on the grounds that the Woodards' suits were barred by the statute of limitations. *Woodard v. City of*

Lincoln, 7 Neb. App. 11, 578 N.W.2d 892 (1998). The Court of Appeals did not determine whether Bessie's claim was barred for lack of filing notice, as this was unnecessary to the disposition of the case.

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. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998); *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

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. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

ASSIGNMENTS OF ERROR

The Woodards assign that the Court of Appeals erred by (1) requiring proof of active misrepresentation for estoppel in disregard of the broader standard of authority they cite as controlling; (2) not recognizing as a basis for equitable estoppel the City's concealment of material facts; (3) not recognizing as a basis for equitable estoppel the City's assertion that facts were otherwise than those which its previous conduct had been calculated to convey; (4) holding that the denial of estoppel based upon a judgment on the pleadings in *Bohl v. Buffalo Cty., supra*, controls the summary judgment motion in the instant case; and (5) not finding that compelling circumstances demand the application of estoppel on the facts of this case to avoid manifest injustice.

ANALYSIS

PHILIP'S CLAIM

This court recognized over 100 years ago that a party can estop itself from relying on time-based defenses if it induces its

opponent's delay in prosecuting the action. In *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, 59 N.W. 752 (1894), an insurance policy contained a 6-month statute of limitations for suits against the company on the policy. In holding that the insurance company could not rely on the limitation if it induced the delay, the court wrote:

> Persons undoubtedly authorized to represent the company to some extent and for some purposes in the adjustment of the loss were shown to have conducted negotiations and made proposals for settlement until after the expiration of six months. We have no doubt that if [the six-month limitation clause] is of any validity the company may, by its conduct, estop itself from claiming the benefit thereof, and that when the company by holding out prospects of an amicable settlement induces the plaintiff to forbear suit until after the expiration of the time limited, the company is thereby estopped from claiming the benefit of the special limitation.

Id. at 30, 59 N.W. at 755.

The situation facing the court today is remarkably similar to that in *Phenix Ins. Co. v. Rad Bila Hora Lodge, supra.* If the appellee in this case were a private party, there is no doubt that summary judgment would have been improper, given the allegations of inducement to delay made to the Woodards.

The City, as an appellee, is not a private party, however, but, rather, a political subdivision, and as such is subject to suit only through the Act. We stated in *Bohl v. Buffalo Cty.*, 251 Neb. 492, 498, 557 N.W.2d 668, 673 (1997), that "[t]his court has never applied, and will not apply in this case, the doctrine of equitable estoppel to excuse a plaintiff's failure to comply with the Political Subdivisions Tort Claims Act."

In *Bohl v. Buffalo Cty., supra*, Bohl had signed a partial payment agreement, drawn by an adjuster for Buffalo County's insurance carrier, which erroneously stated that the relevant statute of limitations was 4 years instead of 2. Bohl filed suit more than 2 years after the accident giving rise to her injuries, and the trial court granted Buffalo County's motion for judgment on the pleadings.

This court held that Bohl inadequately pled the elements of equitable estoppel and thus that the trial court had properly granted the motion. The court declined to answer the question whether equitable estoppel could ever be invoked to excuse failure to comply with the Act.

Other Nebraska cases have held that the state or one of its political subdivisions may be subject to equitable estoppel under compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997); *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989); *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989).

We also note that other jurisdictions have applied the doctrine of estoppel against political subdivisions under circumstances similar to those present in this case. See, *Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997); *Molinar v. City of Carlsbad*, 105 N.M. 628, 735 P.2d 1134 (1987); *Jarvis v. City of Stillwater*, 732 P.2d 470 (Okla. 1987).

We find no reason to place the tort claims acts outside the reach of the doctrine of equitable estoppel. Thus, we hold that the state and its political subdivisions can be equitably estopped from relying on the statute of limitations found in the tort claims acts upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice.

This court has set forth six elements that must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the

facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Bohl v. Buffalo Cty., supra.*

The first prong of this test, which was the basis of the Court of Appeals' decision, is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. See *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970). The majority opinion of the Court of Appeals acknowledged that the City's conduct "arguably can be said to have lulled the Woodards into a false sense of security that this case would be settled—no matter what or when," but distinguished our holding in *State Farm Mut. Auto. Ins. Co. v. Budd, supra*, as requiring " 'trickery and dishonesty.' " *Woodard v. City of Lincoln*, 7 Neb. App. 11, 25, 578 N.W.2d 892, 900 (1998). The Court of Appeals stated that it could find no allegation by the Woodards of trickery or dishonesty, and that any such implication was negated by the fact that the City made several substantial settlement offers after the expiration of the statute of limitations. *Id.*

The dissent in *Woodard v. City of Lincoln, supra*, would have found the evidence sufficient to allow the inference that the City had indicated that formal legal proceedings and rules were not going to govern the Woodards' claim and that the claim was going to be resolved without insisting that the strict letter of the law be followed. *Id.* The dissent viewed the series of settlement offers put forth by the City after the statute of limitations had expired as substantive evidence of the City's intentions in this regard. We agree with the dissent's analysis to the extent that we find that under the facts of this case, whether equitable estoppel is to be applied to Philip's claim is a question of fact which precludes the granting of summary judgment in favor of the City and Wells.

Philip must be given the benefit of all reasonable inferences deducible from the evidence. The letter of understanding stated that it "reserve[d] the rights of Mr. and Mrs. Philip Woodard to

claim damages in the future." While the Court of Appeals rightly found that this language alone does not raise an inference that the City intended to convey the impression that the statute of limitations would not apply to Philip's claim, it is not inconsistent with such an inference.

More probative are statements found in Philip's affidavit. Philip stated that he was led to believe by the letter of understanding that he had reserved his right to file an action when and if a voluntary final settlement could not be made. He also stated that the letter was a formalization of "the agreement that he would . . . negotiate a settlement of the claims with the City upon condition that he not obtain legal representation" and that the City gave him repeated "assurances that the City would voluntarily settle without litigation."

We find that in combination, these statements give rise to the reasonable inference that the City intended to convey to Philip that his claim would be settled rather than litigated. As the filing of a petition is unnecessary if there is to be no litigation, it is a reasonable inference that the City also intended to convey the impression that no petition need be filed at all. Certainly the concept that no petition need be filed at all includes the concept that no petition need be filed within the statute of limitations.

By raising the statute of limitations as a defense, the City is subsequently and inconsistently asserting that Philip did have to file a petition within the statute of limitations in order to recover for his injuries. This is sufficient to meet the first prong of the test for equitable estoppel.

We distinguish the situation where mere attempts to settle are made. "[T]he mere pendency of negotiations during the period of a statute of limitations, which are conducted in good faith with a view to ultimate compromise, is not of itself sufficient to establish an estoppel." *Turner v. Turner*, 582 P.2d 600, 603 (Wyo. 1978). However, ordinary settlement negotiations contain the implicit notion that if settlement is not reached, then litigation may be necessary. It is the City's conveyance of the impression that litigation would not be necessary that, if proved to the finder of fact, establishes the level of misrepresentation necessary for equitable estoppel.

If the City behaved in the manner in which Philip alleges, we find that such conduct meets the standard of "compelling circumstances where right and justice so demand in the interest of preventing manifest injustice." *Inner Harbour Hospitals v. State*, 251 Neb. 793, 804, 559 N.W.2d 487, 495 (1997). In comparison to *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997), where the alleged misrepresentation was a single statement erroneous as a matter of law, Philip alleges a long-term course of conduct conveying a representation of fact that Philip need not file a petition within the statute of limitations.

As the dissent in *Woodard v. City of Lincoln*, 7 Neb. App. 11, 25, 578 N.W.2d 892, 900 (1998), stated, Woodard was lulled into a sense of security over the course of some 3½ years, and then, "with the period of limitation comfortably behind it, the City changed rules and transformed from magnanimous sovereign into litigious adversary." *Id.* at 28, 578 N.W.2d at 902. Such behavior, if allowed, would work a manifest injustice, and thus, if Philip can satisfy the elements of equitable estoppel to the fact finder, such estoppel must be allowed.

We expressly note that today's holding creates no duty on the part of political subdivisions or any other party to inform an adversary of the existence of a statute of limitations or other nuances of the law. We merely hold that the evidence presented by Philip raises a reasonable inference that the City conducted itself so as to represent that the filing of a petition within the statute of limitations was not to be a requirement in Philip's case and that if such an inference can be proved at trial, then it would be manifestly unjust to allow the City to rely on the statute. Accordingly, summary judgment was inappropriate on this issue and the judgment of the trial court must be reversed with regard to Philip's claim.

Bessie's Claim

Although the above analysis applies equally to Bessie's claim insofar as her claim was barred by the 2-year statute of limitations, her claim is different from Philip's in that she never filed a notice of claim with the City as required by § 13-919(1).

Bessie argues that the City should be estopped from relying on the notice requirement based on the same conduct analyzed

above with regard to the statute of limitations. However, one of the elements that must be shown in order to establish equitable estoppel is reliance, in good faith, upon the conduct or statements of the party to be estopped. *Bohl v. Buffalo Cty., supra.* Bessie stated in her affidavit that

> because she did not consult with an attorney and the City did not indicate otherwise *she relied on the actual notices* the City had already received of the claims, including (1) the taped interview on June 11, 1992, which was transcribed; (2) the "Letter of Understanding" wherein the City of Lincoln expressly acknowledged the accident and agreed to reserve the rights of both herself and her husband to claim damages in the future; (3) her husband's written notice of May 12, 1993; (4) together with the fact that she and her husband were conducting ongoing settlement negotiations with the City of Lincoln.

(Emphasis supplied.) Bessie does not allege that she failed to comply with the notice requirements in reliance on the City's conduct, but, rather, that she relied on the actual notice that she felt had been given to the City. She has therefore failed to establish the elements of equitable estoppel as regards her failure to comply with the claim requirements of the Act.

Bessie also argues that her signature on the letter of understanding constitutes substantial compliance with the notice requirements of § 13-919(1). We have held that with regard to a claim's content, substantial compliance with the statutory provisions supplies the requisite and sufficient notice to a political subdivision. *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). However, we made clear in *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), that in order for a written notice to substantially comply with the requirements of § 13-919(1), such written notice must be filed with an individual or office designated in the Act as the authorized recipient of claims. The City's risk management office, for whom Imig worked and with whom the agreement in the letter of understanding was reached, is not an authorized recipient of claims under § 13-905, and thus even if the content of the letter gives notice of Bessie's claim, she did not give it to the proper individual or office.

For these reasons, we hold that the trial court's granting of summary judgment in favor of the City and Wells on Bessie's claim was correct and is hereby affirmed.

CONCLUSION

We hold that the evidence presented by Philip raises an inference, which presents a question of fact, that the City would not assert the statute of limitations as a defense in this case. This holding requires that the summary judgment in favor of the City and Wells on the claim of Philip be reversed and the cause remanded for further proceedings consistent with this opinion.

As to Bessie's claim, we affirm the trial court's granting of summary judgment in favor of the City and Wells, because she did not comply with the notice provisions of § 13-919(1).

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

CONNOLLY, J., dissenting.

I conclude that there is no genuine issue of material fact that would give rise to equitable estoppel in the instant case, and therefore, I respectfully dissent.

The majority concludes that there is a genuine issue of material fact as to whether the City had indicated that formal legal proceedings and rules were going to govern the Woodards' claim and, thus, whether the statute of limitations would apply. This conclusion is based entirely on the "Letter of Understanding" between Philip and the City, and Philip's affidavit as to *his* understanding of that letter. The letter of understanding provided that the City would make voluntary payments to the Woodards, but that these payments would stop if either side retained counsel. The letter also indicated that it was not an admission of liability by the City and that the Woodards could claim damages in the future. Thus, the letter of understanding indicated that no litigation would be necessary to the extent that the City was willing to make voluntary payments.

Had the City continued to make such voluntary payments until the statute of limitations had run, the Woodards' claim might conceivably have merit. However, in the instant case, the City stopped making voluntary payments on April 28, 1993, more than a year prior to the expiration of the statute of limita-

tions. Thus, the City stopped communicating the impression that the statute of limitations would not apply as of April 28, long before the statute of limitations had run. Accordingly, as of April 28, the City's conduct or statement could not amount to a false representation or concealment of material facts, or have been calculated to convey or import the impression that the facts were otherwise than, and inconsistent with, those which the City subsequently attempted to assert. In other words, "all bets were off." The letter of understanding could not, as a matter of law, indicate to the Woodards that the City would not assert the statute of limitations as a defense.

Indeed, Philip's own act would appear to acknowledge as much, since he did not file a written notice of claim with the City until shortly *after* the City stopped making voluntary payments pursuant to the letter of understanding. This action indicates that Philip himself had recognized that the "rules of the game" had already changed and that legal rules now applied. It is difficult to see how Philip could simultaneously assert that he, in good faith, believed that formal legal proceedings and rules were not to govern his claim against the City and, yet, feel compelled to send a written notice of claim by a certified letter. If Philip believed that "no petition need be filed at all," as the majority asserts, then why file a written notice of claim?

The Nebraska Court of Appeals was correct in affirming the trial court's order, and I would affirm.

WRIGHT and STEPHAN, JJ., join in this dissent.

ROBERT L. DAILY, APPELLEE, V. BOARD OF EDUCATION OF MORRILL COUNTY SCHOOL DISTRICT NO. 62-0063, ALSO KNOWN AS SCHOOL DISTRICT OF BRIDGEPORT, APPELLANT.

588 N.W. 2d 813

Filed February 5, 1999. No. S-97-933.

1. **Schools and School Districts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board subjecting a teacher to disciplinary action is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. ____: ____: ____. In a proceeding in error from an order of a school board, the evidence is sufficient as a matter of law if the school board could reasonably find the

facts as it did on the basis of the testimony and exhibits contained in the record before it; evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict.

3. **Words and Phrases.** Corporal punishment, as prohibited in Neb. Rev. Stat. § 79-295 (Reissue 1996), is reasonably understood to be the infliction of bodily pain as a penalty for disapproved behavior.
4. ____. Both words of the term "corporal punishment" are commonly given effect; the act must be corporal, in that it inflicts pain on the physical body of the victim, and it must be punishment, such that the intent of the actor is punitive.
5. **Schools and School Districts.** Neb. Rev. Stat. § 79-258 (Reissue 1996), while not authorizing corporal punishment, does provide authority for school teachers and administrators to use physical contact short of corporal punishment to the degree necessary to preserve order and control in the school environment.
6. **Constitutional Law: Statutes: Presumptions: Proof.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
7. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret that law in a manner such that it is consistent with the Constitution.
8. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking the statute's validity.
9. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
10. ____: ____: ____. Due process requires that a legislative enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it.
11. **Words and Phrases.** Unprofessional conduct must be conduct directly related to the fitness of the actor to act in his or her professional capacity.
12. ____. Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession or conduct which is unbecoming a member in good standing of a profession.
13. **Schools and School Districts.** The use of corporal punishment by a school teacher, in violation of Neb. Rev. Stat. § 79-295 (Reissue 1996), may subject the teacher to discipline for unprofessional conduct under Neb. Rev. Stat. § 79-824 (Reissue 1996).
14. **Attorney Fees: Appeal and Error.** Attorney fees can be awarded against a party bringing an appeal that is without rational argument based on law and evidence.
15. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), connotes an improper motive or a legal position so wholly without merit as to be ridiculous.
16. **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 District Court for Morrill County: BRIAN SILVERMAN, Judge. Reversed and remanded with directions.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

GERRARD, J.

I. INTRODUCTION

The Legislature, in 1988, mandated that "[c]orporal punishment shall be prohibited in public schools." Neb. Rev. Stat. § 79-295 (Reissue 1996). In the context of a disputed teacher-discipline case, we must determine whether "corporal punishment" is a term that is commonly used and understood, such that a person of ordinary sensibilities and intelligence should be capable of ascertaining its meaning and abiding by its proscriptions. For the reasons that follow, we determine that "corporal punishment" is a term that is commonly understood to be the infliction of bodily pain as a penalty for disapproved behavior and that there was sufficient evidence as a matter of law to support the decision of the board of education of Morrill County School District No. 62-0063, also known as School District of Bridgeport (the District), to discipline Robert L. Daily for corporally punishing a seventh grade student. We therefore reverse the judgment of the district court and remand the cause with directions as set forth herein.

II. FACTUAL BACKGROUND

Daily, the plaintiff-in-error in the district court and the appellee in this court, has been a teacher with the District for over 32 years. Daily's performance evaluations indicate that he has been a competent and effective teacher during those years.

On December 12, 1996, Daily was involved in an incident in which he allegedly struck a seventh grade student, identified as K.P. On January 6, 1997, Daily received a letter from Lewis Shoff, superintendent of the Bridgeport Public Schools, notifying Daily that Shoff had determined, because of the incident, that it might be appropriate to cancel Daily's contract. Daily responded, through counsel, that he was requesting a hearing before the board pursuant to "Neb. Rev. Stat. §§79-12,107

through 79-12,121 (Reissue 1994)." A subsequent notice by the District advised Daily that the superintendent would not only recommend the cancellation of his contract, but also recommend that the board consider the possible amendment of Daily's contract to include, but not be limited to, suspension without pay or a written reprimand. Based upon such notice, a hearing was held on January 26 at the Bridgeport Public High School.

The evidence adduced at the hearing showed that on December 12, 1996, Daily kept two students in his classroom after his third-period class. Daily testified that the two seventh graders, K.P. and W.R., had been disrupting the class. Daily specifically testified that W.R. had been talking to another student during class and that K.P. had been attempting to draw attention to himself by flexing his muscles for the class. Daily testified that during the detention, after talking with W.R. about his misbehavior, Daily turned to K.P. to talk about what K.P. had done during class.

The events that followed were disputed. Daily testified that as Daily tried to talk to K.P., K.P. turned away from Daily toward W.R. and again flexed his muscles, evidently in an attempt to draw W.R.'s attention. Daily then, by his testimony, "tapped" K.P. on the head "to get his attention." Daily testified that K.P. responded by saying, "You hit me," and then tried to get up out of his seat. Daily, by his own account, grabbed K.P. by the shoulders and made K.P. remain in the seat. Daily then said, "[K.P.], I didn't hurt you." Daily testified that K.P. then asked if they could go to the office. Daily said that he agreed and that they began to walk toward the door. Daily then, by his account, turned back toward W.R., and K.P. turned away from the door and returned to his seat. Daily specifically denied blocking K.P.'s path to the door. Daily said that he then dismissed the students. Daily testified that he followed K.P. to the locker area to try to talk to him, but that K.P. was unresponsive. Daily said he then returned to his classroom.

Daily also admitted that in "tapping" K.P., he had been acting out of frustration. Daily denied, however, any intent to injure K.P. and stated that his action had been involuntary in that he had acted "without even thinking about it." Daily admitted that in his opinion, he should not have touched K.P.

W.R.'s testimony at the board hearing gave a slightly different version of events. W.R.'s testimony is similar to Daily's until the point when Daily turned his attention to K.P. At that point, W.R. testified that Daily "smacked" K.P. with his open hand on the back of K.P.'s head. W.R. said that K.P. then began to cry. According to W.R., K.P. tried to leave, but Daily said, "[K.P.], sit back down," and Daily then grabbed K.P. and "had to kind of fight him to get him back to his seat." W.R. testified that Daily then said, "Oh, I barely tapped you," to which K.P. replied, "Well, you're not supposed to hit a child anyways." W.R. also testified that Daily had not blocked K.P.'s route to the door.

The only other eyewitness to the incident to testify at the board hearing was Bill Alvarez, a junior high school math teacher and 31-year employee of the District. Alvarez occupied the classroom next to Daily's. Alvarez testified that at the time of the incident, he was standing out in the hall to monitor students during the time between classes. Alvarez saw a group of students standing outside Daily's classroom, waiting for Daily to finish talking to W.R. and K.P. so the students could enter the classroom for their next class. Alvarez walked up next to one of the students who was looking inside the classroom through the glass window in the classroom door. Alvarez testified that although he could not hear what was occurring inside, he "caught the tail end where [Daily] tapped [K.P.] on the head and then he, you know, grabbed him by the arm . . . ."

Alvarez also testified that one "J.D." was one of the students standing outside the door, closer to the window than Alvarez himself had been. An eyewitness account written by J.D. was offered into evidence, but was not accepted into evidence by the hearing officer. This account was largely consistent with W.R.'s account, but additionally related that according to J.D., Daily had stood in front of the classroom door to prevent K.P. from leaving. Also offered but not accepted into evidence was K.P.'s written account of the incident. K.P.'s account was consistent with W.R.'s, except that K.P. professed ignorance of what had prompted Daily to strike him and K.P. also stated that Daily later "would not let [him] out the door." J.D. and K.P. did not testify at the hearing. Written statements by W.R., Daily, and

Alvarez were accepted into evidence; these accounts were consistent with their testimony at the hearing.

Also testifying at the hearing for the District were Steve Jones, the secondary principal of the Bridgeport Public Schools, and Shoff, the superintendent for the District.

Jones testified regarding his investigation of the December 12, 1996, incident. Jones testified that he was called into the guidance counselor's office, where K.P. told him what had happened. Jones' testimony regarding K.P.'s statements was accepted by the hearing officer, not for the truth asserted by the statements but as part of the investigation by Jones that led to disciplinary action against Daily.

Jones testified that K.P. was disheveled and looked upset and that he reported he had been struck in Daily's class. Jones further testified that he observed "considerable redness" on K.P.'s shoulder and arm where K.P. reported that Daily had grabbed him. Jones then obtained a written statement from K.P. and proceeded to interview and obtain written statements from W.R., J.D., and Alvarez.

Jones stated that he then spoke to Daily and asked him to make a written statement. Jones testified that Daily said, during the December 12, 1996, interview, that Daily had "lost his temper, lost control," and admitted to striking K.P. and to restraining K.P. by holding K.P.'s arms. Daily, by Jones' account, admitted to acting from frustration and conceded that he should not have touched K.P. Jones testified that Daily also said that he had not intended to hurt K.P. and that striking K.P. was "an involuntary reaction."

Jones was cross-examined by Daily's counsel regarding the general definition of corporal punishment. Jones testified that he believed "any discipline that uses force is corporal punishment" and that losing one's temper and hitting a student should also be regarded as corporal punishment. Shoff testified that he believed corporal punishment was "the use of physical force."

Shoff also testified about his part in the investigation that led to disciplinary action against Daily. Shoff testified that after reading the written statements obtained by Jones, Shoff decided to suspend Daily without pay. Shoff testified that he was told by K.P.'s mother that K.P. had a headache and an upset stomach

after he came home from school on December 12, 1996. Shoff said that after his review of the incident, he concluded that Daily should be fired for using corporal punishment.

Daily called, as his first witness, Ardis Kisner, a fellow teacher for the District. Daily attempted to adduce evidence that K.P. had spoken to Kisner a couple of months before the incident and had said, "We're going to get Mr. Daily fired." A hearsay objection to this testimony was sustained by the hearing officer, and an offer of proof was made by Daily outside the presence of the school board.

Daily then called the mother of C.H., a student at Bridgeport Junior High. C.H.'s mother testified that on the day after the incident, she answered a telephone call at her home from K.P., who wanted to speak to C.H. C.H.'s mother testified that she told C.H. to pick up the telephone in the bedroom and that when she went back into her kitchen to hang up the telephone she had initially answered, she overheard a part of the conversation taking place between K.P. and C.H.

C.H.'s mother testified that K.P. told C.H. that Daily had hit K.P. the previous day. C.H.'s mother testified that when she picked up the phone, she heard K.P. say, "[C.H.], I got Mr. Daily in trouble." When C.H. asked what happened, K.P. reportedly said, "[W.R.] and I got in trouble, Mr. Daily had us stay after class and then he hit me." According to C.H.'s mother, C.H. asked K.P. if Daily had hurt him, and K.P. replied, "No, he just bopped me on the head but I made it sound like he did." C.H.'s mother said she then went to the bedroom and told C.H. to hang up the telephone. This testimony was received into evidence over objection.

Daily also presented the testimony of the school nurse for the Bridgeport Public Schools, who was one of J.D.'s parents and herself a former student of Daily's. The school nurse testified generally about Daily's teaching skills. She also testified that her son J.D. claimed to have observed the December 12, 1996, incident and that J.D. had told her that Daily struck K.P. "to get his attention." A fellow teacher also testified to Daily's good character and skill as a teacher.

Daily's last witness, before his own testimony, was Peg Person, another teacher for the District. Person testified at

length regarding the "Boys Town Model" of discipline, her training in that model, and her frustrations regarding the discipline policy at the Bridgeport Junior High School.

After the hearing, the board moved to a closed session to deliberate. Thereafter, the board, in open session, found that

> based solely upon the evidence at this formal due process hearing held on January 23 [sic], 1997, that the actions of Robert L. Daily on December 12, 1996, were clearly inappropriate. The Board of Education further finds that the use of physical force out of frustration to strike [K.P.] on the head and restraining him by holding his arms constitute just cause within the meaning of 79-12,112 and 79-12,107 (3) and are in violation of 79-4,140; and thereby constitute insubordination and unprofessional conduct.
>
> As a result of these findings the Board of Education amends the contract of Robert L. Daily to provide for a suspension without pay for 30 working days and a requirement that he obtain adequate professional counseling.

Daily filed a petition in error in the district court, and after hearing, the district court entered a judgment in which it found that there was sufficient evidence as a matter of law to show that Daily "tapped a student," K.P., on the back of the head and "held his arm so that Daily could talk to [him] about his classroom behavior." The district court found that these actions did not constitute a third degree assault, nor did they constitute corporal punishment, and that they "did not constitute insubordination or unprofessional conduct under the circumstances of this case."

The district court further found that hearsay evidence had been introduced at the hearing by the District and that "it must be assumed that the Board of Education erroneously relied upon such evidence to support its findings." The court found that "'just cause'" was lacking and that there was "not sufficient evidence as a matter of law to support the decision of the Board of Education."

The District timely appealed, and upon Daily's notice that the case challenged the constitutionality of a statute, we removed the case to the Supreme Court docket in compliance with Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

The District assigns that the district court erred in (1) using an improper standard of review, (2) making a determination that the board did not rely on competent evidence, (3) making findings of fact contrary to those of the board, (4) determining that the board relied solely on hearsay evidence, (5) finding that "'just cause'" was necessary in order to sustain the board's findings, (6) not finding sufficient evidence as a matter of law to sustain the board's decision, (7) ordering the board to pay Daily in full and overruling the requirement for counseling, (8) making a decision contrary to the law and unsupported by the evidence, and (9) not finding the appeal frivolous and not awarding attorney fees and costs to the board.

Daily did not cross-appeal, but in his brief, Daily asserts as he did in the district court that (1) the District lacked the statutory authority to unilaterally order him to seek counseling, (2) § 79-295 is unconstitutionally vague, and (3) there was insufficient evidence, as a matter of law, to sustain the findings of the board.

IV. STANDARD OF REVIEW

This court has not directly addressed an error proceeding from a school board ruling in which a teacher's employment was not terminated, but in which the teacher was instead subjected to some lesser disciplinary action. Consequently, there is no prior case establishing a standard of review in such a situation. The parties submit, and we agree, that the standard of review for an error proceeding in a teacher employment-termination case would be appropriately applied to a teacher-discipline case.

We hold, therefore, that the standard of review in a proceeding in error from an order of a school board subjecting a teacher to disciplinary action is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997); *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993). The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* "'[T]he evidence is "substantial" or "sufficient as

a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict . . . .' " *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. at 676, 559 N.W.2d at 453 (quoting *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985)).

V. ANALYSIS

1. Board Determination

The District's first, second, third, sixth, seventh, and eighth assignments of error all generally advance the same argument: The board's decision was supported by the evidence, and the district court erred by not affirming it.

The basis for the board's order, as contained in its findings, was that Daily's actions constituted "just cause within the meaning of 79-12,112 and 79-12,107 (3) and are in violation of 79-4,140; and thereby constitute insubordination and unprofessional conduct." We must therefore examine those statutes and our prior cases governing unprofessional conduct or insubordination to determine if there was competent evidence presented at the hearing that would support the board's findings.

The "79-12,107" referred to by the board was codified as Neb. Rev. Stat. § 79-824 (Reissue 1996), effective July 19, 1996. Section 79-824(4) provides, in relevant part, that "[j]ust cause means: (a) Incompetency . . . (b) neglect of duty; (c) unprofessional conduct; (d) insubordination; (e) immorality; (f) physical or mental incapacity; (g) failure to give evidence of professional growth . . . (h) other conduct which interferes substantially with the continued performance of duties."

Section 79-12,112 was codified as Neb. Rev. Stat. § 79-829 (Reissue 1996) effective July 19, 1996, which provides, in relevant part, that "[t]he school board by a vote of the majority of its members may determine that such permanent certificated employee's contract shall be amended or terminated for any of the following reasons: (1) Just cause as defined in section 79-824."

(a) Corporal Punishment

Section 79-4,140, codified as § 79-295, effective July 19, 1996, simply states that "[c]orporal punishment shall be prohibited in public schools."

The Nebraska statutes do not define the term "corporal punishment." The primary effect of § 79-4,140, now § 79-295, was to partially repeal Neb. Rev. Stat. § 28-1413 (Reissue 1985), which had provided in part:

> The use of force upon or toward the person of another is justifiable if:
>
> . . . .
>
> . . . The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:
>
> . . . [t]he actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor[.]

This statute essentially stated the common-law rule regarding corporal punishment, as it existed in the state before the adoption of § 79-4,140, now § 79-295. See *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987).

A brief examination of the legislative history of § 79-4,140, now § 79-295, helps shape our analytical framework. Section 79-4,140 was adopted in 1988 as an amendment to L.B. 316, which added to that bill the full text of what had previously been L.B. 955. The record of the Judiciary Committee hearing on L.B. 955 contains the following exchange:

> SENATOR [JERRY] CONWAY: I was just going to ask you, is corporal punishment that particular term, defined some...in the statutes elsewhere; or did you purposely not define it or?
>
> SENATOR [ERNIE] CHAMBERS: It's a term that is so well known in terms of its meaning. There have been court cases dealing with this subject that it doesn't require a definition.

Judiciary Committee Hearing, L.B. 955, 90th Leg., 2d Sess. 7 (January 29, 1988).

While it is true that there have been court cases defining corporal punishment, none of those cases have been decided in Nebraska. Most cases from other jurisdictions, in fact, define

corporal punishment in the context of statutes that permit "reasonable" corporal punishment. This provides definitions that delineate between "reasonable" and "unreasonable" corporal punishment, but are of little guidance in determining what is and is not corporal punishment.

Generally, however, corporal punishment is reasonably understood to be the *infliction of bodily pain* as *a penalty* for disapproved behavior. See, e.g., Nadine Block and Robert Fathman, *Convincing State Legislatures to Ban Corporal Punishment*, 9 Children's Legal Rts. J. 3:21 (1988). Both words of the term "corporal punishment" are commonly given effect—the act must be "corporal," in that it inflicts pain on the physical body of the victim, and it must be "punishment," such that the intent of the actor is punitive. The interpretation of corporal punishment includes not only striking, but any action which seeks to induce bodily pain, for example, forcing a student to stand on tiptoes with fingertips outstretched against the wall or to crouch and bend over and remain in cramped, painful positions for a long time. See *id.*

Most statutes from other jurisdictions that ban corporal punishment effectively include the same elements as set forth above. See, e.g., Conn. Gen. Stat. Ann. § 53a-18 (West 1994); Mass. Gen. Laws Ann. ch. 71, § 37G (West 1996); Nev. Rev. Stat. § 392.465 (1997); N.J. Stat. Ann. § 18A:6-1 (West 1989).

Other state statutes contain those elements, but also have exceptions that provide, generally, for use of physical contact to maintain order and control. For instance, Wisconsin law provides that corporal punishment does not include "[u]sing incidental, minor or reasonable physical contact designed to maintain order and control." Wis. Stat. Ann. § 118.31(2)(h) (West 1991). See, also, e.g., Cal. Educ. Code § 44807 (West 1993); Mont. Code Ann. § 20-4-302 (1997); Va. Code Ann. § 22.1-279.1 (Michie 1997).

Nebraska statutes do not deal with this issue in the specific context of corporal punishment. The Legislature has provided, however, that "[a]dministrative and teaching personnel may take actions regarding student behavior, other than those specifically provided in the Student Discipline Act, which are reasonably necessary to aid the student, further school purposes, or

prevent interference with the educational process." Neb. Rev. Stat. § 79-258 (Reissue 1996).

We determine that § 79-258, while obviously not authorizing corporal punishment, does provide authority for school teachers and administrators to use physical contact short of corporal punishment to the degree necessary to preserve order and control in the school environment. Moreover, the statute authorizes an acceptable level of incidental physical contact, as is necessary for teachers to promote personal interaction with their students. A certain amount of incidental physical contact is virtually unavoidable for people working together in a social environment.

The key distinction between such reasonable and necessary physical contact and "corporal punishment," as commonly understood and prohibited by statute, is to be found in the elements set forth above. Contact that does not cause pain is simply not corporal punishment. Corporal punishment also does not include physical contact that is not intended to punish a student for disapproved behavior but is instead intended to preserve order in the schools or intended to protect persons or property from harm.

Other jurisdictions, in addressing the issue of corporal punishment, have consistently focused on the punitive intent of the teacher. In *Daniels v. Gordon*, 232 Ga. App. 811, 503 S.E.2d 72 (1998), the appellate court found that a teacher had grasped a student's face and turned the student's head to face her. The court found that "not all physical contact instigated by an educator amounts to corporal punishment." *Id.* at 813, 503 S.E.2d at 75. The court found that "[i]n this case, [the teacher's] actions were instituted to regain control and supervise the classroom . . . . [Her] uncontroverted testimony established that her grasping of [the student's] face was meant to get [his] attention and not to punish." (Citation omitted.) *Id.* Consequently, the court found that the teacher's actions did not constitute "corporal punishment" under Georgia law. *Id.*

Similarly, a Florida appellate court found that physical contact with students did not constitute "corporal punishment" where the contact was intended not to punish, but simply to restore order in the classroom. *Williams v. Cotton*, 346 So. 2d

1039 (Fla. App. 1977), *cert. denied* 354 So. 2d 988. The Florida court found that a Florida statute requiring teachers to " 'keep good order' in [the] classroom necessarily implies the power to the teacher to use reasonable physical force [not amounting to corporal punishment] to do so." *Id.* at 1041. The court found that "[w]ithout such reasonably implied power, the requirement to 'keep good order' would be meaningless." *Id.*

Where the circumstances indicate a punitive intent, however, courts have found corporal punishment. In *People v. McMillan*, 45 Cal. App. 2d Supp. 821, 114 P.2d 440 (1941), the court found that a supervisor in a juvenile facility had committed corporal punishment when he slapped a student. Although the defendant argued that he was merely attempting to preserve order, the court found in the record "evidence tending to show . . . that such force as defendant used was applied just after the objects of it had violated some rule of the institution and apparently for the purpose of punishing them for the violation and not to prevent one." *Id.* at 827, 114 P.2d at 444.

Under similar circumstances, a Pennsylvania court found that a teacher who slapped a student on the face had committed corporal punishment. *Harris v. Commonwealth Secretary of Ed.*, 29 Pa. Commw. 625, 372 A.2d 953 (1977). The court said that "[t]his Court does not consider slapping fourth graders on the face on [sic] attention getting device. Considering the circumstances of the incident, this Court finds that [the teacher] did administer corporal punishment to [the student]." *Id.* at 632, 372 A.2d at 956. The court found, however, that the same teacher had not committed corporal punishment in touching a student to remove a pencil from his hand. *Id.*

Having reviewed and considered the relevant Nebraska statutes, as well as decisions from other jurisdictions, we hold that corporal punishment, as prohibited in § 79-295, is reasonably understood to be the infliction of bodily pain as a penalty for disapproved behavior. One of Daily's arguments in the district court, and preserved in his brief on appeal, was that § 79-295 is void for vagueness, thereby denying Daily his procedural due process rights under article I, § 3, of the Nebraska Constitution and the 14th Amendment to the Constitution of the United States. The district court, because of its resolution of the

case, had no cause to consider Daily's constitutional claim. For the sake of completeness, we find it necessary to address Daily's vagueness claim.

Daily presents a facial challenge to the constitutionality of § 79-295, claiming that the use of the term "corporal punishment" does not provide adequate notice to teachers as to what conduct is prohibited or provide adequate standards to prevent arbitrary enforcement by school boards. It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993). Even when a law is constitutionally suspect, a court will attempt to interpret that law in a manner such that it is consistent with the Constitution. *Id.* The burden of establishing the unconstitutionality of a statute is on the one attacking the statute's validity. *Id.*

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Id.*; *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991) (citing *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). In other words, due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it. *Kwik Shop v. City of Lincoln, supra*; *City of Lincoln v. ABC Books, Inc., supra* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

> A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. . . .
>
> . . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

State v. Sprague, 213 Neb. 581, 587-88, 330 N.W.2d 739, 744 (1983).

The U.S. Supreme Court has held:

> [The] prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." . . . Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.

(Citation omitted.) *Rose v. Locke*, 423 U.S. 48, 49-50, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

While § 79-295 could have been drafted with greater precision, "we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. at 110. In *State v. Rogers*, 44 Ohio App. 2d 289, 337 N.E.2d 791 (1975), an Ohio appellate court rejected a vagueness challenge to a corporal punishment statute. In that case, the defendant teacher challenged the vagueness of the term "corporal punishment," as applied by the Ohio trial court to her alleged abuse of a pupil. The court found that the use of the term did not make the statute "unconstitutionally vague or overbroad since a person of ordinary sensibilities and intelligence should be capable of ascertaining its meaning and abiding by its proscriptions." *Id.* at 291, 337 N.E.2d at 793. Likewise, we conclude that a person of ordinary sensibilities and intelligence should be capable of ascertaining the generally understood meaning of corporal punishment and abide by the statute's proscriptions. Daily's void for vagueness challenge to § 79-295 is without merit.

(b) Sufficiency of Evidence

Having held that corporal punishment is reasonably understood to be the infliction of bodily pain as a penalty for disapproved behavior, we must next consider whether the board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.

We have held that the evidence is "sufficient as a matter of law" if a judge could not, were the trial to a jury, direct a verdict. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559

N.W.2d 448 (1997). It is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions. *Stephens v. Board of Ed. of Sch. Dist. No. 5*, 230 Neb. 38, 429 N.W.2d 722 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). In order to support a school board decision, the record must be such that on the basis of all the testimony and exhibits, the school board could fairly and reasonably find the facts as it did. See *Eshom v. Board of Ed. of Sch. Dist. No. 54, supra.*

The standard of review is crucial to our disposition of the instant case. What some witnesses characterized as a "tap" on the student's head "to get [the student's] attention," other witnesses described as a "smack" on the back of the student's head (hard enough to make the student cry) after the teacher had "lost his temper, lost control." The board heard and observed the testimony of numerous witnesses, on both sides of the issue, before finding that Daily's "use of physical force out of frustration to strike [K.P.] on the head and restraining him by holding his arms" were "clearly inappropriate." The board had to make crucial credibility determinations, and the board obviously accepted one version of the facts rather than another on the critical issues in dispute. Rather than determining whether the board "could fairly and reasonably find the facts as it did," *id.* at 471, 364 N.W.2d at 11, and reviewing the record to ascertain whether there is evidence " 'sufficient as a matter of law,' " *id.*, to support the board's decision, the district court conducted what more closely resembled a de novo review, substituting its own inferences for the findings and conclusions of the board. In doing so, the district court erred.

In our review of the record to determine whether the board "could fairly and reasonably find the facts as it did," *id.*, presuming the testimony of W.R. to be true, as we must, there was sufficient evidence to conclude that Daily "smacked" K.P. on the head, hard enough to make K.P. cry. This physical contact was not necessary to control the classroom or to prevent misbehavior, but was instead initiated responsively *after* K.P.'s misbehavior. Daily himself admitted that his actions were based on his frustration with K.P.'s disobedience. The characterization of the physical contact contained in W.R.'s testimony is not that of

a "tap" on the head, but is instead a description of a blow that inflicted pain on K.P. Jones testified that K.P. was disheveled and looked upset when K.P. reported that he had been struck in Daily's class. In short, W.R.'s description of the incident does not relate the use of physical contact as an attention-getting device, but instead depicts the infliction of physical discomfort on K.P. as a penalty for K.P.'s disapproved behavior.

Regarding Daily's restraint of K.P., however, the facts do not support a finding of corporal punishment. The uncontroverted facts regarding this portion of the incident show that Daily's intent was to preserve order by returning K.P. to his seat and preventing him from leaving the room prematurely. Under § 79-258, Daily was authorized to take actions that were reasonably necessary to further school purposes and prevent interference with the educational process. Therefore, we conclude that on the basis of all the testimony and exhibits, the board could have "fairly and reasonably" concluded that Daily had committed the act of corporal punishment, as prohibited by § 79-295, when Daily struck K.P. on the back of the head on December 12, 1996.

(c) Unprofessional Conduct

Having found that there was sufficient evidence as a matter of law to support the board's finding of corporal punishment, we must now decide whether such a finding may constitute "unprofessional conduct" under § 79-824.

Unprofessional conduct is not defined in § 79-824. In construing the statute at issue in this case, however, this court has held that unprofessional conduct must be conduct directly related to the fitness of the actor to act in his or her professional capacity. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

It is well established in several other jurisdictions that "unprofessional conduct" is that conduct which breaches the rules or ethical code of a profession or conduct which is unbecoming a member in good standing of a profession. See, e.g., *Board of Education v. Swan*, 41 Cal. 2d 546, 261 P.2d 261 (1953), *cert. denied* 347 U.S. 937, 74 S. Ct. 627, 98 L. Ed. 1087 (1954), *overruled on other grounds, Bekiaris v. Board of Education*, 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16

(1972); *In re Alschuler*, 388 Ill. 492, 58 N.E.2d 563 (1944); *Morris v. Clarksville-Montgomery*, 867 S.W.2d 324 (Tenn. App. 1993); *Shea v. Board of Medical Examiners*, 81 Cal. App. 3d 564, 146 Cal. Rptr. 653 (1978); *Pierstorff v. Board of Embalmers*, 68 Ohio App. 453, 41 N.E.2d 889 (1941), *appeal dismissed*, 138 Ohio St. 626, 37 N.E.2d 545. See, also, generally, 68 Am. Jur. 2d *Schools* § 161 (1993 & Supp. 1998). This working definition is sensible, and we adopt the definition for use in teacher-discipline cases.

While the ethical rules of the teaching profession are not in the record, it is clear that the "rules" of the profession must necessarily encompass the statutes enacted by the Legislature to govern the conduct of teachers in the public schools. Furthermore, the violation of a state statute prohibiting the use of corporal punishment in public schools constitutes conduct that is unbecoming a member of the teaching profession. The infliction of corporal punishment by a teacher on a student is clearly conduct directly related to the fitness of that teacher to act in his or her professional capacity.

Accordingly, we conclude that the use of corporal punishment by a teacher, in violation of § 79-295, may subject the teacher to discipline for unprofessional conduct under § 79-824. Since we have already concluded that the board's findings regarding corporal punishment in this case were supported by the evidence, we also conclude that the board's decision regarding unprofessional conduct is supported by the evidence. The district court's findings to the contrary constitute reversible error.

Because the board's findings regarding corporal punishment and unprofessional conduct were supported by the evidence, an evaluation of Daily's alleged insubordination is unnecessary to our disposition of the case; therefore, we will not consider the insubordination issue.

(d) Amendment of Contract

Finally, Daily asserts that the board lacked the statutory authority to unilaterally order Daily to "obtain adequate professional counseling" as a part of the amendment to his teaching contract.

Neb. Rev. Stat. § 79-826 (Reissue 1996) provides in relevant part:

> The superintendent or the superintendent's designee may take action with regard to a certificated employee's performance or conduct which is deemed reasonably necessary to assist the certificated employee and further school purposes, including: (1) Counseling; (2) oral reprimand; (3) written reprimand; and (4) suspension without pay for not to exceed thirty working days.
>
> . . . .
>
> Prior to taking any action under subdivision (4) of this section, the certificated employee shall be advised in writing of the alleged reasons for the proposed action and provided the opportunity to present the certificated employee's version of the facts.

The board's power to order additional sanctions is set forth and limited by Neb. Rev. Stat. § 79-836 (Reissue 1996), in part, as follows:

> (1) After providing the opportunity for a hearing on cancellation, termination, or nonrenewal as provided for in sections 79-828, 79-829, and 79-832, and except when reduction in force is the reason given for possible termination, and when just cause can be shown, the school board may impose such other sanctions, other than termination, cancellation, or nonrenewal of the contract, as may be agreed upon by the parties.

Daily claims that the record is devoid of any agreement by Daily that he "obtain adequate professional counseling." While there may be certain additional or extraordinary sanctions that call for an agreement by the parties, a school district has the authority, pursuant to § 79-826, to suspend a certificated employee without pay for up to 30 working days and to order counseling which is deemed reasonably necessary to assist the employee and further school purposes, so long as the statutory notice and hearing requirements are met.

In the instant case, Daily received all necessary notice and due process before his contract was amended, pursuant to § 79-826; however, that portion of the board's order requiring that Daily "obtain adequate professional counseling" is so

vague as to be virtually unenforceable. Without a minimum of objective standards setting forth the duration of the counseling, or the payment provisions or nature of the mandatory counseling, this portion of the order is subject to the most arbitrary kind of enforcement by the board.

Therefore, upon remand, the district court shall be directed to strike that portion of the board's order which amended Daily's contract to provide that he "obtain adequate professional counseling." In all other respects, the final order of the board amending Daily's contract is proper and within the board's jurisdiction to act.

2. RELIANCE ON HEARSAY EVIDENCE

The district court based its decision, in part, on its assumption that the board erroneously relied on hearsay evidence in making its determination. The District claims that the district court erred in this assumption, and we find it necessary to briefly address the assigned error because our sufficiency of the evidence determination is based on a review of the properly admitted testimony and exhibits.

Daily's argument to the district court on this point was based on *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981). In that case, we held: "Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board, when a teacher's career hangs in the balance, the basic principles of due process demand that hearsay statements of students be given little, if any, weight." *Id.* at 360, 303 N.W.2d at 512.

In this case, presumably, the district court was referring to the statements of K.P. and J.D., who did not testify at the hearing. The written statements of the two boys, however, were not accepted into evidence, and there is no evidence that they were considered by the board. The most questionable hearsay evidence admitted at the hearing, in fact, was offered by Daily, through the testimony of C.H.'s mother regarding statements made by K.P. that C.H.'s mother overheard.

Furthermore, there is no indication in the findings of the board that the hearsay evidence, if considered, was given more than the "little, if any, weight" accorded to such evidence under *Hollingsworth v. Board of Education, supra.* The statements of

J.D. and K.P. were almost entirely cumulative, as the facts asserted by J.D. and K.P. were also contained in the testimony of W.R., Alvarez, and Daily himself. The only fact unique to J.D.'s and K.P.'s accounts is the allegation that Daily prevented K.P. from leaving the room after K.P. was struck, and this allegation is entirely unnecessary to support the board's finding of corporal punishment.

Thus, there is no basis to conclude that the board erroneously relied upon hearsay evidence to support its findings in violation of Daily's due process rights.

3. Attorney Fees

The only other assignment of error that we must address is the District's claim that the district court erred in not finding Daily's appeal to be frivolous.

Attorney fees can be awarded, of course, against a party bringing an appeal that is without rational argument based on law and evidence. See, Neb. Rev. Stat. § 25-824.01 (Reissue 1995); *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990); *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990). 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. *Surratt v. Watts Trucking, supra.*

While Daily has only partially prevailed in this appeal, we conclude that significant issues have been addressed and that Daily's petition in error in the district court was certainly not frivolous. The fact that Daily prevailed in the district court is ample evidence of that fact. This assignment of error is wholly without merit.

VI. CONCLUSION

Based upon the foregoing analysis, we conclude that the board's findings regarding corporal punishment in this case were supported by the evidence and that the use of corporal

punishment by a teacher, in violation of § 79-295, may subject the teacher to discipline for unprofessional conduct under § 79-824. Therefore, we reverse the judgment of the district court and remand this cause to the district court with directions to strike that portion of the board's order which amended Daily's contract to provide that he "obtain adequate professional counseling"; in all other respects, the order of the board amending the contract of Robert L. Daily, including the suspension without pay for 30 working days, shall be affirmed.

REVERSED AND REMANDED WITH DIRECTIONS.

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLANT, V. CITIZENS FOR RESPONSIBLE JUDGES AND KENT BERNBECK, APPELLEES.

588 N.W.2d 807

Filed February 5, 1999. No. S-97-1261.

1. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. ____: ____. Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
5. ____. A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Frank J. Daley, Jr., for appellant.

John M. Boehm for appellees.

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

HENDRY, C.J.

INTRODUCTION

The Nebraska Accountability and Disclosure Commission (NADC), appellant, brought this action seeking a court order requiring Citizens for Responsible Judges and Kent Bernbeck, its cochairman (collectively Citizens), appellees, to submit to the provisions of the Nebraska Political Accountability and Disclosure Act (NPADA), Neb. Rev. Stat. §§ 49-1401 to 49-14,140 (Reissue 1993 & Cum. Supp. 1996). Specifically, the NADC sought a court order requiring Citizens to file a statement of organization, file campaign statements disclosing its receipts and expenditures, and submit its campaign records for an audit. The parties agreed that there were no genuine issues as to any fact. Accordingly, the district court found that Citizens was entitled to judgment as a matter of law and dismissed the action. The main issue on appeal is whether a group, organized to oppose the retention of a member of the judiciary, qualifies as a "committee" pursuant to § 49-1413 and is thereby subject to the reporting requirements of the NPADA.

BACKGROUND

The NPADA was promulgated in 1976 to set up disclosure and accountability procedures concerning campaign finance. Specifically, it was designed to establish requirements for the financing, disclosure, and reporting of political campaigns and lobbying activities and provide conflict of interest provisions for ensuring the independence and impartiality of public officials. Statement of Purpose, L.B. 987, Committee on Miscellaneous Subjects, 84th Leg., 2d Sess. (Feb. 26, 1976).

For purposes of the NPADA, § 49-1413 defines a "committee" and explains when a committee is considered formed and subject to the reporting requirements of the act. Once a committee is subject to the NPADA, it must comply with specific disclosure and reporting requirements. Such requirements include the filing of a statement of organization disclosing the name and purpose of the group, as well as information regarding groups and individuals with whom it is associated. §§ 49-1449 and 49-1450. Committees are also required to file periodic campaign statements disclosing information about

receipts and expenditures in accordance with a statutory schedule. §§ 49-1454, 49-1455, and 49-1459.

The NPADA likewise provides for the NADC to administer and facilitate the provisions of the act. In accordance with the NPADA, the NADC has the authority and duty to perform field investigations and audits of committees "with respect to any campaign statement, registration, report, or other statement filed under the Nebraska Political Accountability and Disclosure Act if the commission or the executive director deems such investigations or audits necessary to carry out the purposes of the act." § 49-14,122.

Citizens is an organization which was formed for the purpose of opposing the retention of Supreme Court Justice David J. Lanphier in the 1996 general election. On October 16, 1996, the NADC notified Citizens in writing that it intended to audit Citizens' records pursuant to §§ 49-14,122 and 49-14,123(8) of the NPADA. Citizens refused to submit to the audit, asserting that it is not subject to the provisions of the NPADA and, therefore, not subject to the jurisdiction and authority of the NADC. Consequently, Citizens has never filed any documentation required by the NPADA.

On October 21, 1996, the NADC filed this suit against Citizens, seeking a court order requiring Citizens to comply with the NPADA by filing a statement of organization, filing a campaign statement, and submitting to an audit of its records. In its petition, the NADC asserted that it has a right and duty to receive this information from Citizens and has an obligation pursuant to § 49-1470 to make such information available to the public. Citizens answered the petition, admitting that its purpose was to oppose the retention of Justice Lanphier and that it did raise more that $2,000 in a calendar year for that purpose. However, Citizens denied that it is a "committee" as defined by the NPADA, and, therefore, asserted that it was not under any legal obligation to comply with the reporting requirements of the act or submit to the statutory authority of the NADC for purposes of an audit.

In response to Citizens' answer, the NADC filed a motion for summary judgment on February 20, 1997. At the hearing on the motion, the parties conceded that the facts are not in dispute and

that the sole issue is one of statutory construction. On May 20, the district court entered an order denying the NADC's motion for summary judgment after concluding that Citizens is not a "committee" pursuant to the NPADA and, therefore, not subject to the act's provisions.

On October 2, 1997, Citizens filed its motion for summary judgment. The district court entered an order granting Citizens' motion for summary judgment on the same grounds for which it had denied the NADC's motion. The NADC filed a notice of appeal with the district court for Lancaster County on December 5.

We removed the case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this Court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The NADC contends, rephrased and summarized, that the district court erred in finding that Citizens is not a "committee" as defined by § 49-1413 and sustaining Citizens' motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. See, *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997).

The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997); *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996); *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995).

ANALYSIS

The NADC claims the district court erred in granting Citizens' motion for summary judgment for the reason that Citizens is subject to the provisions of the NPADA. The NADC makes its claims based on its assertion that Citizens is a "com-

mittee" as defined by the NPADA and therefore subject to the requirements of the act. Citizens argues that it is not a committee for purposes of the NPADA and that therefore it is not legally obligated to comply with the reporting and disclosure requirements of the act or submit to the statutory authority of the NADC.

In March 1998, the Nebraska Legislature by L.B. 632 amended the NPADA, effective July 15, 1998, to include "judicial retention" in the definition of "ballot question." See Neb. Rev. Stat. § 49-1405 (Reissue 1998). With that in mind, the veritable issue before this court is whether Citizens was a committee for purposes of the NPADA as it existed prior to the 1998 amendments. For purposes of this analysis, all references to the NPADA are as it existed prior to the 1998 amendments.

The NADC argues that the district court erred in sustaining Citizens' motion for summary judgment, because the court incorrectly determined that the NPADA could not be interpreted to include committees involving the retention of a judge. The NPADA defines a "committee" for purposes of the act as

> any combination of two or more individuals which receives contributions or makes expenditures of over two thousand dollars in a calendar year for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of one or more candidates or the qualification, passage, or defeat of one or more ballot questions . . . .

§ 49-1413. In order to be considered a committee for purposes of the NPADA, (1) a group must raise or expend over $2,000 in a calendar year and (2) the purpose of the group must be to influence the action of voters with respect to (a) a "candidate" or (b) a "ballot question."

It is undisputed that Citizens raised, received, or expended more than $2,000 within a calendar year and that the purpose of the group was to oppose the retention of Justice Lanphier. However, the district court held, as a matter of law, that Citizens was not a committee for purposes of the NPADA, because a judge standing for retention is not a "candidate," and a judicial retention question appearing on a ballot is not a "ballot question" as defined by the act.

Candidate.

The NPADA defines "candidate" for purposes of the act, in relevant part, as an individual "[w]ho files, or on behalf of whom is filed, a fee, affidavit, nomination papers, or nominating petition for an elective office." § 49-1409(a). The NPADA further defines "elective office" as "a public office filled by an election, except for federal offices." § 49-1417.

The NADC contends that a judge must be considered a "candidate" because a judicial officeholder who wishes to serve another term in office must submit an affidavit to the Secretary of State requesting that the question of his or her right to be retained in office for another term be submitted to the electorate of the appropriate district. See Neb. Rev. Stat. § 24-814 (Reissue 1995). The NADC asserts that although a judge is initially appointed to public office to fill a vacancy, a judge's succeeding terms in office are filled by election. This is so because a judge seeking to remain on the bench must participate in an election as a candidate. In support of its argument, the NADC points to § 49-1443, which defines a public official in part as "an *elected or appointed* official in the judicial branch of the state government or a political subdivision thereof." (Emphasis supplied.)

Citizens argues that although a judge who wishes to stand for retention does file an affidavit with the Secretary of State, the filing of the affidavit is not for an "elective office." Citizens stresses that the definition of "elective office" specifies that it is a "'public office filled by an election.'" Brief for appellees at 13. Therefore, although a judge must stand for retention every 6 years, the office is never *filled* by an election; rather, it is filled by appointment. Citizens also asserts that the language used in § 49-1443 to define public official does not support the NADC's position that the NPADA refers to retained judges as "elected." Rather, Citizens argues that § 49-1443 refers to those judges who initially may have been elected to their judicial offices prior to the implementation of the merit plan for the selection of judges.

We find the definition of "candidate" as provided by the NPADA to be unambiguous. Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort

to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997). It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

The NADC argues that the definition of "elective office" encompasses judicial retention. However, the plain and unambiguous meaning of the term "elective office" as defined by the NPADA is an office *filled* by an election. We need only consider this state's Constitution to determine that a judge does not fall within the definition of a "candidate" for purposes of the NPADA. The Constitution of the State of Nebraska provides:

> In the case of any vacancy in the Supreme Court or in any district court or in such other court or courts made subject to this provision by law, *such vacancy shall be filled by the Governor* from a list of at least two nominees presented to him by the appropriate judicial nominating commission.

(Emphasis supplied.) Neb. Const. art. V, § 21(1). It is clearly apparent that a judicial office has not been *filled* by an election since the adoption of the merit plan in 1963. Judicial offices are *filled* by appointment.

The NADC urges this court to look at other statutes related in subject matter to elections to determine that a judge falls within the definition of a "candidate" as provided in § 49-1409. We find this to be unnecessary. A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. See, *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). As we have stated, the statutory definition of "candidate" as provided in the NPADA is unambiguous. We conclude that the district court did not err in determining that a judge is not a "candidate" for purposes of the NPADA.

Ballot Question.

The NADC next asserts that the district court erred in determining that a judicial retention question appearing on the ballot is not a "ballot question" as defined by § 49-1405 of the NPADA. The NPADA defines "ballot question" as "any question which is submitted or which is intended to be submitted to a popular vote at an election by way of initiative, referendum, recall, or bond issue or as a result of legislative action, whether or not it qualifies for the ballot." § 49-1405. It is axiomatic that a judicial retention question is not an initiative, referendum, recall, or bond issue; however, the NADC argues that it is "a result of legislative action."

The NADC contends that although a judicial retention question is not specifically listed in this definition, the list is not limited, but, rather, the NADC argues that the list is descriptive and suggests a class of items which qualify as ballot questions. The NADC asserts that the phrase "as a result of legislative action" is a catch-all phrase which is ambiguous and requires interpretation by this court.

Citizens argues that "as a result of legislative action" is not ambiguous, nor is it an all-inclusive, catch-all phrase that enlarges the enumerated list. Instead, Citizens contends that "legislative action" is a specific reference to a certain type of action placing an item on the ballot.

The phrase "as a result of legislative action" is unambiguous and requires no interpretation because the term "legislative action" is clearly defined in the NPADA as

> introduction, sponsorship, support, opposition, consideration, debate, voting, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a committee or the Legislature.

§ 49-1431. As defined by the NPADA, the term "legislative action" specifically refers to a certain type of action which places an item on the ballot.

The NADC next contends that the question of judicial retention falls within the definition of "legislative action" by asserting that statutes for the judicial retention process were passed

by the Legislature. See Neb. Rev. Stat. §§ 24-813 through 24-818 (Reissue 1995). The NADC further contends that legislative action causes a judicial retention question to appear on the ballot, because the process of judicial retention is legislatively prescribed. Therefore, according to the NADC, any question is a result of "legislative action" if there is a statutory basis for the question to appear on the ballot. Citizens, however, argues that the definition of "legislative action" is intended to refer to current actions by the Legislature, not simply any question on the ballot merely because there is a statutory basis for it.

The plain language of the definition of legislative action makes clear that it refers to pending or proposed actions of the Legislature or executive branch. The definition of legislative action lists the items to which it applies as "a bill, resolution, amendment, nomination, appointment, report, *or any matter pending or proposed* in a committee or the Legislature." (Emphasis supplied.) § 49-1431. This list indicates a restricted class of items which are qualified as "legislative action." Clearly, the question of judicial retention on a ballot is neither pending nor proposed to a committee or the Legislature. We therefore conclude that a judicial retention question is not placed on the ballot as "a result of legislative action" as this is defined by the NPADA.

The district court did not err in determining that Citizens is not a committee as defined by § 49-1413 and, accordingly, not subject to the provisions of the NPADA. Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. See, *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997). The district court properly granted Citizens' motion for summary judgment for the reason that Citizens did not fall within the scope of the NPADA. The NADC's assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the decision of the district court granting Citizens' motion for summary judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROBERT C. BLACKSON, APPELLEE.

588 N.W. 2d 827

Filed February 5, 1999. No. S-98-275.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Constitutional Law: Statutes: Speedy Trial.** An accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1995) exist independently of each other.
4. **Speedy Trial.** The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
5. **Jurisdiction: Indictments and Informations.** The fact that an information is fatally defective does not deny the trial court jurisdiction to issue any order relating to those purported charges.
6. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court.
7. **Criminal Law: New Trial: Time.** Where a retrial is ordered, it is the trial for the specific criminal offenses originally charged and other offenses required by law to be joined therewith that must begin within 6 months of the retrial order. The 6-month period is computed by moving forward 6 months, backing up 1 day, and then adding any excludable periods.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Leigh Ann Retelsdorf, Deputy Douglas County Attorney, for appellant.

Patrick T. Riskowski, of Gallup & Schaefer, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The State of Nebraska appeals from an order of the Douglas County District Court which sustained Robert C. Blackson's

motion to dismiss for failure to bring him to trial within 6 months of the date of an order granting Blackson a new trial.

SCOPE OF REVIEW

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

FACTS

On January 6, 1993, Blackson was charged with murder in the second degree (count I), two counts of use of a firearm to commit a felony (counts II and IV), and assault in the first degree (count III). Following trial, a jury rendered verdicts of guilty on all four counts, and Blackson was sentenced to life imprisonment on count I, 10 years' imprisonment on count II, 6 to 10 years' imprisonment on count III, and 10 years' imprisonment on count IV, each sentence to be served consecutively. This court affirmed the convictions in *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994), which order was overruled by *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), and *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

Subsequently, Blackson sought postconviction relief, and on October 21, 1996, relying on our decision in *White*, the postconviction court granted Blackson's request for a new trial with regard to the second degree murder conviction and one of the convictions for use of a firearm to commit a felony. The convictions and sentences on the first degree assault charge and the other charge of use of a firearm to commit a felony were affirmed. The State did not appeal the order granting Blackson a new trial, and the State has not filed a new information charging Blackson with second degree murder and the related use of a firearm to commit a felony.

On September 30, 1997, Blackson moved to dismiss the second degree murder and use of a firearm to commit a felony

charges pursuant to his right to a speedy trial under article I, § 11, of the Nebraska Constitution and Neb. Rev. Stat. §§ 29-1205 and 29-1208 (Reissue 1995). At the hearing, the State explained that the prosecutor in charge of the case had taken personal leave and that the State was waiting until the prosecutor returned to file a new information.

Relying on Neb. Rev. Stat. § 29-1207(3) (Reissue 1995), on February 25, 1998, the district court entered an order dismissing counts I and II. The State appeals.

ASSIGNMENT OF ERROR

The State asserts that the district court erred in granting Blackson's motion to dismiss counts I and II.

ANALYSIS

An accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under § 29-1207 exist independently of each other. *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998). Blackson was discharged pursuant to § 29-1208, which provides: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense." The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992).

Section 29-1207 provides that every person indicted or informed against for any offense shall be brought to trial within 6 months as computed therein. "If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand." § 29-1207(3).

It is undisputed that the State failed to commence a new trial against Blackson within 6 months from the October 21, 1996, order granting a new trial and that there were no excludable periods applicable to this case. The State did not appeal from

the order granting a new trial, and the State did not file a new or amended information after the order was entered.

It is the State's position that the original information against Blackson was fatally defective and was therefore insufficient to charge Blackson with a crime. The State contends that absent a valid information, Blackson has not been charged, and that therefore the 6 months for computing the time in which Blackson must be tried has not commenced. The State asserts that since there is no statute of limitations requiring it to bring criminal charges for murder against a defendant within any time period, the State is free to file a new information against Blackson whenever it chooses. In the alternative, the State argues that absent a valid information, the postconviction court lacked jurisdiction to issue the order for new trial, and that the district court lacked jurisdiction to issue the order of discharge.

The information originally filed against Blackson did not allege that he acted with malice in committing the crime of second degree murder. In contending that the original information against Blackson was fatally defective, the State relies upon a line of cases that this court has since overturned which held that malice was an essential element of the crime of second degree murder. See, e.g., *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

We first address the State's position that both the postconviction court and the district court lacked jurisdiction. The State's argument is that the information was fatally defective and, therefore, that Blackson was never charged with a crime in Douglas County. Extending this argument, the State asserts that the postconviction court lacked jurisdiction to enter the order for a new trial and that the district court, which ordered the discharge, also lacked jurisdiction. As a result, the State claims it can file an amended information charging second degree murder at any time, because the 6-month statutory speedy trial period never began to run.

The fact that an information is fatally defective does not deny the trial court jurisdiction to issue any order relating to those purported charges. On the contrary, in *Smith v. State*, 169 Neb. 199, 99 N.W.2d 8 (1959), we indicated that an attack on an

indictment for the reason that it failed to sufficiently charge a crime is not the same as a jurisdictional attack.

The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998). We conclude that the State's argument that the postconviction court and the district court lacked jurisdiction is without merit.

We next address whether the district court correctly determined that Blackson was entitled to an absolute discharge of the charges of second degree murder and the related use of a firearm to commit a felony. The State argues that the statutory right to a speedy trial becomes an issue when a person is indicted or informed against and that because the information was fatally defective, Blackson never was indicted or informed against. The State thus asserts that the statutory 6-month period has never run. This argument also lacks merit.

The State acknowledges that a new trial was granted by the postconviction court's order of October 21, 1996. Section 29-1207(3) explicitly provides that "[i]f such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand." There was no appeal from the order granting postconviction relief, and thus, under § 29-1207(3), the time for bringing Blackson to trial commenced to run from the date of the postconviction order granting a new trial.

In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), we addressed a situation similar to that in the case at bar. The postconviction court had previously granted Gibbs relief because it determined that the original information was fatally defective for failing to allege malice as an element of second degree murder. The court vacated Gibbs' plea of guilty to the defective information on February 29, 1996. The State filed a new information on April 12, and trial was set for August 20. The trial was delayed due to numerous pretrial motions, including two motions for continuance filed by Gibbs. On September 11, Gibbs filed a motion for absolute discharge, which the district court denied.

We affirmed on appeal, stating that under the provisions of § 29-1207(3), the State was required, absent any excludable periods, to try Gibbs within 6 calendar months from the date on which the postconviction court vacated the prior convictions and granted a new trial. We ultimately concluded that due to the excludable periods attributable to Gibbs' motions for continuance, Gibbs was tried within 6 months of the postconviction court's judgment vacating Gibbs' prior convictions, and that Gibbs' right to a speedy trial was not violated. See *State v. Gibbs, supra.*

Gibbs controls our decision in this case. Where a retrial is ordered, it is the trial for the specific criminal offenses originally charged and other offenses required by law to be joined therewith that must begin within 6 months of the retrial order. The 6-month period is computed by moving forward 6 months, backing up 1 day, and then adding any excludable periods. *State v. Gibbs, supra.* Thus, 6 months from the October 21, 1996, order granting a new trial would have been April 21, 1997, and backing up 1 day gives the date by which the new trial was required to commence as April 20. There were no periods excludable from the 6 months. Therefore, the State failed to bring Blackson to trial within the period required by § 29-1207, and we must affirm the order granting absolute discharge.

The judgment of the district court is affirmed.

AFFIRMED.

BEVERLY J. WOOD, APPELLANT, V.
McGRATH, NORTH, MULLIN & KRATZ, P.C., APPELLEE.

589 N.W.2d 103

Filed February 12, 1999. No. S-96-1243.

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. **Attorneys at Law.** An attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law.
3. **Attorney and Client: Compromise and Settlement.** The Nebraska Supreme Court insists that lawyers advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.

4. ____: ____. The decision to settle a controversy is the client's.
5. ____: ____. An attorney should exert his or her best efforts to ensure that a client has been provided the information necessary to assess the risks and benefits of either settling or proceeding to trial.
6. **Attorney and Client.** Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled, or debatable and allow the client to make the decision.
7. **Attorney and Client: Compromise and Settlement.** Because the client bears the risk when settling or refusing to settle a dispute, it is the client who should assess whether the risk is acceptable, not the attorney.
8. **Attorney and Client: Compromise and Settlement: Negligence: Immunity.** The doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement. Rather, whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

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

John R. Douglas and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

CONNOLLY, J.

We granted the appellant, Beverly J. Wood's petition for further review of the Nebraska Court of Appeals' decision. The Court of Appeals concluded that as a matter of law, Timothy J. Pugh, an attorney with the appellee, the law firm of McGrath, North, Mullin & Kratz, P.C. (McGrath), did not breach the standard of care or commit legal malpractice by failing to inform Wood that the law relating to two issues relevant to a divorce settlement was unsettled and that the settlement resolved those issues against her. We reverse the Court of Appeals' decision and conclude that the doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement agreement.

BACKGROUND

We set out the facts focusing on the issues raised in Wood's petition for further review. For a more detailed recitation of the facts, see *Wood v. McGrath, North*, 7 Neb. App. 262, 581 N.W.2d 107 (1998).

Wood brought a legal malpractice action against McGrath, alleging that Pugh had negligently represented her in a dissolution action. The underlying dissolution action was concluded by settlement and decree. In her petition against McGrath, Wood alleged that Pugh allowed her to accept less than her share of the marital estate and was negligent by, inter alia, failing to inform her that (1) the settlement reflected a distribution which excluded all rights to then unvested stock options which her husband held through his employment at Werner Enterprises, Inc.; (2) the state of the law indicated that a trial court could likely include all such stock options within the marital estate; (3) the settlement reflected a distribution which excluded approximately $210,489 from the marital estate to account for potential capital gains tax on the stock that the couple owned; and (4) the state of the law indicated that a trial court could likely value the Werner stock without deducting any potential capital gains tax.

At trial, Wood testified that Pugh told her the settlement awarded her 40 percent of the marital estate and that when she asked if that was appropriate, she said Pugh told her a judge would award her anywhere from 35 to 50 percent—that she could do better or worse than the settlement by going to trial. However, Wood testified that Pugh never discussed the different terms of the settlement, never mentioned any alternatives to settling, never provided any reasons to reject the settlement, and never discussed the potential outcome of a trial. She stated that she would not have signed the agreement if Pugh had told her that a trial court might include the unvested stock options as part of the marital estate and that a trial court might prohibit the deduction of potential capital gains tax when valuing the stock, contrary to what the settlement proposed.

Two attorneys testified as expert witnesses for Wood. David Domina stated that when a property settlement raises the issue of unvested stock options, the decision is the client's whether to

pursue the issue to trial or to nonetheless settle the issue and that a lawyer breaches the applicable standard of care by failing to inform the client of the existence of the issue and the related law. Domina testified that when a settlement agreement deducts potential capital gains taxes from the value of a marital estate, a lawyer breaches the applicable standard of care by failing to inform a client of the effect of the deduction and the related law. Paul Galter testified that given the terms of the settlement agreement presented to Wood, Pugh breached the standard of care because Pugh did not give Wood sufficient information on the unvested stock options and capital gains tax issues. Galter stated that Pugh had a duty to tell Wood that the agreement raised the issues; to explain their effects to Wood; and to explain what the relevant law on the issues was, including what courts in other jurisdictions had held, before permitting her to sign the agreement.

At the close of Wood's evidence, McGrath moved for a directed verdict, which the court sustained on the issues of the stock valuation and the exclusion of unvested stock options.

On appeal, Wood asserted, inter alia, that the trial court erred in granting McGrath's directed verdict, arguing that Pugh breached the standard of care by failing to properly advise her in regard to the settlement agreement.

The Court of Appeals noted that the law on both the inclusion of unvested stock options in the marital estate and the consideration of potential capital gains taxes in valuing the estate were unsettled in Nebraska at the time the parties entered into the agreement. *Wood v. McGrath, North*, 7 Neb. App. 262, 581 N.W.2d 107 (1998). Accordingly, the court held that the judgmental immunity rule applied and concluded that Pugh's acts and omissions relating to the issues were not negligent as a matter of law. The court then stated that "Pugh, upon exercise of informed judgment, was not obligated to give additional advice regarding the unsettled nature of relevant legal principles." *Id.* at 282, 581 N.W.2d at 121.

ASSIGNMENT OF ERROR

In her petition for further review, Wood asserts that the Court of Appeals erred in affirming the trial court's judgment.

SCOPE OF REVIEW

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

ANALYSIS

Wood argues that the doctrine of judgmental immunity does not apply to Pugh's failure to inform her of the law relating to the unvested stock options and capital gains tax deduction issues; that the settlement resolved those issues against her; and that given the body of law on the issues at the time, a trial judge might have resolved those issues in her favor. McGrath notes that the law regarding those issues was unsettled in Nebraska when Pugh represented Wood and argues that the doctrine of judgmental immunity applies to an attorney's decision regarding unsettled law, citing *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). McGrath thus contends that when presenting a client with a settlement, an attorney has no duty to inform a client of possible options when the law relating to a relevant issue is unsettled.

In *Baker, supra*, this court held that an attorney is not liable for an error in judgment on a point of law which has not been settled by this court and on which reasonable doubt may be entertained by well-informed lawyers. Thus, an attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law. This immunity rule encourages practicing attorneys in this state to predict, in a professional manner, the outcome of legal issues relevant to their clients' cases. See Canon 7, EC 7-3 and 7-5, of the Code of Professional Responsibility. However, Pugh's recommendations (or lack thereof) on the unvested stock options and capital gains tax issues are not before us. Rather, the issue is whether the doctrine of judgmental immunity applies to Pugh's failure to inform Wood that the law relating to unvested stock options and potential capital gains tax issues, while unsettled in Nebraska, were settled in other jurisdictions in a manner which would have been favorable to Wood. The question of whether an attorney owes a duty to inform a client of the unsettled nature of rel-

evant law was not addressed in *Baker*. Thus, we must determine whether to extend the *Baker* judgmental immunity rule to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement agreement.

"[W]e insist that lawyers . . . advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks." *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 689, 551 N.W.2d 266, 272 (1996) (citing *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195 (1994)). See, also, *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). We declined in *McWhirt v. Heavey*, 250 Neb. at 547, 550 N.W.2d at 335, " 'to adopt a rule that insulates attorneys from exposure to malpractice claims arising from their negligence in settled cases if the attorney's conduct has damaged the client.' " We decline to adopt such a rule now.

The decision to settle a controversy is the client's. See Canon 7, EC 7-7. If a client is to meaningfully make that decision, he or she needs to have the information necessary to assess the risks and benefits of either settling or proceeding to trial. "A lawyer should exert his or her best efforts to ensure that decisions of a client are made only after the client has been informed of relevant considerations." Canon 7, EC 7-8. The desire is that a client's decision to settle is an informed one.

> The attorney's research efforts may not resolve doubts or may lead to the conclusion that only hindsight or future judicial decisions will provide accurate answers. The attorney's responsibilities to the client may not be satisfied concerning a material issue simply by determining that a proposition is doubtful or by unilaterally deciding the issue. Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled or debatable and allow the client to make the decision.

2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 17.15 at 531-32 (4th ed. 1996).

Additionally, an allegation that an attorney is negligent by failing to inform a client of an unsettled legal issue relevant to a settlement does not demand that an attorney accurately predict the future course of unsettled law. Thus, an allegation that an

attorney did not properly inform a client of relevant unsettled legal issues does not provide the same need for immunity from suit as does an attorney's judgment or recommendation in an area of unsettled law.

In *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996), lawyers affiliated with a law firm prepared disclaimers for clients in which the clients renounced their remainder and contingent interests in a family trust. In affirming the lower court's ruling that a competent estate planning attorney would have advised that the law was unsettled regarding the appropriate time to file the disclaimers, the *Williams* court recognized the difference between alleging negligence for a recommendation based upon an area of unsettled law and alleging negligence for failing to inform a client of relevant unsettled law.

> It does not matter that the opinion that the disclaimers would generate no adverse gift tax consequences was a reasonable view of the law in 1975. The problem is not that Gaston Snow gave reasonable advice that in time proved to be wrong. The problem is that the apparent certainty of the opinion given, at a time when the issue was not conclusively resolved, denied the plaintiffs the opportunity to assess the risk and to elect to follow alternative estate planning options.

Id. at 476, 668 N.E.2d at 806. See *First Nat. Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5 (N.M. App. 1985) (holding that while lawyer was not liable for his error in judgment on unsettled legal issue, jury properly considered whether lawyer was negligent for failing to inform client of risk created by unsettled law that recommendation was based upon).

In *Crosby v. Jones*, 705 So. 2d 1356 (Fla. 1998), which the Court of Appeals relied upon, the *Crosby* court addressed whether an attorney must inform a client of the unsettled law relevant to the client's case. In the underlying case, Crosby advised Jones to settle with one of two tort-feasors, but in doing so, Crosby did not advise Jones that a decision from a Florida appellate district court had determined that settling in such a situation would be adverse to her interests. On appeal in her suit against the second tort-feasor, Jones' appellate district court ruled adversely to her. See *Jones v. Gulf Coast Newspapers, Inc.*,

595 So. 2d 90 (Fla. App. 1992). Jones sued Crosby for malpractice, and on appeal, the *Crosby* court held that the attorney had no duty to inform the client of the unsettled nature of the law. However, the court's decision was based upon the fact that at the time of Crosby's recommendation, (1) a statute and a Florida Supreme Court decision appeared to be on point and supported Crosby's recommendation, see Fla. Stat. ch. 768.041(1) (1973), and *Sun First National Bank of Melbourne v. Batchelor*, 321 So. 2d 73 (Fla. 1975), and (2) two prior decisions issued by Jones' own appellate district court, the same court that ruled adversely in the underlying case, also supported Crosby's recommendation to settle. See *Crosby* at 1358-59, 1359 n.2.

In *Crosby*, 705 So. 2d at 1359, the court noted that its decision "does not mean that an attorney should never be required to inform a client regarding a conflict in the law; however, when an interpretation has been made as to the state of the law in a given district and that interpretation has a proper basis of support," an attorney need not advise his or her client of case law from other jurisdictions. Indeed, the facts and the holding in *Crosby* indicate that that case involved the failure to advise a client in an area of *apparently settled* law, rather than *unsettled* law. Thus, regarding apparently settled law, our decision in *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998), would be dispositive and in accordance with *Crosby*. In the instant case, however, Pugh had no case law from this jurisdiction which supported the settlement agreement's determinations on the unvested employee stock options or capital gains tax issues.

In *Davis v. Damrell*, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (1981), which the Court of Appeals also cited for support, the *Davis* court held that under the circumstances, the doctrine of judgmental immunity applied to the attorney's failure to inform the client of the unsettled nature of the law relating to a settlement agreement. "As a matter of policy," the court stated that an attorney should not be required to compromise his or her good faith and informed judgment by advising the client of the unsettled nature of relevant legal principles. *Id.* at 889, 174 Cal. Rptr. at 260.

The fallacy in the *Davis* court's reasoning is that when determining whether to settle a dispute, it is the client, not the attorney, who bears the risk. Because the client bears the risk, it is the client who should assess whether the risk is acceptable, not the attorney. See Canon 7, EC 7-7 and 7-8; *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996); 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 17.15 (4th ed. 1996).

Ultimately, we cannot support what would be the clear result of extending the judgmental immunity rule in the instant case. If we conclude that the judgmental immunity rule applies to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement, an attorney could forgo conducting research or providing a client with information on a relevant legal issue once he or she determined that the legal issue at hand was unsettled in this state. We fail to see how this result promotes the settlement of disputes in a client's best interests.

We conclude that the doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement. Our conclusion makes no judgment as to whether Pugh was negligent. It imposes no additional duty as a matter of law to research or inform a client on unsettled legal matters. Rather, it simply directs that consistent with *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); and *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks. At the same time, an attorney's ultimate recommendation in an area of unsettled law is immune from suit. *Baker v. Fabian, Thielen & Thielen, supra*. Such a result gives the client the benefit of both professional advice and the information necessary to make an informed decision whether to settle a dispute.

CONCLUSION

The Court of Appeals erred in concluding that Pugh was not negligent as a matter of law in failing to inform Wood of the

unsettled nature of the law regarding whether unvested stock options were part of the marital estate and whether the marital estate's unvested stock options should have been valued without deducting potential capital gains tax. Accordingly, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN and MILLER-LERMAN, JJ., not participating.

JEAN M. BOYLE, APPELLANT, V. JAMES R. WELSH, APPELLEE.

589 N.W.2d 118

Filed February 12, 1999. No. S-97-249.

1. **Summary Judgment.** 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. The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists.
2. **Malpractice: Attorney and Client: Negligence: Proximate Cause: Proof.** A litigant alleging legal malpractice must prove the following: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
3. **Malpractice: Attorney and Client.** In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. Although this general standard is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.
4. **Attorney and Client: Expert Witnesses.** Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.
5. **Malpractice: Attorney and Client: Negligence: Evidence: Expert Witnesses: Presumptions.** In legal malpractice cases, where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons, no expert testimony is required.
6. **Summary Judgment: Proof.** In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.

7. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial.
8. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** An affidavit of a defendant physician in a malpractice case, which affidavit states the defendant did not breach the appropriate standard of conduct, presents a prima facie case of lack of negligence for the purposes of summary judgment.
9. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
10. **Affidavits: Summary Judgment.** Statements in affidavits as to opinion, belief, or conclusions of law are of no effect, and mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment.
11. **Trial: Evidence: Expert Witnesses.** The key inquiry under Neb. Rev. Stat. § 25-1334 (Reissue 1995), insofar as an expert's opinion and foundational evidence is concerned, is whether such evidence would be admissible at trial.
12. **Rules of Evidence: Expert Witnesses.** Under the Nebraska rules of evidence, in an appropriate case, an expert may render an opinion without first disclosing the underlying data upon which that opinion is based.
13. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. If the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the movant is entitled to summary judgment.
14. **Malpractice: Attorney and Client: Proof.** The plaintiff's burden of proving that an attorney failed to comply with the applicable standard of conduct in a legal malpractice case can be met without expert testimony when the asserted negligence lies within the fact finder's comprehension as a matter of common knowledge.
15. **Attorney and Client: Negligence: Limitations of Actions.** The failure to file a suit that should otherwise be filed within the time required by the statute of limitations is a deviation from the standard of care falling within the common knowledge exception. Obviously, an attorney commits no negligence concerning the statute of limitations by failing to file a frivolous suit or one which otherwise would not produce a satisfactory result.
16. **Malpractice: Attorney and Client: Limitations of Actions.** Determining whether there was a suit that should be filed is a predicate step to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney's standard of conduct.
17. **Malpractice: Attorney and Client: Expert Witnesses.** Whether a suit should be instituted against a particular defendant is an issue that is within the province of an attorney's professional skill and judgment, and is not within the ordinary knowledge and experience of laypersons. Thus, generally, legal expert testimony is required to establish such.

18. **Attorney and Client: Expert Witnesses: Physicians and Surgeons.** A medical expert cannot demonstrate that an attorney should have filed a lawsuit.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Associates, and, on brief, Kathy Pate Knickrehm for appellant.

James R. Welsh, of Bradford, Coenen & Welsh, for appellee.

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

CONNOLLY, J.

We granted the petition for further review of the appellee, James R. Welsh. The appellant, Jean M. Boyle, brought a legal malpractice action against Welsh, alleging, inter alia, that Welsh was negligent in failing to timely file suit against certain potential defendants in her underlying medical malpractice action. The question presented is whether an attorney's failure to file a suit within the period provided for in the statute of limitations amounts to negligence, even in the absence of any showing that the suit should have been filed. We conclude that determining whether there was a suit that should be filed is a predicate step to determining whether the failure to timely file such a suit is negligent. We also determine that in the instant case, legal expert testimony was required to establish whether a suit should have been filed. We reverse the judgment of the Nebraska Court of Appeals and remand the cause with directions.

BACKGROUND

Welsh agreed to represent Boyle in a lawsuit against the physicians that performed her postoperative treatment, which occurred during the spring and summer of 1990. Boyle's primary physician was Dr. Patrick A. Smith. However, Boyle was also treated on one occasion by Smith's partner, Dr. John W. Monson. During his representation of Boyle, Welsh filed suit against Smith but not against Monson or Monson and Smith's

partnership. The suit against Smith was tried in 1994, and a verdict was rendered in favor of Smith.

In 1995, Boyle filed a pro se legal malpractice claim against Welsh, alleging that Welsh was negligent (1) by failing to file suit against Monson and the partnership within the period provided for in the applicable statute of limitations and (2) in failing to join Monson and the partnership as defendants in the lawsuit against Smith. Welsh filed a motion for summary judgment and offered his own affidavit stating that he was a certified trial attorney licensed in the State of Nebraska; had represented Boyle in her medical malpractice claim; was personally familiar with the facts of Boyle's case, including the allegations made against him in her petition; and had reviewed the file and trial notebook applicable to his legal representation of Boyle. The affidavit then stated that based on Welsh's education, training, and experience in malpractice cases; his personal knowledge of the facts in Boyle's case; and a review of the file, medical records, and depositions, it was Welsh's professional opinion, based on a reasonable degree of legal certainty, that his representation of Boyle complied with the appropriate standard of conduct. He also offered Boyle's interrogatories, which indicated that she had not retained an expert to testify regarding legal malpractice.

In response, Boyle offered the affidavit of Dr. Thomas J. Safranek, which stated that Monson and Smith violated the appropriate standard of medical conduct in the treatment of Boyle. Boyle also offered her own affidavit, which stated that she had "repeatedly questioned [Welsh] regarding his failure to add Dr. Monson as a defendant in the underlying medical malpractice lawsuit" and that Welsh had "declined to institute an action against" Monson. Her affidavit also stated that Welsh had assured her that "it was not necessary to include Dr. Monson as a defendant in the action in order for the essential evidence to be properly presented at the time of trial" and that Boyle "relied upon and believed [Welsh's] representations and followed his advice."

The trial court received the parties' offered evidence and granted Welsh's motion for summary judgment. The trial court concluded that there was no genuine issue of material fact,

because Boyle failed to offer legal expert testimony to establish Welsh's alleged negligence.

Conceding that legal expert testimony is generally required, Boyle appealed, arguing solely that the failure to file a suit within the period provided for in the statute of limitations is an allegation of negligence falling within the common knowledge exception to the expert testimony requirement. The Court of Appeals first concluded that legal expert testimony is required to establish an attorney's breach of the standard of conduct in legal malpractice actions, with the exception of those allegations falling within laypersons' common knowledge. *Boyle v. Welsh*, 6 Neb. App. 931, 578 N.W.2d 496 (1998). The Court of Appeals then concluded that Boyle's first allegation of negligence, concerning the statute of limitations, was negligence falling within the common knowledge exception. *Id.* According to the court, Safranek's affidavit established that Welsh should have filed suit against Monson and the partnership, and thus, that Welsh's failure to timely do so was obvious negligence. *Id.* However, the Court of Appeals concluded that Boyle's second allegation of negligence, joinder, did not fall within the common knowledge exception. *Id.*

ASSIGNMENT OF ERROR

In his petition for further review, Welsh asserts that the Court of Appeals erred in concluding that Boyle's allegations concerning his failure to initiate suit against Monson and the partnership, within the period provided for in the applicable statute of limitations, fell within the "common knowledge" exception to the expert testimony requirement.

SCOPE OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998). The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists. *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998).

ANALYSIS

LEGAL MALPRACTICE

A litigant alleging legal malpractice must prove the following: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). In the instant case, there is no dispute that an attorney-client relationship existed between Boyle and Welsh. However, the parties do dispute whether Welsh's representation of Boyle breached the standard of conduct. In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. See *Baker v. Fabian, Thielen & Thielen, supra*, citing *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996). Although this general standard is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of *fact*. See, *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991); *Shanley v. Barnett*, 168 Ill. App. 3d 799, 523 N.E.2d 60, 119 Ill. Dec. 592 (1988); 4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 32.16 (4th ed. 1996); Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 Temple L. Rev. 1351 (1988).

Although we have consistently held that expert testimony is necessary to establish a breach of the standard of conduct in professional malpractice cases not involving attorneys, this court has never explicitly held that expert testimony is required to establish such a breach in legal malpractice cases. See, *Boyle v. Welsh*, 6 Neb. App. 931, 578 N.W.2d 496 (1998), citing *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997) (involving medical malpractice), and *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985) (involving architectural malpractice). See, also, *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995)

(holding that expert testimony concerning question of *law* is generally not admissible in evidence). However, we impliedly recognized as much in *McVaney v. Baird, Holm, McEachen, supra*. In *McVaney*, the defendant law firm argued that expert testimony was necessary to establish that its conduct concerning the statute of limitations was not in conformity with the standard of care. This court held that "no *outside* expert testimony was necessary," not because expert testimony is, as a general matter, unnecessary, but because the defendant's attorney had conceded that his conduct would violate the standard of care. (Emphasis supplied.) *McVaney v. Baird, Holm, McEachen*, 237 Neb. at 461, 466 N.W.2d at 507. Indeed, "[i]n every jurisdiction in which the issue has arisen, expert testimony to establish the standard of care has been held to be admissible or has been admitted without discussion." 4 Mallen & Smith, *supra* at 199. Expert testimony is generally required in legal malpractice actions, since a " 'jury cannot rationally apply a general statement of the standard of care unless it is aware' " of what the common attorney would have done in similar circumstances. *Gibson v. Talley*, 162 Ga. App. 303, 305, 291 S.E.2d 72, 75 (1982). Accordingly, we conclude that expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.

Having determined that expert legal testimony is generally required in legal malpractice cases, we must also determine whether the common knowledge exception applies. As noted by the Court of Appeals, we have applied such an exception in medical malpractice cases. *Boyle v. Welsh, supra*, citing *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996). We see no reason to treat legal malpractice actions any differently than medical malpractice actions. See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). See, also, Ambrosio & McLaughlin, *supra*, citing, inter alia, *Molever v. Roush*, 152 Ariz. 367, 732 P.2d 1105 (Ariz. App. 1986); *Dean v. Conn*, 419 So. 2d 148 (Miss. 1982). Therefore, we conclude that in legal malpractice cases, where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons, no

expert testimony is required. *Boyle v. Welsh, supra,* citing *Boyd v. Chakraborty, supra.*

SUMMARY JUDGMENT

In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Melick v. Schmidt,* 251 Neb. 372, 557 N.W.2d 645 (1997). Thus, the threshold question in the instant case is whether Welsh, as the movant, established a prima facie case in support of his motion for summary judgment.

PRIMA FACIE CASE

A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were *uncontroverted* at trial. *O'Connor v. Kaufman,* 250 Neb. 419, 550 N.W.2d 902 (1996). Welsh's motion for summary judgment was premised on his affidavit, wherein Welsh stated that his representation of Boyle met the applicable standard of conduct. Such evidence, if admitted at trial, would be *uncontroverted* only if Boyle failed to produce *any* evidence, whether by expert or otherwise, indicating that Welsh neglected a reasonable duty, i.e., breached the standard of conduct. Boyle's failure to present such evidence would entitle Welsh to judgment as a matter of law, since Boyle would have failed to meet her burden of proof. See, e.g., *Baker v. Fabian, Thielen & Thielen,* 254 Neb. 697, 578 N.W.2d 446 (1998). See, also, *Hall v. Stephenson,* 919 S.W.2d 454 (Tex. App. 1996) (stating that defendant is entitled to summary judgment if summary judgment evidence establishes, as matter of law, that at least one element of plaintiff's cause of action cannot be established).

We note that Welsh's affidavit did not contain a specific recitation of the underlying facts upon which he based his expert opinion. We recognize that other jurisdictions have held that such an affidavit is insufficient to establish a prima facie case. In *Heitmeyer v. Sasser,* 664 So. 2d 358 (Fla. App. 1995), the defendant attorney in a legal malpractice action moved for

summary judgment, presenting the affidavit of a legal expert as to the standard of conduct. The affidavit stated that the expert had reviewed the file in the underlying action, the production of records by the plaintiffs, the pleadings in the underlying action, the pleadings in the instant action, and the depositions of the parties and that, in the expert's opinion, the defendant attorney did not breach the standard of care. The court held that the affidavit was insufficient to shift the burden of proof to the plaintiffs, since the expert's affidavit was conclusory. *Id.* See, also, *Petersen, Ibold & Wantz v. Whiting*, 109 Ohio App. 3d 738, 673 N.W.2d 151 (1996) (holding that expert's conclusory affidavit insufficient).

However, this court has long held that "an affidavit of a defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of conduct, presents a prima facie case of lack of negligence for the purposes of summary judgment." *Boyd v. Chakraborty*, 250 Neb. 575, 580, 550 N.W.2d 44, 47 (1996), citing *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). See, also, *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995); *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987). In *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982) (*Hanzlik I*), the defendant doctor in a medical malpractice action moved for summary judgment, which motion was sustained. On appeal, this court reversed the trial court's judgment, holding that the defendant had failed to establish a prima facie case of nonnegligence. Although the defendant had presented evidence explaining the surgical procedures he followed and detailing the possible consequences of those procedures, the defendant did not indicate that such procedures met the applicable standard of conduct. *Id.* On remand, in *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984) (*Hanzlik II*), the defendant doctor again filed a motion for summary judgment, this time supported by his own affidavit stating that he had met the appropriate standard of care. Although this court did not indicate whether or not he had again presented evidence of the surgical procedures he followed, this court held that his affidavit was sufficient to establish a prima facie showing of nonnegligence. *Id.* Thus, this court's precedent would indicate

that Welsh's affidavit was sufficient to establish a prima facie case, despite its lack of underlying facts.

An analysis of the underlying law demonstrates the basis for this court's holding in *Hanzlik II*. Neb. Rev. Stat. § 25-1334 (Reissue 1995), which prescribes the form of affidavits offered in support of summary judgment, states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth *such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (Emphasis supplied.) There is no question that Welsh's affidavit was made on personal knowledge (he handled Boyle's case) and that he was competent to testify to the matters stated therein (he is an expert as to legal matters). The only question is whether Welsh's opinion in his affidavit would be admissible in evidence had the case gone to trial.

This court interpreted § 25-1334 in the seminal case *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957). In *Klaas*, the plaintiff motorist in a negligence action offered an affidavit in opposition to the defendant's summary judgment motion, which affidavit consisted of conclusions, general statements, and other matters of which the plaintiff had no personal knowledge. This court stated that the plaintiff's affidavit was of no avail, holding that " 'statements in affidavits as to opinion, belief, or conclusions of law are of no effect,' " *id.* at 328, 85 N.W.2d at 646, quoting 3 William Barron & Alexander Holtzoff, Federal Practice and Procedure § 1237 (1951), and that " 'mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment,' " *id.*, quoting *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943). Obviously, the opinion, the belief formed without personal knowledge, or the legal conclusions of a *lay* motorist would be inadmissible at trial and, thus, would not satisfy the requirements of § 25-1334. Likewise, some factual detail is usually necessary to lay foundation for a formal denial or a general allegation. However, the key inquiry under § 25-1334, insofar as an expert's opinion and foundational evidence is concerned, is whether such evidence "would be admissible" at trial.

Although a layperson's opinion is generally not admissible, see Neb. Rev. Stat. § 27-701 (Reissue 1995), an expert opinion, such as that in *Hanzlik II*, is readily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995). Likewise, pursuant to Neb. Rev. Stat. § 27-705 (Reissue 1995), an expert "is not required to testify to 'the underlying facts or data' before stating his opinion." *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 803, 277 N.W.2d 236, 240 (1979). "Without question, under our Rules of Evidence in an appropriate case, an expert may render an opinion without first disclosing the underlying data upon which that opinion is based." *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 305, 275 N.W.2d 77, 80-81 (1979). Thus, Welsh's opinion that his conduct met the standard of conduct would have been admissible at trial, and therefore, Welsh's affidavit met the requirements of § 25-1334.

Because Welsh's affidavit presented competent evidence sufficient to support a finding that his conduct was in compliance with the standard of conduct, he would be entitled to judgment as a matter of law if that evidence were uncontroverted. Therefore, we conclude that Welsh's affidavit established a prima facie case for purposes of summary judgment.

Issue of Material Fact

After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). If the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the movant is entitled to summary judgment. See, e.g., *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). As we have already determined that Welsh established a prima facie case of nonnegligence by producing enough evidence to show that he met the standard of conduct, the question is whether the evidence Boyle presented in opposition to summary judgment is sufficient to controvert Welsh's evidence,

i.e., create an issue of material fact as to whether Welsh was negligent.

First, we note that Boyle did not provide any expert evidence as to whether Welsh met the standard of conduct. However, as we have already indicated, the plaintiff's burden of proving that an attorney failed to comply with the applicable standard of conduct in a legal malpractice case can be met without expert testimony when the asserted negligence lies within the fact finder's comprehension as a matter of common knowledge. See, e.g., *Boyd v. Chakraborty*, 250 Neb. 575, 581, 550 N.W.2d 44, 48 (1996) (applying common knowledge exception in medical malpractice context). See, also, *Brumley v. Naples*, 320 Ark. 310, 896 S.W.2d 860 (1995) (acknowledging that common knowledge exception applies in legal malpractice context). Accordingly, the question is whether Welsh's alleged failure to file suit against Monson and the partnership, within the period provided for in the statute of limitations, falls within the common knowledge exception to the expert testimony requirement in legal malpractice cases. In other words, Is the evidence presented by Boyle, despite the lack of expert testimony, sufficient to create an issue of fact?

We agree with the Court of Appeals to the extent that it concluded that the failure to file *a suit that should otherwise be filed* within the time required by the statute of limitations is a deviation from the standard of care falling within the common knowledge exception. See *Boyle v. Welsh*, 6 Neb. App. 931, 578 N.W.2d 496 (1998). See, also, *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991) (indicating that finding that statute of limitations had run by reason of attorney's poor pleading would constitute actionable negligence). But see *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991) (indicating that no expert testimony was necessary, because defendant attorney's own testimony established standard of care respecting statute of limitations). However, the operative phrase in the above proposition is "a suit that should otherwise be filed." Obviously, an attorney commits no negligence concerning the statute of limitations by failing to file a *frivolous* suit or one which otherwise would not produce a satisfactory result.

In *Koeller v. Reynolds*, 344 N.W.2d 556 (Iowa App. 1983), the plaintiff in a legal malpractice action argued that the defendant attorney's failure to file suit prior to the expiration of the statute of limitations fell within the common knowledge exception. The court responded by stating that the plaintiff's "argument begs the question of negligence by assuming she had a good case." *Id.* at 561. In other words, an attorney does not owe his or her client any duty to file a suit that should not be filed prior to the running of the statute of limitations. Thus, determining whether there was a suit that should be filed is a predicate step to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney's standard of conduct. See, also, *Procanik By Procanik v. Cillo*, 226 N.J. Super. 132, 543 A.2d 985 (1988).

Accordingly, Boyle's evidence must create an issue of fact as to whether a suit should have been filed before it can create an issue of fact as to whether the suit should have been filed within the period provided for in the statute of limitations. Whether a suit should be instituted against a particular defendant is an issue that is within the province of an attorney's professional skill and judgment, and is not within the ordinary knowledge and experience of laypersons. See, *Boulette v. Boulette*, 627 A.2d 1017 (Me. 1993); *Prather v. McGrady*, 261 Ill. App. 3d 880, 634 N.E.2d 299, 199 Ill. Dec. 460 (1994); *Williams v. Beckham & McAliley, P.A.*, 582 So. 2d 1206 (Fla. App. 1991); *Nika v. Danz*, 199 Ill. App. 3d 296, 556 N.E.2d 873, 145 Ill. Dec. 255 (1990). See, also, *Kirsch v. Duryea*, 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978); *Mills v. Cooter*, 647 A.2d 1118 (D.C. App. 1994). Thus, generally, legal expert testimony is required to establish such.

Nonetheless, the Court of Appeals concluded that Boyle's affidavits presented sufficient evidence to create an issue of fact as to whether Welsh's failure to file suit against Monson and the partnership was negligent. *Boyle v. Welsh, supra.* According to the Court of Appeals, Safranek's affidavit demonstrated that a lawsuit against Monson should have been filed.

The fallacy in the court's reasoning lies in the fact that a *medical* expert cannot demonstrate that an *attorney* should have

filed a lawsuit. See *Procanik By Procanik v. Cillo, supra.* In *Cillo*, the plaintiffs complained that the defendant attorneys had committed malpractice by improperly discouraging the plaintiffs from bringing a medical malpractice action against certain doctors, causing the plaintiffs to miss the statute of limitations on their medical malpractice claim. The plaintiffs alleged, inter alia, that one of the defendant attorneys was negligent in characterizing a medical expert's opinion as to the negligence of the potential defendants in the underlying medical malpractice as "'somewhat weak.'" *Id.* at 152, 543 A.2d at 995. The court noted that the legal issue was whether the "somewhat weak" characterization of the medical expert's opinion was a violation of the attorney's standard of conduct. The court then noted that the plaintiff had failed to adduce proof that the attorney's characterization was such a violation. The court concluded that the testimony of the plaintiffs' medical expert in the legal malpractice action as to the proper characterization of the previous medical expert's opinion was irrelevant. *Id.* According to the court, "The issue was not what the report meant to another physician but how it could be reasonably interpreted by a lawyer, and that was not an issue as to which a physician was competent to express an opinion." *Id.* at 153-54, 543 A.2d at 996.

Likewise, in the instant case, Safranek's affidavit, although it may have created an issue of fact as to Monson's negligence, did not create an issue of fact as to whether Welsh was negligent. See *Procanik By Procanik v. Cillo, supra* (indicating that attorney may properly decline to file suit even when doctor has acted negligently).

In her own affidavit, Boyle admitted that she had "repeatedly questioned" Welsh regarding his failure to add Monson as a defendant in the underlying medical malpractice action and that Welsh had assured her that it was unnecessary to do so. Boyle's evidence does not indicate in any way that Welsh was unaware of the statute of limitations. To the contrary, one could infer from Welsh's timely filing of the underlying action against Smith that Welsh was well aware of the need to file suit within the period provided for in the statute of limitations. Thus, if any inference can be drawn from Boyle's affidavit, it is that Welsh

was not going to file suit against Monson and the partnership or add Monson and the partnership to the underlying action, regardless of the statute of limitations.

Therefore, based on the evidence offered by Boyle, it appears that the real theory underlying her cause of action against Welsh is that Welsh was negligent in refusing to join or file suit against Monson and the partnership, and not that Welsh failed to do so prior to the running of the statute of limitations. This court cannot allow Boyle to avoid summary judgment by clothing her cause of action in terms of the statute of limitations, when she has failed to produce any evidence that the statute of limitations is relevant. Indeed, every time an attorney exercises his or her judgment not to bring suit against a particular defendant, the statute of limitations will eventually run. That fact does not magically bring the legal malpractice plaintiff's cause of action into the common knowledge exception.

We conclude that Boyle's evidence opposing summary judgment was insufficient to create an issue of fact as to whether Welsh should have filed suit and, thus, that the trial court properly granted summary judgment in Welsh's favor. This conclusion does not indicate that legal expert testimony is always necessary to establish that a suit should have been filed. Rather, it limits the application of the common knowledge exception to those instances when the need to file the underlying suit is obvious, such as when an untimely suit or appeal was actually filed, see *Brainerd v. Kates*, 68 Ill. App. 3d 781, 386 N.E.2d 586, 25 Ill. Dec. 315 (1979), or where the defendant attorney otherwise establishes such, see, *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998) (wherein attorney admitted negligence in failing to file wrongful death action within applicable statute of limitations); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). See, also, *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991) (indicating that attorney had decided that it would be necessary to file lawsuit).

CONCLUSION

Boyle failed to create an issue of material fact concerning Welsh's alleged negligence. Accordingly, we conclude that the

trial court properly granted Welsh's motion for summary judgment. We reverse the judgment of the Court of Appeals and remand the cause with directions to remand the cause to the district court for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK and MILLER-LERMAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE,
v. MICHAEL E. JOHNSON, APPELLANT.
589 N.W. 2d 108

Filed February 12, 1999. Nos. S-97-632, S-97-633.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
2. **Search Warrants: Affidavits: Probable Cause.** The Nebraska Supreme Court has adopted the "totality of the circumstances" rule established by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), as the basis for determining whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant. Under this standard, the question is whether, considering the totality of the circumstances, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
3. ____: ____: ____. In order to be valid, a search warrant must be supported by an affidavit establishing probable cause.
4. **Case Overruled: Search Warrants: Probable Cause: Constitutional Law.** To the extent that our decisions in *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993); *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993); *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992); *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989); *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989); *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984); *State v. Robish*, 214 Neb. 190, 332 N.W.2d 922 (1983), and the opinions of the Nebraska Court of Appeals in *State v. Nelson*, 6 Neb. App. 519, 574 N.W.2d 770

(1998), and *State v. Flemming*, 1 Neb. App. 12, 487 N.W.2d 564 (1992), suggest that issuance of a search warrant may be based upon something less than probable cause required by the Fourth Amendment to the U.S. Constitution, they are disapproved.

5. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
6. **Search Warrants: Affidavits: Police Officers and Sheriffs: Probable Cause.** The purpose of the four corners doctrine is to require a police officer seeking a search warrant to include in the affidavit all information he or she possesses bearing on the probable cause determination at the time of issuance of the warrant, thus preventing supplementation of that information if the warrant is subsequently challenged.
7. **Search Warrants: Probable Cause: Proof: Time.** 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.
8. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), provides that even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant thereto need not be suppressed where police officers act in objectively reasonable good faith in reliance upon the warrant.
9. **Search Warrants: Affidavits: Police Officers and Sheriffs: Probable Cause.** In regard to a police officer's reasonable reliance on an 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. This is an objective standard of reasonableness, which requires officers to have a reasonable knowledge of what the law prohibits.
10. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Under *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), suppression of 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.
11. **Motions to Suppress: Search Warrants: Affidavits: Evidence.** The good faith exception recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), does not preclude suppression where the issuing magistrate was misled by omissions in an affidavit. Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Dakota County, MAURICE REDMOND, Judge. Judgment of Court of Appeals affirmed.

Thomas A. Fitch, of Fitch & Tott Law Firm, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

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

STEPHAN, J.

In these consolidated appeals, we granted the State's petition for further review of a decision by the Nebraska Court of Appeals which reversed Michael E. Johnson's convictions for possession with intent to distribute a controlled substance (methamphetamine and cocaine) and unauthorized possession of a controlled substance (diazepam), based upon that court's determination that a search warrant for Johnson's home was not supported by probable cause and that the fruits of the search were therefore not admissible. *State v. Johnson*, 6 Neb. App. 817, 578 N.W.2d 75 (1998). Finding no error, we affirm the judgment of the Court of Appeals in both cases.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are set forth in detail in the opinion of the Court of Appeals and are summarized here only to the extent necessary for our consideration of the issues raised in the petition for further review. At approximately 11:25 p.m. on May 19, 1995, police officers arrested Johnson in South Sioux City, Nebraska, pursuant to an arrest warrant on charges of failing to pay child support. Officer Terry Ivener conducted a pat-down search incident to the arrest and felt a small, cylindrical object in one of Johnson's pockets, which Johnson identified as a knife. Ivener retrieved the object, which was a small, clear plastic vial with a black lid containing several small, off-white "rocks." Chemical field tests performed at the scene of the

arrest confirmed Ivener's suspicion that the vial contained methamphetamine. The police officers then searched Johnson's vehicle, which he had occupied immediately prior to his arrest, and found a plastic bag containing two small paper packets which Ivener suspected to be "snow seals," commonly used as containers for controlled substances. Johnson's billfold was searched and found to contain an empty snow seal and $269.50 in cash.

Within hours after arresting Johnson, Ivener prepared an affidavit and complaint for a warrant to search Johnson's home for controlled substances, drug paraphernalia, currency, weapons, and other items generally associated with illicit drug trafficking. The affidavit described Johnson's arrest and the seizure of the vial "containing a substance later identified . . . as methamphetamine." However, the quantity of the substance was not stated in the affidavit. The affidavit also recited the discovery of the snow seals, which Ivener characterized on the basis of his training and experience as "an item used for the sale of controlled substances." The affidavit concluded with the following statements:

> 6. I am aware from my training and experience and from information received from other law enforcement officers that individuals frequently keep controlled substances on their persons; as well as at their residence.
>
> 7. I am aware from my training and experience, and from information received from other law enforcement officers, that individuals involved in the possession, use and distribution of controlled substances use paraphernalia to ingest the controlled substance and that this paraphernalia is retained by the individual for the [sic] future use and that this paraphernalia retains residue of the controlled substance.
>
> 8. I am aware that Michael E. Johnson is a person known to have engaged in the use and sale of controlled substances. I am further aware that Michael E. Johnson has previously been convicted of drug charges. I know that Michael E. Johnson lives at 3401 El Dorado Way, South Sioux City, Dakota County, Nebraska as I have been to his home on service calls on at least three separate occasions.

> 9. Based upon my knowledge and training in the area of dealing with persons suspected to be involved with the drug trade it is my belief that a search warrant on Michael E. Johnson's residence will needed [sic] to be served as soon as possible so as to avoid any possibility of destruction of evidence. Therefore, I request that this warrant be allowed to be served during the hours of darkness.

Pursuant to this affidavit, a magistrate issued a search warrant for Johnson's residence which was executed by Ivener at 2 a.m. on May 20, 1995. Items seized from the residence during this search included a small quantity of cocaine; tablets later confirmed to be diazepam; a triple-beam scale; precut small squares of glossy paper, alleged to be unused snow seals; two pair of scissors; a razor blade; a small, black, glass board; and drug paraphernalia. Johnson was then charged in separate informations with the two offenses of which he was eventually convicted.

Johnson filed a pretrial motion to suppress in each case, alleging that the search warrant was not supported by probable cause. During a suppression hearing on these motions, Ivener testified that he had been to Johnson's residence three or four times prior to May 19, 1995, in response to domestic calls. He admitted that he did not observe drugs or contraband on these occasions. He admitted that he had not been in Johnson's house on May 19 and that he did not have any direct knowledge of what may have been there on that date. He testified that his application for a search warrant was based entirely upon the controlled substance and the snow seals he had found on Johnson's person at the time of the arrest and the fact that other officers told him that Johnson had been previously convicted on an unspecified drug-related offense and had served time in jail. Ivener stated that he did not know the details of Johnson's prior conviction or when it occurred and that he had no personal knowledge about it. Finally, he testified that the relatively small quantity of methamphetamine and the snow seals found in Johnson's possession at the time of his arrest could be consistent with either personal use or distribution.

The trial court denied both of Johnson's motions to suppress evidence seized in the search of Johnson's home, finding that

> the fact that the Defendant had a previous conviction for drug related offense and the Defendant was in possession of snow seals which had markings associated with the delivery or selling of controlled substances on them is probable cause to believe that controlled substances would be found at the Defendant's residence.

During Johnson's trial on the consolidated charges, evidence gathered from the search of his home was received over his objection. He was convicted of possession with intent to distribute a controlled substance (methamphetamine and cocaine), a Class III felony, for which he was sentenced to 2 to 4 years' imprisonment, and unauthorized possession of a controlled substance (diazepam), for which he received a concurrent sentence of 1 to 2 years' imprisonment. Johnson was also sentenced to 1 to 2 years' imprisonment on an unrelated conviction of failure to appear, to be served consecutively to the sentences involved in these consolidated appeals.

In his appeals, Johnson asserted that the district court erred in overruling his motions to suppress evidence seized during the search of his residence and admitting such evidence at trial over his objection. The Court of Appeals determined that Ivener's affidavit did not establish probable cause for issuance of the search warrant in that it contained generalizations about the habits of users and dealers of controlled substances but lacked "articulable facts . . . to support a finding of probable cause that these generalizations applied to Johnson." *State v. Johnson*, 6 Neb. App 817, 828, 578 N.W.2d 75, 83 (1998). The court concluded:

> The facts of Johnson's arrest hours earlier, of the discovery of drugs without an indication of the amount or an inference that the amount was other than that consistent with personal use, and of a prior conviction at some unspecified time in the past did not support the issuance of the search warrant.

Id. The Court of Appeals therefore reversed both convictions and remanded the cause in case No. A-97-632 for a new trial because of the existence of other admissible evidence. Based upon its determination that the conviction in case No. A-97-633 rested entirely upon the diazepam unlawfully seized during the

search of Johnson's residence, the Court of Appeals remanded that cause with directions to dismiss. We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

The State assigns that the Court of Appeals erred in (1) finding that the information contained in the affidavit did not provide probable cause for the issuance of the residence search warrant, (2) failing to find that the officers acted in "good faith" when executing the warrant, (3) reweighing or resolving evidence outside the confines of the affidavit for issuance of the warrant, and (4) issuing inconsistent opinions.

SCOPE OF REVIEW

A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998); *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998). However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Fitch, supra*; *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

ANALYSIS

The principal issue raised in these cases is whether Ivener's affidavit was sufficient to establish probable cause for the issuance of a warrant to search Johnson's residence. This court has adopted the "totality of the circumstances" rule established by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), as the basis for determining whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760

(1992). Under this standard, the question is whether, considering the totality of the circumstances, the issuing magistrate had a " 'substantial basis' " for finding that the affidavit established probable cause. *State v. Detweiler*, 249 Neb. at 489, 544 N.W.2d at 88. If the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient. *State v. Jackson, supra.*

Although the Court of Appeals articulated and applied the totality of the circumstances test in this case, it also stated the proposition that "[t]o be valid, the search warrant obtained . . . must have been supported by an affidavit establishing probable cause to search the home *or by reasonable suspicion based on articulable facts that evidence of crime would be found in the home.*" (Emphasis supplied.) *State v. Johnson*, 6 Neb. App. 817, 824, 578 N.W.2d 75, 80 (1998). The italicized portion of this proposition appears in several of our opinions beginning with *State v. Robish*, 214 Neb. 190, 332 N.W.2d 922 (1983). See, also, *State v. Lytle, supra*; *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993); *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993); *State v. Utterback, supra*; *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989); *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989); *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984). The Court of Appeals has also cited this proposition previously in reliance on our holdings. See, *State v. Nelson*, 6 Neb. App. 519, 574 N.W.2d 770 (1998); *State v. Flemming*, 1 Neb. App. 12, 487 N.W.2d 564 (1992).

The phrase "reasonable suspicion, supported by articulable facts, that criminal activity exists" is the test for determining the sufficiency of grounds for an investigatory stop. See, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). In that

context, "reasonable suspicion" entails some minimal level of objective justification for detention, which has been described as something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *State v. Soukharith, supra*. Like probable cause, reasonable suspicion is determined from the totality of the circumstances. *State v. Soukharith, supra*; *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993). However, a reasonable suspicion sufficient to justify an investigative stop may exist even if probable cause is lacking under the Fourth Amendment. *State v. Soukharith, supra*; *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). To the extent that our decisions beginning with *State v. Robish, supra*, and continuing through *State v. Lytle, supra*, and those of the Court of Appeals in *State v. Nelson, supra*, and *State v. Flemming, supra*, suggest that issuance of a search warrant may be based upon something less than probable cause required by the Fourth Amendment, they are disapproved.

The State's petition for further review raises the issue of what "circumstances" may be examined under this test. As the Court of Appeals correctly stated in its opinion, an appellate court is restricted to consideration of the information and circumstances contained within the four-corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Johnson, supra*, citing *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). The purpose of the four corners doctrine is to require a police officer seeking a search warrant to include in the affidavit all information he or she possesses bearing on the probable cause determination at the time of issuance of the warrant, thus preventing supplementation of that information if the warrant is subsequently challenged. *State v. Barrilleaux*, 620 So. 2d 1317 (La. 1993). See, also, *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978) (White, J., dissenting). We have also held that this doctrine precluded a defendant from challenging a search warrant on the ground that an informant who provided information contained in the affidavit subsequently proved to be unreliable

in deposition and trial testimony. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The State argues that by considering Ivener's testimony at the suppression hearing that the amount of controlled substance which he observed in Johnson's possession was "consistent with personal use" and that the "drug conviction" mentioned in the affidavit was 10 years prior to the incident involved in this case, the Court of Appeals "improperly utilized evidence outside the four corners of the affidavit, and reweighed evidence at the trial court level." Memorandum brief for appellee in support of petition for further review at 4.

The Court of Appeals wrote, "For the sake of completeness, we note that the testimony shows that the statement regarding Johnson's drug history pertains to a drug conviction which was 10 years prior to this incident." *State v. Johnson*, 6 Neb. App. 817, 826, 578 N.W.2d 75, 82 (1998). At the suppression hearing, Ivener was asked the date of Johnson's prior conviction referred to in Ivener's affidavit. He responded, "I don't know the details other than that he had been convicted and did some time for it." When questioned further, he indicated that the conviction occurred before he was hired by the South Sioux City Police Department in March 1994. Johnson's counsel then stated, "Okay. If I stated it was 10 years at least would you disagree with that?" Ivener replied, "I wouldn't disagree, because I don't know." While we do not regard this testimony as sufficient to support the aforementioned statement by the Court of Appeals, neither do we regard it as material to the Court of Appeals' conclusion or our review. The Court of Appeals determined that the information in Ivener's affidavit, including information regarding "a prior conviction at some unspecified time in the past" did not support the issuance of a search warrant. *Id.* at 828, 578 N.W.2d at 83. The fact that the conviction occurred at some unspecified time in the past is clearly within the four corners of the affidavit and is therefore properly considered in determining whether the affidavit provided an adequate basis for the issuance of the search warrant.

The affidavit stated that Johnson was in possession of methamphetamine at the time of his arrest. Facts relating to the

amount of the substance and whether it was consistent with personal use were omitted from the affidavit but supplied by Ivener in his testimony at the suppression hearing. The consideration by the Court of Appeals of information known to Ivener but omitted from his affidavit was consistent with our decisions in *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), and *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In *Utterback*, we determined that in overruling a motion to suppress, a district court erred in failing to consider evidence at the suppression hearing that the officer was aware of certain facts affecting the reliability of an informant but omitted them from the affidavit used to obtain a search warrant. We held that the district court should have considered "whether the omissions from the detective's affidavit misled the county judge [who issued the warrant] and whether the omitted information was material to a determination of probable cause." *Id.* at 995, 485 N.W.2d at 772. We concluded that based upon the known facts which the officer omitted from the affidavit, there was no probable cause for issuance of the search warrant. *Id.* In *State v. Morrison, supra*, we considered the suppression hearing testimony of the officer who executed the affidavit, including details which had been omitted from the affidavit, and concluded that had this information been presented to the magistrate, there would still have been probable cause to issue the search warrant.

In *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), the court stated, "By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." We agree and therefore conclude that in determining whether the affidavit was sufficient to establish probable cause for the search of Johnson's residence, the Court of Appeals was not precluded by the four-corners doctrine from considering information material to the determination of probable cause which was known by Ivener but omitted from his affidavit.

In the Court of Appeals' analysis, it correctly stated the rule that "'"[p]roof 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."'" (Emphasis omitted.) (Emphasis supplied.) *State v. Johnson*, 6 Neb. App. 817, 827, 578 N.W.2d 75, 82 (1998), quoting *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), *cert. denied* 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397, quoting *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987). We agree with the Court of Appeals that the general statements in the affidavit concerning Johnson's prior conviction and involvement with controlled substances do not provide the temporal nexus necessary to establish probable cause. However, that nexus is present with respect to the methamphetamine and snow seals which were found in Johnson's possession hours before the search warrant was requested. The question, then, is whether these facts establish probable cause to believe that evidence of a crime would be found at Johnson's residence.

The State urges that we follow authority from other jurisdictions holding that a magistrate is entitled to draw reasonable inferences from the information in an affidavit, including the inference that drug dealers will have drugs in their homes. See, e.g., *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986). However, a common thread among these cases is that the affidavit provided facts establishing that the defendant was a drug dealer as opposed to someone in possession of drugs for personal use. See, e.g., *U.S. v. Williams*, 974 F.2d 480 (4th Cir. 1992) (affidavit clearly established that defendant was drug dealer); *Angulo-Lopez, supra* (evidence that defendant was engaged in drug trafficking); *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992) (large amount of cash and 12 baggies of marijuana were discovered in vehicle search); *State v. Bynum*, 579 N.W.2d 485 (Minn. App. 1998) (defendant sold drugs from his automobile).

In the present cases, we find nothing in the affidavit which would lead to a reasonable inference that Johnson was engaged in the sale of controlled substances at or near the time of his arrest. The general statement that Iverson was aware of Johnson's previous conviction of "drug charges" would not support such an inference, since there is no indication of the date of the conviction or whether it involved the sale, as opposed to possession, of controlled substances. Likewise, the fact that

Johnson was in possession of an unspecified quantity of methamphetamine and three snow seals, described in the affidavit as "an item used for the sale of controlled substances," provides no basis for inferring that Johnson was a seller of controlled substances, rather than a purchaser. Thus, even if we were to accept the State's premise that incriminating evidence is likely to be found in the homes of drug dealers, the affidavit on its face contains no facts from which it could reasonably be inferred that Johnson was a drug dealer at or near the time of his arrest. For these reasons, the district court's findings of fact upon which it denied Johnson's motions to suppress were clearly erroneous, and the Court of Appeals correctly concluded that Ivener's affidavit did not establish probable cause to justify the search of Johnson's residence.

The State also contends that the Court of Appeals erred in failing to consider and apply the "good faith exception" recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant thereto need not be suppressed where police officers act in objectively reasonable good faith in reliance upon the warrant. We agree that the Court of Appeals should have addressed this issue, and we therefore do so on further review.

We summarized the principles governing application of the *Leon* good faith exception in *State v. Reeder*, 249 Neb. 207, 214, 543 N.W.2d 429, 434 (1996), *cert. denied* 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397 (1996), as follows:

> 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.

Additionally, we stated in *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), that the *Leon* good faith exception does not preclude suppression where the issuing magistrate was misled by omissions in the affidavit. Thus, we held that "[o]missions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit." *Utterback*, 240 Neb. at 995, 485 N.W.2d at 772.

In the present cases, as in *Reeder* and *Utterback*, the officer who executed the search warrant was the same person who prepared the affidavit upon which it was issued. In *Reeder*, we held that it was entirely unreasonable for the officer to rely upon the affidavit he presented in support of the search warrant because it lacked any information pertaining to the reliability of an informant and another person who supplied the information set forth in the affidavit. In *Utterback*, we held that the good faith exception was inapplicable and suppression was required, because the information which the officer omitted from his affidavit was material to a determination of its probable cause such that the omission was misleading to the issuing judge.

We conclude that the affidavit upon which the search warrant was issued in the present cases was misleading in that it omitted the fact, known to Ivener, that the methamphetamine found in Johnson's possession was of a small quantity not inconsistent with possession for personal use. We note that Ivener had been employed in law enforcement for less than a year at the time of Johnson's arrest and testified that this was probably the first

occasion on which he submitted an affidavit in support of an application for a search warrant. He testified that his affidavit was not intended to mislead the issuing magistrate. While we do not conclude otherwise, we find that the facts omitted from his affidavit nevertheless weaken any possible inference that Johnson was a drug dealer who kept drugs at his residence, and the omission was therefore misleading under our analysis in *Utterback*. We therefore conclude that the *Leon* good faith exception is inapplicable in these cases.

Finally, the State argues that the results reached by the Court of Appeals in these cases are inconsistent with that in *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996). We need not decide this issue, since we find no error by the Court of Appeals in the present cases.

CONCLUSION

In summary, we conclude that the Court of Appeals did not err in determining that the search warrant for Johnson's residence was not supported by probable cause. Based on this and our determination that the *Leon* good faith exception is inapplicable, we agree with the Court of Appeals that the fruits of the search were inadmissible and that the district court erred in overruling Johnson's motions to suppress and objections at trial. We therefore affirm the judgment of the Court of Appeals in both cases.

AFFIRMED.

MILLER-LERMAN, J., not participating.

DILLON TIRE, INC., APPELLEE, V. DON FIFER, DOING BUSINESS AS FIFER MOTOR VILLAGE, AND SAMS TRANS, INC., APPELLANTS.

589 N.W.2d 137

Filed February 12, 1999. No. S-97-1001.

1. **Equity: Appeal and Error.** Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
2. ____: ____. In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial

court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Judgments: Appeal and Error.** In an appellate review of a law action, factual findings of the trial court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
4. **Actions: Pleadings.** The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity. The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. This determination is unaffected by the conclusions of the pleader or what the pleader calls it.
5. **Debtors and Creditors: Conveyances: Fraud: Equity.** An action seeking to declare a transfer fraudulent as to a creditor invokes equity jurisdiction of a court.
6. **Equity: Jurisdiction.** If a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
7. **Equity.** Equity looks through forms to substance. Thus, a court of equity goes to the root of the matter and is not deterred by forms.
8. **Debtors and Creditors: Conveyances: Fraud: Proof.** In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
9. **Debtors and Creditors.** Whether insolvency exists is usually a question of fact.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellants.

William E. Olson and Kevin T. Lytle, of DeMars, Gordon, Olson and Shively, for appellee.

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

STEPHAN, J.

After obtaining a judgment against D.S.T. Trucking, Inc. (D.S.T.), Dillon Tire, Inc., brought this action against Don Fifer

(Fifer), doing business as Fifer Motor Village, and Sams Trans, Inc., pursuant to Nebraska's Uniform Fraudulent Transfer Act (Act), Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998), based upon allegations that D.S.T. made certain fraudulent transfers to or for the benefit of Fifer and Sams Trans. Following a bench trial, the district court for Lancaster County found in favor of Dillon Tire and entered judgment against Fifer and Sams Trans. In a memorandum opinion filed June 17, 1998, the Nebraska Court of Appeals summarily affirmed the order of the district court, based upon its conclusion that the factual findings made by the district court were not clearly erroneous. We granted Fifer and Sams Trans' petition for further review in which they assert that the Court of Appeals applied an improper standard of review to reach an incorrect result.

I. FACTUAL AND PROCEDURAL BACKGROUND

Fifer and his wife, Sandra Fifer, each owned 50 percent of the stock of D.S.T., a corporation which, prior to its dissolution in April 1995 for nonpayment of corporate occupation tax, had been engaged in the business of over-the-road trucking. The Fifers also own the stock of Sams Trans, another trucking operation, which was incorporated in April 1994. In 1994 and 1995, Fifer also owned and operated Fifer Motor Village, a sole proprietorship engaged in automobile sales. At some point in 1993 or 1994, the Fifers decided to move to a warmer location. In order to do so, they decided to liquidate D.S.T. and operate a few trucks under only Sams Trans. The operations of D.S.T. were wound down during January, February, and March 1995, and D.S.T. was dissolved for nonpayment of corporate occupation tax in April 1995.

Dillon Tire instituted an action against D.S.T. in August 1994 to recover an amount due on an open account. This claim was reduced to a judgment in the amount of $7,810.30, plus interest and costs, on March 13, 1995. Several months later, Dillon Tire brought the present action pursuant to the "Nebraska Uniform Fraudulent Conveyance [sic] Act, Neb. Rev. Stat. Sections 36-701 through 36-712." In its petition, Dillon Tire asserted its position as a judgment creditor of D.S.T. In five separate causes of action, it alleged that D.S.T. had made payments of money to

or for the benefit of Fifer or Sams Trans "with the actual intent to hinder, delay or defraud Dillon Tire, Inc." Dillon Tire also alleged that D.S.T. executed these transactions "without receiving a reasonably equivalent value in exchange for the transfer" at a time when D.S.T. "intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due." Dillon Tire prayed for judgment in the amount of each transfer, as well as costs and "such other and further relief as may be just and equitable." Fifer and Sams Trans answered by general denial.

At the commencement of trial, Dillon Tire voluntarily dismissed one of its causes of action. Evidence was received with respect to the transfers which were the subject of the remaining four causes of action. These included (1) the use of D.S.T. funds to purchase a van which was titled in the name "Fifer Motor Village"; (2) the payment by D.S.T. to Nebraska's Department of Motor Vehicles (DMV), alleged to have been made on behalf of Sams Trans; (3) the payment by D.S.T. to Countrywide Insurance Agency, alleged to have been made on behalf of Sams Trans; and (4) the payment by D.S.T. to Omaha Truck Center Inc., alleged to have been made on behalf of Sams Trans. The parties stipulated that at the time of trial, the unpaid amount of Dillon Tire's outstanding judgment against D.S.T. was $7,730.96.

The district court found that each of the transfers was fraudulent as to Dillon Tire under the provisions of the Act and that "Don Fifer d/b/a Fifer Motor Village and Sams Trans., Inc., received fraudulent transfers or conveyances from . . . D.S.T., in an amount totalling $14,414.38." The court entered judgment against Fifer and Sams Trans in the amount of Dillon Tire's unsatisfied judgment against D.S.T. plus costs and postjudgment interest. The court further held that the "judgment shall be satisfied, in part, by the cash bond posted herein by Defendant Sams Trans., Inc., and filed with the Clerk of the Court, pursuant to the Stipulation entered by the parties to this action on November 15, 1995," and that any balance of the judgment not satisfied out of the bond proceeds "may be executed upon by Plaintiff against either Defendant." We note that neither the bond nor the stipulation referred to by the district court is con-

tained in the transcript prepared for this appeal.

Fifer and Sams Trans perfected an appeal from this order in which they assigned as errors (1) the insufficiency of the evidence to establish that the transfers were fraudulent and (2) the entry of judgment. Citing to *Wolf v. Degner*, 243 Neb. 702, 502 N.W.2d 440 (1993), both Fifer and Sams Trans and Dillon Tire asserted in their briefs that the action was equitable in nature and that the scope of review was de novo on the record. However, the Court of Appeals disagreed and held that this was an action at law because the "sole remedy sought and awarded was monetary damages." Applying a "clearly erroneous" standard of review, the Court of Appeals summarily affirmed pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1996).

II. ASSIGNMENTS OF ERROR

Fifer and Sams Trans contend, restated, that the Court of Appeals erred (1) in holding that the action was one at law which was not subject to a de novo review on appeal and (2) in holding that the evidence was sufficient to support the district court's finding that fraudulent transfers had occurred.

III. ANALYSIS

1. Scope of Review

Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review. See *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998). However, in an appellate review of a law action, factual findings of the trial court have the effect of a jury verdict and will not be set aside on appeal unless they are

clearly wrong. *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity. *Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co.*, 178 Neb. 226, 132 N.W.2d 758 (1965). The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. *Id.* This determination is unaffected by the conclusions of the pleader or what the pleader calls it. *Lone Cedar Ranches v. Jandebeur, supra.*

We have previously stated that an action seeking to declare a transfer fraudulent as to a creditor invokes equity jurisdiction of a court. *Wolf v. Degner*, 243 Neb. 702, 502 N.W.2d 440 (1993); *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989); *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988); *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

In addition, we have said that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981). Equity looks through forms to substance. Thus, a court of equity goes to the root of the matter and is not deterred by forms. *Id.* See, also, *Thaggard v. Union Bank & Trust Company*, 277 Ala. 485, 172 So. 2d 49 (1965) (claims for damages are within protection of statutes authorizing bill in equity to set aside fraudulent transfers and once equity assumed jurisdiction, court would retain it for all purposes necessary to complete determination of cause).

The Court of Appeals distinguished this case from *Wolf v. Degner, supra*, on the basis that "Dillon Tire did not seek, and the trial court made no reference to, equitable remedies; the sole remedy sought and awarded was monetary damages." We disagree. It is clear from the record that Dillon Tire invoked the remedy afforded by the Act and that the district court applied

this statutory remedy, which we have characterized as equitable in nature. The Act defines "asset" as "property of a debtor" subject to certain exceptions not relevant here. § 36-702(2). It further defines "transfer" to include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, *and includes payment of money*, release, lease, and creation of a lien or other encumbrance." (Emphasis supplied.) § 36-702(12). Thus, a fraudulent transfer in the form of a payment of money can be the subject of the equitable remedy afforded by the Act. For example, in *Carpenter Paper Co. v. Lakin Meat Processors, supra*, a judgment creditor sought to recover proceeds from the sale of assets of a corporate judgment debtor that had been assigned to its president and principal shareholder under theories that the assignment constituted a fraudulent conveyance and that the corporate veil should be pierced to permit recovery against the individual assignee. We characterized both theories of recovery as equitable in nature and reviewed the findings of the trial court de novo on the record.

We therefore conclude that the Court of Appeals erred in characterizing this action as one arising at law and applying the standard of review for such actions. To resolve this appeal of an equitable action, we must try factual issues de novo on the record and reach a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, we may consider and give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997); *Wolf v. Degner, supra.*

2. Sufficiency of Evidence

Before commencing our de novo review of the factual issues, we summarize the applicable legal principles. Under the Act, a transfer may be determined fraudulent as to present and future creditors where it is shown that the debtor had actual intent to hinder, delay, or defraud a creditor. § 36-705. In addition, § 36-706 provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the

> transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider knew or reasonably should have known that the debtor was insolvent.

However, pursuant to § 36-709(f),

> A transfer is not voidable under subsection (b) of section 36-706:
>
> (1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;
>
> (2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or
>
> (3) if made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

With respect to a corporate debtor, an "insider" is defined by the Act to include a director, officer, or person in control of the debtor, or a relative of such person. § 36-702(7)(ii)(A),(B),(C), and (G). Section 36-704(a) provides in relevant part that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." A debtor is considered "insolvent" under the Act "if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." § 36-703(a). "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." § 36-703(b).

In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

Clear and convincing evidence is " 'that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.' " *Id.* at 762, 380 N.W.2d at 629, quoting *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

Although Dillon Tire alleged that the transfers in question were made with actual intent to hinder, delay, or defraud, the district court made no finding of such intent, and we find no evidence supporting such allegations on our de novo review. Thus, we analyze the four transactions in question to determine whether they constituted fraudulent transfers as defined by § 36-706.

(a) Purchase of Van

On February 10, 1995, a date subsequent to the date on which Dillon Tire's claim arose, Fifer purchased a van for $2,500 using a D.S.T. check. The van was titled in the name of "Fifer Motor Village," and D.S.T. has not repaid the money used to purchase the van. Fifer testified that the van was purchased as a partial repayment of previous loans which, as a stockholder, he had made to D.S.T. The evidence establishes that Fifer was an "insider" with respect to D.S.T. as defined by § 36-702(7) and that the use of D.S.T. funds for the purchase of the van was in consideration of an antecedent debt. There is no contention or evidence that any of the factors set forth in § 36-709(f) are applicable. Thus, the transfer was fraudulent pursuant to § 36-706(b) if D.S.T. was insolvent at the time of the transfer and Fifer knew or reasonably should have known of the insolvency.

Whether insolvency exists is usually a question of fact. *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986). The evidence establishes that by the end of 1994, D.S.T. owed delinquent payroll taxes in the amount of $27,526, which it was unable to pay because of insufficient revenues. The Fifers subsequently personally assumed the obligation to pay these taxes. D.S.T. also owed $35,593 in shareholder loans unpaid as of December 31, 1994. D.S.T.'s corporate tax return reflects an unpaid bank overdraft at the end of 1994. In addition, truck lease payments due in November and December 1994 and

January 1995 were not paid until February 1995. Although Sandra Fifer disclaimed any knowledge of the bank overdraft and testified that she generally tried to pay D.S.T.'s debts when they came due, we are required to defer to the fact that the trial court heard and evaluated her testimony in this regard. Based upon our de novo review, we conclude that by December 31, 1994, D.S.T. was insolvent under the test established by § 36-703(b) and that Fifer knew or should have known of the insolvency. We thus determine that Dillon Tire met its burden of proving by clear and convincing evidence that the use of corporate funds to purchase the van for the benefit of an insider for antecedent debt was fraudulent as to Dillon Tire under § 36-706(b).

(b) Insurance Premium Payment

The evidence establishes that on March 13, 1995, D.S.T. issued a check for $1,892 to an insurance agency in connection with an application for an insurance policy covering a 1994 Freightliner truck. Sandra Fifer testified that the premium was initially paid in the ordinary course of business because the insurance premiums were due at that time. Although D.S.T. owned the truck at the time of the payment, Sams Trans was listed as the insured on the application for insurance. On March 27, 1995, the insurance company sent Sams Trans a notice of cancellation of the policy. On March 31, Sams Trans took possession of the truck and assumed the purchase contract on it. Sams Trans received refunds of the policy premiums in the amounts of $525 and $1,365 on April 13 and May 11, respectively. At the time of the first refund payment, D.S.T. had ceased operations, and by the time of the second payment, it had been dissolved. Although the Fifers testified that the refund money was used to pay some of D.S.T.'s creditors and to pay for D.S.T.'s permits and fees, there is no evidence of the dates, amounts, or recipients of such payments. Based upon our de novo review, we find that this payment was made after Dillon Tire's claim arose and at a time when D.S.T. was insolvent and that D.S.T. did not receive a reasonably equivalent value in exchange for the payment. We therefore conclude Dillon Tire

has proved by clear and convincing evidence that this payment constituted a fraudulent transfer pursuant to § 36-706(a).

(c) Lease Payments

On February 7, 1995, D.S.T. paid $7,054.23 in delinquent lease payments for a 1993 Western Star semi-tractor truck leased by D.S.T. from November 1994 through February 1995. On March 24, 1995, Fifer assumed all obligations under the lease and took possession of the truck. While the record indicates that Fifer would not have been able to assume the lease if the delinquent payments had not been made, this fact is not determinative of the key issue, which is whether D.S.T. received reasonably equivalent value in exchange for the transfer. We conclude that it did. "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." § 36-704. The lease payments satisfied obligations which D.S.T. incurred in the ordinary course of its business, and thus secured an antecedent debt. Based upon our de novo review, we determine that Dillon Tire has not met its burden of proving by clear and convincing evidence that such payments constituted fraudulent transfers.

(d) Payment to Department of Motor Vehicles

On February 6, 1995, a debit was made to the D.S.T. checking account in order for a cashier's check to be issued to the DMV as payment for 1995 motor vehicle licensing fees and taxes for equipment owned by D.S.T. at the end of 1994. This amount included the license fees for the two trucks, a 1994 Freightliner and a 1993 Western Star, which were subsequently acquired by Fifer and Sams Trans. Sandra Fifer testified that the value of the fees paid by D.S.T. for the Western Star truck was $1,472.14 and that the value of the fees for the Freightliner truck was $1,498.01. When Fifer and Sams Trans acquired the vehicles, they were reregistered with DMV. The Fifers testified that the licenses were paid for in the regular course of D.S.T. business in February 1995 because that is when they became due. They further testified that permits and license fees were assignable and transferable, but not refundable. Sandra Fifer also testified that had the permits and licenses been turned back

in, they would have generated a refund of only approximately $80 per vehicle. Fifer testified that D.S.T. received refunds on three trucks in the amount of $84 each but did not state whether these included the Freightliner or Western Star trucks.

Based upon our de novo review, we conclude that Dillon Tire has not proved by clear and convincing evidence that the payment to DMV was fraudulent under the Act. As in the case of the lease payments, the relevant inquiry is not whether Sams Trans derived some benefit as a result of the payment by D.S.T., but, rather, whether D.S.T. received reasonably equivalent value in return for the payment. There is evidence that the license and permit fees were due as of December 31, 1994. Thus, D.S.T. received value in the form of licenses and permits in exchange for its payment to DMV. Further, it is clear from the Fifers' testimony that at most, $84 per truck could have been refunded to D.S.T. if the licenses and permits were turned back in. Thus, D.S.T. received "reasonably equivalent" value under § 36-706(a) for the payment because D.S.T. needed to make the payment in order to satisfy an obligation that was due and would not have been able to receive a refund of more than $168 total regardless of whether the trucks were subsequently transferred.

IV. CONCLUSION

Based upon our de novo review, we affirm the finding of the district court that the payment by D.S.T. in the amount of $2,500 for the purchase of the van and the payment by D.S.T. in the amount of $1,892 for an insurance premium were fraudulent transfers as to Dillon Tire. We reverse the judgment of the Court of Appeals, summarily affirming the district court's determination that delinquent lease payments and payments made for license and permit fees due on December 31, 1994, constituted fraudulent transfers. The cause is remanded to the Court of Appeals with directions that it vacate the district court's previous judgment and enter judgment in favor of Dillon Tire in the amount of $4,392, representing the total amount of the fraudulent transfers made by D.S.T. as determined herein.

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

MILLER-LERMAN, J., not participating.

LIA BRADFORD SHIVVERS, APPELLANT, V. AMERICAN FAMILY INSURANCE CO., APPELLEE, PRUDENTIAL INSURANCE COMPANY, APPELLEE AND CROSS-APPELLEE, AND STEPHANIE (LA PLANTE) ROBERTSON, APPELLEE AND CROSS-APPELLANT.

589 N.W. 2d 129

Filed February 12, 1999. No. S-97-1153.

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: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
3. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Insurance: Contracts.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
5. **Insurance: Contracts: Motor Vehicles: Liability: Public Policy.** A household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under Nebraska's Motor Vehicle Safety Responsibility Act does not violate public policy and is enforceable.
6. **Insurance: Contracts.** Whether an insurance contract is ambiguous is a question of law.
7. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** The fact that parties to a contract suggest different interpretations of its language does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
9. **Insurance: Contracts: Intent: Appeal and Error.** In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
10. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
11. **Contracts.** An otherwise unambiguous contract provision is not made ambiguous simply because it is difficult to apply to the facts of a particular case.

12. **Insurance: Contracts: Intent: Words and Phrases.** For purposes of a motor vehicle insurance policy which does not otherwise define the term "household," a resident of the named insured's "household" means one who dwells or has an abode under the same roof as the named insured for a duration of sufficient length so that the occupiers can be said to compose a family. The factors to be considered in determining whether that test has been met include, but are not limited to, the intent of the parties, the formality of the relationship between the person in question and the members of the named insured's household, the permanence or transient nature of that person's residence therein, the absence or existence of another place of lodging for that person, and the age and self-sufficiency of that person.

Appeal from the District Court for Sheridan County: BRIAN SILVERMAN, Judge. Reversed and remanded with directions.

Andrew W. Snyder, of The Van Steenberg Firm, for appellant.

Stefan T. Wall and Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, for appellee American Family.

Terry Curtiss, of Curtiss, Moravek, Curtiss & Margheim, for appellee Prudential.

Martin J. Troshynski, of Kelley, Scritsmier & Byrne, P.C., for appellee Robertson.

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

STEPHAN, J.

Lia Bradford Shivvers was injured as the result of a single-vehicle accident which occurred on December 28, 1993, while she was a passenger in a vehicle owned and operated by her roommate of 10 days, Stephanie (La Plante) Robertson. At the time of the accident, Robertson was insured by Prudential Insurance Company, which denied coverage with respect to Shivvers' personal injury claim against Robertson on grounds that the two women resided in the same household and thus fell within a liability coverage exclusion contained in the Prudential policy. American Family Insurance Co., which insured Shivvers, denied liability to her under its uninsured and underinsured motorist coverage on the same grounds. In this declaratory judgment action, the district court for Sheridan County determined that Shivvers and Robertson resided in the same household at

the time of the accident and that the household exclusions contained in both the Prudential and American Family policies were therefore applicable. On Shivvers' appeal, we conclude as a matter of law that the arrangements under which Shivvers and Robertson resided together did not constitute a household. Therefore, we reverse the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

Shivvers and Robertson are not related by blood or marriage. They met each other through a mutual acquaintance who knew that the two women, then unmarried and in their early twenties, were considering moving to the same locale for the purpose of carrying out their ministries as Jehovah's Witnesses. After some discussion, the two decided to move to Chadron, Nebraska, and live together there for purposes of financial convenience. Prior to sharing a residence, the women agreed to divide all expenses equally and each agreed to pay for her own telephone calls. They moved into a house in Chadron on December 18, 1993, with each maintaining a separate bedroom as her private area. After a short period, they moved to an apartment in Chadron. Following the move, the women again split the rent and other living expenses and maintained separate bedrooms.

Shivvers and Robertson each purchased her own groceries but would sometimes shop together and split the cost. Each woman provided a portion of furniture for the common areas of the residence, and each provided her own bedroom furniture. The women testified that they spent time together as part of their religious work and took turns driving their own vehicles in order to do so, but otherwise spent approximately 3 hours or less each day together. The women generally did not eat meals together, had separate friends, and maintained separate bank accounts. Both women testified in their depositions that they shared living arrangements out of financial necessity in order to save money and that neither considered herself to be living with the other as a family. Shivvers further testified that her original goal was to stay in Chadron for 1 year. At the end of the arrangement, approximately 11 months after they first shared a house together, both women returned to their parents' homes in another state.

At the time of the accident, Robertson was insured under a "Car Policy" issued by Prudential. In a section entitled "Losses We Will Not Pay For (Part 1)," under the subheading "Household Residents," the policy stated: "We will not pay for bodily injury to you or a household resident if caused by you or a household resident. We will not defend you or a household resident in any suits brought against each other directly or indirectly by a third party." The policy defined "household resident" as "someone who lives in your household. A household resident includes a "resident relative." The term "resident relative" is defined by the policy as "someone who lives in your household and is related to you by blood, marriage, adoption or is a ward or foster child." The Prudential policy does not define the term "household."

On the date of the accident, Shivvers was insured under a "Family Car Policy" issued by American Family. The policy stated in part:

> We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. The bodily injury must be sustained by an insured person and must be caused by accident and arise out of the use of the uninsured motor vehicle.

The policy further provided that the term "uninsured motor vehicle" did not include a vehicle "owned by or furnished or available for the regular use of you or any resident of your household." The uninsured motorist coverage contained an exclusion stating that it did not apply to bodily injury to a person "[w]hile occupying . . . a motor vehicle that is not insured under this Part, if it is owned by you or any resident of your household." The American Family policy also contained an underinsured motorist coverage endorsement containing a similar exclusion. The policy does not define the term "household" or the phrase "any resident of your household."

Shivvers originally filed this action against American Family, in which action she alleged that because coverage for her claim was excluded by the Prudential policy, she was therefore entitled to coverage under her uninsured and underinsured motorist coverage with American Family. Robertson and Prudential were

later joined in the action. In their answers, Prudential and American Family denied that their policies provided coverage for Shivvers' claim against Robertson. Robertson filed an answer, alleging that Prudential had undertaken defense on her behalf in a related case between Shivvers and Robertson and was therefore estopped from denying coverage. She sought an order recognizing her claim of estoppel or, in the alternative, declaring that the Prudential policy provided coverage for Shivvers' claim. Robertson also asserted a cross-claim against Prudential, alleging that it acted in bad faith in denying coverage under its policy.

Shivvers filed a motion for summary judgment "regarding the issue of . . . Prudential Insurance Company's liability" and the applicability of the household exclusion clause contained in the Prudential Policy. Prudential moved for summary judgment on the ground that its policy provided no coverage for Shivvers' claim against Robertson because of the exclusion. American Family also moved for summary judgment, asserting that it had no liability to Shivvers by virtue of the household exclusion contained in its policy. Robertson moved for partial summary judgment against Prudential, asserting as a matter of law that Prudential's policy provided coverage for Shivvers' claim against her.

In ruling on these motions, the district court determined that (1) Shivvers and Robertson lived together in Chadron, (2) the women had no other residence, and (3) the women shared the costs and responsibilities of the apartment they maintained. The district court found that the women were "'household residents'" within the meaning of Prudential's policy. With regard to Shivvers' policy with American Family, the district court found that pursuant to our decision in *Amco Ins. Co. v. Norton*, 243 Neb. 444, 500 N.W.2d 542 (1993), Shivvers and Robertson were members of the same household and that the "'household exclusion'" in the policy was therefore applicable. Accordingly, the district court sustained both insurance companies' motions for summary judgment and denied the motions of Shivvers and Robertson. Shivvers appealed, and Robertson filed a cross-appeal with respect to her claim that Prudential had denied coverage in bad faith. We granted Shivvers' motion to bypass.

ASSIGNMENTS OF ERROR

Shivvers assigns that the district court erred in granting summary judgment to Prudential and American Family and in overruling the motions for summary judgment of Shivvers and Robertson. Shivvers further assigns that the district court erred in its determination that she and Robertson were members of the same household within the meaning of each of the insurance policies. On cross-appeal, Robertson assigns that the district court erred in granting Prudential's motion for summary judgment and denying her own motion.

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. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998); *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Id.*; *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997).

ANALYSIS

It is undisputed that Shivvers and Robertson resided under the same roof at the time of Shivvers' injury. The issue before us is whether they were residents of a single "household" as that

term is used in the coverage exclusions contained in both insurance policies. We have recognized that the parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Hemenway, supra.* We held in *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993), that a household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under Nebraska's Motor Vehicle Safety Responsibility Act does not violate public policy and is enforceable. See, also, *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993), citing *Hildebrand, supra.* In the present case, the parties do not contend, nor does the record reflect, that the policies in question were issued as proof of financial responsibility as required by this act.

As in the interpretation of any contract, we must first determine whether the policy language at issue is ambiguous. See *Moller, supra.* Whether an insurance contract is ambiguous is a question of law. *Id.*; *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997). An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Moller, supra*; *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996). The fact that parties to a contract suggest different interpretations of its language does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Moller, supra*; *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Moller, supra.* The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Hemenway, supra.*

In *Hildebrand*, 243 Neb. at 745, 502 N.W.2d at 471, we found no ambiguity in an exclusion which provided that liabil-

ity coverage would not be provided to " '[a]ny insured or any member of an insured's family residing in the insured's household.' " Similarly, Wisconsin courts have held that the phrase "resident or member of the same household" as used in automobile liability insurance policies is not ambiguous and should be construed in light of its plain and common meaning. See, *Pamperin v. Milwaukee Mut. Ins. Co.*, 55 Wis. 2d 27, 197 N.W.2d 783 (1972); *Quinlan v. Coombs*, 105 Wis. 2d 330, 314 N.W.2d 125 (Wis. App. 1981). We agree with the observation of the court in *Quinlan* that "an otherwise unambiguous provision is not made ambiguous simply because it is difficult to apply to the facts of a particular case." *Id.* at 335, 314 N.W.2d at 128. The household exclusions at issue in this case are not ambiguous, and they must therefore be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. See, *Moller, supra*; *Kast, supra.*

The critical term "household" is not specifically defined by either policy. In construing other provisions in motor vehicle liability insurance policies, we have held that the term "household" means " ' " ' [t]hose who dwell under the same roof and compose a family.' " ' " *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 68, 493 N.W.2d 171, 174 (1992), citing *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971), quoting *Andrews v. Commercial Casualty Ins. Co.*, 128 Neb. 496, 259 N.W. 653 (1935). In *Amco Ins. Co. v. Norton*, 243 Neb. 444, 450, 500 N.W.2d 542, 546-47 (1993), we stated:

> for purposes of a homeowners insurance policy which does not otherwise define the phrase, "resident of the named insureds' household" means one who dwells or has an abode under the same roof as the named insureds for a duration of sufficient length so that the occupiers can be said to compose a family. The factors to be considered in determining whether that test has been met include, but are not limited to, the intent of the parties, the formality of the relationship between the person in question and the members of the named insureds' household, the permanence or transient nature of that person's residence therein, the absence or existence of another place of lodging for that person, and the age and self-sufficiency of that person.

Prudential argues that this definitional test should not be applied with respect to its policy because to do so would render other provisions of its policy meaningless. Specifically, Prudential contends that because its policy defines "household resident" as "someone who lives in your household," including a "resident relative," the phrase "household resident" necessarily extends beyond family members. Prudential contends that under the language of its policy, the "determining factor . . . of whether a person is a household resident is simply whether the person 'lives in . . . (the insured's) household.' " Brief for appellee Prudential at 14. We are not persuaded by this circular argument for two reasons. First, as noted above, Prudential's policy does not define "household." Second, even if we were to accept the premise that unmarried adults living under the same roof could constitute a household under some circumstances, it does not necessarily follow that all such arrangements compose a "household" for purposes of a coverage exclusion in an automobile liability insurance policy.

In *Quinlan v. Coombs*, 105 Wis. 2d 330, 314 N.W.2d 125 (Wis. App. 1981), the court addressed the question whether an unmarried and unrelated couple who lived together were residents of the same household for purposes of an exclusion similar in nature to those considered here. The court noted that under Wisconsin law, the "plain and common meaning of the expression 'residents of the household' " is:

> "a common type of close relationship, varying greatly in detail, where people live together as a family in a closely knit group, usually because of close relationship by blood, marriage, or adoption and deal with each other intimately, informally, and not at arm's length. The intention of the members as to the duration of the relationship would seem to be important in only two aspects. The intended duration should be sufficient so as not to be inconsistent with the intimacy of the relationship, and also long enough so that it is reasonable to expect the parties to take the relationship into consideration in contracting about such matters as insurance or in their conduct in reliance thereon. . . ."

(Emphasis omitted.) *Id.* at 333, 314 N.W.2d at 127, quoting *National Farmer's Union Property & Casualty Co. v. Maca*, 26

Wis. 2d 399, 132 N.W.2d 517 (1965). The court held that under this definition, it was not necessary for persons to be related by blood, marriage, or adoption in order to be residents of the same household, and that "public policy is enhanced by permitting insurance companies to exclude coverage in those close relationship situations where an insured is driving or has the opportunity to drive cars interchangeably rather than by merely casual use." *Id.* at 336, 314 N.W.2d at 129. The court concluded that a jury's determination that the two persons were residents of the same household was supported by evidence that they shared a bedroom, slept in the same bed, ate an average of two meals per day together, shopped for groceries together, and used each other's automobiles while residing together.

We note that the test which we articulated in *Amoco Ins. Co. v. Norton*, 243 Neb. 444, 500 N.W.2d 542 (1993), does not include a specific requirement that persons be related by blood or marriage in order to constitute a household. However, this case does not require us to decide whether unrelated persons living under the same roof could ever be considered members of the same household, because the undisputed facts are that Shivvers and Robertson lived together purely as a matter of economic expediency and not in any sense as a family. Their living arrangement had had a duration of only 10 days at the time of Robertson's injury and 11 months in total. Shivvers' original goal was to live in Chadron for 1 year. Each owned, operated, and insured her own vehicle, and they did not use their vehicles interchangeably. Each had her own bedroom, paid her own personal expenses, and lived independently of the other with the exception of their shared residence and religious activities. They were simply roommates. Courts in other jurisdictions have held that where persons reside together as roommates, or in a landlord-tenant relationship, they do not constitute a "household" as that term is used in insurance policy provisions such as those before us here. See, e.g., *Permanent General Assur. Corp. v. Woods*, 1993 WL 157665 (Tenn. App. May 14, 1993) (holding that term does not encompass landlord-tenant or simple roommate arrangements); *Universal Underwriters Ins. Co. v. Evans*, 565 So. 2d 741, 743 (Fla. App. 1990) (stating that "[w]hatever else the word 'household' may suggest, we have no difficulty

holding that it does not encompass landlord-tenant or simple roommate arrangements"); *Bartholet v. Berkness*, 291 Minn. 123, 189 N.W.2d 410 (1971) (holding two bachelors sharing same living quarters are not residents of same household). It has also been held that even when individuals are members of the same family, they are not residents of the same household when they reside together in roommate or landlord-tenant arrangements. *Donegal Mut. Ins. Co. v. State Farm*, 377 Pa. Super. 171, 546 A.2d 1212 (1988).

We conclude that the ordinary meaning of the language of the household exclusions contained in both the Prudential and American Family policies should be ascertained in accordance with the definitional test articulated in *Norton, supra*, and that under that test, it must be said as a matter of law that Shivvers and Robertson were not residents of the same "household" at the time of Shivvers' injury. For this reason, the district court erred in sustaining the motions for summary judgment of Prudential and American Family and in denying the motions of Shivvers and Robertson. Because we hold that coverage was not excluded by the language of either policy, we need not reach the issues raised by Robertson's cross-appeal. Likewise, we do not address any issue with respect to American Family's uninsured and underinsured motorist coverage other than the inapplicability of the household exclusion contained therein. We therefore reverse the judgment of the district court and remand the cause with directions to enter summary judgment for Shivvers and partial summary judgment for Robertson and for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOSEPH A. HAAG, APPELLEE, V. ALFRED M. BONGERS AND DELORES D. KUHL, PERSONAL REPRESENTATIVES OF THE ESTATE OF LEO J. BONGERS, DECEASED, APPELLEES AND CROSS-APPELLANTS, WILLIAM J. DOLAN, DOING BUSINESS AS DOLAN REALTY AND AUCTION CO., AND BAUER-MORAVEC AUCTIONEERS AND CLERKS, APPELLEES, AND PUTNAM HITCH PRODUCTS, INC., APPELLANT AND CROSS-APPELLEE.

589 N.W.2d 318

Filed February 12, 1999. No. S-97-1243.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
3. **Directed Verdict.** A motion for a directed verdict should state the specific grounds therefor.
4. **Products Liability: Proof.** To recover against a defendant on a claim of strict liability, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.
5. **Products Liability.** A product may be defective and unreasonably dangerous because the manufacturer sold the product without sufficient warnings or instructions.
6. **Products Liability: Words and Phrases.** Unreasonably dangerous means that a product has the propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with ordinary knowledge common to the foreseeable class of users as to its characteristics.
7. **Products Liability: Proof.** Whether a product is unreasonably dangerous is generally a question of fact.
8. **Trial: Appeal and Error.** Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.

9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
10. **Jury Instructions: Appeal and Error.** Regarding a claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
11. ____: ____. While ordinarily the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter, a trial judge is nonetheless under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made.
12. **Negligence: Liability: Independent Contractor.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
13. **Employer and Employee: Independent Contractor.** There are 10 factors which are considered in determining whether a person is an employee or an independent contractor: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. The right of control is the chief factor distinguishing an employment relationship from one of an independent contractor. In examining the extent of the employer's control over the worker in this context, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed.
14. **Pleadings: Negligence: Proof: Appeal and Error.** Contributory negligence is an affirmative defense, which must be proved by the party asserting such defense. An affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition. An affirmative defense must be specifically pled to be considered. An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, District Judge, Retired. Affirmed.

Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Kevin R. McManaman and Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellees Bongers and Kuhl.

M.J. Bruckner and John W. Ballew, Jr., of The Bruckner/Ballew Law Firm, P.C., for appellee Haag.

WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Putnam Hitch Products, Inc. (Putnam), appeals and Alfred M. Bongers (Bongers) and Delores D. Kuhl (Kuhl), personal representatives of the estate of Leo J. Bongers (collectively, the Estate), cross-appeal from a jury verdict in the amount of $600,000 in favor of Joseph A. Haag (Haag) and against the Estate, Dolan Realty and Auction Co. (Dolan), Bauer-Moravec Auctioneers and Clerks (Bauer-Moravec), and Putnam for injuries Haag sustained on January 30, 1993, while attending an antique vehicles auction on the Estate's premises. Haag was injured when a hitch ball used in towing a vehicle flew off the towing rig and hit Haag on the right side of his skull and his right eye. For the reasons stated below, we affirm the trial court's order entering judgment on the jury's verdict.

II. BACKGROUND

Leo Bongers died intestate on October 8, 1992. Subsequently, Bongers and Kuhl, Leo Bongers' nephew and niece, were appointed as personal representatives of his estate. Upon his death, Leo Bongers left substantial real and personal property, including more than 120 antique cars, trucks, and motorcycles.

In late October 1992, Russ Moravec of Bauer-Moravec contacted the Estate and offered his services as auctioneer. Upon doing so, Moravec learned that Bill Dolan of Dolan had also

contacted the Estate. On November 2 or 3, the Estate concluded that Bauer-Moravec and Dolan should conduct the auction of the vehicles jointly and split all of the expenses and commissions relating to the sale. On November 3, the Estate, Bauer-Moravec, and Dolan signed a written agreement to this effect. Therefore, in this opinion, Bauer-Moravec and Dolan will be referred to collectively as "the auctioneers."

Moravec recommended that the auction be held in May, June, or July 1993, at an airstrip in Butler County. This arrangement would have allowed the parties to line up the vehicles in a row outside in good weather so that people attending the auction could go from car to car and the vehicles would not need to be moved during the auction. Moravec was concerned that some of the older vehicles would not be in operating condition if the sale were held earlier, and Moravec favored having the auction at this site in this fashion because it would allow the parties to conduct the auction in a safe manner. The Estate rejected Moravec's recommendation and insisted that the sale be conducted in January 1993.

The auction was held on property owned by the Estate, a farm located 1½ miles south of David City on the west side of Highway 15. The Estate and the auctioneers decided that the auction would be held inside because of probable bad weather, in a building owned by the Estate that opens at both ends.

In order to prepare for the sale, the Estate was to put the vehicles in running order, while the auctioneers attempted to locate all of the titles for the vehicles and to arrange for volunteer assistants to help with the sale. The Estate specifically approved the use of assistants for the auction. One of the assistants, Doug Reznicek, had previously assisted Bauer-Moravec in preparing for other auctions. Reznicek assisted in making arrangements to move the vehicles into and out of the sale building. The evidence shows that initially, the Estate was unsure that it would pay the assistants, but that after the sale, the Estate paid Reznicek, as well as all of the other assistants, except one, out of Estate funds.

Prior to the sale, the auction was heavily advertised at the Estate's insistence. As the auction approached, the parties were flooded with telephone calls regarding the sale. A joint decision

was made by the Estate and the auctioneers to open both ends of the auction building and add tents on either side to accommodate more people. A joint decision was made to charge each person wishing to enter the bid barn $25, and a separate tent was set up with a remote broadcast of the auction so that people could watch the auction without paying the $25 fee. If a bidder actually purchased a vehicle, the Estate refunded the $25 fee.

As the auction grew closer, it became apparent that the Estate would not have many of the vehicles in running order in time for the sale. A joint decision was made to tow the vehicles into the building. The vehicles were towed with small tractors which the auctioneers borrowed from farmers in the surrounding community. In order to attach the antique vehicles to the tractors, Scot Bauer, of Bauer-Moravec, purchased Putnam hitch balls and Bauer's wife purchased ropes. Mylar-type ropes were used instead of chains to tow the vehicles so that the antique vehicles which were not in running order would not be harmed.

The auction took place on January 30, 1993, beginning at 9:30 a.m. Throughout the auction, 1,300 people paid the $25 bid fee. The Estate and the auctioneers planned to sell a vehicle every 3 minutes. It was very cold on the day of the sale, with temperatures well below freezing. The bid barn was crowded, and the vehicles were towed on a path through the crowd into an area for viewing and bidding. The crowd was standing shoulder to shoulder. There were no barriers to separate the crowd from the vehicles. Given the configuration of the barn and the bidding area, it was necessary for the assistants to physically move people back in order to pull the vehicles through the building.

Before the sale, Reznicek met with the assistants and instructed certain of them to attach the hitch balls to the drawbars of the tractors with a rope in order to tow the vehicles. At trial, Reznicek testified that he did not directly or indirectly tell anyone how to install a hitch ball on a drawbar and that he gave the hitch balls to persons who presumably knew how to properly attach a hitch ball to a tractor drawbar. Reznicek stated that during the preauction meeting, he gave the assistants general safety instructions. The evidence shows that it is common knowledge within the Butler County farming community that all threads on the nut of a hitch ball must be engaged for proper installation.

Approximately 1 hour into the sale, with approximately 700 to 800 people in the bid barn, an antique Studebaker truck was towed through the crowd into the building and sold. After the sale, assistants attempted to tow the Studebaker truck out of the building and experienced difficulty in doing so. As the assistants attempted to tow the vehicle, the hitch ball became detached from the drawbar, flying off the tractor and hitting Haag, who was standing at the back left of the tractor. Because of the accident, Haag suffered serious injuries to his head, which are not contested on appeal.

The evidence shows that the drawbar on this tractor was double the size of a drawbar normally found on this type of tractor and that all threads on the shank of the hitch ball had not been engaged. Reznicek did not inspect the tractors prior to the sale to see if the hitch balls were properly attached to the drawbars, nor did the auctioneers or the Estate. The evidence shows that Bongers was on the premises during most of the auction.

After the accident, the assistants used chains and not ropes to tow the vehicles in and out of the building. No other accidents occurred during the sale.

On September 9, 1997, Haag filed a fourth amended petition against the Estate, Dolan, Bauer-Moravec, and Putnam. Haag alleged that he had suffered injuries while attending the auction on January 30, 1993, on premises owned by the Estate. Haag alleged that he was a business visitor on the premises owned by the Estate and that the auction was held by Bongers and Kuhl in their capacity as personal representatives. Haag alleged that the Estate employed Dolan and Bauer-Moravec to conduct the auction. Haag alleged that all decisions with respect to the conduct of the auction were cleared with the Estate.

Haag alleged that he was injured when the hitch ball came loose from the drawbar of the tractor towing the Studebaker truck. Haag alleged that the towrope propelled the hitch ball through the air and that it struck Haag on the right side of his skull and his right eye.

Haag alleged that the hitch ball was installed in a negligent manner by one of the assistants utilized by the Estate, Dolan, and Bauer-Moravec to assist in the auction. Haag alleged that this individual was negligent in several regards: (1) in using the

hitch ball in a manner for which it was not intended; (2) in placing the shank or screw of the hitch ball in a drawbar hole which was too large; (3) in placing the hitch ball in a drawbar which was too thick for the hitch ball that was being used; (4) in failing to fully engage the nut with the screw of the hitch assembly; and (5) in using a Mylar-type towrope, which created an unreasonable risk of harm to Haag and the other occupants of the building because it acted like a slingshot when the hitch failed. Haag alleged that the negligence of this individual was imputed to the Estate, Dolan, and Bauer-Moravec, under the doctrines of respondeat superior and vicarious liability. Additionally, Haag alleged that the towing procedures engaged in at the auction constituted unreasonably and inherently dangerous activities and that therefore the Estate had a nondelegable duty to make sure that the auction was conducted in a safe manner on its premises.

Haag alleged that the Estate was negligent in the following ways: (1) in failing to correct the manner in which the hitch balls were being used to tow the vehicles into the bid barn when they knew, or in the exercise of reasonable care should have known, that the manner in which the hitch balls were being used was unreasonably dangerous and created an unreasonable risk of harm to the occupants of the bid barn; (2) in failing to limit the number of people in the bid barn so that the bidders could be kept at a safe distance from the towing process; and (3) in failing to warn Haag and the other business visitors that the vehicles were being towed in an unreasonably dangerous manner.

Haag alleged that Dolan was negligent in conducting the auction when he knew, or by the exercise of reasonable care should have known, that the vehicles were being towed in an unreasonably dangerous manner in close proximity to the bidders and that the bid barn was too crowded to carry out the auction in a reasonably safe manner. Haag alleged that Dolan was also negligent in failing to warn Haag and the other bidders that the vehicles were being towed in an unreasonably dangerous manner.

Haag alleged that Bauer-Moravec was negligent (1) in arranging to have the vehicles, and in particular, the Studebaker truck, towed in an unreasonably dangerous manner; (2) in

selecting a Mylar-type rope instead of a chain to provide the connection between the towing tractor and the towed vehicles; (3) in failing to inspect the drawbar and the hitch of the tractor that was towing the Studebaker truck; (4) in conducting the auction when it knew, or in the exercise of reasonable care should have known, that the bid barn was too crowded to carry out the auction in a reasonably safe manner; and (5) in failing to warn Haag and the other bidders that the vehicles were being towed in an unreasonably dangerous manner.

Haag alleged that at the time of the accident, Bauer-Moravec was acting as an agent for the Estate and that Bauer-Moravec's negligence was imputed to the Estate under the doctrines of respondeat superior and vicarious liability.

Haag also alleged that Putnam was strictly liable for Haag's injuries in manufacturing, designing, and placing on the market a hitch ball manufactured of nonfree machine steel which was inadequate to support the foreseeable forces to which the hitch ball would be subjected. Additionally, Haag alleged that Putnam was strictly liable in failing to provide the following instructions and warnings with its hitch ball: (1) Use the hitch ball only for towing trailers or vehicles connected to the ball with a socket-type coupler that matches the ball size; (2) attach it to a platform at least three-eighths of an inch thick; mounting hole must not exceed ball shank diameter by more than one-sixteenth of an inch; (3) do not exceed gross trailer weight shown on ball; (4) always use a lockwasher and position it next to nut; (5) threaded shank must protrude beyond bottom of nut when tightened; (6) check nut tightness every time the trailer is hooked up and at the beginning of each towing day; tow only if nut is tightened as specified; (7) replace any damaged or worn part; (8) never attach a towrope, chain, cable, or stretch-type elastic rope to hitch ball or safety chain or other attachment with a ball; and (9) lubricate ball and coupler to minimize wear and friction; coupler must not bind on ball.

Haag alleged that the various alleged acts were the direct and proximate cause of his injuries and that he sustained serious personal injuries consisting of the loss of his right eye; fractured periorbital bones, including the frontal bone, the zygomatic bone, and the maxillary bone; and multiple lacerations and

abrasions. Haag requested special damages in the amount of $41,846.48, general damages as determined by law, and costs of the action. Specifically, Haag requested damages for past and future physical pain and mental suffering; current and future medical expenses; past and future loss of income; permanent injury and disability; permanent disfigurement; and permanent impairment of earning capacity.

On September 8, 1997, Bauer-Moravec filed an answer, stating that Haag's fourth amended petition failed to state a cause of action against it and requesting that Haag's petition be dismissed with prejudice.

On September 9, 1997, Putnam filed an answer, admitting that it is a corporation organized and existing under Michigan law and that prior to January 30, 1993, it manufactured hitch balls that were placed into the stream of commerce and distributed and sold throughout the United States, including Nebraska. Putnam denied each and every other allegation contained in Haag's fourth amended petition, except those constituting admissions against Haag's interest. Putnam stated that the other named defendants or others unknown to Putnam had exclusive control, use, and custody over the hitch ball and its assembly and were misusing the hitch ball at the time of the accident. Putnam stated that this misuse was a proximate cause of any damages or injuries that Haag incurred. Additionally, Putnam stated that its hitch ball did not need to be accompanied by warnings because warnings were not necessary or appropriate for the hitch ball's intended use and purpose.

On September 9, 1997, the Estate also filed an answer. In its answer, the Estate stated that it had contracted with Bauer-Moravec and Dolan as independent contractors to conduct the auction and that the auction took place on farm real estate owned by the Estate. The Estate stated that Haag's petition failed to state a cause of action against it and that Putnam was strictly liable to Haag for his injuries.

A jury trial was held on September 9 through 12 and 15 through 16, 1997. Fifteen witnesses testified at trial, and the record consists of 740 pages of testimony and 173 exhibits. Much of the testimony at trial has been set out in the preceding

portion of this opinion, except the testimony of the two expert witnesses who appeared at trial.

William Weins, an associate professor of mechanical engineering at the University of Nebraska-Lincoln, testified on Haag's behalf and stated that he reviewed the following items involved in the accident: the hitch ball, the towrope, and the drawbar, as well as another Putnam hitch ball not involved in the accident and three hitch balls from other manufacturers.

Weins testified that it was his opinion, with a reasonable degree of scientific certainty, that the Putnam hitch ball involved in the accident was unreasonably dangerous because (1) it was not being used with a coupler, as it was intended to be; (2) the hitch ball was placed in a drawbar that was too thick; (3) only two threads were engaged on the shank of the hitch ball; and (4) a towrope was used, which stored energy and acted like a slingshot when the hitch ball became detached from the drawbar.

Weins testified that the accident would not have occurred if four or five threads had been engaged on the shank of the hitch ball and that the threads would have been fully engaged on the shank of the hitch ball if a hitch ball with a longer shank had been used. Essentially, Weins stated that the hitch ball was not the proper size for the drawbar and that as a result, the hitch ball was not securely attached to the drawbar. Weins testified that all of the above misuses were reasonably foreseeable to a hitch ball manufacturer and that other manufacturers in the industry supplied warnings against these misuses. Weins stated that the Putnam hitch ball was unreasonably dangerous because it did not warn against any of the foreseeable misuses or events and that Putnam's failure to warn on the proper use of this device was the proximate cause of Haag's injuries. On cross-examination by Putnam, Weins testified that he could not say that had there been warnings in the instant case, they would have been followed.

Weins testified that Putnam should have attached the following warnings to its hitch balls: (1) This hitch ball is for application with a coupler; (2) use this hitch ball only with drawbars three-fourths of an inch thick; (3) engage all of the nuts on this

hitch ball; (4) place this hitch ball only in a hole of a certain size; (5) keep the hitch ball lubricated; and (6) do not attach other devices to the hitch ball, specifically, polymer towropes.

Weins testified that the drawbar on the tractor involved in the accident was 1½ inches thick, twice as thick as the average drawbar on this size tractor. Weins testified that the hitch ball used was close to the correct size and that it was not unreasonable to believe that this hitch ball would have been suitable for this drawbar. Weins also stated that the nut on this particular hitch ball was securely tightened and that the only way an installer could have determined if all the threads were fully engaged was by looking underneath the drawbar or by feeling with his or her fingers.

Rex Paulsen, a professional engineer at Fay Engineering, testified on Putnam's behalf. Paulsen testified that using this particular hitch ball on the drawbar in question, without engaging all of the threads, was a misuse of the Putnam hitch ball and that this misuse was a proximate cause of the accident. Paulsen stated that placing this hitch ball in a hole that was too large, in a drawbar that was 1½ inches thick, engaging only two threads, and using a towrope created a risk of harm, readily recognizable by an ordinary user. Paulsen stated that all of the above misuses were foreseeable misuses. In contrast, in later testimony he stated that in his opinion, it was not a reasonably foreseeable misuse of the hitch ball that a person would engage only two threads on a drawbar that is 1½ inches thick.

On September 16, 1997, the jury returned a verdict finding for Haag and against the Estate, Bauer-Moravec, and Putnam in the amount of $600,000. Previously, the trial court had adjudged Dolan to be in default and entered judgment on the pleadings against Dolan and in favor of Haag.

On September 25, 1997, the Estate and Putnam filed separate motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. On October 1, Dolan filed a suggestion in bankruptcy.

In an order and judgment filed October 29, 1997, the trial court overruled the Estate's and Putnam's posttrial motions and stayed any further action against Dolan. The trial court entered judgment on the jury's verdict in the sum of $600,000 in favor

of Haag and against the Estate, Bauer-Moravec, and Putnam. Further facts are recited below as are necessary to our analysis.

Putnam appeals, and the Estate cross-appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Putnam contends that the trial court erred in not granting its motion for a directed verdict because the issue of whether Putnam was strictly liable for failing to attach warnings to its hitch ball should not have been submitted to the jury and because Haag failed to establish that Putnam's failure to include warnings with its hitch ball with respect to foreseeable misuses was a proximate cause of Haag's injury. Additionally, Putnam argues that although counsel for Putnam commented in closing upon warnings, the trial court abused its discretion in not allowing Putnam's counsel to state in his closing argument that the evidence established that if a warning had been given by Putnam, it would not have been read or heeded.

On cross-appeal, the Estate argues that the trial court erred (1) by instructing the jury that a mere principal-agent relationship between the Estate and Bauer-Moravec was sufficient to create vicarious liability upon the principal, the Estate, for the physical tort of its agent, Bauer-Moravec, acting within the scope of the agency; (2) in giving instruction No. 21 to the jury over its objection; (3) by submitting the issue of the Estate's negligence under the theory of premises liability to the jury; and (4) in not instructing the jury that the Estate was liable only for the amount of noneconomic damages in direct proportion to its percentage of negligence.

IV. ANALYSIS

1. Putnam's Assignments of Error

(a) Denial of Putnam's Motion for Directed Verdict

In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from

the evidence. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Id.*

(i) Necessity of Warning

On appeal, Putnam argues that the trial court erred in not granting its motion for a directed verdict because the issue of whether Putnam was strictly liable for failing to attach warnings to its hitch ball should not have been submitted to the jury. Haag responds that Putnam's assignment of error cannot be considered on appeal, because although Putnam made a motion for a directed verdict, it did not state a sufficiently specific basis therefor. Haag contends that, in any event, the evidence regarding the necessity of warnings was in conflict and was sufficient to submit to the jury. For the reasons which follow, we conclude that the trial court correctly denied Putnam's motion for a directed verdict and submitted the issue of the necessity of warnings to the jury.

A motion for a directed verdict should state the specific grounds therefor. See, Neb. Rev. Stat. § 25-1315.01 (Reissue 1995); *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). Putnam noted eight specific grounds in support of its motion for directed verdict. In two instances, Putnam referred to the alleged lack of proof regarding Haag's claim of strict liability. In a third specification, Putnam claimed the evidence established that it was not liable, because inter alia, it did not produce an unreasonably dangerous product. The motion for directed verdict was adequate under § 25-1315.01.

To recover against a defendant on a claim of strict liability, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the

plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

In the instant action, Haag's case against Putnam was submitted to the jury on the issue of whether Putnam was strictly liable to Haag for failing to include warnings or instructions with its hitch ball. Specifically, Haag alleged that Putnam should have included the following warnings with its hitch balls: (1) Use the hitch ball only for towing trailers or vehicles connected to the ball with a socket-type coupler that matches the ball size; (2) attach hitch ball to a platform at least three-eighths of an inch thick; mounting hole must not exceed ball shank diameter by more than one-sixteenth of an inch; (3) do not exceed gross trailer weight shown on ball; (4) always use a lockwasher and position it next to nut; (5) threaded shank must protrude beyond bottom of nut when tightened; (6) check nut tightness every time the trailer is hooked up and at the beginning of each towing day; tow only if nut is tightened as specified; (7) replace any damaged or worn part; (8) never attach a towrope, chain, cable, or stretch-type elastic rope to hitch ball or safety chain or other attachment with a ball; and (9) lubricate ball and coupler to minimize wear and friction; coupler must not bind on ball.

Putnam argues on appeal that its hitch balls are not unreasonably dangerous and that no warnings were required. In this regard, Putnam states in its appellate brief that a "hitch ball utilized by farmers in farming communities all across the state is a simple device like that of a bolt or nut which requires no warning at all." Brief for appellant at 12.

Although this court has yet to squarely address this issue, it is generally the law that a product may be defective and unreasonably dangerous because the manufacturer sold the product without sufficient warnings or instructions. The Restatement (Second) of Torts § 402 A, comment *j*. at 353 (1965), states, "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . .

as to its use." See, also, 72 C.J.S. *Products Liability* § 29 (Supp. 1975); 63 Am. Jur. 2d *Products Liability* § 562 (1997).

"Unreasonably dangerous" means that a product has the propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with ordinary knowledge common to the foreseeable class of users as to its characteristics. *Kudlacek v. Fiat S.p.A., supra.* Previously, this court has held that whether a product is unreasonably dangerous is generally a question of fact. *Rahmig v. Mosley Machinery Co.,* 226 Neb. 423, 412 N.W.2d 56 (1987).

In the instant case, there is no serious dispute that not all the threads were engaged, that the hitch ball used was not the proper size for the drawbar, and that a synthetic rope which possessed the ability to store energy was used. The testimony was in conflict as to whether or not those misuses were foreseeable. Haag adduced evidence that the misuses of the hitch ball just described were foreseeable. In particular, Weins testified that the Putnam hitch ball was unreasonably dangerous because Putnam did not warn its consumers against any of the foreseeable misuses set out above. In contrast, Paulsen testified at one point that the misuses of the Putnam hitch ball were the proximate cause of the accident but that these misuses were not reasonably foreseeable to Putnam.

The law with respect to foreseeable misuses has been generally summarized as follows: "When product misuse and its attendant risks are reasonably foreseeable, the manufacturer is in the best position to avoid product-related injuries by giving an adequate warning. Thus, the duty to warn includes a duty to warn with respect to foreseeable misuse of a product." 3 Am. Law Prod. Liab. 3d § 32:48 (rev. 1993). Several jurisdictions follow the rule that the duty to warn includes a duty to warn against foreseeable misuses. See, *Liriano v. Hobart Corp.*, 132 F.3d 124 (2d Cir. 1998); *Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221 (D.C. Cir. 1996); *Morales v. American Honda Motor Co., Inc.*, 71 F.3d 531 (6th Cir. 1995), *appeal after remand* 151 F.3d 500 (6th Cir. 1998); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992); *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008 (8th Cir. 1989); *White v. Amoco Oil Co.*, 835 F.2d 1113 (5th Cir. 1988).

Although the testimony was in conflict regarding the foreseeability of the misuses in this case, because there was sufficient evidence from which a jury could reasonably conclude that the misuses to which the Putnam hitch ball were put were foreseeable, thereby creating a duty to warn against such misuses, the issue of whether a warning was required was properly submitted to the jury. The trial court properly denied Putnam's motion for a directed verdict.

(ii) Failure to Warn as Proximate Cause

Putnam claims that the trial court erred in failing to grant its motion for a directed verdict on the basis that Haag failed to establish that Putnam's failure to include warnings with its hitch ball was a proximate cause of Haag's injury. Haag responds that he produced expert testimony at trial sufficient to prove that Putnam's failure to warn was the proximate cause of Haag's injuries.

Putnam argues on appeal that assuming warnings were required, Haag nevertheless failed to prove that Putnam's failure to include warnings with its hitch ball was the proximate cause of Haag's injuries. Putnam states that the evidence at trial showed that the persons who installed the hitch balls on the tractors already knew how to properly install the hitch balls. Essentially, Putnam argues that any warnings it might have included with its hitch balls would have been useless.

A review of the record shows that Weins testified at trial regarding Putnam's alleged failure to warn and expressed the opinion that the failure to include warnings or instructions with Putnam hitch balls was the proximate cause of Haag's injuries. On this record, the evidence regarding the utility of warnings and causation due to lack of warnings was sufficient to support Weins' opinion, and the jury was properly permitted to weigh the evidence regarding causation due to failure to warn. See *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998). We conclude that the trial court did not err in denying Putnam's motion for a directed verdict on Putnam's theory that a failure to warn did not proximately cause the accident.

(b) Limiting Closing Argument

Putnam contends that the record shows that if Putnam had attached warnings to its hitch balls, the installers of these hitch

balls would not have read or heeded the warnings and that its counsel should have been allowed to state in his closing argument to the jury that the record established that warnings would not have been heeded. Haag responds that there is no evidence that warnings would not have been heeded. We conclude that the trial court did not err in connection with its ruling on closing argument.

The general rule is that conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988), citing *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984).

In the instant case, no witness testified that warnings, if given, could not be expected to be heeded. Weins testified that he could not opine whether, if given, warnings would be followed. Rex Putnam, the president of Putnam, testified that warnings on hitch balls are to satisfy lawyers. The record does not establish which assistant installed the hitch ball and whether he or she would have obeyed a warning, if any, against misuse. The court is aware that one of the auctioneers, who the evidence shows did not install the hitch balls, testified that he personally would not have read instructions, but that he would have expected the assistants who installed the hitch balls to read the instructions.

The trial court advised Putnam's counsel over objection that Putnam's counsel would not be permitted to state that the evidence showed that warnings would not be heeded. During closing argument, Putnam's counsel referred variously to warnings, including a comment that

> Rex Putnam knew that other manufacturers used warnings, yeah, he did, he told you that. Sure, he made a conscience [sic] decision not to do that because, in his opinion, I think he testified, that the warnings were for the lawyers, and he also testified that many of his competitors did not warn.

There was no evidence presented that warnings could be expected to be ignored, and Putnam's counsel referred in closing argument to the evidence on the topic of warnings such as it

existed in the record, thereby presenting the jury with the issue. The trial court's ruling was not an abuse of discretion.

2. Estate's Assignments of Error

(a) Jury Instructions

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

Regarding a claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

(i) Instructions Nos. 2 and 15: Agency

The Estate argues that the trial court erroneously instructed the jury that a mere principal-agent relationship between the Estate and Bauer-Moravec was sufficient to create vicarious liability upon the principal, the Estate, for the physical tort of its agent, Bauer-Moravec, acting within the scope of the agency. The Estate argues that one cannot be held vicariously liable for the physical torts of another unless a master-servant relationship is proved and that that requires proof of a right to control. Haag does not specifically address the Estate's argument in his brief. After reviewing the instructions given by the trial court as a whole, we determine there is no reversible error based on the trial court's instructions to the jury on this issue.

The Estate objects to two instructions given by the trial court, instructions Nos. 2 and 15. Instruction No. 2 provided in part:

> Simply stated for the purposes of this trial that theory [of respondeat superior] means that a principal [(the Estate)] is responsible for the negligent acts of its agents (Bauer-Moravec) while they are or were acting within the scope of their employment. Such a claim is based on an agency

> concept, which is hereinafter explained to you in separate instructions. If negligence is imputable under this theory, it is referred to as vicarious (the sharing of) liability.
>
> . . . .
>
> With respect to the plaintiff's claim of respondeat superior, the defendant [(the Estate)] has denied that a principal/agent relationship existed in this matter. That defendant claims that the defendants Bauer-Moravec were independent contractors and not agents of [the Estate]. The status of an independent contractor is hereinafter explained to you in a separate instruction.

Instruction No. 15 stated:

> It is claimed that at the time of the accident on January 30, 1993, the defendants Bauer-Moravec were acting within the scope of their authority as an agent of [the Estate]. That means that if you find that defendants Bauer-Moravec are liable to the plaintiff, and you determine that an agency relationship existed, then you must also find that [the Estate] is liable to the plaintiff. On the other hand, if you find that the defendants Bauer-Moravec are not liable to the plaintiff, then you must find that [the Estate] is not liable to the plaintiff based on any agency relationship between these parties.

Although the Estate objected to a portion of instruction No. 2 at the instruction conference, it did not object to the portion noted above, nor did the Estate object to instruction No. 15 at trial.

While ordinarily the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter, a trial judge is nonetheless under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

In the instant case, the trial court adequately instructed the jury in other instructions that an agency relationship between the Estate and Bauer-Moravec existed only if the Estate consented to Bauer-Moravec's acting on its behalf and if the Estate

had the right to exercise control over Bauer-Moravec, regardless of whether the Estate actually exercised control over Bauer-Moravec. Given that the trial court's instructions taken as a whole correctly state the law and that there was adequate evidence therefor, the instructions were not misleading and adequately covered the issues submissible to the jury and there was no prejudicial error concerning the instructions and necessitating a reversal. Thus, the Estate's argument with respect to instructions Nos. 2 and 15 is without merit.

(ii) Instruction No. 21: Imputed Negligence

The Estate argues that the trial court committed reversible error in giving instruction No. 21 to the jury over its objection. Instruction No. 21 stated: "The negligence, if any, of the volunteer who placed the hitch ball in question on the tractor in question is imputed to the defendants [(the Estate)] and Bauer-Moravec, and they are liable for the full amount of the damages which were caused by that negligence." The Estate argues that by giving this instruction, the trial court in effect directed a verdict against the Estate, since there was no dispute at trial that an unknown assistant negligently placed the hitch ball on the tractor. The Estate contends that there was no basis on this record for this instruction with respect to the Estate, because the auctioneers were independent contractors and the assistants were servants of the auctioneers, not the Estate. Haag argues that this instruction was correct and that given the Estate's involvement in and significant control of the auction, the negligence of the assistant, if any, was properly imputed to the Estate. As explained below, we conclude that the auctioneers were independent contractors, but given the Estate's substantial control over the independent contractors' work, the Estate was not relieved of its duty to exercise reasonable care in connection with the conduct of the auction and that therefore, instruction No. 21 is supported by the record and was properly given.

a) Estate's Duty

Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997), citing *Anderson v. Nashua Corp.*,

246 Neb. 420, 519 N.W.2d 275 (1994); *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994). There are two recognized exceptions to the general rule: the employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Kime v. Hobbs, supra.*

There are 10 factors which are considered in determining whether a person is an employee or an independent contractor: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Id.*, citing *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). The right of control is the chief factor distinguishing an employment relationship from one of an independent contractor. *Id.*, citing *Pettit, supra.* In examining the extent of the employer's control over the worker in this context, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed. *Id.*

Based on the facts of this case, we conclude that the auctioneers served as independent contractors. However, the Estate exercised sufficient control over the auction to subject it to liability, notwithstanding the participation of the auctioneers as independent contractors. The factors which demonstrate the Estate's control include, but are not limited to, the following facts: The auction was held on the Estate's property, and the Estate insisted that the auction be conducted in winter rather

than in summer in a more expansive setting. The Estate was responsible for putting the vehicles in running order but failed to do so, resulting in the necessity of towing the vehicles at the auction. The Estate approved the use of tractors to tow the vehicles at the auction. The Estate approved the use of assistants. The Estate paid the assistants. The Estate insisted that the auction be heavily advertised, resulting in a shoulder-to-shoulder crowd through which the vehicles were to be towed. The Estate and the auctioneers decided to extend the bid barn and charge a $25 fee. Bongers was present at the auction at the time of the accident.

Although actual performance of the task of towing the vehicles was to be performed by the independent contractor auctioneers, the facts in this case as to the Estate's active and considerable control over the activities that led to the accident are sufficient to subject the Estate to liability. In this regard, we note that the Restatement (Second) of Torts § 414 at 387 (1965) provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

See, *Kime v. Hobbs, supra*; *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). We conclude that because the Estate retained considerable control over the relevant work, it is therefore liable for a failure to exercise reasonable care in the use of that control. Accordingly, imputing the negligence of the assistants to the Estate was justified by the facts, and it was not error for the trial court to give instruction No. 21.

b) Premises Liability

In the instant case, the trial court submitted the issue of the Estate's negligence to the jury on the basis of premises liability. The Estate argues that the court's instruction on this ground was improper, arguing that the auctioneers and not the Estate possessed the land on the date of the sale in order to conduct the

auction and that premises liability does not apply because the accident at issue did not result from a "condition" of the land. Because premises liability encompasses activities conducted on the premises, not merely the condition of the land, we find the Estate's argument to be without merit.

In instruction No. 23, the trial court correctly instructed the jury that the Estate could be liable to Haag under the theory of premises liability if Haag proved four things: (1) The Estate, in carrying on an activity on its premises, failed to use reasonable care for the safety of business visitors; (2) the Estate should have expected that business visitors such as Haag either would not discover or realize the danger or would fail to protect themselves against danger; (3) this failure to use reasonable care was a proximate cause of some damage to Haag; and (4) the nature and extent of that damage. The trial court's instruction was based on NJI2d Civ. 8.23, which is entitled in part, "Damage to Business Visitor—Activities on Premises," in contrast to NJI2d Civ. 8.22, which is entitled in part, "Damage to Business Visitor—Condition of Premises." The instruction at NJI2d Civ. 8.23 follows the Restatement (Second) of Torts § 341 A at 209 (1965), which provides:

> A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

The Restatement, *supra*, comment *a*. at 209-10, states in part:

> The obligation of the possessor is therefore not limited to one of reasonable care to protect him against conditions of which he does not know or have reason to know, as in the case of the licensee . . . but extends also to protection against the risk of harm from activities of which the invitee knows or has reason to know, where it may reasonably be expected that he will fail to protect himself notwithstanding such knowledge.

Therefore, it is clear that premises liability encompasses not only condition of land, but also activities conducted on the premises.

Additionally, the evidence shows that the Estate remained in possession of the land on the date of the sale, regardless of whether the auctioneers used the property owned by the Estate on which to conduct the auction. See *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991) (holding that rule regarding premises liability applies not only to possessor of land, but also to owner in control of premises), *disapproved on other grounds, Welch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

Therefore, we conclude that the trial court properly submitted to the jury instruction No. 21, which stated that the negligence, if any, of a volunteer assistant could be imputed to both Bauer-Moravec and the Estate. We conclude that the Estate had a nondelegable duty to keep its premises safe for the auction. The trial court did not err in giving instruction No. 21 to the jury, nor did it err in submitting the Estate's negligence to the jury on the basis of premises liability. Therefore, the Estate's assignment of error regarding instruction No. 21 is without merit.

(b) Contributory Negligence

The Estate relies in general on Neb. Rev. Stat. § 25-21,185.07 (Reissue 1995) and in particular on Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) and claims that the trial court erred in not instructing the jury that the Estate was liable only for the amount of noneconomic damages in direct proportion to its percentage of negligence. These statutes pertain to civil actions in which contributory negligence is an affirmative defense. Haag contends that the Estate may not raise this claim on appeal, because the Estate is raising this issue for the first time on appeal. Haag further correctly observes that the Estate did not request an instruction or submit a proposed verdict form on this issue at trial and did not preserve the issue for appeal.

Contributory negligence is an affirmative defense, which must be proved by the party asserting such defense. *Carpender v. Bendorf*, 246 Neb. 77, 516 N.W.2d 619 (1994). An affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a

claim asserted in the petition. *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). An affirmative defense must be specifically pled to be considered. *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994). An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997). Thus, we do not address this issue on appeal.

V. CONCLUSION

After reviewing the record, we conclude that the trial court did not err in denying Putnam's motion for a directed verdict and that the trial court did not abuse its discretion in its ruling with respect to Putnam's closing argument. Additionally, we conclude that the Estate's claimed errors regarding the instructions given by the trial court are without merit. For these reasons, we affirm the orders of the district court.

AFFIRMED.

HENDRY, C.J., and CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CHAMU URBANO, ALSO KNOWN AS URBANO CHAMU, APPELLANT.

589 N.W.2d 144

Filed February 12, 1999. No. S-98-555.

1. **Jury Instructions: Proof: Appeal and Error.** In order 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.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
4. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the trial court to describe the offense in the language of the statute.
5. **Trial: Evidence: Proof.** 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.

6. **Self-Defense.** Justifications for the use of force in self-defense are statutorily defined.
7. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
8. **Insanity: Mental Health: Intent.** Although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent.
9. **Jury Instructions: Intent.** A trial court need not specially instruct the jury regarding the defense of diminished capacity if the court has otherwise properly instructed the jury regarding the intent which is an element of the crime charged.
10. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically indicated otherwise.
11. **Sentences: Final Orders: Appeal and Error.** A sentence is not a final judgment until the entry of a final mandate of an appellate court if an appeal is taken.
12. **Statutes: Public Officers and Employees: Legislature.** The Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature and to not exercise discretion in excising a portion of the law.
13. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

MILLER-LERMAN, J.

In this direct appeal, Chamu Urbano, also known as Urbano Chamu, appeals his conviction and sentence for assault committed by a confined person, a violation of Neb. Rev. Stat. § 28-932 (Reissue 1995). We affirm Urbano's conviction and the sentence imposed upon him, as modified. In rendering our decision, we consider the impact of recent statutory changes to

the penalties applicable to Class IV felony convictions considered on direct appeal.

I. STATEMENT OF FACTS

Urbano is an inmate at the Nebraska State Penitentiary. On June 13, 1997, Urbano was housed in the "control unit," a special housing unit within the penitentiary for inmates who have committed disciplinary violations. Qualified health professionals had determined that regulated daily doses of prescription medication would be beneficial to Urbano, including curbing aberrant behaviors such as exhibitionistic exposure of his genitals and violent verbal outbursts. Urbano often refused to voluntarily take the prescribed medication. In the early part of June 1997, a court entered an order authorizing penitentiary officials to administer the prescribed medication to Urbano. This order was mentioned by several trial witnesses, but no copy of it was entered into evidence.

At approximately 1 p.m. on June 13, 1997, penitentiary personnel asked Urbano to take his medication voluntarily. Urbano stated that he would not do so. A team of penitentiary personnel then gathered to perform a "forced cell move," sometimes referred to as a "takedown." At least nine penitentiary employees are required for a forced cell move team. Five guards are assigned to physically move the inmate: one guard for each of the inmate's arms and legs and one guard to walk ahead of the inmate. A team member is present as a "spokesman" to "talk to the camera" used to videotape the forced cell move, to facilitate a complete video record of the move. One team member controls the opening and closing of doors in the control unit. One team member is specifically assigned to videotape the forced cell move process, and another team member acts as the team's supervisor. Because a forced cell move is, by its nature, a physically confrontational process, the penitentiary's team members wear "riot gear" during forced cell moves. This gear consists of a helmet with face shield, a thick vest to protect the team member's torso, elbow pads, and protective gloves. The lower portions of team members' forearms are unprotected by the riot gear.

Team members testified at trial that as they gathered in preparation for the forced cell move, Urbano remained in his

cell, shouting. In a videotape of the forced cell move entered into evidence at trial, Urbano can be heard talking loudly throughout the cell move, although his actual comments are unintelligible. Team members testified that Urbano used foul language and kept repeating that he was a man, that he did not need medication, and that team members would "pay the consequences" for forcing him to take the medication.

Before the team members entered Urbano's cell, a team member again asked Urbano if he would voluntarily take his medication and Urbano was advised that if he did not do so, the team members would use force on Urbano to allow the court-ordered injection of medication. Urbano again refused the medication. Team members then assumed their assigned positions, forcibly restrained Urbano, and carried him into the "bull pen," an open area adjoining the control unit which separates it from the general inmate population areas. Urbano continuously twisted and struggled, shouting profanity.

Cpl. Debbie Finke Proctor, a penitentiary employee, was assigned to restrain one of Urbano's arms during this forced cell move. She had assisted in at least six prior forced cell moves involving Urbano. In the June 13, 1997, cell move of Urbano, Proctor felt someone obstruct the movement of one of her legs. She assumed her leg had been grabbed by a fellow team member in error, and she looked away briefly while still restraining Urbano's arm. As Proctor rapidly turned back to Urbano, she saw him preparing to bite the portion of her left forearm which was not protected by riot gear. Proctor tried to pull her arm away, but she was unable to do so before Urbano made contact with her arm, biting down hard on it. Proctor managed to extricate her arm from Urbano's teeth without halting the progress of the forced cell move. The cell move team transported Urbano to the bull pen, where a nurse injected Urbano with the prescribed drug which was the subject of the court order.

After the forced cell move of Urbano was completed, Proctor showed another team member the injury to her left arm where Urbano had bitten her. Bruises were already becoming evident, and the skin was broken at the site where she had been bitten. Proctor's teammate suggested that she seek medical attention. Proctor was seen at Lincoln General Hospital. The medical care

prescribed for Proctor, which she followed, included a tetanus shot, antibiotics, and a regimen of painfully vigorous wound cleansing several times daily for 2 weeks. By the time of trial, 10 months after the incident, the abrasion and bruises on Proctor's left arm had healed, but a scar from the bite wound was still evident. Proctor testified that she had her blood tested periodically for the 6 months following Urbano's bite on her arm because Urbano had tested positive for hepatitis C and Proctor's physicians were concerned that Urbano might have infected her when he bit her arm.

Urbano was charged on September 27, 1998, with assault by a confined person, which at that time was a Class IV felony, in violation of § 28-932. The case was tried to a jury on February 26 and 27, 1998. Urbano was personally present at all phases of the proceedings with his counsel and a court-appointed interpreter.

At trial, Urbano claimed that he refused to take his medication because the shots administered to him were painful and "[i]t's just like killing my mind." Urbano stated that the medication caused him to be depressed and lethargic and to gain weight. The essence of his defense was that he acted in self-defense and that he did not have the requisite intent to form the crime of assault by a confined person. Urbano testified that in refusing to voluntarily take the medication on June 13, 1997, he did not intend to hurt anyone and that he did not remember biting any of the forced cell move team members. Urbano offered no other evidence in his defense.

Urbano testified that during the forced cell move maneuver, he hit his head against a wall while team members were forcibly restraining him. No injury to Urbano is apparent on the videotape in evidence. The videotape shows that Urbano was restrained and his medication administered to him in a shot and that the penitentiary nurse thereafter asked Urbano if he needed further medical attention. Urbano claimed that his head or face had been hit. However, following an examination of his head and face, the penitentiary nurse advised Urbano that there were no apparent injuries. Urbano's counsel proffered jury instructions on the elements of the crime and self-defense and an instruction regarding Urbano's mental capacity, specifically

questioning whether he could have framed the requisite intent to commit the crime with which he was charged. The trial court refused to give these instructions. Urbano's counsel also objected to the instruction prepared by the trial court defining the elements of the crime of assault by a confined person. The objection was overruled.

The jury found Urbano guilty as charged. On April 23, 1998, the trial court sentenced Urbano to a term of imprisonment of "not less than 5 years nor more than 5 years." Urbano appeals.

II. ASSIGNMENTS OF ERROR

Urbano claims that the trial court erred in refusing to give jury instructions he proffered regarding the material elements of the crime with which he was charged, self-defense, and his mental condition. Urbano claims that the trial court incorrectly overruled his objection to the jury instruction prepared by the court regarding the elements of the crime of assault by a confined person. Finally, Urbano claims that his sentence is excessive and that, pursuant to recent legislation, his sentence must be reduced.

III. STANDARD OF REVIEW

In order 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. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

IV. ANALYSIS

1. Jury Instruction Claims

Urbano assigns as error the trial court's giving of its instruction No. 3 regarding the elements of the crime of assault by a confined person. Urbano claims that the trial court erred in refusing to give three of his proffered instructions. We find no merit to these claims.

(a) Elements

Urbano timely objected to the court's jury instruction No. 3 defining the elements of the crime of assault committed by a confined person and instead tendered his own instruction No. 4 to the court regarding the elements of the crime. The court refused to give Urbano's proposed instruction No. 4.

As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997). At the time of trial, § 28-932 provided, in pertinent part, that "[a]ny person who is legally confined in a jail or correctional or penal institution and intentionally, knowingly, or recklessly causes bodily injury to another person shall be guilty of a Class IV felony[.]" Although Urbano's tendered instruction accurately described the elements defined by § 28-932, it also sought to instruct the jury that as part of the State's initial evidentiary burden, the State had to prove that Urbano did not act in self-defense.

The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove. *Id.* If the trial evidence does not support a claim of self-defense, the jury should not be instructed upon it. *Id.* See, also, *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978). An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *Glantz, supra.*

Urbano's proposed jury instruction regarding the elements of the crime of assault by a confined person and the defense of

self-defense wrongly shifted the initial evidentiary burden regarding self-defense and was an incorrect statement of the law. The evidence introduced by Urbano at trial did not, even giving Urbano every favorable inference, establish that Urbano acted in justifiable self-defense. The trial court correctly refused to give the jury Urbano's tendered instruction No. 4 regarding the elements of the crime. The trial court's instruction No. 3 regarding the elements of assault by a confined person was an adequate statement of the law, and we find no error in it.

(b) Self-Defense

Urbano also tendered a separate jury instruction No. 3, which exclusively addressed the issue of self-defense. The trial court refused this instruction on the basis that the trial evidence did not support the instruction.

A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. *Kinser, supra.* To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *State v. Marshall,* 253 Neb. 676, 573 N.W.2d 406 (1998).

Justifications for the use of force in self-defense are statutorily defined, and the defendant bears the initial burden to produce evidence which supports a claim of self-defense. *Kinser, supra.* It is only *unlawful* force directed at a defendant which provides a justifiable basis for self-defense. See Neb. Rev. Stat. § 28-1409 (Reissue 1995). See, also, *State v. Graham,* 234 Neb. 275, 450 N.W.2d 673 (1990). If a defendant has unjustifiably placed himself or herself in harm's way, a court may properly find that such facts do not support a lawful claim of self-defense. See *Marshall, supra.*

Urbano claims that he was justified in biting Proctor in self-defense because he felt the force used by the cell move team was excessive, he did not want to receive the injection of medication, and he did not think he needed it. In an inconsistent claim, Urbano also argues that he had no memory of biting Proctor. In any event, Urbano does not deny that the medication administered to him was given pursuant to a court order, albeit

against his will. Furthermore, at trial and on appeal, Urbano has not questioned the validity of the court order.

Beyond recounting his own feelings, Urbano produced no evidence that the forced cell move was illegal, that penitentiary personnel conducted it illegally, or that penitentiary personnel acted in an unduly aggressive manner or acted outside the scope of their authority and penitentiary rules and regulations. In rejecting Urbano's proposed self-defense jury instruction, the trial court stated that the evidence at trial did not show that the forced cell move of Urbano was unlawful. We agree with this conclusion.

Neb. Rev. Stat. § 28-1414 (Reissue 1995) defines certain circumstances which preclude a claim of self-defense. These include instances in which, inter alia, a defendant unjustifiably acts in self-defense, negligently or recklessly believing that unlawful force is being used against him or her. See *id.* While Urbano opined at trial that he thought the forced cell move team members treated him unnecessarily roughly, he introduced no evidence beyond his own opinion that this was so. The remaining evidence introduced at trial pertaining to the forced cell move was produced by the State, all of which tended to establish that the cell move was initiated only after Urbano refused to take medication which he knew was court ordered, that the cell move was accomplished by the use of appropriate standardized takedown procedures, and that Urbano was physically resistant throughout the episode.

A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. See *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997). We conclude on this record that there was no evidence to support Urbano's claim that he justifiably bit Proctor's arm in self-defense. The trial court properly refused Urbano's tendered instruction No. 3 regarding self-defense.

(c) Mental Capacity

Urbano tendered instruction No. 2 regarding mental capacity. Urbano's proposed instruction No. 2 reads: "Any evidence received concerning defendant's mental condition bears only on the presence or absence of the intent necessary to prove the

crime charged." Urbano claims that the trial court erred in refusing to give this instruction, because according to *State v. Vosler*, 216 Neb. 461, 468, 345 N.W.2d 806, 811 (1984), "evidence of an accused's mental condition at the time the offense was committed is always admissible to prove absence of intent." As a threshold matter, we note that proposed instruction No. 2 fails to recite the entire proposition of law in *Vosler*, which limits its holding to the facts of the *Vosler* case. Proposed instruction No. 2 does not accurately summarize the law in *Vosler* and is, at best, confusing, and the trial court correctly rejected it on these bases.

A review of the evidence shows that Urbano testified that he was given medication against his will daily during the 3 weeks preceding his assault on Proctor and that his thought processes were detrimentally altered. Urbano testified that he did not remember biting Proctor and that he did not intend to hurt anyone. Urbano claims that the jury could have found from the trial evidence that he was not mentally competent to form the intent which is a prerequisite to the crime with which he was charged and, therefore, that the trial court erroneously refused his proposed instruction concerning his mental condition and the significance thereof.

At first blush, Urbano's argument seems to be based on the insanity defense found in Neb. Rev. Stat. § 29-2203 (Reissue 1995). It is well settled that when a defendant pleads insanity and offers evidence on that issue, the plea is an implicit, although not legally operative, admission of the State's charges. *Vosler, supra.* Section 29-2203 provides that if a defendant intends to assert the defense that he or she is not guilty by reason of insanity, the defendant must provide the prosecution and court with notice of the defense at least 60 days before trial, and that the burden of proving the defense is upon the defendant. In the instant case, Urbano did not give the court or the prosecution advance notice of a purported insanity defense, nor did Urbano plead that he was insane. On the contrary, he pled and consistently maintained that he was not guilty throughout the proceedings. Accordingly, we do not view the defense theory expressed in Urbano's proffered instruction as one based on insanity.

Separate and apart from an insanity defense, a defendant may, with appropriate evidence, try to defeat the charge filed against him or her by proving that at the time the offense occurred, the defendant lacked the ability to intend the voluntary and probable consequences of his or her act. We noted in *State v. Vosler*, 216 Neb. 461, 468, 345 N.W.2d 806, 811 (1984), that "although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent." The defense implicit in Urbano's tendered jury instruction No. 2 appears akin to a claim of temporarily diminished capacity, that is, Urbano seems to claim that his mental condition on the day he bit Proctor was so diminished by the accumulated medication which he had received for the preceding 3 weeks that he was incapable of intentionally, knowingly, or recklessly biting Proctor.

A trial court need not specially instruct the jury regarding the defense of diminished capacity if the court has otherwise properly instructed the jury regarding the intent which is an element of the crime charged. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990), relying upon *Vosler, supra*, and *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958). We have reviewed the court's instructions in this case. The instructions given by the trial court to the jury properly articulated the intent which is a prerequisite to the crime of assault by a confined person, according to § 28-932. To the extent that Urbano was entitled to an instruction regarding intent, the jury instructions adequately covered this topic. We conclude, therefore, that the trial court did not err in refusing to instruct the jury on mental capacity as requested by Urbano in proffered instruction No. 2.

2. Excessive Sentence Claim

Upon conviction, Urbano was sentenced on April 23, 1998, to a term of imprisonment of "not less than 5 years nor more than 5 years." He contends that the sentence imposed upon him was excessive, and, in any event, he requests that we modify the minimum portion of it based on recent statutory amendments regarding Class IV felony indeterminate sentences. Urbano pre-

sumes that he received an indeterminate sentence and notes that the minimum for a Class IV felony indeterminate sentence, when an indeterminate sentence of imprisonment is imposed, cannot now exceed 20 months' imprisonment, pursuant to statutory amendments contained in 1997 Neb. Laws, L.B. 364. The State claims that Urbano cannot take advantage of the new maximum minimum provision of 20 months' imprisonment for a Class IV felony indeterminate sentence, because the crime of which he stands convicted has been reclassified as a Class IIIA felony and because the Legislature has indicated an intent that the amelioratory effects of the amendments do not apply to defendants sentenced before July 1, 1998, by virtue of 1998 Neb. Laws, L.B. 1073. We do not agree. As explained more fully below, we conclude that the sentence imposed on Urbano was indeterminate, and we modify the minimum portion of the sentence to 20 months' imprisonment and affirm as modified.

Nebraska's sentencing statutes have been significantly amended in recent years. Sentences imposed for felony convictions are governed by the range of penalties set forth at Neb. Rev. Stat. § 28-105 et seq. (Reissue 1995 & Cum. Supp. 1998). In addition, Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1998) and Neb. Rev. Stat. § 83-1,105.01 (Cum. Supp. 1998) also impact criminal sentences imposed by trial courts and reviewed by appellate courts. In general, these statutes provide respectively, inter alia, for the imposition of indeterminate sentences and calculation of time to be served. Reference to these statutes and amendments thereto is made later in our analysis of Urbano's sentencing claim.

(a) *Randolph* Doctrine

Although the sentence of the district court was not an abuse of discretion, the Legislature has amended the indeterminate sentencing statute and we are compelled to consider if the amendment has any effect on Urbano's sentence. At the time the district court entered the sentence in this case on April 23, 1998, § 29-2204 (Reissue 1995) provided, in relevant part, that "in imposing an indeterminate sentence upon an offender, the court shall: . . . [f]ix the minimum and maximum limits of the sentence to be served within the limits provided by law . . . ." In

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

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

(b) Amendments to Sentencing Statutes

(i) Amendments Pertaining to Reclassification of Assault by Confined Person

The State contends that Urbano's sentence cannot be reduced, because the crime of which Urbano was convicted, under § 28-932, assault by a confined person, has since been reclassified from a Class IV felony to a Class IIIA felony. The crime of assault by a confined person was classified in § 28-932 as a Class IV felony on June 13, 1997, the date that Urbano bit Proctor; on September 29, 1997, the date upon which he was charged with the crime; on February 26 and 27, 1998, the dates during which Urbano was tried on those charges; on April 23, 1998, the date upon which Urbano was sentenced; and on May

4, 1998, the date Urbano filed his notice of appeal. The operative date of the amendment to § 28-932 which reclassified the crime of assault by a confined person from a Class IV felony to a Class IIIA felony was July 1, 1998.

The reclassification of the crime of which Urbano was convicted obviously increases the severity of the classification. It also increases the potential punishment, because the minimum portion of a Class IIIA felony indeterminate sentence is unrestricted. That is, there is no upper limit on the minimum term of a Class IIIA felony indeterminate sentence, whereas the maximum minimum of a Class IV felony indeterminate sentence cannot now exceed one-third of the maximum sentence allowed by law, i.e., 20 months' imprisonment. The greatest possible minimum term in an indeterminate sentence for a Class IV felony would be 20 months' imprisonment, which is one-third of 5 years. In contrast, for example, while an indeterminate sentence of 4 to 5 years' imprisonment would be permissible for a Class IIIA felony, it could not be imposed for a Class IV felony.

A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *Groff, supra*. The ex post facto analysis applies where a statutory amendment changes the punishment of a crime, and it may also be applied where there is a change in the classification of a crime. See, *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982); *State v. Crisp*, 195 Neb. 833, 241 N.W.2d 129 (1976).

The statutory reclassification amendment to § 28-932 did not become operative until after every material stage of the judicial process in the trial court was complete. The amendment to § 28-932 classifies the crime as more severe and creates a potentially harsher minimum punishment than that which is permitted for Class IV felonies. When an amendment or change to a statute imposes a more burdensome punishment than existed when the crime was committed, it runs afoul of ex post facto principles and it is not, therefore, applied. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995). We conclude that apply-

ing the amendatory terms to § 28-932 in Urbano's case and applying the corresponding penalties would convert his Class IV felony conviction into a Class IIIA conviction and amount to an impermissible ex post facto application of the new law. Therefore, we reject the State's argument that Urbano's sentence cannot be modified because the crime of which Urbano stands convicted has been transformed from a Class IV to a Class IIIA felony effective July 1, 1998. The crime of which Urbano was convicted is a Class IV felony, which we do not reclassify on appeal to a Class IIIA felony.

(ii) Amendments Contained in L.B. 1073

The State argues that the *Randolph* doctrine cannot be invoked to lessen the minimum term of an indeterminate sentence in *any* Class IV felony case pending before July 1, 1998. The State notes that 1998 Neb. Laws, L.B. 1073, resulted in 1998 amendments to § 29-2204 which became operative on April 15, 1998, approximately 2½ months before the 1997 amendments pertaining to, inter alia, reclassification and Class IV sentencing parameters became operative. The State argues that the 1998 amendments curtailed application of the 1997 amendments generally and, in particular, caused the 1997 amendments to be inapplicable to cases pending before July 1, 1998. We do not agree.

A careful examination of the legislative history of L.B. 1073 shows that the 1998 Legislature did not debate the limiting language upon which the State relies and which the State claims restricts the courts' ability to apply the ameliorative benefits of the 1997 amendments to § 29-2204 to Class IV felony cases. That is, the Legislature did not specifically indicate that criminal appellants could not take advantage of the amendatory acts which mitigate the punishments for Class IV felonies.

The pertinent changes effected upon § 29-2204 by L.B. 1073 under discussion are set forth below, denoted by underlining and italics. The italicized portions are at issue in this discussion.

> 29-2204. (1) Except when a term of life is required by law, in imposing an indeterminate sentence upon an offender the court shall:

(a)(i) *Until July 1, 1998*, fix the minimum and maximum limits of the sentence to be served within the limits provided by law, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum; and

(ii) *Beginning July 1, 1998:*

(A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law[.]

(Emphasis supplied.) Laws of Nebraska, L.B. 1073, 95th Leg., 2d Sess. 408.

The legislative history shows that as finally approved and passed by the Legislature, L.B. 1073 was an amalgamation of substantive issues culled from more than 10 legislative bills. L.B. 1073 included such diverse topics as housing standards and manufactured homes, juvenile justice mediation, restriction of imposition of the death penalty on mentally retarded persons, hospital clinical privileges, the State's brain injury registry, and state personnel matters, as well as amendments to § 29-2204. Although there was debate as to some of these matters, e.g., restriction of imposition of the death penalty on mentally retarded persons, the members of the Legislature did not draft or debate the amendment to § 29-2204 designated by the italicized text above. The history of L.B. 1073 as it evolved in the legislative process shows that the first time the amendatory terms "Until July 1, 1998" and "Beginning July 1, 1998" appeared in L.B. 1073 was after the bill had been sent to and returned from the state Revisor of Statutes for "enrollment and review."

The Revisor of Statutes is empowered by Neb. Rev. Stat. § 49-701 et seq. (Reissue 1998), in preparing supplements and reissued or replacement volumes of the Nebraska Revised Statutes, to renumber and rearrange statutory sections, to remove obsolete matter within any section, and to harmonize provisions of Nebraska's statutes. See § 49-705. See, also, *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996). The Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature and to not exercise discretion in excising a portion of the law. See *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). These principles apply to making unauthorized additions to statutes. The Revisor of Statutes cannot make corrections or modifications which change the substantive meaning of a statute as enacted by the Legislature. *Stuthman v. Stuthman*, 245 Neb. 846, 515 N.W.2d 781 (1994).

The effect of the terms which emerged following review by the Revisor of Statutes and were added to § 29-2204 as shown by the italicized text above is substantive. These terms appear to restrict a Class IV felony criminal appellant's ability under § 29-2204 to request a court, pursuant to the 1997 amendments, to modify downward the minimum portion of an indeterminate sentence in a case pending before July 1, 1998. The application of the 1998 terms to the 1997 amendments runs afoul of the notion expressed in *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, in which we said that " '[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient *should* apply to every case to which it constitutionally *could* apply.' " (Emphasis supplied.) *Id.* at 302, 183 N.W.2d at 228, relying on *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965). As noted above, *Randolph* further stands for the principle that if a relevant statute is amended during the pendency of a criminal case and the amendment works to the benefit of a criminal defendant, the court should apply the amendatory terms absent a specific expression of contrary legislative intent, " 'because to hold otherwise would be to conclude that the Legislature was motivated by a desire for

vengeance, a conclusion not permitted in view of modern theories of penology.' " *Randolph*, 186 Neb. at 302, 183 N.W.2d at 228.

Nothing in the legislative history of L.B. 1073 evidences a specific legislative intent to deviate from the *Randolph* doctrine, and there is no hint of a "desire for vengeance" by the 1998 Legislature that the 1997 amelioratory amendments should not apply to cases concluded at the trial level before, but pending on appeal after, July 1, 1998. The 1998 amendatory terms, which were added to § 29-2204 by the Revisor of Statutes, do not evidence a specific expression of legislative intent to deny a criminal appellant the ameliatory provisions of the 1997 amendments, and the 1998 amendments do not restrict a criminal appellant's ability to request a court to reduce the minimum portion of his or her indeterminate sentence in a Class IV felony case in which sentencing occurred before July 1, 1998, but was pending on direct appeal after July 1, 1998. The terms added upon review by the Revisor of Statutes in this instance do not inhibit an appellate court's authority under the *Randolph* doctrine to reduce the minimum portion of a Class IV felony defendant's indeterminate sentence in an appropriate direct appeal pursuant to the 1997 amendments to § 29-2204. See, e.g., *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979) (holding that defendant's right to jury trial was not defeated by substantive statutory changes improperly made by Revisor of Statutes).

With respect to its argument that due to the 1998 amendments, the 1997 amendments may not be invoked by defendants whose cases were pending before July 1, 1998, the State further claims that the 1998 amendments also apply to § 83-1,105.01 and were § 83-1,105.01 amended in a manner similar to § 29-2204, such amendment would preclude a reduction in sentence.

The provisions in § 83-1,105.01 generally provide for the method of calculating credit for time served. In connection with its argument, the State acknowledges that unlike § 29-2204, the 1998 amendments did not amend § 83-1,105.01. The State claims, however, that we should treat § 83-1,105.01 as having been *impliedly* amended by the 1998 amendments because "the

two statutes [§§ 29-2204 and 83-1,105.01] are essentially identical, [and] what the Legislature intended with respect to § 29-2204 with respect to indeterminate sentences for Class IV felonies also must have been intended with respect to the like provision in Neb. Rev. Stat. § 83,105.01 [sic]." Brief for appellee at 9. This argument is unpersuasive.

This court has reviewed the relevant legislative history recited above. Nothing in the legislative history of 1998 Neb. Laws, L.B. 1073, suggests that the Legislature intended to amend § 83-1,105.01. Even a casual reading of the two statutes shows that §§ 29-2204 and 83-1,105.01 are not "essentially identical," as claimed by the State, with respect to, inter alia, their titles, purposes, or terms.

Chapter 29 is entitled "Criminal Procedure," and article 22, in which § 29-2204 is found, is reserved for statutes governing "Judgment on Conviction." In contrast, chapter 83 is entitled "State Institutions," and article 1 is reserved for statutes governing "Management." This article is devoted to the creation and management of numerous state agencies, including a subchapter devoted to the Department of Correctional Services and the Office of Parole Administration. Section 83-1,105.01 is found within the portion of Chapter 83 which addresses parole administration, including, inter alia, the calculation of and apportionment of credit for time served against the minimum and maximum terms of an inmate's sentence.

Although there are similarities as to some portions of § 29-2204 and § 83-1,105.01, we will not presume that the Legislature "intended" to restrictively amend § 83-1,105.01 in the same manner as § 29-2204 was amended. Absent evidence of legislative intent to modify existing statutes or ordinances, we ordinarily do not assume the existence of such intent. See, e.g., *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991). Indeed, when legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). See, also, *Sidney Education Assn. v. School Dist. of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973).

The legislative history surrounding the 1998 amendment to § 29-2204 contains no evidence of legislative intent to amend § 83-1,105.01. It is not for this court to judicially infer legislative amendatory intent where none is manifest in the legislative history. We therefore conclude that the 1998 amendatory language appended to § 29-2204 is limited to § 29-2204.

In sum, the 1998 amendments to § 29-2204 do not limit a Class IV felony defendant's ability to request an appellate court to review or modify the minimum portion of his or her indeterminate sentence upon direct appeal and they do not restrict a court's authority to evaluate and apply the *Randolph* doctrine in such direct appeals where it is appropriate to do so. See *State v. Harris*, 7 Neb. App. 520, 583 N.W.2d 366 (1998) (modifying minimum term of Class IV felony indeterminate sentence on direct appeal, pursuant to 1997 legislative amendment).

(c) Indeterminate and Determinate Sentences and Modification of Urbano's Sentence

Sections 29-2204, as amended in 1997, and 83-1,105.01 now provide that Class IV felonies are subject to the requirement that the minimum term of an indeterminate sentence not exceed one-third of the maximum term. Urbano was convicted of a Class IV felony. He was sentenced to a term of imprisonment of "not less than 5 years, and not more than 5 years." Urbano claims that by expressly articulating a minimum and maximum term of imprisonment, the trial court sentenced him to an indeterminate sentence susceptible to downward adjustment based upon the 1997 amendments. We agree.

Sections 29-2204, as amended, and 83-1,105.01 impose the condition that the minimum term of an indeterminate sentence may not exceed one-third of the maximum and are reminiscent of the indeterminate sentencing scheme used in Nebraska courts before 1993. See, e.g., *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974). In 1993, the Legislature abolished the limit on the length of the minimum term in an indeterminate sentence and replaced it with the rule that the minimum term of an indeterminate sentence could be any term within the sentencing range prescribed by statute. See, e.g., *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

Determinate sentences were also affected by the 1993 legislation. Before 1993, the maximum term of imprisonment served by a defendant under a determinate sentence was considered to be the sentence pronounced by the court. A defendant's release from incarceration might, however, occur before he or she had served the amount of time specified in a determinate sentence, because the "minimum" term of a determinate sentence was considered to be the minimum term provided by law. See, e.g., *Hedglin, supra.* See, also, *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977).

The minimum portion of a term of imprisonment, be it expressly articulated by the trial court in an indeterminate sentence or determined as a matter of law from the statute defining the range of penalties for a specific crime, provides a basis for calculating the amount of time a defendant must actually serve a sentence of imprisonment before he or she is initially considered eligible for parole. See, e.g., Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 1998). See, also, *Blazek, supra.* During the period from 1993 through the operational date of the 1997 amendments, there was no statutory requirement that separate or differing minimum and maximum terms of imprisonment be imposed. See *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997) (holding that imposition of sentence of imprisonment of 20-year minimum and 20-year maximum was not an abuse of discretion). The law required pronouncement of a maximum sentence. See *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996). Between 1993 and 1997, where a sentencing court imposed a sentence in which the minimum-to-maximum range was the same number, under the sentencing scheme then in effect, the sentence could be considered "determinate" for calculation of credit purposes, *State v. DuBray*, 5 Neb. App. 496, 560 N.W.2d 189 (1997), and the sentencing statutes did not require that the minimum sentence be for a different term than the maximum sentence, *Cook, supra.*

Cook and *DuBray* were correct statements of the law regarding sentencing requirements against the backdrop of a sentencing scheme different from that now in effect. Those cases are now distinguishable because § 29-2204 has been amended and they are inconsistent with § 83-1,105.01 as it now exists. The

1997 amendment to § 29-2204 and § 83-1,105.01 substantially changed the sentencing scheme. Now, an indeterminate sentence for a Class IV felony is subject to the limitations discussed above on the minimum portion of the sentence. See §§ 29-2204(a)(i) and 83-1,105.01(1). A sentence articulated now as one number and without any indication of a sentencing range is considered as having an implied minimum term equal to the minimum punishment allowed by statute. See, §§ 29-2204(a)(ii) and 83-1,105.01(2); *Blazek, supra.*

Urbano was convicted of assault by a confined person. As noted above, we conclude that although the crime has been reclassified from a Class IV felony to a Class IIIA felony, Urbano remains convicted of a Class IV felony. Urbano was sentenced to a range of "not less than 5 years, nor more than 5 years," a sentence that was valid at the time it was imposed. In this case, the sentencing court imposed an indeterminate term of imprisonment for Urbano's Class IV felony conviction, in which the minimum term of imprisonment was 5 years and the maximum term of imprisonment was 5 years. The trial court stated the maximum permissible term of imprisonment which it intended that Urbano serve, which the court was obligated to do. See *State v. Bensing, supra.* However, the minimum term of imprisonment stated by the court, i.e., 5 years, is inconsistent with §§ 29-2204 as amended in 1997 and 83-1,105.01, operative July 1, 1998, which now limit the minimum term of imprisonment for an indeterminate sentence imposed for a Class IV felony to a maximum of 20 months. Under these facts, this court may correct this error on direct appeal by modifying the minimum portion of Urbano's sentence so that it does not exceed the maximum minimum permitted by law for a Class IV felony indeterminate sentence. See *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974). In doing so, we note that this is not a case in which we must consider the aggregate effect of several sentences to be served concurrently. Such facts might yield a different conclusion. See *Blazek, supra.* We also observe that the benefit of the *Randolph* doctrine available to Urbano on direct appeal of his criminal conviction is not available as a basis for postconviction relief.

To summarize, Urbano was convicted of a Class IV felony, the maximum punishment for which is 5 years' imprisonment. The sentence imposed on Urbano was correct when imposed. The 5-year maximum term of imprisonment imposed by the trial court in this indeterminate sentence is consistent with the range of permissible penalties set forth in § 28-105, and we need not modify it. However, in order to conform to the terms of §§ 29-2204 and 83-1,105.01 now in effect, the minimum term of Urbano's indeterminate sentence cannot exceed 20 months' imprisonment, which is one-third of the statutory maximum punishment of 5 years' imprisonment. This court has interpreted the phrase "maximum term," for purposes of determining the minimum portion of an indeterminate sentence, as referring to the maximum term provided by law. *State v. Ford*, 194 Neb. 400, 231 N.W.2d 515 (1975). In the instant case, the maximum of 5 years' imprisonment is permissible and the maximum minimum permissible is 20 months' imprisonment. We therefore modify Urbano's sentence to a term of 20 months' to 5 years' imprisonment.

(d) Modification Based on Abuse of Discretion

Urbano also appeals for further reduction of his sentence pursuant to this court's power to modify criminal sentences. See Neb. Rev. Stat. § 29-2308 (Reissue 1995).

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

Urbano is 34 years old. Prior to the conviction which is the subject of the instant case, Urbano was convicted of six felonies in California and Nebraska, including robbery, theft, and selling and transporting narcotics. He had also been convicted of and imprisoned for numerous misdemeanor assault and battery charges. Urbano has operated under at least six known aliases in the course of his criminal career. At the time of his assault on Proctor, Urbano was serving a sentence at the Nebraska State

Penitentiary for felony receipt of stolen property. He had been confined to the penitentiary's control unit since 1994.

We do not agree with Urbano that the sentence imposed upon him is excessive or constitutes an abuse of discretion by the trial court. The sentence as modified is affirmed.

V. CONCLUSION

Urbano's conviction is affirmed. Urbano's sentence, as modified, is affirmed. Urbano's sentence as modified is 20 months' to 5 years' imprisonment.

AFFIRMED AS MODIFIED.

CONNOLLY, J., concurs.

PROFESSIONAL BUSINESS SERVICES CO., A NEBRASKA CORPORATION, APPELLANT, V. STEPHEN J. ROSNO, APPELLEE.

589 N.W.2d 826

Filed February 19, 1999. No. S-97-1106.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. **Restrictive Covenants: Employer and Employee.** In an employment agreement, a covenant not to compete may be valid only if it restricts a former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact.
4. ____: ____. To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee.
5. ____: ____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
6. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** To distinguish between ordinary competition and unfair competition, courts and commentators have frequently focused on an employee's opportunity to appropriate

the employer's goodwill by initiating personal contacts with the employer's customers. 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.

7. **Restrictive Covenants: Employer and Employee: Goodwill.** A determination that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Robert R. Otte and Joseph E. Dalton, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Jerry L. Pigsley, of Harding, Shultz & Downs, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Professional Business Services Co., a Nebraska corporation (PBS), appeals from an order of the district court for Lancaster County, dated September 19, 1997, granting Stephen J. Rosno's demurrer to PBS' second amended petition and dismissing PBS' second amended petition. In its second amended petition, PBS alleged that Rosno had breached a noncompetition covenant in an employment contract entered into between Rosno and PBS, and PBS sought $41,433 in liquidated damages. For the reasons recited below, we reverse, and remand with directions to reinstate the second amended petition.

BACKGROUND

On September 11, 1996, PBS filed a petition against Rosno, stating that it is a Nebraska corporation having its principal place of business in Lincoln, Nebraska. PBS is generally in the business of providing accounting services. PBS alleged that on October 1, 1992, PBS entered into a contract with Rosno which provided that Rosno would begin work for PBS on October 1,

with Rosno's employment ending on September 30, 1993, unless extended by PBS on a year-to-year term. PBS alleged that Rosno's title was "Tax Specialist," that Rosno was employed as a certified public accountant, and that Rosno's duties included managing PBS' accounting and payroll services, providing services for PBS' clients, and performing other tasks as required.

PBS alleged that on November 10, 1995, Rosno met with one of PBS' officers, Steve Strasheim, and that Rosno presented Strasheim with a written "Notice of Termination," effective in 90 days. PBS alleged that Rosno stated at this meeting that he considered certain noncompetition and trade secret provisions in the contract to be invalid and that he would be asking PBS' clients to become clients of his new accounting firm. PBS alleged that on November 13, Rosno and Strasheim met again and after Rosno repeated that he would continue to solicit PBS' clients, Strasheim terminated Rosno's employment with PBS.

In its first petition, PBS set out certain of the relevant portions of the contract between Rosno and PBS. The employment contract was not attached to the original petition. It was alleged that sections 7a and b of the contract provided as follows:

> a. In-Term Covenant: The parties agree that during the term of this Agreement and during the term of Rosno's employment by the Employer, the respective clients of the Employer shall remain the clients of the Employer and that Rosno shall not, directly or indirectly, whether as an officer, director, shareholder, partner, advisor, consultant or employee or in any other capacity do business for or with any client of the employer outside of the scope of duties rendered for Employer pursuant to this Employment Agreement. . . .
>
> b. Post-Term Covenant: Rosno further covenants and agrees that in the event of the termination of his employment, for whatever reason, he shall not directly or indirectly solicit, contact or perform services for any of Employer's clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party. Said Post-Term Covenant shall continue for a period of two (2) years following such

> termination or separation for any reason whatsoever and shall include the area located within twenty-five (25) miles of Lincoln, Nebraska.

PBS alleged that either during Rosno's employment or within 2 years after his termination, Rosno directly or indirectly solicited, contacted, or performed services for PBS' clients. PBS alleged that section 8 of Rosno's contract provided as follows:

> Enforcement: Employer shall be entitled to enforce the terms and provisions of the above and foregoing paragraph by injunction and/or restraining order issued by a court of competent jurisdiction in addition to any other rights, remedies or procedures that may be allowed at law and available to the Employer.
>
> Rosno agrees that in the event he directly or indirectly, or in any capacity with another entity or person performs services for a client of Employer within two (2) years after his termination with Employer that he shall pay a liquidated amount of the total amount of billings received by Employer during the two (2) year period prior to Rosno's violation of his non-competition covenant.

In its petition, PBS alleged that under section 8 of the contract, Rosno owed PBS $41,433 and additional damages yet to be determined. PBS requested these amounts in its original and subsequent petitions, along with interest as allowed by law and such other and further relief as may be just and equitable.

On October 17, 1996, Rosno filed a "Motion to Make More Definite and Certain and Notice of Hearing." After hearing, the trial court sustained Rosno's motion in part, directing PBS to file an amended petition, with a copy of the written contract between the parties attached, and further directing PBS to set forth with particularity the type of damages sought and the amount of special damages. In subsequent petitions, PBS indicated that the damages sought were liquidated.

On November 19, 1996, PBS filed a first amended petition, attached to which was a copy of the contract. A review of the contract shows that following the typed provisions pertaining to the postterm covenant in section 7b, there is handwritten matter initialed by the parties providing that the postterm covenant not to compete shall not apply to clients listed in "Exhibit I."

Exhibit I was attached to the first amended petition and lists approximately 95 clients of PBS.

On December 3, 1996, Rosno filed a demurrer to PBS' first amended petition, stating that PBS' first amended petition failed to state facts sufficient to constitute a cause of action. In a journal entry dated April 10, 1997, the trial court sustained Rosno's demurrer, concluding that the covenant alleged in PBS' first amended petition is impermissively restrictive because it prohibits Rosno from contacts with " 'any of Employer's clients.' " The trial court granted PBS leave to file a second amended petition.

PBS filed a second amended petition on May 14, 1997. In its second amended petition, PBS alleged that prior to October 1, 1992, Rosno was employed by Dale Gruntorad & Co. (Gruntorad), an accounting firm in Lincoln, Nebraska, and that while at Gruntorad, Rosno did substantial amounts of work for PBS and its clients on Gruntorad's behalf. PBS alleged that through this work, Rosno became familiar with significant aspects of PBS' business, which PBS has run for 37 years. PBS alleged that during the past 37 years, it has developed substantial goodwill with its clients.

PBS alleged that on or about June 1, 1992, Rosno approached PBS for a job, and that after several discussions, PBS advised Rosno that because he was familiar with its business, PBS would permit Rosno to contract with PBS if he left Gruntorad and started his own accounting firm. Rosno stated that he could not start his own accounting firm under the noncompete agreement he had with Gruntorad, but that his noncompete agreement with Gruntorad would not prevent him from entering into an employment relationship with PBS. PBS further alleged that Rosno proposed that he enter into a noncompete covenant with PBS, stating that this would allow him to leave Gruntorad without violating his noncompete agreement with Gruntorad.

In its second amended petition, PBS alleged that based on Rosno's representations, PBS agreed to hire Rosno and enter into an employment contract containing certain noncompete provisions. PBS alleged that Rosno was aware of the noncompete provisions before entering into the contract. PBS also alleged that prior to entering into the contract with Rosno, the

parties discussed the fact that Rosno would have substantial personal contact with many of PBS' clients and that PBS had developed substantial goodwill with these clients and that this goodwill was a valuable business asset. PBS alleged that prior to signing the contract, the parties amended the contract by interlineation pursuant to Rosno's request, providing that certain clients and accounts of PBS be specifically excluded from the noncompete provision for Rosno's benefit as reflected in exhibit I to the contract.

In its second amended petition, PBS alleged that while employed at PBS, Rosno "had the responsibility and did review each and every tax return that [PBS] prepared" and that Rosno "was actively involved in each client's file." PBS alleged that after it hired Rosno, Rosno had access to and worked in every aspect of PBS' business. PBS alleged that it relied on Rosno for all aspects of its business. It specifically alleged that Rosno "had substantial contact with virtually all of [PBS'] clients" during the course of his employment with PBS. Lastly, PBS alleged that Rosno had violated the terms of his contract with PBS by siphoning away PBS' goodwill.

On May 16, 1997, Rosno filed a demurrer to PBS' seconded amended petition, stating that PBS' second amended petition failed to state facts sufficient to constitute a cause of action. On September 19, the trial court filed an order granting Rosno's demurrer. In its order, the trial court cited *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997). The trial court examined the contract and reasoned, inter alia, that the covenant not to compete therein was more restrictive than the covenant found invalid in *Moore* and was, therefore, unenforceable. The second amended petition was dismissed. PBS appeals.

ASSIGNMENTS OF ERROR

On appeal, PBS argues that the district court erred in finding that its second amended petition did not state a cause of action and in granting Rosno's demurrer and dismissing the second amended petition.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together

with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998).

ANALYSIS

PBS contends that the district court erred in granting Rosno's demurrer to its second amended petition because the noncompete provision in Rosno's contract is valid and enforceable under the facts alleged in the second amended petition and applicable law. Rosno argues that PBS' second amended petition fails to state a cause of action because the noncompete clause in Rosno's contract is more restrictive than reasonably necessary to protect PBS' legitimate interest and, thus, invalid and unenforceable. In support of its position, PBS refers to the general rule that in an employment agreement, a covenant not to compete may be valid only if it restricts a former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact. *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee. *Moore, supra.* There is no indication or claim that enforcement of the noncompete clause in Rosno's contract will be injurious to the public or that the restriction is "unduly harsh" as that expression is used in the cases. Accordingly, we focus our analysis on whether or not the restriction of the covenant is no greater than reasonably necessary to protect PBS' legitimate interest as alleged in the second amended petition.

An employer has a legitimate business interest in protection against a former employee's competition by improper and

unfair means, but is not entitled to protection against ordinary competition from a former employee. *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), citing *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990). In *Moore*, we stated:

> " 'To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. 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.' "

Id. at 401, 562 N.W.2d at 539, quoting *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

In its second amended petition, PBS alleges that Rosno had substantial personal contact with virtually all of PBS' clients, the inference being that Rosno had the opportunity to appropriate PBS' goodwill with its clients. In the instant case, PBS alleged facts in its second amended petition sufficient to show that PBS has a legitimate interest in protecting customer goodwill. A determination that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete. *Moore, supra*, citing *Vlasin, supra.* The issue before us, therefore, is whether it can be conclusively determined from the pleadings that the restriction of the noncompete covenant in Rosno's contract is greater than reasonably necessary to protect legitimate interests of PBS.

The relevant postterm noncompete clause in Rosno's contract, section 7b, with the handwritten addendum included, provides as follows:

> Rosno further covenants and agrees that in the event of the termination of his employment, for whatever reason, he shall not directly or indirectly solicit, contact or perform services for any of Employer's clients for his own benefit

> or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party. Said Post-Term Covenant shall continue for a period of two (2) years following such termination or separation for any reason whatsoever and shall include the area located within twenty-five (25) miles of Lincoln, Nebraska. The post-term covenant shall not apply to clients listed on Exhibit I.

With respect to the propriety of the scope of the noncompete covenant, Rosno cites *Moore, supra*, and argues that PBS failed to state a cause of action because its covenant not to compete generally prohibits Rosno from soliciting PBS' clients, regardless of whether or not Rosno had personal contact with these clients while at PBS, and that the second amended petition shows on its face that the noncompete covenant is unenforceable. PBS responds that the rule set out in *Moore* is a general rule and that it should have been allowed to produce evidence to support the facts alleged in its second amended petition and to show that the noncompete provision in Rosno's contract was not more restrictive than necessary to protect PBS' legitimate interests under the facts.

In its second amended petition, PBS alleged that the noncompete provision was placed in Rosno's contract at Rosno's request, that Rosno insisted that approximately 95 of PBS' clients be omitted from the noncompete provision as reflected in exhibit I to the contract, that Rosno had substantial contact with PBS' clients before he came to work for PBS, that PBS expected that Rosno would continue to have substantial personal contact with PBS' clients upon joining PBS, and that Rosno did in fact have substantial personal contact with virtually all of PBS' clients while at PBS. We conclude that PBS' second amended petition stated a cause of action and that Rosno's demurrer to this petition should have been overruled, thereby allowing PBS to proceed to produce evidence as to the propriety of the inclusion of this noncompete covenant in Rosno's contract.

In *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 668, 407 N.W.2d 751, 756 (1987), this court reviewed several cases involving noncompete covenants and stated the general rule that a covenant not to compete in an employment contract "may be

valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact." In *Polly*, this court stated that generally, a noncompete covenant is more restrictive than reasonably necessary if it restricts an employee from working for or soliciting all of the former employer's clients or accounts, regardless of whether the former employee actually did business with and had personal contact with those clients. In *Polly*, this court reviewed *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), and observed that *Dana F. Cole & Co.*, by virtue of its facts, presented an exception to the general rule.

In *Dana F. Cole & Co., supra*, this court held that based on the evidence at trial, a covenant which restricted a former branch manager of an accounting firm from practicing accounting within 75 miles of the office he had managed was reasonable and enforceable. This court held that such a covenant was valid in light of evidence which showed that branch managers had personal relationships with clients served and that on the basis of past experience, the employer had the need to protect itself from the risk of a branch manager's taking clients with him or her when he or she left its employ.

In *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), this court affirmed the grant of an employee's motion for summary judgment on a breach of covenant not to compete claim, determining that the scope of the covenant not to compete in that case was greater than necessary to protect a personnel recruiting corporation's legitimate interests and, thus, was unenforceable. In *Moore*, this court repeated the general rule that 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 or accounts with whom the former employee actually did business and had personal contact. In *Moore*, the covenant involved precluded the employee from entering into business with anyone of whom he had knowledge due to his employment with the corporation, rather than those clients of the corporation with whom the employee merely did business and had personal contact. In addition, the covenant in question precluded the employee from

working in employment recruitment anywhere in the continental United States. In *Moore*, the summary judgment evidence showed that while with the employer, Moore worked primarily with clients of the employer in the Midwest, indicating that Moore had little personal contact with the employer's clients outside the Midwest. The employer failed to rebut the evidence of overbreadth or otherwise propose a rationale for such a broad restriction. The restriction was, thus, untenable.

In the instant case, PBS has alleged certain facts in its second amended petition which because they are well pled, we accept as true, together with the proper and reasonable inferences of law and fact which may be drawn therefrom. See *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998). After reviewing PBS' second amended petition, and liberally construing it as we must, we conclude that PBS' second amended petition taken as a whole states a cause of action. In this regard, we note that PBS has alleged, inter alia, that Rosno has had substantial contact with virtually all of PBS' clients. The inferences of law and fact from the second amended petition are that Rosno is being restricted from working for or soliciting PBS' clients or accounts with whom Rosno actually did business and had personal contact and that in his employment contract the covenant not to compete with respect to all of PBS' clients could be enforceable. We therefore conclude that the allegations in the second amended petition and the reasonable inferences of law and fact therefrom indicate that the noncompete covenant may be proper and that PBS should be permitted to present evidence to support the facts alleged in its second amended petition.

CONCLUSION

For the reasons stated above, we reverse the trial court's September 19, 1997, order granting Rosno's demurrer and dismissing the second amended petition and remand this cause to the district court with directions to reinstate PBS' second amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

PRODATA COMPUTER SERVICES, INC., A NEBRASKA CORPORATION, APPELLEE, V. RONALD E. PONEC I, AN INDIVIDUAL, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND MARION R. WAMSAT AND JOSEPH ALAN HARTLEY, INDIVIDUALS, THIRD-PARTY DEFENDANTS, APPELLEES.

590 N.W. 2d 176

Filed February 19, 1999. No. S-97-1114.

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 that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed witnesses and accepted one version of the facts rather than another.
2. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment.
3. **Trusts: Property: Title: Equity: Proof.** A plaintiff seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
4. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned.
5. **Trusts: Property.** Where money is the asset upon which a constructive trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.
6. **Agents: Agency: Equity.** An agent or other fiduciary who deals with the subject matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Patrick T. Riskowski, of Gallup & Schaefer, for appellant.

James B. Cavanagh, of Lieben, Whitted, Houghton, Slowiaczek & Dougherty, P.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Ronald E. Ponec I appeals an order of the district court for Douglas County imposing a constructive trust on certain assets owned by Ponec in favor of appellee ProData Computer Services, Inc. We affirm.

STATEMENT OF FACTS

Appellees Marion R. Wamsat and Joseph Alan Hartley started ProData, a computer business, in 1981. When they created ProData, Wamsat and Hartley were its sole shareholders, a status they continued to hold at the time of trial. Wamsat and Ponec were married to each other during the years of ProData's early growth. They were married in 1962. Wamsat and Ponec separated in 1990 and divorced in 1991.

At the time Wamsat and Hartley formed ProData, Ponec was self-employed in his own computer consulting business, which was located next door to ProData's office. About a year after ProData had been in business, Ponec began to assist Wamsat and Hartley with bookkeeping for ProData on an uncompensated, as-needed basis. At that point, ProData's accounting needs were few, and Ponec, who had accounting experience, was able to assist ProData while continuing to maintain his separate business.

Ponec began to work for ProData on a full-time basis in about 1982. Although he had substantive knowledge of computers, Ponec's employment duties for ProData were at all times exclusively in accounting and financial matters. Ponec established ProData's internal accounting system using computer software created by Wamsat. Ponec was responsible for handling ProData's billings, collections, deposits, expense payments, and bank accounts. Ponec stored most of ProData's financial records in his office. Ponec stored some records, including those detailing compensation paid to ProData employees, in his desk, which he kept locked when he was not in his office. Wamsat described Ponec as ProData's "chief financial operator."

Wamsat, Hartley, and Ponec all characterized ProData as a "family" business which successfully grew over time. Two adult

children of Wamsat and Ponec's were employed by ProData, as was Hartley's wife. Although Ponec was never a shareholder of ProData, he was compensated in the same manner as Wamsat and Hartley, ProData's owners. Ponec received an annual salary of approximately $70,000, plus a company car for business and personal use with fuel and insurance costs fully paid. Ponec received retirement and insurance benefits and reimbursement for business expenses charged on a credit card which ProData procured for his business use. There was trial evidence that during approximately the first 6 years of his employment with ProData, Ponec continued to maintain his separate computer consulting business, and that he kept all of the proceeds generated by it.

Ponec and Wamsat separated from each other in 1990 and divorced in 1991. Ponec continued to work at ProData, and his compensation was not impacted as a result of the divorce. Ponec did not receive any stock or ownership interest in ProData from Wamsat in the 1991 divorce proceedings. At that time, ProData employed 9 or 10 persons, including Ponec. By the time of trial in the instant case, in August 1997, ProData had grown to 15 employees.

ProData maintained business accounts at two Omaha banks. ProData's general operating account, as well as a money market account and several certificates of deposit, was at Western Security Bank (WSB). ProData also maintained a money market account and a checking account for paying small miscellaneous company expenses at Douglas County Bank & Trust (DCBT). Wamsat testified that there was a DCBT branch office in the same building that housed ProData's office and that ProData maintained the DCBT accounts for convenience. According to Wamsat, ProData's receipts were to be deposited in the DCBT money market account as they were received and then transferred in a lump sum once or twice a month to ProData's operating account at WSB.

Ponec provided Wamsat and Hartley with a general report on ProData's finances every 3 to 4 months. According to Wamsat, she and Hartley requested monthly financial reports from Ponec, but they received this information irregularly "[b]ecause Mr. Ponec would never get the books done in time for us to

review them every month." In these reports, Ponec presented Wamsat and Hartley with a general profile he prepared of ProData's income and expenses that contained little detail. According to Wamsat, "[Ponec] always had a reasonable summation" when he was questioned about specific items, and she had no knowledge of any irregularity in the firm's accounting. Wamsat testified that neither she nor Hartley knew about any unauthorized compensation taken by Ponec and that had they known of such, there would have been "a horrible battle."

In November 1995, Hartley expressed concern about ProData's finances. Hartley told Wamsat that he thought ProData's net profit should have been higher than that reported by Ponec. Ponec was away on vacation, so Hartley and Wamsat personally examined the ProData records. They quickly detected substantial irregularities. Without Ponec's knowledge, Wamsat and Hartley hired their own accountant to aid them in their examination of ProData's accounts. Wamsat and Hartley also obtained assistance from personnel at DCBT and WSB, including production of the banks' microfilmed records of ProData's monthly account activity during the 1990 to 1995 period.

With assistance, Wamsat and Hartley detected several categories of financial transactions in which Ponec repeatedly converted ProData funds to his own use. The first category consisted of checks written by Ponec on ProData's DCBT money market account for large sums of cash. Ponec "buried" these checks in ProData's records as payments to fictitious vendors. The second category of questionable transactions included direct payments from ProData's DCBT account for personal luxuries Ponec afforded himself, including investments, jewelry, clothing, guns, and a country club membership. Wamsat and Hartley found that Ponec had funded monthly payments for his personally owned Mercedes Benz automobile from ProData's WSB operating account. Ponec had also taken customer checks made payable to ProData for professional services and deposited them directly into his own checking account.

ProData filed suit against Ponec on February 23, 1996, seeking a judgment of $754,523.06 against Ponec for alleged fraud,

conversion, embezzlement, breach of fiduciary obligations, and breach of his employment contract with ProData.

After filing its petition and before trial, ProData obtained pretrial attachment of certain assets owned by Ponec, including the home in which Ponec and his present wife resided in Elkhorn, Nebraska, and investment accounts that Ponec maintained at Dain Bosworth, Inc., and Wallace Weitz & Co. Shortly before trial, with the court's permission, ProData added a cause of action seeking imposition of a constructive trust upon these assets and others owned by Ponec.

In response to ProData's petition, Ponec admitted that he was a financial officer of ProData empowered to conduct ProData's financial affairs and maintain its records. Ponec denied all of ProData's claims for recovery. He affirmatively alleged, inter alia, that ProData ratified all of his actions and that ProData's claims against him were barred by laches, waiver, and estoppel and ProData's contributory negligence.

ProData's claims seeking recovery of money from Ponec were tried to a jury on August 11 to 15, 1997. The jury returned a verdict in favor of ProData for $579,507.30. The trial court and the parties' counsel agreed that ProData's request to impose a constructive trust on Ponec's assets sounded in equity. In a separate proceeding tried to the bench on the record of evidence introduced in the jury proceedings, the trial court imposed a constructive trust on all property belonging to Ponec, in an amount not to exceed the amount of the jury verdict. The trial court subsequently granted ProData's motion for $114,471 in prejudgment interest. Ponec appeals.

ASSIGNMENTS OF ERROR

Ponec claims the trial court erred in imposing a constructive trust in favor of ProData on the house owned by Ponec and in imposing a constructive trust upon three investment accounts owned by Ponec at Dain Bosworth, Inc., and Ponec's investment account at Wallace Weitz & Co.

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 that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed witnesses and accepted one version of the facts rather than another. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997) (*Mischke II*).

ANALYSIS

General Principles.

On appeal, Ponec does not dispute the amount or correctness of the jury's verdict in favor of ProData. Ponec's appeal is limited to his claims that the trial court should not have imposed a constructive trust upon the house in which Ponec resides with his wife or upon Ponec's investment accounts at Dain Bosworth, Inc., and Wallace Weitz & Co.

A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997). An action to impose a constructive trust sounds in equity. *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

A party seeking to impose a constructive trust has the burden to establish a constructive trust by clear and convincing evidence. *Hanigan v. Trumble, supra.* Real property may be the subject of a constructive trust. See *id.* See, also, *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). Intangible property and liquid assets such as stocks, and bank and investment accounts may also be held subject to a constructive trust. See, *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Regardless of the nature of the property upon which the constructive trust is imposed, a plaintiff seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual

should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

Record on Appeal.

The bill of exceptions contains a verbatim record of the trial to the bench on August 15, 1997, on ProData's cause of action for imposition of a constructive trust, after the jury had rendered a verdict in favor of ProData for $579,507.30. At the conclusion of the hearing on the constructive trust, the trial judge ordered that constructive trusts be imposed on Ponec's property and further ordered ProData's counsel to "submit an order that reflects the findings that the court does allow constructive trusts on the properties of the defendant alone not to exceed the value of the judgment that's been rendered[.]"

No order reflecting the court's determination of August 15, 1997, and the scope of the constructive trusts thus imposed can be found in the record on appeal. It is incumbent upon the party appealing to present a record which supports the errors assigned. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998). Our examination of the appeal is obviously limited by the record on appeal, and we proceed accordingly.

Our examination of the record on appeal shows that the transcript from the district court contains copies of the pretrial attachment order for Ponec's house, dated February 23, 1996, and the pretrial attachment order of January 13, 1997, for Ponec's Dain Bosworth, Inc., and Wallace Weitz & Co. accounts. The transcript also contains a single typewritten, unsigned page entitled "District Court Journal," dated August 15, 1997, which is not file-stamped and which notes in pertinent part as follows: "Pursuant to plaintiff's sixth cause of action a construction [sic] trust is imposed against all of the assets of the Defendant Ronald E. Ponec to the extent of the judgment. Order to be submitted." The transcript is devoid of any other trial court orders imposing a constructive trust identifying specific assets owned by Ponec, and as noted, there is no order in the appellate file prepared by counsel identifying with specificity the objects of the trust following the trial court's order of August 15.

There is no dispute that the trial court imposed a constructive trust on Ponec's home and investment accounts. Absent an order by the trial court expressly defining the scope of the constructive trust imposed upon Ponec's home and his Dain Bosworth, Inc., and Wallace Weitz & Co. investment accounts, our analysis of Ponec's claims on appeal is limited to an analysis of the propriety of the general constructive trust orders contained in the record.

Mootness: Practice Tip: Ponec's House.

As his first assignment of error, Ponec claimed that for a variety of reasons the constructive trust imposed on his house in Elkhorn is improper. At oral argument of this case on January 8, 1999, counsel for both parties stipulated that in view of the fact that the house had been disposed of, the appellate issue pertaining to the imposition of the constructive trust on the house is moot. We therefore treat the issue of the constructive trust on the house as moot.

Where a party or parties are aware that appellate issues have become moot during the pendency of the appeal and such mootness is not reflected in the record, in the interest of judicial economy, a party may file a suggestion of mootness in the Nebraska Supreme Court or Nebraska Court of Appeals as to the issue or issues claimed to be moot. Compare, Neb. Ct. R. of Prac. 7C (rev. 1996), providing for a suggestion of mootness in prison disciplinary and postconviction cases. A suggestion of mootness as to some but not all issues is in addition to, but not a substitute for, a motion to dismiss for lack of jurisdiction due to mootness of the entire appeal under rule 7B(1).

Ponec's Investment Accounts.

Ponec claims that the trial court erred in imposing a constructive trust on his investment accounts at Dain Bosworth, Inc., and Wallace Weitz & Co. Ponec admitted ownership of these accounts and he testified at trial that he deposited ProData funds into his investment accounts at Dain Bosworth, Inc., and Wallace Weitz & Co. Trial exhibits 57, 59, and 65 established, and Ponec admitted, that from October 1993 through December 1995, Ponec deposited a total of $67,931.99 of ProData's funds

directly into his Dain Bosworth, Inc., accounts. Exhibits 71 and 83 established, and Ponec admitted, that in 1995, he used $20,000 in ProData funds to purchase investments for his Wallace Weitz & Co. account.

On appeal, Ponec nevertheless claims that a constructive trust cannot be imposed upon these investment accounts because he established them before the funds taken from ProData were discovered. Ponec also claims that a constructive trust is improper because part of the total investments in these accounts may have been purchased with funds other than those proved to have been wrongfully taken by Ponec from ProData. We find both of these arguments unpersuasive.

Ponec admitted taking the funds at issue and forwarding them to Dain Bosworth, Inc., and Wallace Weitz & Co. for investment in his personal accounts. He admitted that neither ProData nor either of its shareholders received the benefit of the ProData funds or investments purchased therewith at Ponec's direction. Trial evidence supported ProData's claim that the corporation and its officers were unaware of Ponec's misdeeds for at least 4 years preceding their discovery of Ponec's unauthorized financial transactions.

We have previously stated:

> Where money is the asset upon which the [constructive] trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.

Chalupa v. Chalupa, 254 Neb. 59, 62, 574 N.W.2d 509, 512 (1998).

The fact that Ponec's investment accounts existed prior to the deposit of the funds he obtained from ProData is immaterial to our analysis of this case. Where money is the asset upon which a constructive trust is based, the amount of money subject to trust may be identified and located by, inter alia, tracing the money into a specific and existing account. See *id.* In the instant case, the money from ProData has been clearly and convincingly traced into the two investment accounts.

Ponec suggests that the investment accounts should be excluded from imposition of a constructive trust, because the ProData funds as invested in Ponec's accounts may have appreciated in value. The law is clear that if the beneficiary of a constructive trust proves his or her entitlement to imposition of such a trust by clear and convincing evidence, the beneficiary's judgment interest may in appropriate cases be satisfied not only by the original value which constitutes the trust corpus, but also by the reasonable value of the appreciation of that asset. See, *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995) (*Mischke I*); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978); *Vogt v. Town and Country Realty*, 194 Neb. 308, 231 N.W.2d 496 (1975).

Furthermore, we have recently observed: "'"An agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings. . . ."'" *Mischke II*, 253 Neb. at 447, 571 N.W.2d at 255-56. In *Mischke II*, this court affirmed imposition of a constructive trust upon preexisting real and personal property and funds derived therefrom that were manipulated for personal gain by an estate's personal representative. See, also, *Hanigan v. Trumble,* 252 Neb. 376, 562 N.W.2d 526 (1997) (affirming imposition of constructive trust on home constructed with funds obtained by financial advisor through breach of fiduciary duty to plaintiffs); *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997) (approving ex parte orders attaching bank accounts of insurance consultants who wrongly converted and withheld funds from their principal, thereby breaching their fiduciary duty). We find no error in the trial court's finding that the fact that Ponec established the accounts before his misdeeds were discovered was not determinative as to imposition of a constructive trust upon the investment funds.

Ponec testified that during 1991 to 1995, he had no source of earned income other than his ProData salary and, in addition, some limited interest on investments. ProData introduced uncontroverted evidence that during that time period, at least $87,931.99 of its funds were deposited by Ponec directly into his personal investment accounts at Dain Bosworth, Inc., and

Wallace Weitz & Co. ProData introduced further uncontroverted evidence that during that time, Ponec deposited more than $247,000 in checks made payable to ProData by its customers into Ponec's personal checking account for his own use. The trial evidence was also undisputed that from 1991 through 1995, Ponec issued drafts to himself for cash from ProData's accounts totaling more than $30,000, all for his personal use. At trial, Ponec testified that he *might* have partially funded the Dain Bosworth, Inc., and Wallace Weitz & Co. accounts with moneys other than those he took from ProData, but he produced no evidence of this. In view of the undisputed evidence detailed above, Ponec's statement, without more, is insufficient to support his claim that the trial court erred in imposing a constructive trust on Ponec's Dain Bosworth, Inc., and Wallace Weitz & Co. investment accounts. Upon our de novo review, we determine that the evidence clearly and convincingly establishes that the unauthorized ProData funds found their way into Ponec's investment accounts and that the imposition of a constructive trust on the accounts was proper.

CONCLUSION

The trial court's order provided generally that ProData was entitled to imposition of constructive trusts upon Ponec's assets, including but not limited to Ponec's house and Ponec's Dain Bosworth, Inc., and Wallace Weitz & Co. investment accounts. Issues surrounding the imposition of a constructive trust on the house are moot. The record on appeal demonstrates that ProData met its burden of proof by clear and convincing evidence as to the imposition of the constructive trust on the investment accounts. On this record, we find no error in the trial court's order imposing a constructive trust in favor of ProData on Ponec's Dain Bosworth, Inc., and Wallace Weitz & Co. investment accounts.

AFFIRMED.

JIM JOHANSON, APPELLEE AND CROSS-APPELLANT, V. THE BOARD OF EDUCATION OF LINCOLN COUNTY SCHOOL DISTRICT NO. 1, ALSO KNOWN AS NORTH PLATTE PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND LINCOLN COUNTY SCHOOL DISTRICT NO. 1, ALSO KNOWN AS NORTH PLATTE PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

589 N.W.2d 815

Filed February 19, 1999. No. S-97-1125.

1. **Schools and School Districts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board subjecting a teacher to disciplinary action is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. The evidence is sufficient as a matter of law if a judge could not, were the trial to a jury, direct a verdict.
2. **Due Process: Teacher Contracts: Testimony: Witnesses: Appeal and Error.** When a teacher whose contract is to be terminated for cause opposes the termination, minimum procedural due process requires that (1) the teacher be advised of the cause or causes for the termination in sufficient detail to fairly enable him or her to show any error that may exist, (2) the teacher be advised of the names and the nature of the testimony of witnesses against him or her, (3) at a reasonable time after such advice, the teacher must be accorded a meaningful opportunity to be heard in his or her own defense, and (4) hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
3. **Constitutional Law: Teacher Contracts: Testimony.** A teacher who is present at his or her own contract termination hearing is not constitutionally entitled to a summary of the nature of the testimony of the witnesses against him or her prior to the hearing.
4. **Schools and School Districts: Testimony: Witnesses.** Neb. Rev. Stat. § 79-832 (Reissue 1996) provides for a list of witnesses to be given to a teacher upon request, but does not require a school board to provide a summary of the nature of the witnesses' testimony.
5. **Due Process: Schools and School Districts: Hearsay.** The admission of hearsay testimony at a hearing before a school board does not violate due process.
6. **Words and Phrases.** Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession or conduct which is unbecoming a member in good standing of a profession.
7. **Witnesses: Words and Phrases: Appeal and Error.** Conduct may be deemed unprofessional even if it does not specifically violate the rules or ethical code governing the professional at issue, since such conduct may still be unbecoming of a member in good standing of the teaching profession. To determine whether conduct is unbecoming, even though not in violation of an explicit rule or ethical code, the Nebraska Supreme Court looks to the opinions of educational professionals.

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

Kelley Baker, of Harding, Shultz & Downs, for appellants.

Jerold V. Fennell, of Domina Law, P.C., for appellee.

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

CONNOLLY, J.

The appellants, Lincoln County School District No. 1 and its board of education (collectively District), terminated the employment contract of the appellee, Jim Johanson, with the District, finding that Johanson had engaged in unprofessional conduct. Johanson filed a petition in error with the district court, which concluded that there was insufficient evidence to support the findings of the District. We conclude that the evidence was sufficient to support the District's findings, and therefore, we reverse the order of the district court and remand the cause with directions to reinstate the District's decision.

I. BACKGROUND

1. SECTION 79-831 NOTICE

Johanson was employed by the District and taught fifth grade at Osgood Elementary. Johanson received written notice pursuant to Neb. Rev. Stat. § 79-831 (Reissue 1996) that the interim superintendent would be submitting a recommendation to terminate Johanson's contract of employment with the District effective May 30, 1997. The § 79-831 notice stated that Johanson had the right to request a hearing and that such a request must be received no later than 7 days after receipt of the notice by Johanson; that if Johanson requested a hearing, such would be scheduled within 30 days; that Johanson would be notified in writing at least 5 days prior to any such hearing as to the hearing's date, time, and place, together with the grounds alleged for termination; and that Johanson would receive notification of his rights relative to legal representation, access to evidence, examination of witnesses, right of appeal, and other pertinent information.

Johanson requested a hearing on the matter, as well as a complete listing of all the alleged grounds for the termination of his employment, a complete list of witnesses who would testify at the hearing, a summary of what such witnesses would testify to, and copies of all the documents that would be presented at the hearing or used as a basis for any witness' testimony. The District responded by providing Johanson with written notice, pursuant to Neb. Rev. Stat. § 79-832 (Reissue 1996).

2. SECTION 79-832 NOTICE

The § 79-832 notice stated the grounds alleged by the District in support of the recommendation to terminate Johanson's contract, provided the names of the witnesses who would be called to testify, identified the documents that would be offered as exhibits, and described Johanson's right to be represented and the opportunities he would be afforded at the hearing. An affidavit of Paul R. Brochtrup, the interim superintendent, was enclosed with the § 79-832 notice and summarized the allegations against Johanson.

The alleged grounds for termination contained in the § 79-832 notice involved incidences of alleged unprofessional conduct toward two of Johanson's students, Jacob M. and Craig L. The § 79-832 notice stated that Johanson had allowed the fifth grade class to hide from Jacob, had tied Jacob up with an extension cord, had referred to Jacob as an "idiot," and had physically and verbally abused Craig. Brochtrup's affidavit specifically alleged the following: (1) During the fall of 1995, while Jacob was in the restroom, Johanson allowed the fifth grade class to leave the classroom and hide from Jacob; (2) Johanson wrapped Jacob in an electrical cord as a joke; (3) Johanson made a fist and used his knuckles to hit the center of Craig's forehead; (4) Johanson took Craig from the classroom into the hall, put his hands on Craig's cheeks, and shook Craig's head "real hard"; (5) Johanson took Craig to the door that separates the fourth and fifth grade classrooms, opened the door, and told Craig to look at the fourth graders, who would be his classmates next year if Craig did not "get to working"; (6) Johanson lifted Craig up by his jaw and pushed his cheeks until Craig's teeth hurt; (7) Johanson grabbed Craig by the shoulders

and shook him; (8) Johanson cornered Craig in the fifth grade classroom "with his hands on [Craig's] cheeks"; (9) Johanson asked Craig to stick out his tongue, Johanson placed a drop of soap on his finger, and then Johanson placed the soap on Craig's tongue; and (10) Johanson gave Craig a paper sack and told Craig to pack and get out.

3. Hearing

Jacob is diabetic, suffers from attention deficit hyperactivity disorder, and has a learning disability. Craig also has a learning disability, suffers from attention deficit hyperactivity disorder, and has a pervasive developmental disorder.

Jacob's mother and Craig's mother both testified on behalf of the District.

The secretary at Osgood Elementary, Monna Trueblood, testified as to the incident involving Jacob and the electrical cord. Trueblood stated that Jacob came to the office and asked to use the telephone. She asked Jacob why he wanted to use the telephone, and Jacob replied that he wanted to call his mother to untie him. When Trueblood looked up, she noticed that Jacob was "tied up" with "a heavy extension cord." She untied Jacob and asked him who had tied him up. Jacob told her that it was "Mr. J." Trueblood stated that the extension cord was about 25 feet long and was wrapped around Jacob between his elbows and his shoulders. On cross-examination, Trueblood testified that there were no knots in the cord, but it was wrapped in a "mummy fashion," was not "dangling," and was "maybe secured in back." Trueblood testified that Jacob was unable to lift his arms, but that he did not "exhibit any physical discomfort." She stated that Jacob "did not seem exceptionally upset."

Jamalee O'Rourke, a fourth grade teacher at Osgood Elementary, testified as to the incident concerning Craig and the fourth grade class. O'Rourke stated that the door between her classroom and Johanson's classroom opened and that Johanson brought Craig into her classroom. According to O'Rourke, Johanson said, "I want you to look at this class. Look at this class, because if you don't get to work you're going to be with these students next year." Johanson stated this "a couple of times." She acknowledged that this was not "typical behavior" and that it "surprised" her.

Jackie Kelsey, an elementary behavioral consultant, testified as to various incidents concerning Craig. Craig had told her about the incident involving the fourth grade classroom and that it had embarrassed him; that Johanson had hit Craig in the forehead with Johanson's knuckles, causing Craig's glasses to fall down on his face, and that it had hurt; that Johanson had put his hands on Craig's cheeks and shaken Craig's head very hard and that this also hurt; and that Johanson had picked up Craig by his jaw, which pushed his cheeks into his teeth until his teeth hurt. According to Kelsey, Craig indicated that he did not want Kelsey to tell the principal or Johanson about his disclosing these incidents.

Tana Ambrose, a resource teacher at Osgood Elementary, testified as to Johanson's physical handling of Craig. Ambrose testified that she had gone to Johanson's classroom and that when she turned from the hall into the classroom she saw that Johanson had his hands on Craig's face along the jawline. Johanson was telling Craig that Johanson did not want Craig to use "those words in his classroom." Ambrose described Johanson's tone of voice as angry. Ambrose stated that as Johanson "was talking he was kind of moving his hands trying to reinforce what he's [sic] saying . . . I saw Craig from the sideview, and his glasses—I didn't see them moving, so I don't think—he was not shaking him hard." Johanson did not appear to be emotionally out of control, and Craig did not seem to be in any physical pain.

Jeanelle Cross, an aide to behaviorally disturbed students at Osgood Elementary, testified as to another incident where Johanson physically handled Craig. Cross stated that she had walked into Johanson's classroom and observed Johanson shaking Craig by the shoulders. Johanson's back was to Cross, and he was apparently unaware of her presence. According to Cross, Johanson was "shaking [Craig] pretty good," since she saw Craig's "glasses bobbling." Cross stated that she did not remember what was said, but that Johanson's voice was raised. Cross stated that she was "shocked" by Johanson's behavior and that the other students' "eyes were real wide."

Cross also observed the incident concerning the paper sack. According to Cross, Craig started "making some noises" when

she told him she was taking him to music class. When Johanson overheard this, he said,

> Craig, I don't know why you do these things to make me angry. I think the only thing that works with you to make you behave is to get angry with you. If you don't like the rules in this school, then just pack your stuff up, get out, check yourself into a new school and no one here will miss you.

Craig stood there, so Johanson asked Craig if he needed a paper sack to put his "stuff" in. Craig said, "[O]kay," so Cross helped Craig clean out his desk and escorted him to the office.

The principal of Osgood Elementary, Dick Deutschman, testified at length about the allegations against Johanson. Deutschman stated that he had been told by two fifth grade students that the class hid from Jacob on the playground while Jacob was in the restroom. When Jacob emerged from the restroom, Jacob had no idea where his classmates had gone. Deutschman discussed the incident with Johanson, and Johanson stated that it was something the children wanted to do to one another.

When Deutschman learned of Johanson's tying Jacob in an extension cord, he asked Johanson to apologize to Jacob's parents, and Johanson did so.

Deutschman stated that the story concerning Johanson's alleged statement that Jacob was an "idiot" "didn't make a lot of sense," and so, he "didn't do a lot with that." Deutschman testified in some detail about the incident in which Johanson put soap on Craig's tongue. According to Deutschman, Johanson acknowledged that Johanson's behavior was inappropriate. Johanson told Deutschman that he had apologized to Craig's parents.

When Deutschman learned of the paper sack incident, he began to investigate Johanson. During this investigation, Deutschman was told by some fifth grade students that Johanson had jerked and shaken Craig and that Craig had been picked up by his neck.

On cross-examination, Deutschman admitted that Johanson's evaluations had been positive. Deutschman stated that his last

evaluation of Johanson was completed only 1 day prior to the date of the § 79-831 notice and that this final evaluation was "average." Deutschman also admitted that he had been accused by Craig's parents of attempting to conceal information concerning Johanson, but denied that he had done so. Deutschman admitted that he had "sided with Mr. Johanson" concerning the extension cord and soap incidents.

Johanson testified on his own behalf. Johanson admitted that his class had hidden from Jacob while Jacob was in the restroom. According to Johanson, he and the other students hid in the music room and, when Jacob came back into the music room, they jumped out and said, "[S]urprise." On cross-examination, Johanson stated that he did not perform this "joke" on any of his other students.

Johanson also admitted to having wrapped Jacob in an extension cord. Johanson gave the following account:

> It was in the afternoon, I was teaching a lesson using some electric burners that I had, and I had to drop cords out to teach that lesson; and the lesson was over and we were cleaning up the room, and Jacob came up and asked me what I was doing, and I said that I was wrapping up dropped [sic] cords and he asked—and I asked if he would like to help and he said he would.
>
> And I handed him the end of the drop cord and I said, "Now spin around in a circle," and he spun around in a circle and let the cord wrap around him; and—he was kind of dancing and kind of showing off a little bit, enjoying the attention that he was getting from that. And—and then when he—when it was wrapped around him, he kind of, I don't know, reacted and ran out of the classroom.
>
> And my intent there was just to lift the cord up off of him, much like I had been wrapping them around my arm and shoulder as I was putting them away. I guess I was doing it to kind of build their—to bolster the self-esteem. I didn't mean to do that to destroy him.

On cross-examination, Johanson admitted that he was aware Jacob was upset when Jacob ran from the room and that Jacob was going to call his mother.

Johanson denied making a fist and hitting Craig in the forehead with his knuckles. Johanson stated that he did not know of any basis for this allegation.

Johanson admitted to handling Craig by placing his hands on Craig's jaw. Johanson gave the following account:

> I did put my hand underneath Craig's chin and turned his face to look at me . . . . Craig walked up to me and said, "How in the hell do you expect me to do these papers if you don't put them in my bag?"
>
> And I just put my hand underneath his chin and said, "Young man, that is not the way you talk to an adult," and that was done between the third and the fourth grade room, and it was done in front of Mr. Deutschman. He observed that incident.

According to Johanson, he did not shake Craig's head hard.

Johanson admitted to the incident involving the fourth grade class. Johanson stated that he told Craig, "Young man, this is the—the people that you're going to be in class with next year. Is this the ones you want to be with or do you want to be with your group that you're in?" Johanson admitted that he did not handle this incident as well as he could have.

Johanson denied picking Craig up by Craig's jaw. Johanson stated that he knew of no basis for this allegation. Johanson also denied shaking Craig. Johanson thought that this allegation arose from an incident concerning some scissors with which Craig attempted to stab Johanson. Johanson testified that during the struggle to take the scissors from Craig's hand, Craig's glasses "did become bumped or crooked on his face." On cross-examination, Johanson stated that he first removed the scissors from Craig's hand and then held Craig to control him. The scissors were actually on the desk when he was holding Craig.

Johanson admitted to turning Craig's head so that Craig would look at him, on another occasion, which was the basis for the allegation of cornering Craig in the classroom.

Johanson gave the following account of the soap incident:

> [Craig] said, "I'm going to take these scissors and cut the nipples off all the girls in this class." And that's when I said, "Craig, that is not appropriate and you're not going to use that language in this classroom." I said, "Do you

> want to stop using it or do you want me to wash your mouth out with soap," again thinking that he would take—that he would just stop.
>
> [Craig] said, "I will—I want you to wash my mouth out with soap," and so I said, "Then come up here." And I took . . . the bottle, I put it—a drop on my finger. I asked him to stick his tongue out. I placed one—I placed—just touched it to his tongue, and that was basically the end of the incident.

Johanson admitted to telling Craig's parents that he "was in error" and that Craig's behavior was "no excuse" for his own behavior.

Finally, Johanson admitted to the incident involving the paper sack. He stated that he "should've handled [the incident] differently."

4. Unprofessional Conduct

Testimony was adduced and exhibits received as to whether Johanson's conduct was unprofessional. A section of the District's teacher handbook concerning discipline was entered into evidence, as well as a section of the District's policy manual, which also concerned discipline. Brochtrup stated that the teacher handbook was provided to every teacher in the District and that, although the policy manual was not provided to individual teachers, the policy manual was available for review in every school building. The teacher handbook stated in pertinent part:

> The teacher should be fair, reasonable, dignified and approach pupils in good temper. Loud, angry talk, and sarcasm employed by a teacher in the presence of his class is apt only to lessen the respect of all the students for him and antagonize the offender.
>
> Courtesy should be practiced at all times by both teacher and student. Many bad conduct cases will disappear if the teacher is courteous to students and demands equal consideration from students.
>
> . . . .
>
> The suggested steps of procedure in handling problems of pupils by teacher are:

> Know student's background.
>
> Handle promptly in a private conference.
>
> Write a report to the building principal, giving background of the case and steps taken.
>
> Conference with student and principal.
>
> Conference with student, principal, and parents.
>
> Strong disciplinary measures or suspension by the principal.
>
> Principals are authorized to suspend any student from school for gross misdemeanors, immortality [sic], persistent disobedience or violation of the rules or policies of the school, or when the presence of the student is detrimental to the best interests of the school.

Most of the language contained in the teacher handbook was also contained in the policy manual. However, the policy manual also stated: "Teachers will not use physical means to inflict punishment or compel obedience. . . . A teacher or principal may use physical force against a pupil, without prior consent, because of unusual circumstances, when immediate action is essential to repel an attack, or protect other persons." Both the teacher handbook and the policy manual explicitly prohibited the use of corporal punishment.

Based on his review of the facts and the above documents, Brochtrup stated that it was his professional opinion that Johanson's behavior toward Jacob and Craig was "unbecoming of a professional educator and constitute[d] unprofessional conduct." Brochtrup also stated that teachers dealing with students with special needs should meet a higher standard of professionalism.

When Johanson was asked whether his handling of the hiding and electrical cord incidents involving Jacob was professional, Johanson stated, "I think humor's important in the classroom, but I guess it's probably not professional." Johanson also admitted that he had "anguished" over the soap incident and that he had "really screwed up."

5. District Findings

The District found that Johanson's conduct toward Craig and Jacob was unprofessional. The District specifically found

that the following conduct was unprofessional and largely undisputed:

> allowing the fifth grade students to hide from [Jacob] while he was in the rest room; tying, or allowing Jacob to wrap himself up with an electrical cord; taking Craig to the door that separates the fourth and fifth grade classrooms, opening that door, and telling Craig "Look at these kids because they will be your classmates next year if you don't get to working."; placing soap on Craig 's tongue; and giving Craig a paper bag and telling him to pack his things and get out of the classroom.

Although there was conflicting testimony, the District further found that Johanson had "used physical force or restraint when the need for physical force either did not exist or had ended." Finally, the District found that Johanson's conduct was contrary to state law as well as the disciplinary procedures contained in the teacher handbook, the District's policies, and the District's rules and regulations. Accordingly, the District terminated Johanson's contract effective at the end of the current contract period.

In a lengthy order, the district court concluded that there was insufficient evidence to support the District's findings.

II. ASSIGNMENTS OF ERROR

The District asserts, restated, that the trial court erred in holding that the court would have been required to direct a verdict based on the lack of evidence if the matter had been tried to a jury. On cross-appeal, Johanson asserts that he was denied procedural due process, in violation of § 79-832, the Nebraska Constitution, and the Constitution of the United States.

III. SCOPE OF REVIEW

The standard of review in a proceeding in error from an order of a school board subjecting a teacher to disciplinary action is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. The evidence is sufficient as a matter of law if a judge could not, were the trial to a jury, direct a verdict. *Daily v. Board of Ed. of Morrill Cty., ante* p. 73, 588 N.W.2d 813 (1999).

IV. ANALYSIS

1. Cross-Appeal

Johanson argues that he was denied procedural due process, in violation of § 79-832, the Nebraska Constitution, and the Constitution of the United States. Johanson contends his due process rights were violated in that he was not provided with a summary of the nature of the testimony of every witness that testified against him and that hearsay testimony was admitted over objection.

(a) Nature of Witness' Testimony

In *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983), this court addressed the constitutional requirements of procedural due process in the contested termination of a tenured teacher. Quoting the Fifth Circuit, we stated:

> "Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that: (a) [the teacher] be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist, (b) he be advised of the names and the nature of the testimony of witnesses against him, (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense, (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges."

Id. at 796-97, 340 N.W.2d at 879, quoting *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

The constitutional due process requirements set forth in *Irwin* were later applied in *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985), and *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). In *Benton*, the notice did not provide the factual allegations underlying the charges against a school principal, but, rather, offered only the " 'just cause' " reasons for considering termination in the conclusory language of the applicable statute. *Id.* at 137, 361 N.W.2d at 518. We held that the notice failed to afford the principal constitutional due process. *Id.* In *Eshom*, we

held that a principal's reference to informal evaluations of a teacher, the nature of which testimony was not disclosed in the notice, did not violate due process. Thus, although *Benton* clearly indicates that notice of the cause or causes for termination must be presented in some detail, *Eshom* indicates that the nature of each witness' testimony need not be presented in exacting detail.

In *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986), which was decided after both *Benson* and *Eshom*, the Fifth Circuit limited the language in *Ferguson v. Thomas, supra*, the case upon which this court originally relied in *Irwin*. In *Wells*, the question was whether a school superintendent's constitutional due process rights were violated when a termination hearing was held without the superintendent's having previously received a list of witnesses and a summary of those witnesses' testimony. The court held that there was no due process violation, stating:

> When an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied. It is only when he was not present when they were heard that such measures are called for as [a notice containing a summary of each witness' testimony]. When, as here, the adjudicator acts on the sole basis of testimony produced at a hearing at which the accused is present, then by the time the accused must present his case he has necessarily already heard the witnesses' names and the substance of their testimony. The authorities upon which [the superintendent] relies to demand names and summaries of testimony in advance plus confrontation are cases in which there was no confrontation and we required the other as a substitute. *Dixon* [*v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.1961)]; *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir.1970). Any charged person is constitu-

> tionally entitled once to be told what he is charged with and on what evidence; none is entitled to be told so twice. To so require would be to impose on state administrative proceedings a higher standard than the Constitution requires for criminal trials. . . . This we have never done.

(Emphasis omitted.) (Citations omitted.) *Wells v. Dallas Independent School Dist.*, 793 F.2d at 683.

In the instant case, Johanson was present at the hearing. Based on *Wells v. Dallas Independent School Dist., supra*, and our own holding in *Eshom*, we can only conclude that Johanson was not constitutionally entitled to a summary of the nature of the testimony of the witnesses against him.

Johanson was likewise not entitled to such by statute. The proceedings in the instant case were brought pursuant to Neb. Rev. Stat. §§ 79-829 to 79-832 (Reissue 1996). Section 79-832(1) states:

> A formal due process hearing . . . means a hearing procedure adopted by the school board which contains at least the following: (a) Notification to the certificated employee in writing at least five days prior to the hearing of the grounds alleged for action, cancellation, termination, or nonrenewal of the teacher's contract; (b) upon request of the certificated employee a notification, at least five days prior to the hearing, of the names of any witnesses who will be called to testify against the certificated employee and an opportunity to examine any documents that will be presented at the hearing; (c) the right to be represented; and (d) an opportunity to cross-examine all witnesses and to examine all documents and to present evidence material to the issues.

Statutory language is to be given its plain and ordinary meaning. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997). Although § 79-832 provides for a list of witnesses upon request, it does not require the District to provide a summary of the nature of the witnesses' testimony.

(b) Admission of Hearsay Testimony

The strict rules of evidence obviously did not apply at Johanson's hearing. See, *Daily v. Board of Ed. of Morrill Cty., ante* p. 73, 588 N.W.2d 813 (1999); *Hollingsworth v. Board of*

Education, 208 Neb. 350, 303 N.W.2d 506 (1981). Nonetheless, Johanson claims that his due process rights were violated because some hearsay testimony was admitted at his hearing, citing *Hollingsworth v. Board of Education, supra*. In *Hollingsworth*, we stated: "Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board, when a teacher's career hangs in the balance, the basic principles of due process demand that hearsay statements of students be given little, if any, weight." *Id.* at 360, 303 N.W.2d at 512. Nowhere in this statement is there any indication that the *admission* of hearsay testimony at such a hearing violates due process. Rather, the statement clearly indicates the opposite. Not only may hearsay testimony be admitted at such a hearing, but it also may be given some weight, albeit little, if any.

Because hearsay testimony may be properly admitted at a hearing to terminate a tenured teacher's contract, we can only conclude that Johanson's assignment of error in this regard is without merit.

2. Sufficiency of Evidence

In the instant case, the trial court concluded that there was insufficient evidence to support the District's findings that Johanson's conduct was unprofessional. Thus, the question is whether there was sufficient evidence presented to support the District's finding that Johanson's conduct was unprofessional.

We recently defined unprofessional conduct as "that conduct which breaches the rules or ethical code of a profession or conduct which is unbecoming a member in good standing of a profession." *Daily v. Board of Ed. of Morrill Cty., ante* at 90, 588 N.W.2d at 824.

In the instant case, there was sufficient evidence to conclude that the teacher handbook and the policy manual were part of the rules or ethical code governing teachers in the District. The teacher handbook was provided to every teacher in the District, and the policy manual was readily available. Accordingly, we will look to the relevant provisions of the teacher handbook and the policy manual to aid us in our analysis of the District's findings concerning unprofessional conduct.

However, we note that the teacher handbook and the policy manual do not define the boundaries of unprofessional conduct in the instant case. Conduct may be deemed unprofessional even if it does not specifically violate the rules or ethical code governing the professional at issue, since such conduct may still be unbecoming of a member in good standing of the teaching profession. See *Daily v. Board of Ed. of Morrill Cty., supra.* See, also, *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997) (Gerrard, J., dissenting). To determine whether conduct is unbecoming, even though not in violation of an explicit rule or ethical code, we look to the opinions of educational professionals. In "light of their professional expertise, schoolteachers are normally expected to be able to determine the type of conduct which constitutes unfitness to teach." *Shea v. Board of Medical Examiners*, 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653, 660 (1978), citing *Morrison v. State Board of Education*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). See, also, *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978).

(a) Hiding Incident

The evidence regarding the occurrence of this incident was not in dispute. Johanson admitted to hiding from Jacob while Jacob was in the restroom and that this was not done to any other students. Not only did Johanson admit that this incident occurred, but he, as an educational professional, also admitted that it constituted unprofessional conduct. Accordingly, we conclude that there was sufficient evidence to support a finding that this conduct was unbecoming a member in good standing of the teaching profession and, thus, the District's finding that it was unprofessional.

(b) Electrical Cord Incident

Likewise, the evidence regarding the occurrence of this incident was not in dispute, and Johanson admitted that his conduct in this regard was unprofessional. We again conclude that the evidence was sufficient to support a finding that Johanson's conduct was unbecoming of a teacher and, thus, was unprofessional.

(c) Fourth Grade Class Incident

Once again, there is no dispute as to whether this incident occurred. The question is whether it constituted unprofessional conduct.

The teacher handbook states that teachers should act dignified toward students and should not employ sarcasm. The steps of procedure in handling discipline problems suggested in the handbook include knowing the student's background, handling the problem promptly in a *private* conference, and then providing the principal with a written report. Nowhere does the handbook or policy manual suggest that a teacher *publicly* humiliate a student in front of another classroom, which, if not sarcastic, is certainly undignified. O'Rourke, the fourth grade teacher who witnessed this incident, stated that it surprised her, and Johanson admitted that he did not handle this incident as well as he could have.

We conclude that the evidence was sufficient to support a finding that Johanson's conduct breached the rules or ethical code of the District and, thus, that there was sufficient evidence to support the District's finding that it was unprofessional.

(d) Soap Incident

That this incident occurred is not in dispute. Again, the question is whether it was unprofessional.

The policy manual governing Johanson's conduct explicitly prohibits "physical means to inflict punishment or compel obedience" absent "unusual circumstances, when immediate action is essential to repel [an] attack, or protect other persons." Regardless of whether placing soap on Craig's tongue was "corporal punishment," a matter we need not decide, it was clearly a "physical means" of discipline. There is no evidence that using such means was essential, or even remotely necessary, to get Craig to stop using foul language, let alone to repel an attack or protect other persons. Johanson asked Craig whether he wanted his mouth washed out with soap, and Craig willingly complied, going so far as to stick his tongue out. The only inference one can draw from Craig's complicity, at least in regard to the issue at hand, is that physical means were not necessary to compel Craig's obedience in any way. Moreover, Johanson him-

self admitted that his conduct "was in error" and that Craig's behavior did not excuse his own.

We conclude that the evidence was more than sufficient to support the District's findings that Johanson's conduct regarding this incident was unprofessional.

(e) Incidents of Physical Force or Restraint

The evidence regarding Johanson's use of physical force or restraint, other than the electrical cord and soap incidents, was largely in dispute. In analyzing these incidents, we bear in mind that, under the directed verdict standard, the District is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be drawn from the evidence. See *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). Kelsey's testimony was based entirely upon statements made to her by Craig. Thus, even under the directed verdict standard, her testimony should be given little, if any, weight. See *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981). However, Ambrose testified that she had personally witnessed Johanson holding Craig by the jawline and moving Craig's head from side to side to reinforce what he was saying. She also stated that Johanson was speaking in an angry voice. Cross testified that she personally observed Johanson shaking Craig by the shoulders hard enough to make Craig's glasses bobble and that Johanson's voice was raised.

The above incidents are clearly contrary to the rules or ethical code of the District. First, the teacher handbook discourages loud, angry talk. Second, in neither instance of physical discipline is there any indication that such was immediately essential to repel an attack or protect other persons. Under the policy manual, physical contact is not a permissible means to reinforce what one is saying. As for the incident observed by Cross, Johanson admitted that, although Craig may have had scissors at one point, the scissors were on the desk while Johanson was shaking Craig.

We can conclude only that the evidence was sufficient to support the District's findings that Johanson's use of physical force or restraint constituted unprofessional conduct.

V. CONCLUSION

We conclude that Johanson's due process rights were not violated. We further conclude that the District's findings as to the incidents discussed in the analysis are supported by sufficient evidence and are sufficient to support Johanson's contract termination. Therefore, we need not discuss any additional findings of the District or conclusions of the district court. We reverse the district court's order and remand the cause with directions to reinstate the District's decision.

REVERSED AND REMANDED WITH DIRECTIONS.

MARY PAULETTE RAUCH, NOW KNOWN AS MARY PAULETTE SHEETS, APPELLEE, v. DONALD KEITH RAUCH, APPELLANT.

590 N.W. 2d 170

Filed February 19, 1999. No. S-97-1224.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.
4. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
6. **Modification of Decree: Child Support: Res Judicata.** In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata.

7. **Child Support: Taxation.** Income for the purpose of child support is not synonymous with taxable income.

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

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

Bernard J. Glaser, Jr., and Richard M. Glidden for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this case, the father requested modification of his child support obligation. In response, the mother also requested modification of the child support obligation and a change in health insurance coverage. The district court increased the father's child support obligation, directed him to obtain new health insurance, and ordered him to pay the mother's attorney fees in the amount of $800.

SCOPE OF REVIEW

Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. See, *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998); *Ahrens v. Conley*, 5 Neb. App. 689, 563 N.W.2d 370 (1997).

In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, 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. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

FACTS

Mary Paulette Rauch and Donald Keith Rauch were granted a dissolution of marriage on September 11, 1984, with custody

of the couple's two minor children, Nathan Michael and Meghan Nichole, given to Mary. Donald was ordered to pay child support in the amount of $350 per month for both children and was directed to provide health insurance for the children. Donald's child support obligation was increased in December 1988 to $550 per month for both children. In 1984, Mary and the children moved from Lincoln to western Nebraska. They live approximately 250 miles from Lincoln.

In February 1992, Donald alleged that he had experienced a material change in his income. Donald, who was a salesperson for Midland Medical Supply Company (Midland Medical), had lost one of his major clients and, consequently, suffered a substantial decrease in his income. Recognizing that Donald was experiencing economic hardship, Mary stipulated to a 1-year reduction in Donald's child support obligation. The district court entered an order reducing Donald's child support obligation for 1 year from $550 per month to $400 per month.

Shortly after losing his major client, Donald left his job with Midland Medical and began farming full time an 80-acre farm that he and his current wife owned outside of Martell, Nebraska. Donald's counsel admitted at oral argument that in the 10 years Donald has owned the farm, it never returned a profit. Donald alleged that the farm had averaged a loss of $18,720 per year for the last 3 years. In 1994, Donald started working as a truck-driver in order to supplement his income. From trucking, Donald earned $4,199 in 1994, $29,241 in 1995, and $35,738 in 1996.

On January 31, 1997, Donald filed a petition for modification of his child support obligation, claiming he had a substantial decrease in his income attributable to farming losses incurred in the last 3 years. In response, Mary alleged that her income had also substantially decreased and that she was entitled to an increase in child support. She also alleged that the children's health insurance carrier had not reimbursed her for a large portion of the children's medical expenses and asked the district court to order Donald to obtain a different policy.

From the time of the dissolution until 1994, Donald maintained health insurance through Midland Medical. In 1994, Donald unilaterally enrolled in a health maintenance organiza-

tion (HMO) with Mutual of Omaha. The HMO policy required Donald to choose a primary physician in Lincoln for each person covered under the policy. This primary physician would be required to render all nonemergency medical treatment. In emergency situations, a physician other than the primary physician could render treatment and would be compensated by the HMO, as long as the HMO was contacted within 24 hours of the treatment. Any nonemergency medical treatment rendered by a physician other than the primary physician was not covered by the policy.

In January 1995, Meghan was diagnosed with diabetes and required frequent medical treatment. Rather than driving approximately 250 miles to Lincoln to see her children's primary physician for nonemergency health care, Mary sought medical treatment for the children with physicians other than the primary physician covered under the HMO. As nonemergency treatment rendered outside of the Lincoln area was not covered by the HMO, Mary incurred approximately $7,000 in medical bills.

After a hearing, the district court determined that it would not consider Donald's farming losses when calculating his monthly income. The court acknowledged that the Nebraska Child Support Guidelines indicate that business losses should be taken into consideration, but the court treated the farming as a hobby rather than a business because Donald had never earned a profit from farming. The court relied solely upon the income Donald earned from driving a truck in calculating his monthly income. The court did not deduct from Donald's monthly income the amount spent on providing health insurance for the children.

Donald was ordered to pay $905 per month in child support while both minor children resided with Mary and to pay $631 per month in child support when only one minor child resided with her. Donald was also ordered to obtain a health insurance policy which covered the children's nonemergency and emergency care within a 100-mile radius of Mary's home. The parties were ordered to share equally in the cost of medical care not covered by insurance. Donald was ordered to pay Mary's attorney fees.

Donald filed a timely notice of appeal. Pursuant to our power to regulate the caseloads of Nebraska's appellate courts, we moved this case to our docket.

ASSIGNMENTS OF ERROR

In summary, Donald claims that the district court erred in not considering farming losses when calculating his child support obligation, in finding that the cost which he incurred to maintain health insurance for the children should not be deducted from his monthly income, in finding that the existing health insurance for the minor children was insufficient, and in not considering that Donald had two families to support when calculating his child support obligation to the children of his prior marriage.

ANALYSIS

A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. See, *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998). In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

The parties presented sufficient evidence to show a material change of circumstances. Both presented evidence which illustrated that they had experienced significant changes in their respective incomes. Mary also established that one of the minor children had been diagnosed with diabetes.

The Nebraska Supreme Court has adopted and subsequently amended the child support guidelines since the entry of the divorce decree in this case. We therefore conclude that there have been sufficient changes in circumstances to justify a modification of the present child support obligation and health insurance coverage. See, *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991) (adoption of child support guidelines constitutes material change in circumstances); *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993) (child's diagnosis with disease which required outlay of additional expense not contemplated at time of original decree or first modification was material change in circumstances); *Olmer v. Olmer*, 2 Neb. App. 178, 507 N.W.2d 677 (1993) (amendment of guidelines might be considered material change in circumstances).

Having determined that modification of the dissolution decree was justified by material changes in circumstances, we review the modifications for an abuse of discretion. In Nebraska, dissolution of marriage cases are equitable in nature. *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998). This rule applies not only in original dissolution proceedings, but also in proceedings for modification of the decree of dissolution. *Id.*

First, Donald claims that the district court abused its discretion by not considering his farming losses in its calculation of his monthly income. Child support obligations are determined by using the parents' total monthly income. The guidelines define total monthly income as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages. Nebraska Child Support Guidelines, paragraph D. Donald argues that since the guidelines indicate that income from all sources should be considered, the court abused its discretion when it did not consider his farming losses.

To the extent that Donald owns and operates a farm, he is self-employed. Generally, farming losses and depreciation are figured in arriving at the total monthly income considered in the guidelines. Paragraph D of the guidelines provides that if a party is self-employed, depreciation claimed on income tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income. This language suggests that the losses from Donald's farming operation should have been included in the calculation of his monthly income.

Paragraph C of the guidelines instructs that all orders for child support obligations shall be established in accordance with the provisions of the guidelines, but exceptions are allowed. Paragraph C states that if the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied, a deviation may be allowed, as long as the deviation takes into consideration the best interests of the child. See, also, Neb. Rev. Stat. § 42-364.16 (Reissue 1998); *Faaborg v. Faaborg, supra*. In the event of a deviation, the reason for the deviation should be contained in the findings portion of a court's decree or order, or worksheet 5 should be completed by the court and filed in the court file. Nebraska Child Support Guidelines, paragraph C. Deviations are allowed whenever the application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C(5); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991).

We have recently held that income for the purpose of child support is not synonymous with taxable income. See *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). Therefore, even though Donald is entitled to take a loss from his taxable income due to his farming losses, it does not necessarily follow that the loss is also considered for the purpose of calculating his child support obligation.

The evidence shows that during the last few years, Donald has invested considerable sums of money in his farm. He spent approximately $71,550 on farming equipment in 1993 and $4,000 in 1994. The support of one's children is a fundamental

obligation which takes precedence over almost everything else. See *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984). It would be unfair for Donald to benefit from his choice to incur debt and build equity in his farm at the expense of his children. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

In *Knippelmier v. Knippelmier, supra*, we noted that the actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award for child support. Also, the guidelines provide that if applicable, earning capacity may be considered in lieu of a parent's actual, present income. Nebraska Child Support Guidelines, paragraph D. This is especially true when it appears that the parent is capable of earning more income than is presently being earned. See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996) (proper amount of child support is determined not necessarily by parent's earnings, but by parent's earning capacity).

The district court stated that considering the consistent, lengthy, and substantial losses reflected in Donald's farming, it was justified in deviating from the guidelines. As the court noted, Donald earned only $43,826 from farming in the last 3 years, while he incurred $114,865 in income tax losses. In light of the circumstances of this particular case, we find that consideration of the farming losses might create a false impression of Donald's financial situation and lead to an unjust award of child support. Thus, the court did not abuse its discretion when it deviated from the guidelines by not considering the farming losses when calculating Donald's monthly income.

Next, Donald argues that the amount of his insurance premium should be deducted from his monthly income prior to calculating the child support obligation. The increased cost to the parent for health insurance for the child or children of the parent shall be allowed as a deduction from gross income. Nebraska Child Support Guidelines, paragraph E. The parent requesting an adjustment for health insurance premiums must submit proof of the amount of the premium.

Our review of the record shows that Donald did not sustain his burden of proof on this issue. Donald asked the district court to deduct the amount of his insurance premium from his

monthly income calculation, even though he failed to prove that he incurred an increased cost to maintain the coverage for Nathan and Meghan. Donald testified that the premium on the HMO policy was $400 per month. Donald, his current wife, his wife's son, and Nathan and Meghan are all covered by the insurance policy. Donald did not establish that the insurance premium actually increased because Nathan and Meghan were named on the policy.

Donald also testified that he pays his current wife $300 per month to compensate for the insurance cost for Nathan and Meghan. He concluded that he was obligated to compensate his wife $300 per month because he had two children and she had only one child. However, Donald did not establish that the $300 per month actually reflected the cost of insuring Nathan and Meghan. Therefore, Donald presented no information by which the district court could have found that he was entitled to deduct $300 per month from his monthly income, and we find no abuse of discretion.

In addition, the district court directed Donald to obtain new health insurance for Nathan and Meghan. Donald's HMO policy would not cover nonemergency care provided by a physician other than the children's primary physician. Mary and the children live approximately 250 miles from the primary physician. If Mary wanted the HMO to cover the children's routine health care, she was forced to drive approximately 500 miles to and from Lincoln. Even if Mary contacted the HMO within 24 hours of treatment by a doctor other than the primary physician, the treatment was covered by insurance only if it was characterized by the HMO as emergency medical treatment. After Meghan was diagnosed with diabetes, Mary was obligated to frequently take her to the doctor, and Mary incurred substantial medical costs as a result thereof. In light of the facts that Mary and the children now live approximately 250 miles from Lincoln and that one of the children has been diagnosed with an illness which requires frequent medical attention, the district court did not abuse its discretion when it ordered Donald to obtain a new health insurance policy for the children.

In his appellate brief, Donald argues that the district court abused its discretion when calculating child support, because it

failed to consider his obligation to support his present family. During oral arguments, this assignment of error was waived, and we do not address it.

The judgment of the district court is affirmed.

AFFIRMED.

DOROTHY PUTNAM, APPELLANT, V.
JEFF FORTENBERRY ET AL., APPELLEES.
589 N.W. 2d 838

Filed February 19, 1999. No. S-97-1235.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
4. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
5. **Records: Appeal and Error.** An appellate brief generally may not expand the evidentiary record and should limit itself to arguments supported by the record. An appellate court may, however, consider agreed circumstances presented to it in brief or argument.
6. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
7. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
8. **Injunction.** The purpose of an injunction is to restrain actions that have not yet been taken.
9. ____. Injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.

10. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
11. **Declaratory Judgments.** At the time that a declaratory judgment is sought, there must be an actual justiciable issue.
12. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
13. **Declaratory Judgments.** Declaratory relief cannot be used to obtain a judgment which is merely advisory.
14. **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, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
15. ____: ____. It is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting, even if the problem is likely to recur.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

D. Milo Mumgaard and Vincent M. Powers for appellant.

William F. Austin, Lincoln City Attorney, for appellees.

Craig Groat, amicus curiae.

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

GERRARD, J.

INTRODUCTION

Dorothy Putnam appeals from the district court's denial of temporary and permanent injunctions against the appellees, Jeff Fortenberry; Cindy Johnson; Dale Young, Jerry Shoecraft; Colleen Seng; Curt Donaldson; Linda Wilson; City of Lincoln, Nebraska; and Michael Johanns (hereinafter collectively the City), enjoining the City from completing the sale of Lincoln General Hospital (hereinafter Lincoln General) from the City of Lincoln to Bryan Memorial Hospital and Bryan Healthcare, Inc. (hereinafter collectively Bryan). The threshold issue we must address is whether it is appropriate for us to review the denial of an injunction, given that the act Putnam sought to enjoin was completed several months ago.

FACTUAL AND PROCEDURAL BACKGROUND

Lincoln General was an independent municipal hospital owned by the City of Lincoln, employing 1,124 part-time and full-time employees. On September 2, 1997, an ordinance was introduced during the Lincoln City Council meeting to approve a "Master Affiliation Agreement by and among Bryan Healthcare, Inc. and Bryan Memorial Hospital and The City of Lincoln, Nebraska and The Board of Trustees of Lincoln General Hospital" (hereinafter affiliation agreement). The affiliation agreement provided generally that Lincoln General would be sold to Bryan for a price of $42 million.

A public hearing was held on September 8, 1997, and the ordinance was passed by the city council on September 15. The affiliation agreement was executed by all the parties on October 1 and set forth a closing date of October 31.

Putnam first filed a petition in the district court on September 11, 1997, regarding this sale. Putnam's amended petition asked the district court, under various theories, to issue a declaratory judgment stating that the actions of the City in passing the ordinance and executing the affiliation agreement were contrary to law and were null and void, and to grant a permanent injunction preventing the City from attempting to convey Lincoln General to any other person, entity, or corporation.

On October 21, 1997, the district court denied Putnam's request for a temporary and a permanent injunction. The district court rejected Putnam's arguments that the deed to the Lincoln General property created restraints on alienation, that the property was held in public or testamentary trust, that the City lacked the legal authority to make the sale, that the public meetings statutes were violated, and that the sale was made without adequate consideration. On November 20, Putnam filed a notice of appeal, and we removed the case to the Supreme Court docket on our own motion.

Significantly, the sale of Lincoln General has been completed. The affiliation agreement established a closing date of October 31, 1997, with Bryan to take possession of Lincoln General on November 1. No injunction was issued by the district court, and the record reveals no stay or supersedeas bond, before or after the filing of the notice of appeal. The City indi-

cated in its brief that the sale had been completed, Putnam conceded this fact in her reply brief, and both parties acknowledged during oral argument that the sale had been completed.

ASSIGNMENTS OF ERROR

Putnam assigns, restated, that the district court erred (1) in finding that the City possessed the statutory authority necessary to sell Lincoln General and (2) in finding no violation of Nebraska's public meetings statutes.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Omega Chem. Co. v. United Seeds*, 252 Neb. 137, 560 N.W.2d 820 (1997); *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, 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. *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998).

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998).

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

ANALYSIS

Prior to reaching the errors assigned by Putnam, we must consider whether the completion of the sale of Lincoln General

has rendered this case moot. Evidence of the completion of the sale, however, does not appear in our record on appeal. An appellate brief generally may not expand the evidentiary record and should limit itself to arguments supported by the record. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995); *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988). We have held, however, that an appellate court "may consider agreed circumstances presented to it in brief or argument." *Koenig v. Southeast Community College*, 231 Neb. 923, 925, 438 N.W.2d 791, 794 (1989). See, also, *City of Crete v. County of Saline*, 214 Neb. 200, 332 N.W.2d 926 (1983). In their arguments presented to this court, the parties have agreed that the sale of Lincoln General has been completed.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. McCormick*, 246 Neb. 890, 523 N.W.2d 697 (1994).

As a general rule, a moot case is subject to summary dismissal. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

INJUNCTIVE RELIEF

In the present case, the City argues that since the sale of Lincoln General has been closed, this appeal is moot, since injunctive relief is no longer available to resolve the issues presented. The purpose of an injunction is to restrain actions that have not yet been taken. *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995). It is well established that injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done. *Rawson v. Harlan County, supra*; *Koenig v. Southeast Community College, supra*; *Propst v. Board of Educational Lands and Funds*, 156 Neb. 226, 55 N.W.2d 653 (1952), *cert. denied* 346 U.S. 823, 74

S. Ct. 39, 98 L. Ed. 348 (1953). See, *Duggan v. Beermann, supra*; *Elson v. Schmidt*, 136 Neb. 778, 287 N.W. 196 (1939). See, also, *Bishop v. Huff*, 81 Neb. 729, 116 N.W. 665 (1908).

> "Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction."

Conrad v. Kaup, 137 Neb. 900, 902, 291 N.W. 687, 688 (1940).

In *Koenig v. Southeast Community College, supra*, this court faced a situation in which the plaintiffs brought an action to enjoin the closure of a community college campus and the relocation of its programs to another campus. At the time the action was brought, the resolutions of the college board of governors had been implemented to only a small degree. *Id.* No supersedeas was requested or granted, however, and by the time the appeal was submitted to this court, the closing and relocation at issue had been completely accomplished. *Id.* This court determined:

> In this case the matter is fait accompli, and the action has been taken. No court could now prohibit what has already taken place, nor is it likely that any court would restore the situation as it existed prior to the passage of the resolutions. As to injunction, the case has become moot.

Id. at 925-26, 438 N.W.2d at 794.

Similarly, *Elson v. Schmidt, supra*, presented a situation in which a stockholder in a dissolved corporation sought to enjoin the liquidating trustees of the corporation from disposing of some of the corporate assets. The trustees alleged that the assets had already been transferred, but the plaintiff challenged the validity of the sale. *Id.* In an appeal from the denial of injunctive relief, we determined:

> The controlling question on this appeal is whether the trustees have been divested of title to the [assets]. If title does not remain in them, the decree of the district court must be affirmed. Equity will not issue an injunction where the act is already committed and the injury is done.

Id. at 779, 287 N.W. at 197. After determining that the trustees had already transferred title to the assets, this court affirmed the district court's dismissal of the stockholder's petition, because the relief sought had been rendered moot. *Id.*

Finally, in *Propst v. Board of Educational Lands and Funds, supra*, we decided a case in which the holder of a school land lease, Propst, sought to prevent the sale of the land for which he held a leasehold estate. Propst's right to renew his lease had been voided when the statute under which the lease had been obtained was found unconstitutional. *Id.* When the Board of Educational Lands and Funds sought to sell new leases for school property, Propst sued to prevent the sale. *Id.*

Propst himself bought the new lease at an auction before his case was determined, however. *Id.* We noted that Propst "made no effort to have the court by order in this case delay or postpone the sale proceedings until the case could be heard and decided." *Id.* at 234, 55 N.W.2d at 658. We ultimately found that since the sale which Propst sought to prevent had been completed, injunctive relief would not lie, and the case was moot. *Id.*

We do not discern a meaningful distinction between the circumstances of the aforementioned cases and those of the instant appeal. Because the act which Putnam sought to enjoin is complete, our opinion on the trial court's denial of injunction would be nugatory. We, therefore, conclude that the issue of injunctive relief is moot.

DECLARATORY JUDGMENT

In addition to seeking an injunction against the sale of Lincoln General, Putnam sought a declaratory judgment that the sale was unlawful. Thus, we must next determine whether declaratory judgment is also moot.

A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). At the time that the declaration is sought, there must be an actual justiciable issue. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). A jus-

ticiable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); *Koenig v. Southeast Community College, supra.*

In *Koenig v. Southeast Community College*, 231 Neb. at 926, 438 N.W.2d at 795, we ultimately determined:

> At this stage of the litigation, judicial enforcement of any decree attempting to eliminate the reallocations, renovations, installations, expenditures, and transfer would be impossible. A declaratory judgment could no more prohibit what has taken place than could an injunction. The case is moot as to declaratory judgment as well as to injunction.

Similarly, in the present case, a declaratory judgment would suffer from the same infirmities as an injunction. Declaratory relief would not undo what has already been completed. A declaratory judgment in this case would be nothing more than advisory, and "declaratory relief cannot be used to obtain a judgment which is merely advisory." *Galyen v. Balka*, 253 Neb. at 276, 570 N.W.2d at 524. Putnam's request for declaratory judgment is also moot.

Public Interest Exception

Putnam concedes that the sale of Lincoln General has been completed, but argues that we should consider this case under the public interest exception to the mootness doctrine.

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, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997).

We find in the instant case that while the issues presented involve public questions, there is little need for authoritative adjudication of these issues, because of the remote likelihood of another case presenting the same or similar circumstances. The

issues presented in this case rest on the terms of this particular sale, the particular deeds and bequests made for Lincoln General's benefit, and the particular procedures that were used to approve the sale in this case. It is highly unlikely that another case could present a similar factual situation.

Moreover, the posture of this case is due to the terms of this particular contract, the relief sought by Putnam, and the strategic choice of Putnam in not attempting to prevent the sale from closing during the pendency of appellate review. The nature of this case would not inherently preclude appellate review. It is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting, even if the problem is likely to recur. See *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993) (holding that appeal of denial of postconviction relief was moot where issues presented would not inherently evade review). See, also, *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988); *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978), *cert. denied* 439 U.S. 1068, 99 S. Ct. 836, 59 L. Ed. 2d 34 (1979) (moot case in which transitory setting was invoked as prerequisite to application of public interest exception).

In short, we conclude that the public interest exception to the mootness doctrine does not apply in this case.

CONCLUSION

Since Putnam did not seek to prevent this sale from going forward pending review, there was no obstacle to the parties' closing the sale as scheduled by the affiliation agreement. Moreover, since injunctive relief would no longer be effective, an appeal from the denial of such relief no longer provides the opportunity for meaningful disposition. As the act complained of has been completed, Putnam's request for injunction is moot. Declaratory judgment would be completely nugatory, and Putnam's request for declaratory relief is also moot. The public interest exception to the mootness doctrine, urged upon us by Putnam, does not properly apply in this case.

In view of the conclusion that this case presents no properly justiciable issues, the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD L. SCHMELING, RESPONDENT.

589 N.W. 2d 833

Filed February 19, 1999. No. S-98-992.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof: Appeal and Error.** The Nebraska Supreme Court, in its de novo review of the record, must find that a particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding.
3. **Disciplinary Proceedings: Rules of the Supreme Court: Time.** According to Neb. Ct. R. of Discipline 10(H) (rev. 1996), a respondent has a 30-day period in which to answer formal charges filed against him or her. If the respondent fails to answer the charges within this time, or if the respondent's answer raises no issue of fact or law, the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.

Original action. Judgment of disbarment.

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

PER CURIAM.

On September 25, 1998, formal charges were filed by the relator, Nebraska State Bar Association, against the respondent, Richard L. Schmeling, a member of the relator association. Additional formal charges were filed against Schmeling the

same day. For the reasons set forth below, we order Schmeling's disbarment, effective immediately.

FACTS

The charges filed against Schmeling in the instant case arise from his representation of two clients in separate matters. We briefly summarize the facts relevant to each complaint.

Hefner Complaint.

Mary Hefner (Hefner) retained Schmeling in 1990 to represent her in the dissolution of her marriage to Carl Hefner, Jr. Hefner paid Schmeling $200 when she retained him and later paid him further sums for his representation. Schmeling filed a petition seeking dissolution of Hefner's marriage in the district court for Lancaster County on October 26, 1990, and he shortly thereafter obtained an order for temporary support for the benefit of the Hefner children, who lived with Hefner.

Schmeling did not complete the Hefner divorce. Unbeknownst to Hefner, the case was dismissed by the court for lack of prosecution in 1994, and, thus, Hefner was not divorced from Carl Hefner. Hefner alleged that Schmeling did not inform her that her divorce case had been dismissed for lack of prosecution and that she did not learn of the case's dismissal and her continued married status until another attorney so advised her in 1997.

On July 16, 1997, in a written response to the relator's request for information about the Hefner case, Schmeling disputed Hefner's claim that the discovery of her married status came as a surprise to her, because according to Schmeling, as a result of a prior divorce, "Mary knew full well that in order to be divorced, you have to go to court for a hearing[.]" Schmeling stated that he did not complete the divorce because he could not locate Carl Hefner to complete the division of the marital estate and compute child support. Evidence introduced by the relator showed that Carl Hefner was readily located by agencies that enforced Carl Hefner's child support arrearage and that Carl Hefner personally appeared in a Colorado court in May 1992 regarding income withholding to satisfy his child support obligation.

The relator filed charges against Schmeling based upon Schmeling's representation of Hefner, charging Schmeling with violating the provisions of Canons 1, 6, and 7 of the Nebraska Code of Professional Responsibility, as set forth below:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> (3) Neglect a legal matter entrusted to him.
>
> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his representation of a client, a lawyer shall not:
>
> (2) Fail to carry out a contract of employment entered into with a client for professional services[.]

We note that the relator's reference to DR 7-102 as set forth above incorporates a portion of DR 7-101.

These charges were scheduled for hearing by the Committee on Inquiry of the First Disciplinary District on February 16, 1998. Schmeling acknowledged in writing his receipt of the charges, which were delivered to him by certified mail. Nonetheless, Schmeling did not personally appear at the hearing, and his interests were not represented by counsel. After the relator's presentation of evidence, the Committee on Inquiry found cause to believe that Schmeling had committed the ethical violations with which he was charged. Formal charges were filed with this court on September 25. Schmeling has not responded to them.

Chrastil Complaint.

In additional formal charges against Schmeling filed with this court on September 25, 1998, the relator alleged that during the period of 1989 through 1995, Schmeling represented Mark Chrastil in connection with a workers' compensation matter. The additional formal charges alleged, inter alia, that in his representation of Chrastil, Schmeling allowed an applicable statute of limitations to expire, thereby extinguishing Chrastil's ability

to seek judicial redress for his injury; failed to perform or acquire a study of Chrastil's lost earning capacity; made insufficient efforts to obtain reimbursement for the costs of treatment for Chrastil's injury or condition; and pursued no award of permanent partial disability benefits for Chrastil.

Subsequent to the occurrence of the events alleged in the additional formal charges, Chrastil retained other counsel. Chrastil filed a petition against Schmeling alleging professional negligence and seeking $83,120 in damages. Schmeling made no answer or appearance in this case, and on December 23, 1996, Chrastil obtained a judgment against Schmeling. Invoking judicial process, Chrastil collected part of his judgment against Schmeling in May 1997. The remainder of the judgment is unsatisfied.

The relator's additional formal charges alleging Schmeling's breach of his professional responsibilities to Chrastil were served upon Schmeling on October 15, 1998. The relator alleged that in Schmeling's representation of Chrastil, Schmeling breached the following provisions of Canon 1 of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

The relator further alleged that Schmeling violated DR 6-101(A)(3) and DR 7-102(A)(2), both of which are set forth above in connection with the charges stemming from Schmeling's representation of Hefner. Schmeling filed no response to these charges.

Failure to Respond to Relator's Inquiry.

The relator alleged in a separate count of the additional formal charges that on March 13, 1998, the relator sent Schmeling a copy of Chrastil's complaint alleging Schmeling's violation of the Code of Professional Responsibility and requested Schmeling's response to the allegations. The relator received no

response from Schmeling. On March 31, a second such letter was sent to Schmeling, again seeking his response to Chrastil's allegations of unethical and unprofessional breaches of conduct. Schmeling did not respond to this letter or to three subsequent reminder letters sent to him by the relator. Schmeling also did not respond to the additional formal charges filed against him by the relator regarding Chrastil's complaint.

The relator alleges that Schmeling's failure to respond constitutes a violation of Canon 1, DR 1-102(A)(1), (4), and (5), which provides as follows, in pertinent part:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.

Based upon the foregoing facts and Schmeling's failure to respond to the formal charges and additional formal charges filed against him in this court, on November 17, 1998, the relator requested this court to enter judgment on the pleadings against Schmeling.

SCOPE OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996). The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding. *Id.*

ANALYSIS

This court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska. *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995). In furtherance of this responsibility, this court has adopted rules of discipline which provide, inter alia, that misconduct by an attorney shall be grounds for the imposi-

tion of sanctions ranging from censure to disbarment. *Id.* "The purpose of an attorney disciplinary proceeding is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice." *Id.* at 604, 537 N.W.2d at 634.

According to Neb. Ct. R. of Discipline 10(H) (rev. 1996), a respondent has a 30-day period in which to answer formal charges filed against him or her. If the respondent fails to answer the charges within this time, or if the respondent's answer raises no issue of fact or law, the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings. Neb. Ct. R. of Discipline 10(I). See, also, *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 568 N.W.2d 214 (1997).

Due to Schmeling's failure to respond to the charges against him, the record before us in the instant case consists principally of the relator's charges and evidence. As noted above, regarding the Hefner matter, Schmeling made one written response to the relator's initial inquiry. Schmeling thereafter failed to appear at the hearing convened by the Committee on Inquiry, and he has not responded to the formal charges in this court which are the subject of this action. Schmeling has made no answer whatsoever to the Chrastil complaint, despite repeated opportunities to do so offered by the relator. On the record before us, we find clear and convincing evidence that Schmeling has committed the ethical breaches with which he has been charged.

In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances. In determining the imposition of discipline, the court should bear in mind that cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. See *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998). In this regard, we are aware of *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995), in which Schmeling was suspended from the practice of law for 1 year based on the neglect of a bankruptcy matter and three prior reprimands.

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Schleich, supra.* We have previously observed that "the violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment." *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 472, 558 N.W.2d 53, 56 (1997).

This court has consistently held that a lawyer who neglects an entrusted matter has failed to act competently and has committed unprofessional conduct. *Johnston, supra*; *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996). The instances of unprofessional conduct described in the charges at issue bear a regrettable resemblance to past instances in which Schmeling has neglected professional matters entrusted to him. See *Schmeling, supra.* The charges in the instant case are not isolated events. Schmeling has been afforded past opportunities to monitor his compliance with the Code of Professional Responsibility, including three private reprimands and a 1-year suspension from the practice of law. *Id.* Schmeling's persistent neglect of legal matters entrusted to him and his failure to respond to the pending charges lead us to conclude that we cannot allow such neglectful and uncooperative practices to possibly harm the public in this state in the future. See, *Johnston, supra*; *Johnson, supra.*

CONCLUSION

Balancing Schmeling's interest in the privilege of practicing law against the nature of his breach of the Code of Professional Responsibility, the need to maintain the reputation of the bar as a whole, and the need to protect the public, we determine that Schmeling must be, and hereby is, disbarred, effective immediately.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

ZACHARY R. CLAYTON, APPELLANT, V. GARY E. LACEY, APPELLEE.

589 N.W. 2d 529

Filed February 26, 1999. No. S-97-893.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court.
2. **Jurisdiction: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1995), a district court has jurisdiction over a petition-in-error proceeding only when it is reviewing a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.
3. **Prosecuting Attorneys.** A pretrial diversion decision made by the county attorney is not a decision made by a tribunal, board, or officer exercising judicial functions, rather, it is an exercise of prosecutorial discretion.
4. ____. A pretrial diversion decision made by the county attorney is not the exercise of either a judicial or quasi-judicial function.
5. **Prosecuting Attorneys: Appeal and Error.** While a petition in error is not the proper method for challenging the prosecutor's failure to accept the defendant into a diversion program, prosecutorial discretion, while not subject to review by a petition in error, is subject to review when the decision involves the deliberate use of suspect classifications.

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

Dennis R. Keefe, Lancaster County Public Defender, and Kristi J. Egger Brown for appellant.

Michael E. Thew, Deputy Lancaster County Attorney, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Zachary R. Clayton, was arrested and charged with burglary. Clayton sought to avoid prosecution by participating in the Lancaster County pretrial diversion program, but was denied admission by the Lancaster County Attorney's office. Clayton then filed a petition in error in the Lancaster County District Court seeking judicial review of that decision.

Appellee, Gary E. Lacey, Lancaster County Attorney, demurred on the grounds that the trial court did not have jurisdiction over the subject matter of the action and that the petition in error did not allege facts sufficient to state a cause of action. The trial court sustained Lacey's demurrer on both grounds. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We affirm.

BACKGROUND

Clayton was arrested and charged with the felony offense of burglary pursuant to Neb. Rev. Stat. § 28-507 (Reissue 1995). Clayton sought to avoid prosecution by participating in the diversion program. The burglary charge was dismissed at Clayton's costs to allow him to participate in the diversion program. Clayton was denied admission to the diversion program by the county attorney's office. No reason was provided in the letter Clayton received from the county attorney's office. Clayton was again charged with the same burglary offense which had previously been dismissed. Pursuant to the pretrial diversion eligibility criteria and program conditions, Clayton served written notice of his desire to appeal the denial of his request to participate in the pretrial diversion program. Prior to the administrative review hearing, Clayton's counsel was notified by the county attorney's office that part of the reason Clayton had been rejected from the diversion program was due to the fact that firearms were taken in the burglary.

An evidentiary hearing was conducted by hearing officer James Cada, and Cada subsequently issued a written decision, concluding that Lacey acted in an arbitrary and capricious manner in denying Clayton pretrial diversion, but further found that "there should be an exception where there are weapons [involved]."

Following Cada's written decision, Lacey served written notice upon Clayton's attorney that he was still refusing to allow Clayton into the pretrial diversion program. Lacey's letter specifically stated that "[t]his case dealt with stolen guns. [Clayton] was requested to provide information for the police to gain possession of those guns. He refused to cooperate in any

way with that reasonable request and as such will not be given the benefit of the program."

Clayton filed a petition in error in the district court pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1995), seeking judicial review of Lacey's decision. Lacey demurred on the grounds that the trial court did not have jurisdiction over the subject matter of the action and that the petition in error did not allege facts sufficient to state a cause of action. The trial court sustained Lacey's demurrer on both grounds and dismissed Clayton's action, ruling that Lacey's decision to deny Clayton's request to participate in the diversion program was not "a judgment rendered or final order made by any tribunal, Board or Officer exercising judicial functions" as required by § 25-1901 and was not, therefore, an appropriate matter to be raised by petition-in-error proceedings.

ASSIGNMENT OF ERROR

Clayton assigns that the trial court erred as a matter of law in ruling that Lacey's decision to deny Clayton's request to participate in the diversion program did not involve the exercise of a "judicial function" as required by § 25-1901 and was not, therefore, an appropriate matter to be raised by petition-in-error proceedings.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court. *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995).

BACKGROUND OF LANCASTER COUNTY PRETRIAL DIVERSION PROGRAM

Lacey, in his official capacity as Lancaster County Attorney, has established a pretrial diversion program pursuant to Neb. Rev. Stat. §§ 29-3601 to 29-3603 (Reissue 1995). In addition, Lacey has established formal eligibility guidelines which have been reduced to writing as required by § 29-3603(1). Burglary is an eligible felony offense under the guidelines. The guidelines specifically state that the county attorney reserves the right

to reject any applicant to the program whose offense is deemed too serious for the program.

Section 29-3603(7) requires that defendants who are denied enrollment in a diversion program be afforded an administrative review of the decision and written reasons for denial. Lancaster County's diversion program guidelines specifically state that anyone denied admission to the program will be notified in writing by either the county attorney, city attorney, or diversion services of the decision and the reasons for denial. The guidelines further provide that if the defendant wants an administrative hearing, he or she must file written notice with the county attorney and diversion services. Administrative reviews are heard by local attorneys in private practice who have been appointed as hearing officers by the Lincoln Bar Association and have volunteered their services. The decision of the hearing officer is advisory and is not binding on the county attorney. The purpose of the hearing is limited to determining whether the county attorney's decision was arbitrary and capricious.

ANALYSIS

We begin our analysis by noting that Clayton was not notified in writing by the county attorney, city attorney, or diversion services of the reasons for his initial denial of admission into the pretrial diversion program as required by § 29-3603(7) and the guidelines. While we recognize that there was an error made in not notifying Clayton in writing of the reasons for his denial, and we do not condone such errors, the fact that written reasons were not given does not affect our analysis or the outcome in this case.

Clayton brought this case as a petition in error. Pursuant to § 25-1901, a district court has jurisdiction over a petition-in-error proceeding only when it is reviewing "[a] judgment rendered or final order made by any tribunal, board or officer exercising judicial functions and inferior in jurisdiction to the district court . . . ." Clayton's claim arises from Lacey's decision to deny Clayton admission into the diversion program. We conclude that a pretrial diversion decision made by the county attorney is not a decision made by a tribunal, board, or officer exercising judicial functions, rather, it is an exercise of prose-

cutorial discretion. It is not the exercise of either a judicial or a quasi-judicial function.

While a petition in error is not the proper method for challenging the prosecutor's failure to accept the defendant into a diversion program, prosecutorial discretion, while not subject to review by a petition in error, is subject to review when the decision involves the deliberate use of suspect classifications. See, *U.S. v. Richardson*, 856 F.2d 644 (4th Cir. 1988); *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988) (where pretrial motion to dismiss in criminal proceeding on basis of violation of equal protection because of selective prosecution was denied).

CONCLUSION

Lacey's decision to deny Clayton admission to the diversion program is not a decision made by a tribunal, board, or officer exercising judicial functions, as required under § 25-1901 for a petition in error. Because it lacked subject matter jurisdiction, the trial court did not err in sustaining Lacey's demurrer and dismissing the action.

AFFIRMED.

JOHN M. MUELLER AND JANET RAE MUELLER, HUSBAND AND WIFE, APPELLANTS, AND CEDAR VALLEY PARTNERSHIP, A NEBRASKA PARTNERSHIP, APPELLEE, V. HOWARD J. BOHANNON AND GRACE BOHANNON, HUSBAND AND WIFE, AND HAROLD B. MCGOWAN AND SHIRLEY M. MCGOWAN, HUSBAND AND WIFE, APPELLEES.

589 N.W. 2d 852

Filed February 26, 1999. No. S-97-1067.

1. **Equity: Quiet Title.** A quiet title action 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, reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Abandonment: Words and Phrases.** Abandonment is the voluntary and intentional relinquishment of a right to property.

4. **Easements: Abandonment: Intent.** An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing.
5. **Easements: Abandonment: Intent: Time: Proof.** In proving intention to abandon an easement, time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him or her, and the intention which the one or the other indicates, that are important.
6. **Easements: Abandonment: Pleadings: Proof.** Abandonment of an easement must be pled and proved, the burden of proof being on the party alleging it.
7. **Easements: Abandonment: Intent: Proof.** As to easements created by express grant or deed, evidence of nonuse cannot by itself prove abandonment, no matter how long the nonuse. Nonuser is relevant evidence of abandonment, but must be combined with other facts which indicate an intent of the easement holder to abandon its use.
8. **Abandonment: Proof.** The evidence proving abandonment must be clear and convincing.
9. **Easements: Abandonment: Intent: Proof.** The fact that an easement holder finds a more convenient alternative route instead of using the easement does not deprive the easement holder of the easement that remains for the holder's use and enjoyment whenever the holder has occasion to use the right.
10. **Easements: Abandonment.** If an owner of an easement, by his own act, renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him.
11. **Equity.** Equity aids the diligent and not the negligent.

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

David E. Pavel for appellants.

Nile K. Johnson and Charles A. Nye for appellees the Bohannons and the McGowans.

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

CONNOLLY, J.

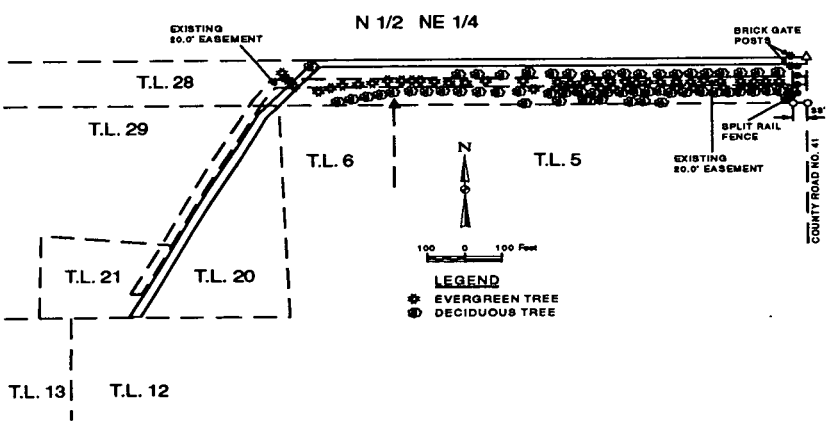
Appellees Howard J. Bohannon (Bohannon) and Grace Bohannon claim an easement across property owned by appellants John H. Mueller (Mueller) and Janet Rae Mueller. The easement was created by deed in the Bohannons' chain of title. The Muellers filed this quiet title and declaratory judgment action asking the district court to declare (1) that the claimed easement was not sufficiently described, (2) that it was not

properly recorded, or (3) that the Bohannons and their predecessors in title abandoned the easement. The district court granted the Muellers summary judgment. On appeal, the Nebraska Court of Appeals reversed, and remanded the cause on the abandonment issue. On remand, the district court ruled that the easement had not been abandoned. The Muellers appeal.

This appeal presents the question, Where an easement is created by express grant or deed, does evidence that the easement holder and/or its predecessors did not use the easement for more than the prescriptive 10-year period raise a presumption of abandonment and shift the burden of proof to the easement holder? We conclude that an easement created by deed does not raise a presumption of abandonment and that the burden did not shift to the Bohannons. However, we determine that the Muellers have proved by clear and convincing evidence that the Bohannons have abandoned the easement. Accordingly, we reverse.

BACKGROUND

The property in question encompasses tax lots in the south half of the northeast quarter of Section 28, Township 17 North, Range 12 East of the 6th P.M., in Washington County, Nebraska. The following is a sketch depicting the road and easement and other features relevant to this appeal. The sketch is for illustrative purposes only and does not purport to be drawn to scale.



In a warranty deed dated December 22, 1976, appellees Harold B. McGowan (McGowan) and Shirley M. McGowan sold Tax Lots 20 and 21 to James Culver and Nola Culver (Culver). Prior to selling the lots, McGowan constructed a road that began on its east end at a county road and ran westerly through what is now Tax Lot 28, then turned southwest and ran through what is now Tax Lot 29 and then between Tax Lots 20 and 21. The illustration above represents the road by solid lines. The deed to the Culvers granted "a permanent easement for ingress and egress to the premises . . . ." The illustration above represents the actual easement by dotted lines. McGowan stated that his intent was that the easement that the deed described represent the road he constructed.

In June 1982, the Culvers sold the Bohannons Tax Lots 12, 13, 20, and 21 by warranty deed. The permanent easement in the previous deed to the Culvers was also contained in the deed to the Bohannons. The Bohannons reside east of Tax Lots 12 and 13 and have direct access to a county road from their residence. After the 1982 land purchase, the Bohannons owned a continuous strip of property from their residence to Tax Lots 20 and 21. However, a vehicle like a tractor or four-wheel-drive vehicle would be necessary to reach Tax Lots 20 and 21 through their property, because of the lay of the land.

In September 1984, the McGowans sold Tax Lots 28 and 29 to Cedar Valley Partnership by warranty deed, and Cedar Valley in turn sold the lots to the Muellers by a land contract dated October 5, 1987. Prior to purchasing the property, Mueller noticed the approximately 25-foot-wide sliver of property separating Tax Lots 20 and 21 and testified that he approached Bohannon with an offer to exchange portions of land to make Tax Lot 29 more usable. Mueller testified that Bohannon declined and made no mention that Bohannon claimed an easement on the property between Tax Lots 20 and 21.

In the spring of 1989, a dispute arose concerning the validity of the easement. Bohannon testified that he first informed Mueller of the claimed easement that spring, telling Mueller that he had the right to use the road as owner of an easement. Mueller objected, telling Bohannon that there was no easement on the property and that Bohannon had no business on his prop-

erty. A couple of days later, Bohannon presented Mueller with documentation of the easement.

The record, however, reflects that the easement is not actually located on the road that the Bohannons utilized. Rather, a 1996 survey shows that the easement that the Bohannons' and the Culvers' deeds describe is a 20-foot strip of land beginning within Tax Lot 21, running northeasterly through Tax Lot 21's northern boundary into Tax Lots 28 and 29 and then running easterly through Tax Lot 28 to a county road, as outlined by dotted lines on the illustration above. Mature trees stand upon much of the actual easement. However, the record reveals that McGowan planted those trees prior to the sale to the Culvers.

The Muellers and Cedar Valley filed this quiet title and declaratory judgment action in November 1993 against the Bohannons and the McGowans. The district court granted the Muellers summary judgment. The Court of Appeals reversed on appeal, finding that (1) the McGowan-to-Culver deed described the easement with sufficient detail to convey title and (2) the Muellers had constructive notice that the easement burdened their property. *Mueller v. Bohannon*, 96 NCA No. 26, case No. A-95-237 (not designated for permanent publication). However, the Court of Appeals determined that a fact question existed as to whether the Bohannons abandoned the easement and remanded the cause for trial on the issue of abandonment.

In a separate action, the Bohannons filed suit against the Muellers, asking the district court to declare that the Bohannons obtained an easement by prescription over the road that they actually used. The Bohannons' petition included a survey map indicating that, as shown by the above illustration, the easement they were granted does not follow the existing roadway. The Muellers answered in part that the Bohannons could not have obtained an easement by prescription because the Bohannons' use of the roadway was done with the permission of the Muellers and their predecessors in title. The Bohannons' lawsuit was joined for trial with the Muellers' quiet title and declaratory judgment action.

At trial, Bohannon admitted that he never used the actual easement described in his deed. He said the Bohannons did not use it because they did not know that the actual easement was

something other than the existing roadway. He said that McGowan had told them that the existing roadway was the easement. Culver testified that to access Tax Lots 20 and 21 the Culvers used, exclusively, the existing roadway. Culver stated that they never had a surveyor confirm where the easement was located, but, rather, assumed that stakes outlining the east side of Tax Lot 21 and the west side of Tax Lot 20 indicated where the easement was.

Bohannon testified that he fenced Tax Lots 20 and 21, including the north side of Tax Lot 21, in order to maintain cattle on the property.

The district court, in separate orders, determined in the Muellers' lawsuit that the actual easement was not abandoned and determined in the Bohannons' lawsuit that the Bohannons did not obtain a prescriptive easement over the existing roadway. The Bohannons did not appeal the order relating to their prescriptive easement claim. The Muellers appealed the district court's abandonment ruling, which is now before us.

ASSIGNMENTS OF ERROR

The Muellers assign, restated, that the district court erred in (1) finding that the written existing easement in favor of the Bohannons was not abandoned; (2) failing to find that the easement was not used for a period of more than 10 years; (3) failing to find that the nonuse of the easement raised a presumption of abandonment not rebutted by the Bohannons; (4) failing to find that the easement had been abandoned because the existing easement was never intended to be an easement, was never utilized as such, and could not be practically utilized as a roadway easement; and (5) failing to find that the Bohannons exhibited an intent to abandon the existing easement.

SCOPE OF REVIEW

A quiet title action sounds in equity. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995). 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, reaches a conclusion independent of the findings of the trial court, sub-

ject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996); *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *Poppleton v. Village Realty Co., supra*; *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995).

ANALYSIS

Presumption of Abandonment From Mere Nonuse

The record clearly reflects that the Bohannons never used the actual easement described in their deed from the time that they purchased the property until the filing of this lawsuit—a period of over 11 years. The Muellers argue that the Bohannons' nonuse of the easement for more than the 10-year prescriptive period raises a presumption that the Bohannons abandoned the easement. The Muellers contend that pursuant to *Hillary Corp. v. United States Cold Storage, supra*, the presumption shifted the burden to the Bohannons to prove that they did not intend to abandon the easement, that the Bohannons failed to produce any rebutting evidence, and thus that the district court erred in finding that the Bohannons had not abandoned the easement. The Bohannons distinguish *Hillary Corp.* on grounds that that case involved an implied easement rather than one created by deed, as in this case. The Bohannons argue that where an easement is created by deed or grant, mere nonuse of the easement for no matter how long neither raises any presumption nor shifts the burden of proof.

Abandonment is the voluntary and intentional relinquishment of a right to property. See *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977). An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954); *Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932). See *Davco Realty Co. v. Picnic Foods, Inc., supra*. " 'Time is not a necessary element; it is not the duration of the nonuser, but the nature of the

acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important . . . .' " *Williams*, 123 Neb. at 72, 242 N.W. at 271. Abandonment of an easement must be pled and proved, the burden of proof being on the party alleging it. *Hillary Corp. v. United States Cold Storage, supra*; *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N.W. 236 (1907), *overruled on other grounds, Hillary Corp. v. United States Cold Storage, supra.*

Notwithstanding the rule that it is the party alleging abandonment that has the burden of proof, we first stated in *Agnew v. City of Pawnee City, supra*, and restated in *Hillary Corp. v. United States Cold Storage*:

> An intention to abandon an easement cannot be inferred from the mere fact that the easement was not used for a period of years in excess of the prescriptive period. See, *Masid v. First State Bank, supra*; *Agnew v. City of Pawnee City, supra*. However, nonuse of an easement for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuse is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it.

Id. at 415, 550 N.W.2d at 900. We then stated that if the easement holder or its predecessor used the easement within the 10-year prescriptive period, the burden of proving an intent to abandon the easement remains with the party asserting abandonment. *Id.* However, if the easement holder and/or its predecessors did not use it within the prescriptive period, a presumption of abandonment arises and the burden of rebutting the presumption is on the easement holder by proving that it and/or its predecessors did not intend to abandon the easement. *Id.*

The Bohannons correctly assert that each occasion to which we have applied this burden-shifting rule involved implied or prescriptive easements, rather than easements created by express grant or deed. See, *Hillary Corp. v. United States Cold Storage, supra* (involving implied easement from former use); *Masid v. First State Bank, supra* (involving prescriptive ease-

ment); *Agnew v. City of Pawnee City, supra* (involving prescriptive easement). The question then is, Does evidence of nonuse of an easement created by express grant or deed, for the prescriptive period, shift the burden of proof to the easement holder such that if the easement holder does not rebut the evidence the party asserting abandonment may succeed without presenting any further evidence of abandonment?

The law was settled by the time of our decision in *Agnew* that, at least as to easements created by express grant or deed, evidence of nonuse could not by itself prove abandonment no matter how long the nonuse. See, *Edgerton v. McMullan*, 55 Kan. 90, 39 P. 1021 (1895) (stating that the law is well settled that mere nonuser of an easement granted by deed does not constitute abandonment); *Welsh v. Taylor*, 134 N.Y. 450, 31 N.E. 896 (1892) (holding that mere nonuse of an easement created by deed does not affect title to the easement); *Dill v. Board of Education of Camden*, 47 N.J. Eq. 421, 435-36, 20 A. 739, 744 (1890) (stating "[i]t is well settled that mere non-user for any length of time, no matter how long, will not destroy or extinguish an easement arising, as here, out of express grant, as distinguished from one arising out of long adverse user"); *Lindeman v. Lindsey*, 69 Pa. 93, 99-100 (1871) (stating "[i]f the instrument contain the grant of an easement or privilege to either party in the land or the water, against such a grant there is no statute of limitation without actual hostile and adverse possession, and certainly no prescription or presumption from mere non-user"); Emory Washburn, A Treatise on the American Law of Easements and Servitudes, ch. V, § 6 at 717 (4th ed. 1885) (stating "if the easement has been acquired by deed, no length of time of mere non-user will operate to impair or defeat the right").

Additionally, *Struve v. Republican V. R. Co.*, 2 Neb. (Unoff.) 585, 590-91, 89 N.W. 604, 606 (1902), although only its conclusion was adopted by this court, stated: "Whatever may be the rule in relation to the abandonment of an easement acquired otherwise than by deed, the authorities all agree that non-user of an easement acquired by deed for any length of time is not an abandonment."

Moreover, modern authority is in agreement. Nonuser is relevant evidence of abandonment, but must be combined with other facts which indicate an intent of the easement holder to abandon its use. *Franck Bros., Inc. v. Rose*, 301 S.W.2d 806 (Mo. 1957); *Owens Hardware Co. v. Walters*, 210 Ga. 321, 80 S.E.2d 285 (1954); *Simms v. Fagan*, 216 Minn. 283, 12 N.W.2d 783 (1943); *First Nat. T. & S. Bank v. Smith*, 284 Mich. 579, 280 N.W. 57 (1938); *Fruit Growers Co. v. Donald*, 96 Colo. 264, 41 P.2d 516 (1935); *McHugh v. Haley*, 61 N.D. 359, 237 N.W. 835 (1931); *Wallkill Farms Homeowners v. Velazquez*, 205 A.D.2d 681, 613 N.Y.S.2d 641 (1994); *Feldman v Monroe Twp Board*, 51 Mich. App. 752, 216 N.W.2d 628 (1974); *Alabama Power Co. v. Dailey*, 31 Ala. App. 441, 18 So. 2d 142 (1944); 4 Powell on Real Property § 34.20 (1998); 3 Herbert Thorndike Tiffany, The Law of Real Property § 825 (3d ed. 1939 & Cum. Supp. 1996); 7 Thompson on Real Property § 60.08(b)(3)(ii) (David A. Thomas ed. 1994); Annot., Loss of Easement, 25 A.L.R.2d 1265, § 2-4 (1952); 5 Restatement of Property § 504, comment *d.* (1944). We have stated that the important facts to prove abandonment are " 'the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates . . . .' " *Williams v. Lantz*, 123 Neb. 67, 72, 242 N.W. 269, 271 (1932).

Welsh v. Taylor, supra, aptly explained the rationale why mere nonuse of an easement created by express grant or deed cannot be sufficient to prove the easement was abandoned. *Welsh* stated:

> A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by non-user, and unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that when the occasion arises for its use and enjoyment he will find his rights therein absolute and unimpaired.

134 N.Y. at 460-61, 31 N.E. at 899.

Thus, we agree with the Bohannons and conclude that the burden of proof did not shift to the Bohannons upon evidence that the easement was not used for more than 10 consecutive years. Mere nonuse for any period of time cannot by itself extinguish an easement acquired by deed.

FACTS INDICATING ABANDONMENT

Having determined that the burden of proof did not shift to the Bohannons, we determine that the Muellers still have the burden of proof and must show additional facts indicating that the Bohannons or their predecessor easement holders, the Culvers, intended to abandon the easement, in order to prevail. The evidence proving abandonment must be clear and convincing. *Koshian v. Kirchner*, 139 A.D.2d 942, 527 N.Y.S.2d 921 (1988); *Franck Bros., Inc. v. Rose, supra*; 7 Thompson on Real Property, *supra*.

The Muellers assert that additional facts in the record indicate an intent to abandon the actual easement. The Bohannons contend that the Muellers "did nothing more than prove that the [Bohannons] were mistaken as to the true location of the easement and, instead of using the granted easement, used a roadway alongside of it." Brief for appellees the Bohannons and the McGowans at 5. On that basis, the Bohannons argue that the Muellers failed to produce sufficient evidence proving the Bohannons intended to abandon the easement.

We first note that while the proof of nonuse is not sufficient to prove abandonment by itself, that proof is nonetheless objective evidence indicating that the Bohannons intended to abandon the easement. The strength of this evidence is heightened by the fact that the only other owners of the easement, the Culvers, also never used the easement. Thus, not only was this easement not used for about 17 years, it was *never* used. The easement was never cleared or prepared for potential use.

The Muellers argue that the fact that the Culvers and McGowans accessed the property by means other than the easement created by the deed is evidence that they intended to abandon the property. We disagree. "[T]he fact that the easement holder finds a more convenient alternative route does not

deprive the easement holder of the easement that remains for the holder's use and enjoyment whenever the holder has occasion to use the right." *Jackvony v. Poncelet*, 584 A.2d 1112, 1117 (R.I. 1991). See, *Witt v. McKenna*, 600 A.2d 105 (Me. 1991); *Scott v. Long Valley Farm Kentucky, Inc.*, 804 S.W.2d 15 (Ky. App. 1991); *Gagnon v. Carrier*, 96 N.H. 409, 77 A.2d 868 (1951). Such is the case here. Additionally, the Muellers stated in their answer to the Bohannons' companion case that any use that the Bohannons made of the roadway was done with permission of the Muellers and their predecessors in title. The Bohannons' use of the roadway, then, was not an unequivocal act indicating an intent to abandon the actual easement.

The Muellers next argue that the Culvers erected a fence along the north side of Tax Lot 21 which would block the existing easement and would be evidence of abandonment. Culver testified that a fence existed on the north side of Tax Lot 21. However, her testimony is unclear as to whether she meant that such a fence existed when the Culvers purchased the land, whether she meant they placed a fence there, or whether she was simply observing that a fence exists presently along the north side of Tax Lot 21, which is true.

However, Bohannon testified at trial that he erected a fence along the north side of Tax Lot 21. He stated:

> Q. . . . Now, with regard to Exhibit No. 22, would you point out to us where the fences are and when they were erected or if they were erected when you bought the property?
>
> A. No, I bought them. I put them up myself.
>
> . . . .
>
> Q. Is there a fence line on the north of tax lot 21?
>
> A. There is a fence line on the north side of 21 and on the west side of 21.
>
> . . . .
>
> Q. Now, you put all those fences up?
>
> A. Right.
>
> Q. When did you erect those fences?
>
> A. Whenever I got cattle. I can't tell you for sure what year that was.

Q. Were there any fences in place in any of this area when you first bought the land?

A. No.

"If an owner of an easement, by his own act, renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him." *Toelle v. Preuss*, 172 Neb. 239, 241-42, 109 N.W.2d 293, 294 (1961). Bohannon's construction of the fence, then, is objective evidence of abandonment.

After considering the Muellers' arguments and conducting a de novo review of the record, we conclude that the evidence of nonuse from the time of the easement's creation, combined with Bohannon's construction of a fence across the easement, is sufficiently clear and convincing evidence to show that the Bohannons intended to abandon the actual easement.

However, the Bohannons argue that "it would be logically impossible for them to [abandon the easement] because they did not know the location of the easement." Brief for appellees the Bohannons and the McGowans at 6. This argument misses the mark because if the Bohannons did not know of the actual location of the easement, they should have known. The deed of conveyance to the Bohannons expressly described the easement's location. The Court of Appeals determined, and it is the law of the case, that the McGowan-Culver deed's description of the easement was adequate. That description is identical to the easement description in the deed of conveyance to the Bohannons, as the Court of Appeals noted. A survey would have revealed the true location of the easement, as evidenced by the survey prepared for the trial in this case. However, the record indicates the Bohannons did not have a survey conducted when they purchased the property, nor did they rely on any survey. Equity aids the diligent and not the negligent. See, *Abels v. Bennett*, 158 Neb. 699, 64 N.W.2d 481 (1954); *Peters v. Huff*, 63 Neb. 99, 88 N.W. 179 (1901). The Bohannons had the means in their possession to obtain actual knowledge of the easement. See *Abels v. Bennett, supra*. Thus, we conclude on these facts that the Bohannons' stated lack of actual knowledge is not persuasive as to their argument.

CONCLUSION

Evidence that the Bohannons did not use the actual easement granted by their deed, for whatever length of time, raised no presumption that shifted the burden of proving abandonment to the Bohannons. However, the record contains sufficient evidence objectively indicating, clearly and conclusively, that the Bohannons abandoned the actual easement. Accordingly, we reverse.

REVERSED.

IN RE APPLICATION OF SANITARY AND IMPROVEMENT DISTRICT NO. 384 OF DOUGLAS COUNTY, NEBRASKA, TO CERTAIN EASEMENTS IN DOUGLAS COUNTY, NEBRASKA, BY EMINENT DOMAIN TO BE OWNED AND USED BY CONDEMNOR FOR ITS CORPORATE PURPOSES. SANITARY AND IMPROVEMENT DISTRICT NO. 384 OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. BRUHNS PACKING COMPANY, APPELLANT, AND BANK OF ELKHORN ET AL., APPELLEES.

589 N.W. 2d 542

Filed February 26, 1999. No. S-97-1076.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.
5. ____: ____: ____. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **Judgments: Costs: Attorney Fees.** An award of attorney fees in a condemnation case is taxed as costs, and costs are considered part of the judgment.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Appeal dismissed.

Gregory C. Scaglione and Amy B. Blumenthal, of Koley, Jessen, Daubman & Rupiper, P.C., for appellant.

David L. Welch, of Gaines, Mullen, Pansing & Hogan, for appellee SID No. 384.

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

WRIGHT, J.

NATURE OF CASE

The landowner, Bruhns Packing Company (BPC), argues that the compensation it received for a temporary and permanent easement was inadequate because it was not allowed to introduce evidence concerning the loss of vegetation located on the condemned land and because the jury was specifically instructed to disregard any possible value such vegetation might have added to the fair market value of the land.

After trial, BPC filed a motion for attorney fees, expert witness fees, prejudgment interest, and costs. The district court failed to rule on this motion before BPC filed its notice of appeal.

SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

FACTS

In 1995, Sanitary and Improvement District No. 384 of Douglas County, Nebraska (SID), decided to construct an interceptor and outfall sanitary sewerline over, upon, and under BPC's property. Thereafter, SID attempted to enter into an agreement with BPC as to the value of the acquisition of a permanent and temporary easement, but the parties were unable to reach an agreement. SID filed a petition to condemn BPC's property, and a board of appraisers was appointed to assess the damages to BPC. The board of appraisers assessed the damages as $31,850, and BPC appealed to the Douglas County District Court.

A jury found that BPC had been damaged in the amount of $40,000. On September 23, 1997, BPC filed a motion for attor-

ney fees, expert witness fees, prejudgment interest, and costs, pursuant to Neb. Rev. Stat. §§ 25-1708 (Reissue 1995) and 76-711 and 76-720 (Reissue 1996). BPC claimed that it was entitled to be compensated $10,822 in attorney fees, $7,705 in expert witness fees, $8,236.86 in prejudgment interest, and $383.88 in costs. On October 7, 3 days before the notice of appeal had to be filed, the motion was heard and the matter was taken under advisement. The district court failed to rule upon the motion before the notice of appeal was filed on October 10.

ASSIGNMENTS OF ERROR

BPC claims that the district court erred (1) by refusing to admit evidence regarding damage to vegetation caused by the taking; (2) by refusing to give BPC's requested jury instructions regarding vegetation damages and by instructing the jury to disregard vegetation damages; (3) by refusing to admit evidence concerning SID's notice of acquisition; (4) by dismissing BPC's claim that Neb. Rev. Stat. §§ 76-706 and 76-707 (Reissue 1996) are unconstitutional; and (5) by failing to sustain BPC's motion for attorney fees, expert witness fees, prejudgment interest, and costs prior to the deadline for appeal.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998). In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

BPC filed its motion for fees, interest, and costs pursuant to §§ 25-1708, 76-711, and 76-720. For purposes of this opinion, we need review only the request for attorney fees pursuant to § 76-720. Section 76-720 provides in part that if the condemnee takes an appeal and obtains an award that is at least 15 percent more than that granted by the appraisers, then the court, in its discretion, may award the condemnee a reasonable sum for the fees of his or her attorney. See, also, *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994); *Keller v. State*, 184 Neb. 853, 172 N.W.2d 782 (1969).

The issue is whether absent a ruling on the motion for attorney fees, the order from which BPC appealed is a final, appealable order. We conclude that until the district court rules on at least the portion of the motion pertaining to attorney fees, there is no final, appealable order.

In *Keller v. State, supra*, and in *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997), we held that awards of attorney fees in condemnation cases are allowed and are taxed as costs. Moreover, Neb. Rev. Stat. § 76-726 (Reissue 1996) supports the conclusion of *Keller v. State* and *Abboud v. Papio-Missouri River NRD* that attorney fees are considered costs in condemnation proceedings. Section 76-726 allows for the court to award costs, disbursements, and expenses to a condemnee who seeks a review of a condemnation award. Included in the definition of costs, disbursements, and expenses are reasonable attorney, appraisal, and engineering fees. Thus, awards for attorney fees in condemnation cases are allowed and are taxed as costs.

Next, we consider whether costs are considered separately or as part of a judgment. In *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970), the issue on appeal was whether an award of costs could be retaxed by the district court after appeal. The appellant claimed that costs taxed in the district court were part of the judgment of that court and that after the term in which the judgment was entered, they could not be vacated or modified except in the manner authorized by statute. In deciding this issue, we overruled any contradictory case law and made it clear that an award of costs was to be considered part of the judgment.

An award of attorney fees in a condemnation case is taxed as costs, and costs are considered part of the judgment. Therefore, an award of attorney fees in condemnation cases should also be considered part of the judgment. The failure of the district court to rule on BPC's motion left a portion of the judgment unresolved, and consequently, the order from which BPC appealed is not final. See *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997) (order is final when no further act of trial court is required to dispose of cause).

Similar facts were presented in *State ex rel. Fick v. Miller, supra*. There, parents of a child sought a writ of mandamus against the board of education of their child's school. The district court in part dismissed the parents' petition and in part granted the writ and taxed costs against the defendants, including "'the amount of attorneys fees for the benefit of the relators' attorney to be determined in a supplementary proceeding at a later date . . . .'" *State ex rel. Fick*, 252 Neb. at 165, 560 N.W.2d at 795. After determining that attorney fees taxed as costs were part of a judgment, we concluded that the judgment could not be a final, appealable order, since it did not specify the amount of attorney fees to be awarded and indicated that the amount would be determined at a future date.

In the case at bar, BPC filed a motion for attorney fees that has not been ruled on by the district court. Once BPC filed the motion in question, it placed at issue an award of attorney fees. This issue must be resolved before there is a final, appealable order. Because the order from which BPC appealed is not final and appealable, we dismiss the present appeal for lack of jurisdiction.

APPEAL DISMISSED.

ROBERT NELSON ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE, AND MLP ENTERPRISES, INTERVENOR-APPELLEE.

589 N.W.2d 522

Filed February 26, 1999. No. S-97-1175.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.

2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Municipal Corporations: Statutes.** In analyzing the Omaha Municipal Code, a legislative enactment, we follow the same rules as those of statutory analysis.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** A statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute.
6. ____. 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.
7. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. In making such motion, the moving party admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn from such facts. The moving party also admits the untruth of his or her own allegations insofar as they have been controverted.
8. ____: ____: ____. On a motion for judgment on the pleadings, a court cannot assume the existence of facts not alleged.
9. **Pleadings.** Failure to file a reply controverting a new allegation raised in an answer to a petition results in the allegation's being taken as true.
10. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
11. **Motions for New Trial.** The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.

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

Christopher D. Curzon, of Dwyer, Smith, Grimm, Gardner, Pohren, Lazer & Rogers, for appellants.

Alan M. Thelen for appellee.

Michael J. Mooney and Jerry M. Slusky, of Gross & Welch, P.C., for intervenor-appellee.

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

HENDRY, C.J.

INTRODUCTION

Subsequent to the approval of a proposed development by the Omaha City Council, a group of real property owners, Robert Nelson et al. (Homeowners), possessing land abutting and around the proposed development, filed a petition for injunctive relief and declaratory judgment against the City of Omaha. Homeowners alleged that the proposed development was a "Major Amendment" to a planned unit overlay district (PUD) originally approved by the Omaha City Council in 1984 and, therefore, required a supermajority vote of the city council for approval, rather than the 4-to-3 vote which occurred. After the developer, MLP Enterprises (MLP), was allowed to intervene, the district court entered judgment on the pleadings in favor of the City of Omaha and MLP. Homeowners now appeal from the district court's judgment and denial of their motion for new trial. For the reason that the Omaha Municipal Code does not require a five-sevenths vote of the city council to approve a "major amendment" to a PUD which does not involve a boundary change, we affirm.

BACKGROUND

On April 4, 1997, MLP filed an application with the City of Omaha Planning Department, requesting to amend an existing PUD. A PUD is an overlay district which is used in combination with a base district and is adapted to the special needs of the different areas of the city. Omaha Mun. Code, ch. 55, art. XI, § 55-582 (1996). An overlay district is a district established to prescribe special regulations to a site that is to be used only in combination with a base district. Omaha Mun. Code, ch. 55, art. II, § 55-28 (1996). A base district is a district with established regulations governing its use and development. Omaha Mun. Code, ch. 55, art. II, § 55-15 (1996).

A PUD is intended to provide flexibility in the design of planned urban projects and may be used only in the manner permitted by the underlying base district. Omaha Mun. Code, ch. 55, art. XI, §§ 55-584 and 55-585 (1996). The purpose of a PUD is to encourage comprehensive planning of major developments and innovation in project design and to ensure com-

patibility with the surrounding environment. Omaha Mun. Code, ch. 55, § 55-584.

> A PUD entails a legal description, a topographic map, a general site plan, and a utility site plan. It is essentially a "footprint" of the buildings and is required by the city of Omaha whenever multiple buildings are to be built on a single lot. The developer is required to build exactly as the plans indicate.

Tuttle & Assoc. v. Gendler, 237 Neb. 825, 828, 467 N.W.2d 881, 883 (1991). As we noted with regard to conditional zoning, a PUD is a device which allows the city flexibility to extract improvements that bare zoning ordinances do not provide. See *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

The Omaha Planning Department determined MLP's application for the proposed development to be a "major amendment to a planned unit overlay district" and unanimously approved it for recommendation. The application was then submitted for approval to the Omaha City Council. Prior to the vote of the Omaha City Council, a formal protest was filed by Homeowners, who believed that their protest would require the city council to approve the "major amendment" by a five-sevenths vote of the council members. The City of Omaha Law Department, however, determined that the formal protest did not apply to an "amendment" of a PUD. Thereafter, the Omaha City Council approved the "major amendment" by a vote of 4 to 3.

On August 27, 1997, Homeowners filed a petition against the City of Omaha, in the district court for Douglas County, alleging the following facts:

> 1. Plaintiffs are residents of the City of Omaha, in Douglas County, State of Nebraska, and are real property owners in, abutting and around the proposed development set forth in paragraph 3.
>
> 2. Defendant, City of Omaha, is a municipal corporation, pursuant to Omaha Municipal Code, City Charter §1.10, and existing as a city of the metropolitan class, pursuant to Neb.Rev.Stat. §14-10 et seq., in Douglas County, State of Nebraska.
>
> 3. The City of Omaha is duly constituted and authorized to exercise sundry zoning powers, pursuant to City Code

§§55-1 et seq. and Neb.Rev.Stat. §§14-401 et seq., and thereby regulate, restrict, control and oversee the commercial and residential development of real property within the jurisdictional boundaries of the City of Omaha.

4. On or about April 4, 1997, MLP Enterprises, 11780 Manchester Road, Suite 207, Des Peres, Missouri, 63131, filed an Application Planned Unit Development with the City of Omaha Planning Department and requested that an existing Planned Unit Development Overlay District, approved in 1984, on certain real property located informally southeast of 103rd Street and Hamilton Street, in the City of Omaha, Douglas County, Nebraska, and containing 13.2 acres, be amended to allow certain alterations. The proposed "Major Amendment to a Planned Unit Overlay District," was approved by the City of Omaha Planning Board on May 7, 1997.

5. On June 25, 1997, certain Plaintiffs filed a Formal Protest, with the City Clerk for the City of Omaha, to the Major Amendment to a Planned Unit Development Overlay District, pursuant to Omaha Code §55-590(I) and Neb.Rev.Stat. §14-405, and which protest would require the City Council to approve the Major Amendment to Planned Unit Development Overlay District by five-sevenths of the council members. Those signatories on the Formal Protest represented more than twenty percent (20%) of the abutting landowners to the real property described in paragraph 3.

6. Consideration of the Major Amendment to a Planned Unit Development Overlay District was scheduled for hearing before the City Council for the City of Omaha on July 29, 1997. Prior to the date of the council hearing, the City of Omaha Law Department determined that the Formal Protest was not effective as the aforementioned Omaha Code section did not apply to an amendment to a planned unit development overlay district but only applied to rezoning.

7. On or about July 29, 1997, the City Council for the City of Omaha adopted on a four to three vote an ordi-

nance approving the aforedescribed Major Amendment to a Planned Unit Development Overlay District.

In their petition, Homeowners contended that the City of Omaha Law Department erred in determining "the Formal Protest filed by the signatories thereto did not apply to the consideration and adoption of the Major Amendment to Planned Unit Development Overlay District, and a 4 to 3 vote was acceptable for passage of the ordinance instead of a 5 to 2 vote . . . ." Homeowners sought a declaratory judgment from the district court finding the Omaha City Council's 4-to-3 vote insufficient to approve the proposed development. Homeowners also requested injunctive relief to prevent the enforcement of the ordinance and the issuance of building permits for the proposed project.

MLP filed a petition of intervention, claiming an interest in the litigation and a potential for substantial damage if the project was delayed. Intervention was permitted, and MLP, along with the City of Omaha, filed answers to Homeowners' petition. MLP's answer alleged that the application for the amendment did not request any change in the boundaries of the PUD. Homeowners never filed a reply to either MLP's or the City of Omaha's answer. Thereafter, the City of Omaha and MLP each filed a motion for judgment on the pleadings, claiming that Homeowners' petition failed to state a cause of action. The matter was heard before the district court for Douglas County, and on September 18, 1997, the court entered judgment on the pleadings in favor of the City of Omaha and MLP on both causes of action. The court found the "major amendment" did not involve a change in boundaries and, therefore, approval of the amendment did not require a favorable vote of five-sevenths of all members of the city council. Homeowners then filed an application for a new trial, which was overruled by the court on October 14.

Homeowners filed a notice of appeal in the district court for Douglas County on November 12, 1997. We removed the case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Homeowners contend, rephrased, that the district court erred in (1) finding that a 5-to-2 vote by the Omaha City Council was not required to approve the "major amendment" to the PUD, in light of Homeowners' formal protest made pursuant to Omaha Mun. Code, ch. 55, art. X, § 55-590(i) (1996), and Neb. Rev. Stat. § 14-405 (Reissue 1997), and (2) denying Homeowners' motion for a new trial.

STANDARD OF REVIEW

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997).

As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996); *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996).

ANALYSIS

FORMAL PROTEST

Homeowners' first assignment of error alleges that the district court erred in finding that a five-sevenths vote was not required by the Omaha City Council to approve the "major amendment" to the PUD. Homeowners argue that pursuant to § 55-590(i) of the Omaha Municipal Code and § 14-405, the formal protest required a supermajority of the Omaha City Council to approve the "major amendment."

Section 55-590 of the Omaha Municipal Code relates to the application and adoption process of a PUD district. Specifically, Omaha Mun. Code § 55-590(i) states "[a]ny protest against a PUD planned unit development overlay district shall be made and filed as provided by R.R.S. 1943, § 14-405, and amendments thereto." As referenced by § 55-590(i), § 14-405 provides:

> Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. *When a protest against a change of boundaries is presented to the city clerk at least six days*

> *prior to the city council vote on such change, such change shall not become effective except by a favorable vote of five-sevenths of all members of the city council.* The protest shall be in writing, signed, and sworn and acknowledged pursuant to section 64-206 by the required owners. For purposes of this section, the required owners shall mean those fee simple owners of record as recorded by the register of deeds owning at least twenty percent of the area: (1) Included in the proposed change; (2) abutting either side of the proposed change; (3) abutting the rear of the proposed change; (4) abutting the front of the proposed change; or (5) directly opposite of the proposed change on the other side of a dedicated public right-of-way and extending fifty feet on either side of such opposite lot.

(Emphasis supplied.)

To determine when a formal protest of a major amendment to a PUD triggers the requirement of a supermajority vote of the city council, we must examine those portions of the Omaha Municipal Code pleaded by the parties which are part of the record. See *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). In analyzing the Omaha Municipal Code, a legislative enactment, we follow the same rules as those of statutory analysis. See, *Omaha City Emp. Local 251 v. City of Omaha*, 222 Neb. 412, 384 N.W.2d 271 (1986); *Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977).

First, we look to the plain language of the code. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998). It is clear from the plain language of Omaha Mun. Code § 55-590(i) that a formal protest must be made and filed pursuant to § 14-405.

Homeowners claim that Omaha Mun. Code § 55-590(i) specifically refers to "any" protest against a PUD and that, therefore, "all" protests against PUDs require a supermajority

vote of the city council, regardless of the "change of boundaries" qualification found in § 14-405. We have stated that a statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). In this instance, it is a city code which has adopted a Nebraska statute by a specific reference. The adopting reference in Omaha Mun. Code § 55-590(i) does not limit the adoption to any specific portion of § 14-405. Homeowners' assertion that § 55-590(i) does not adopt the "change of boundaries" requirement in § 14-405 is without basis.

Section 14-405 clearly states that a five-sevenths vote of the city council is necessary when a protest is "*against a change of boundaries.*" (Emphasis supplied.) There is nothing in the statute indicating that a five-sevenths vote is required to approve any other change that is protested. See § 14-405. 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. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). Accordingly, by the adoption of § 14-405, Omaha Mun. Code § 55-590(i) requires a vote of five-sevenths of the city council to approve an amendment *only* when "a protest [is] against a change of boundaries." § 14-405. If the formal protest is unrelated to a change in boundaries, there is no requirement that there must be a supermajority vote of the city council for approval.

In their petition, Homeowners never allege the protest was against a "change of boundaries." Homeowners specifically allege that the formal protest was filed against a "Major Amendment to a Planned Unit Development Overlay District." More accurately stated, the proposed amendment was an amendment to the development plan of the PUD. This is so because the proposed changes in the amendment deal with the design of the buildings and the utilization of the land encompassed by the PUD. Additionally, Homeowners conceded at oral argument that the actual physical placement and location of the

PUD were not altered in any manner by the "amendment" from the original PUD, which was adopted in 1984.

To get approval for a "major amendment" to the development plan of an existing PUD, MLP did exactly as required by the Omaha Municipal Code. Section 55-591 of the Omaha Municipal Code specifically provides for the approval of "major amendments" to the development plan of a PUD. Omaha Mun. Code, ch. 55, art. XI, § 55-591 (1996). There is no requirement that a "major amendment" to the development plan of a PUD be approved by a five-sevenths vote of the city council. See Omaha Mun. Code § 55-591. All that is required by § 55-591 to approve a "major amendment" is "approv[al] by the city council" after a recommendation for such amendment is submitted by the planning board. This procedure, as alleged by Homeowners in their petition, was followed.

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. In making such motion, the moving party admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn from such facts. The moving party also admits the untruth of his own allegations insofar as they have been controverted. *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997). However, on a motion for judgment on the pleadings, a court cannot assume the existence of facts not alleged. *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

The district court correctly found that a five-sevenths vote was not required by the Omaha City Council to approve a "major amendment" which did not involve a change in the PUD's boundaries. Therefore, assuming the truth of all facts pleaded in Homeowners' petition and all reasonable inferences to be drawn from those facts, Homeowners never stated a claim. There was neither an allegation nor an inference that the "amendment" constituted a "change in boundaries." Notwithstanding, Homeowners attempted to argue, in their brief and at oral argument, that although not specifically alleged, a "change of boundaries" was implied by their general allegations.

In paragraph 4 of their petition, Homeowners allege that MLP's application requested that an "existing Planned Unit

Development Overlay District, approved in 1984, on certain real property located informally southeast of 103rd Street and Hamilton Street, in the City of Omaha, Douglas County, Nebraska, and containing 13.2 acres, be amended to allow certain alterations." This allegation indicates that "certain alterations" are to be made on the existing PUD, at the same location and containing the same amount of real property. In addition, MLP's answer specifically alleges that the proposed amendment did not involve any change of boundaries of the PUD. This allegation is deemed to be true because it was never controverted by Homeowners in that Homeowners never filed a reply to MLP's answer. See *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989) (holding failure to file reply controverting new allegation raised in answer to petition resulted in allegation's being taken as true).

Given paragraph 4 of Homeowners' petition and Homeowners' failure to controvert MLP's specific allegation that in the "amendment," there "were no changes required in the boundaries," the reasonable inference to be drawn is that Homeowners did not allege a "change of boundaries" in their petition. Consequently, the City of Omaha and MLP were entitled to judgment as a matter of law, and judgment on the pleadings was properly entered. Homeowners' first assignment of error is without merit.

NEW TRIAL

In their second assignment of error, Homeowners assert that the district court erred in not granting them a new trial. A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997). The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists. *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). A motion for new trial is to be granted only when error prejudicial to the

rights of the unsuccessful party has occurred. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996).

Homeowners' application for a new trial was properly denied because the City of Omaha and MLP were entitled to judgment as a matter of law. Homeowners' petition failed to state a cause of action, and therefore, judgment on the pleadings, in favor of the defendants, was proper. Because the City of Omaha and MLP were entitled to judgment as a matter of law, we find no error occurred that was prejudicial to the rights of Homeowners and no legal cause existed to grant a new trial.

CONCLUSION

For the foregoing reasons, the decisions of the district court (1) granting judgment on the pleadings to the City of Omaha and MLP and (2) denying Homeowners' application for a new trial are affirmed.

AFFIRMED.

STEVE HENDERSON, APPELLANT, V. DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

589 N.W.2d 520

Filed February 26, 1999. No. S-98-169.

1. **Jurisdiction: Appeal and Error.** Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim.
4. **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 agency, as represented by the Attorney General, makes a voluntary appearance.
5. **Jurisdiction: Immunity: Waiver.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent, and the state's immunity from suit cannot be waived by a voluntary general appearance by the Attorney General.

Appeal from the District Court for Lancaster County: Bernard J. McGinn, Judge. Reversed and remanded with directions to dismiss.

Steve Henderson, pro se.

Don Stenberg, Attorney General, and Linda L. Willard for appellees.

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

WRIGHT, J.

NATURE OF CASE

Steve Henderson appeals from the denial of his petition for writ of mandamus.

SCOPE OF REVIEW

Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

FACTS

Pursuant to a plea of guilty, Henderson was convicted of incest, and subsequently, he was sentenced to incarceration for a period of not less than 3½ nor more than 7 years. Henderson appealed his conviction to the Nebraska Court of Appeals, which summarily affirmed, and a mandate issued on September 2.

On September 18, 1997, Henderson filed a petition for writ of mandamus in the district court for Lancaster County. Among other things, Henderson sought a writ directing the Department of Correctional Services (Department) and its officers Gary Grammer and John Martin to establish Henderson's projected release date as one-half of his maximum term, in accordance with Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1996).

The district court determined that the Department had properly calculated Henderson's projected release date, and the court denied his request for writ of mandamus. Henderson appeals.

ASSIGNMENTS OF ERROR

In summary, Henderson asserts that the district court erred in finding that the Department had properly calculated his projected release date and in failing to issue a writ directing the Department to recalculate such date.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State, supra.* When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim. *Id.*

We first note that Henderson failed to serve summons upon either the office of the Attorney General, as the representative of the Department, or the Department's officers Grammer and Martin. While the voluntary appearance of a party is equivalent to service, Grammer and Martin did not make such an appearance. See *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996). Thus, the district court lacked personal jurisdiction over Grammer and Martin, and they are not parties to this action. See, *id.*; *State Furniture Co. v. Abrams*, 146 Neb. 342, 19 N.W.2d 627 (1945); Neb. Rev. Stat. § 25-217 (Reissue 1995).

The Attorney General's office, on the other hand, entered a voluntary general appearance. 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 agency, as represented by the Attorney General, makes a voluntary appearance. *Nebraska Methodist Health Sys. v. Dept. of Health, supra.* See *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995).

Still, we must address whether the district court had subject matter jurisdiction over this action against the Department. Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the

state. See, e.g., *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998); *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997); *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995); *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993). Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent, *Riley v. State, supra*, and the state's immunity from suit cannot be waived by a voluntary general appearance by the Attorney General, see *McShane v. Murray*, 106 Neb. 512, 184 N.W. 147 (1921).

We conclude that Henderson's mandamus action against the Department is barred by sovereign immunity. Neb. Rev. Stat. § 25-2156 (Reissue 1995) states in part: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Nothing in the statutes governing mandamus, Neb. Rev. Stat. §§ 25-2156 through 25-2169 (Reissue 1995), indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency. Therefore, we conclude that the district court lacked subject matter jurisdiction over Henderson's action against the Department. See, *In re Russell*, 155 F.3d 1012 (8th Cir. 1998) (federal mandamus statute does not waive sovereign immunity); *Taylor v. Troy State University*, 437 So. 2d 472 (Ala. 1983) (mandamus action against state university was barred by sovereign immunity, although action against president and vice president as individuals was not); *Love v. Bachman*, 44 Md. App. 282, 408 A.2d 743 (1979) (in order to maintain mandamus action against state agency, legislature must have explicitly or implicitly removed protective barrier of governmental immunity).

CONCLUSION

Having determined that the district court lacked personal jurisdiction over Grammer and Martin and lacked subject matter jurisdiction over the action against the Department, we reverse the judgment and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

RONALD VARIANO, APPELLANT, V. DIAL CORPORATION, APPELLEE.

589 N.W.2d 845

Filed February 26, 1999. No. S-98-712.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), 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. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
3. **Workers' Compensation: Presumptions.** The only opinion regarding vocational rehabilitation or loss of earning power entitled to a rebuttable presumption pursuant to Neb. Rev. Stat. § 48-162.01(3) (Reissue 1998) is that of a vocational rehabilitation counselor chosen or selected by the procedures set forth in § 48-162.01(3).
4. **Workers' Compensation: Words and Phrases.** The phrase "loss-of-earning-power evaluation" in Neb. Rev. Stat. § 48-162.01(3) (Reissue 1998) refers to a process as opposed to a document.
5. **Presumptions: Proof: Words and Phrases.** A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof.
6. **Workers' Compensation: Rules of Evidence: Presumptions: Proof.** Pursuant to Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995), in all cases not otherwise provided for by statute or by such rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to Neb. Rev. Stat. § 48-162.01(3) (Reissue 1998) is correct.
7. **Workers' Compensation.** Workers' compensation benefits awarded pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 1998) are not measured by loss of bodily function, but by reduction in earning power or employability.
8. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1998), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

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

Thomas F. Dowd, of Dowd & Dowd, for appellant.

Thomas D. Wulff and Kevin L. Flynn, of Welch & Wulff, for appellee.

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

STEPHAN, J.

In this workers' compensation case, each party claims the benefit of a rebuttable presumption pursuant to Neb. Rev. Stat. § 48-162.01 (Reissue 1998), based upon seemingly inconsistent opinions regarding loss of earning power expressed by the same court-appointed vocational rehabilitation counselor. We conclude that when considered together in their chronological sequence, the counselor's opinions establish a rebuttable presumption that the employee sustained a total loss of earning power as a result of his compensable injury and that the evidence is insufficient as a matter of law to rebut the presumption.

FACTS AND PROCEDURAL BACKGROUND

On May 8, 1995, Ronald Variano sustained an injury to his back after lifting a 50-pound container during the course of his employment with Dial Corporation. He has not been employed since that time. Variano was examined by his primary care physician, Dr. Karen Stacey, on May 11, 1995. Dr. Stacey diagnosed a lumbar sacral back strain with right sciatica. While continuing with Variano's overall care, Dr. Stacey referred Variano to Dr. Richard Belatti for pain management and Drs. Frank P. LaMarte and D.M. Gammel for evaluation.

Variano was paid temporary total disability benefits from May 9, 1995, through November 11, 1996. On July 12, 1996, at the request of Variano and Dial's workers' compensation carrier, the workers' compensation court appointed Richard Metz, a vocational counselor, to determine the extent of Variano's loss of earning power. Metz submitted a report dated September 11, 1996 (hereinafter September report), in which he stated that Variano required vocational rehabilitation services and "will have sustained a loss of earning power of 25%-30%" as a result of his work-related injury. This report cited a 10-percent impairment rating given by Dr. Gammel and a 7-percent impairment rating from Dr. LaMarte. The report also identified, based on a functional capacity evaluation completed by Dr. Gammel on January 15, Variano's known functional restrictions and limitations.

After submitting the September report, Metz continued working toward identifying a specific vocational goal which would restore Variano to suitable work. Before completing this process, Metz requested clarification from Dr. Stacey concerning Variano's functional impairments and restrictions. Dr. Stacey eventually provided Metz with a physical capacities evaluation which differed slightly from the functional capacity evaluation completed by Dr. Gammel. After receiving this information from Dr. Stacey, Metz completed his vocational analysis and concluded in a February 23, 1997, letter report that Variano would not benefit from vocational rehabilitation.

On March 4, 1997, Variano's attorney wrote a letter to Metz, with a copy to Dial's workers' compensation carrier, requesting clarification of Metz' opinion regarding Variano's loss of earning power. The letter stated in relevant part:

> I familiarized myself with your report of September 11, 1996 and your recent letter of February 23, 1997. It appears from a review of the most recent letter that you have now concluded based on Dr. Stacey's functional restrictions and limitations that Mr. Variano is not able to engage in substantial competitive employment and that vocational rehabilitation would be of no benefit in this regard. In short, it appears that based on the limitations imposed by Dr. Stacey since your September 11, 1996 report, his loss of earning power is now 100% as opposed to the earlier opinion of 25-30%.

On March 28, 1997, Metz responded by letter (hereinafter March letter), stating in relevant part:

> It is my opinion that Mr. Variano would not be able to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality or attainments could do. While he could obtain trivial occasional employment under rare conditions and at small remuneration, I do not believe that vocational rehabilitation would do much, if anything, to improve that situation. Therefore, it is my opinion that he would not benefit from vocational rehabilitation services and is totally disabled as a result of his injury.

> In your letter, you asked me to reconsider or to reevaluate the loss of earning power assessment which I had previously prepared. Unfortunately, I am unable to do so at this time. It has been the Court's policy to require the requestor to pay the costs associated with having the agreed upon or appointed counselor reassess or reconsider his previously submitted loss of earning power evaluation report. Therefore, unless Mr. Variano is willing to pay for any additional review or reconsideration of the loss of earning power evaluation—or Liberty Mutual insurance is willing to assume this expense—I am unable to honor your request. For me to do as you have requested and bill the insurer for this action would be unfair and contrary to the Court's policy regarding such action.
>
> I hope I have answered your question and, at the same time, effectively explained why I am unable to go back and "rebut" my own loss of earning power evaluation.

At the time of his injury, Variano was earning $422 per week. Following his injury, he received temporary total disability benefits of $281.33 per week for 79 weeks. He then began receiving permanent partial disability benefits in the amount of $84.40 per week for 221 weeks based upon a 30-percent loss of earning power.

In reliance on the opinions expressed by Metz in his March letter, Variano filed a petition with the Workers' Compensation Court, requesting the payment of total disability benefits from and after November 12, 1996, plus a waiting penalty and attorney fees. Dial filed a third-party petition, asserting that the State of Nebraska, Second Injury Fund, was liable for a portion of Variano's claim on the basis of preexisting disabilities. The trial judge, relying on Metz' September report, found that Variano was not totally disabled and had sustained only a 30-percent loss of earning capacity. In addition, the trial judge found that Dial had failed to prove liability on the part of the Second Injury Fund and dismissed therefore its third-party claim. Variano requested review by a three-judge panel of the Workers' Compensation Court, which affirmed the trial court's findings. Variano perfected this appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the

caseloads of the appellate courts. Dial did not seek review of the trial court's order dismissing the Second Injury Fund, and accordingly, that issue is not before us.

ASSIGNMENTS OF ERROR

Variano asserts, restated, that the Workers' Compensation Court erred factually and as a matter of law in disregarding the opinion of Metz that Variano was totally disabled.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Smart v. Scrivner/Food 4 Less*, 254 Neb. 111, 574 N.W.2d 505 (1998).

Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998).

ANALYSIS

Section 48-162.01(1), which is a part of the Nebraska Workers' Compensation Act, states that "restoration of the injured employee to gainful employment" is one of the "primary purposes" of the act. To this end, the statute provides a means of determining a vocational rehabilitation plan for an injured worker, as well as his or her loss of earning power. See *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995). The Workers' Compensation Court is required to maintain a directory of public and private vocational rehabilitation service providers and counselors who have been approved by the court. § 48-162.01(2). The statute provides in part that "[n]o individual service provider or counselor shall be considered qualified unless he or she has satisfied the standards for certification established by the compensation court and has been certified by the compensation court." *Id.* The statute further states that if an

injured employee claims entitlement to vocational rehabilitation services, the employee and the employer or its insurer shall attempt to agree on the choice of a vocational rehabilitation counselor from the directory maintained by the compensation court. If no agreement is reached, the court is required to select a counselor from its directory, who shall then evaluate the employee and develop a rehabilitation plan if deemed necessary. § 48-162.01(3). The statute creates "a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation." *Id.* It also provides:

> Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. It shall be a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

Id. This provision has been included in § 48-162.01 since its amendment operative January 1, 1994. See 1993 Neb. Laws, L.B. 757. See, also, *Stansbury v. HEP, Inc., supra.*

Under this statute, "the only opinion regarding vocational rehabilitation or loss of earning power entitled to a rebuttable presumption is that of a vocational rehabilitation counselor chosen or selected by the procedures set forth in [§ 48-162.01(3)]." *Stansbury v. HEP, Inc.*, 248 Neb. at 713, 539 N.W.2d at 35. In this case, that person is Metz, and our first task is to identify the opinion expressed by him to which the statutory presumption applies. The trial court did not make a finding with regard to the statutory presumption but characterized the case as one of "conflicting medical and expert vocational rehabilitation reports," constituting "evidence that would support any position." The trial court chose to rely upon the opinion expressed by Metz in his September report, that Variano had a 25- to 30-percent loss of earning capacity and was physically able to perform certain jobs identified in the September report.

On appeal, Variano argues that the rebuttable presumption attaches to the opinion Metz stated in his March letter, that Variano was "totally disabled as a result of his injury" and was unable to perform any work other than "trivial occasional employment under rare conditions and at small remuneration." He asserts that this opinion is not inconsistent with that contained in Metz' September report, but, rather, represented "a progression of testing which ultimately disclosed that instead of a 25-30% loss of earning capacity, Metz was dealing with an injured employee who was totally disabled because the vocational analysis disclosed there was no suitable competitive employment available for him." Brief for appellant at 10. Dial argues that the opinion stated in Metz' September report was the only opinion to which the presumption could apply because Metz specifically stated in his March letter that he could not reevaluate his prior loss of earning power assessment "unless Mr. Variano is willing to pay for any additional review or reconsideration of the loss of earning power evaluation—or Liberty Mutual Insurance is willing to assume this expense." In the alternative, Dial argues that if the presumption applies to Metz' March letter, it is rebutted by his previous opinion in the September report and the medical evidence. Finally, Dial argues that based upon its inherent power to determine loss of earning capacity, the compensation court "could have made its own determination with regard to Variano's loss of earning capacity if it so desired and completely ignored both the September 11, 1996 report and the March 1997 letter." Brief for appellee at 18.

We are persuaded that Variano's position is correct. The statutory presumption applies to an "opinion" resulting from a "loss-of-earning-power evaluation" conducted by a vocational rehabilitation expert selected or appointed pursuant to § 48-162.01. In his September report, Metz states:

> According to several physicians, Mr. Variano has reached maximum medical improvement for all of his work-related injuries[.] However, he has not been physically restored to a point where he is able to return to suitable work for which he has previous training and experience. Furthermore, Mr. Variano's employer is unable to accommodate the client's restrictions and limitations since

> Dial Corp. has ceased its Omaha operations. Additionally, based upon this counselor's interpretation of the transferable skills analysis, it would appear that the client may not possess sufficient transferable skills which could result in suitable work (i.e., a position that "falls" within the client's physical restrictions and limitations and which pays at or near Mr. Variano's preinjury wage. *Therefore, it appears that the client is entitled to and requires vocational rehabilitation services.*

(Emphasis in original.) (Emphasis supplied.) Metz continues, "It is, therefore my opinion, based upon the aforementioned data, as well as my experience as a vocational rehabilitation counselor, that, as a result of his work related injuries, Mr. Variano *will have sustained* a loss of earning power of 25% - 30%." (Emphasis supplied.)

Clearly, this statement constitutes Metz' opinion up to that point in time of what Variano's loss of earning capacity would likely be after he received the vocational rehabilitation services which Metz then believed would benefit him. However, in a progress report for the period ending February 22, 1997, Metz described his unsuccessful efforts to identify suitable employment which would be consistent with Variano's physical restrictions. Metz reported that a "transferable skills analysis" was performed, that he " 'staffed' " Variano's case with two of Metz' colleagues, that he consulted with a Nebraska Job Service job placement counselor, and that he had an "OASYS run" completed. Metz concluded that "while Mr. Variano is employable in the general labor market, it does not appear that he can be restore [sic] to suitable work. Therefore, I feel he would not benefit from vocational rehabilitation, including formal retraining." This led to Metz' March letter to Variano's counsel in which he reiterated his opinion that Variano would not benefit from vocational rehabilitation services and was unable to perform anything other than "trivial occasional employment under rare conditions and at small remuneration." From the record, it appears that this was Metz' final opinion based upon his evaluation of Variano's potential for employment, which he had not completed at the time of his September report. The fact that the March letter was not contained in a report entitled "Loss of

Earning Power Evaluation," as was the opinion Metz expressed in the September report, does not alter its substance. Based upon our obligation to apply statutory language in accordance with its plain and ordinary meaning, see *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998), we construe the phrase "loss-of-earning-power evaluation" in § 48-162.01(3) to refer to a process as opposed to a document. The record reflects that the opinion stated by Metz in his March letter to Variano's counsel resulted from the evaluation *process* which was incomplete at the time of his September report. Whether intended or not, the March letter expresses an opinion reached by a court-appointed vocational rehabilitation counselor based upon his evaluation of a worker's loss of earning capacity, and neither the compensation court nor this court is free to disregard the opinion simply because of the format in which it was expressed. Thus, the trial court was required to afford the opinion expressed by Metz in the March letter the rebuttable presumption of correctness required by § 48-162.01(3).

A "rebuttable presumption" is generally defined as "[a] presumption that can be overturned upon the showing of sufficient proof." Black's Law Dictionary 1186 (6th ed. 1990). "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995). We hold that this rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct.

We must next determine whether there is competent sufficient evidence to rebut the presumption. Contrary to Dial's contention, Metz' initial opinion concerning the extent of Variano's loss of earning capacity cannot rebut his final opinion because it was rendered prior to the completion of his evaluation. In the September report, Metz expressed his opinion regarding the loss of earning power which Variano "will have sustained" after receiving the vocational rehabilitation services which Metz then believed would be of benefit. In his March letter, Metz stated

his opinion regarding Variano's loss of earning capacity after concluding, on the basis of evaluations he performed subsequent to his previous report, that Variano would not benefit from vocational rehabilitation services, including formal retraining. Thus, his first opinion expressed in the September report was necessarily preliminary to the second opinion expressed in the March letter and cannot be deemed to rebut it.

This case is distinguishable from *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995), where we held that an opinion contained in a vocational rehabilitation plan could be rebutted by the author's contradictory opinion contained in the same plan. *Stansbury* is distinguishable for the additional reason that the vocational rehabilitation counselor who proposed the plan was not selected or appointed pursuant to § 48-162.01(3), and his opinion was therefore not entitled to a rebuttable presumption. Thus, while we held in *Stansbury* that the compensation court was free to disregard the opinions of the rehabilitation counselor, the same cannot be said in this case because of the statutory presumption which must be accepted unless rebutted. Likewise, no statutory presumption was involved in *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997), where we held that as the trier of fact, the compensation court was free to choose which, if any, expert to believe on the issue of causation.

Dial argues that Metz' final opinion was rebutted by evidence that the physical restrictions imposed upon Variano by Dr. Gammel were less than those established by Dr. Stacey, whose opinion Metz relied on to arrive at the opinion he expressed in the March letter. However, we have held that workers' compensation benefits awarded pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 1998) "are not measured by loss of bodily function, but by reduction in earning power or employability." *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 545, 288 N.W.2d 482, 485 (1980).

> "Earning power," as used in subsection (2) of § 48-121, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the

> employment in which he is engaged or for which he is fitted.

Cords v. City of Lincoln, 249 Neb. 748, 756, 545 N.W.2d 112, 118 (1996), citing *Sidel v. Travelers Ins. Co., supra.* We find no sufficient competent evidence in the record which would rebut the opinions concerning loss of earning power expressed by Metz in his March 28, 1997, letter to Variano's attorney. For this reason, we reverse, and remand to the Workers' Compensation Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. JEANETTE DIVIS, APPELLANT.
589 N.W.2d 537

Filed February 26, 1999. No. S-98-746.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Constitutional Law: Statutes: Proof.** The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision.
3. **Constitutional Law: Statutes: Presumptions.** Statutes are presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality.
4. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements, if such a construction can be reasonably accomplished.
5. **Constitutional Law.** The distribution of powers clause, Neb. Const. art. II, § 1, prohibits one branch of government from exercising the duties of another branch.
6. **Criminal Law: Legislature.** The defining of a criminal act and its penalties is purely a legislative function.

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 for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

On June 25, 1998, the district court for Dodge County affirmed the judgment and sentence entered by the county court against Jeanette Divis on the charge of driving under the influence (DUI), first offense. Divis appeals. On appeal, Divis claims that Neb. Rev. Stat. § 60-6,196(8) (Reissue 1993) is unconstitutional. We conclude that § 60-6,196(8) is constitutional. We affirm the decision of the district court.

STATEMENT OF FACTS

Divis was arrested on December 18, 1997, in Fremont, Nebraska, and charged with DUI, first offense. Following her arrest, Divis moved to quash the charge, alleging that § 60-6,196 was unconstitutional. The focus of Divis' claim of unconstitutionality is subsection (8). Section 60-6,196(8) provides generally that the sentencing court shall direct that an alcohol assessment be conducted of a defendant convicted of DUI, first offense, or of a person convicted of DUI who has not previously been evaluated. The county court denied Divis' motion and entered a not guilty plea on Divis' behalf. Thereafter, based on stipulated facts, the trial court found Divis guilty of the charge. In accordance with § 60-6,196(8), Divis was given a presentence evaluation and an alcohol assessment. Upon the completion of the evaluation, Divis was sentenced to probation for 6 months, with additional conditions not relevant to this appeal.

Divis appealed the county court judgment and sentence, alleging that § 60-6,196(8) violated the separation of powers clause of Neb. Const. art. II, § 1. Following a hearing, the district court found the statute in question constitutional and affirmed the county court's decision. This appeal followed.

ASSIGNMENT OF ERROR

Divis assigns one error. She claims that the lower courts erred in not finding § 60-6,196(8) to be in violation of Neb. Const. art. II, § 1, the distribution of powers clause.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998); *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). The party challenging the constitutionality of a statute bears the burden to "'clearly establish[]'" the unconstitutionality of a statutory provision. *State v. Schmailzl*, 243 Neb. 734, 736, 502 N.W.2d 463, 465 (1993), quoting *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). Statutes are presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). A penal statute must be construed so as to meet constitutional requirements, if such a construction can be reasonably accomplished. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996).

ANALYSIS

On appeal, Divis has assigned only one error, that is, the claim that § 60-6,196(8) on its face violates the separation of powers clause, Neb. Const. art. II, § 1. Divis' brief, however, raises additional errors regarding the severability of the statute and whether the statute properly required that Divis request the alcohol assessment. Pursuant to our rules, "consideration of the case will be limited to errors assigned and discussed." Neb. Ct. R. of Prac. 9D(1)d (rev. 1996). See, also, *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993). We, therefore, do not address Divis' additional unassigned claims. For the sake of completeness, we note that by our decision below finding § 60-6,196(8) constitutional, Divis' severability argument, had it been properly raised, would be moot.

Divis challenges the constitutionality of § 60-6,196(8) on its face. Section 60-6,196(8) provides, in pertinent part, as follows:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, sub-

> mit to and participate in an alcohol assessment. . . . At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results . . . in lieu of or in addition to any penalties deemed necessary.

For a claim of unconstitutionality based on the face of a statute to succeed, the party challenging the statute must show that the law impinges on some fundamental constitutional right or that the law creates a suspect classification. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). "If the . . . law implicates neither fundamental rights nor suspect classifications, it must be upheld unless it bears no rational relationship to a legitimate government interest." *Id.* at 383, 488 N.W.2d at 538. See, also, *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 gravamen of Divis' complaint is that § 60-6,196(8) violates the separation of powers clause, evidently because it authorizes a sentencing court in its discretion to disregard certain statutory penalties previously established by the Nebraska Legislature for individuals convicted of DUI and, instead, "having reviewed the assessment results, [the court] may then order the convicted person to follow through on the alcohol assessment results . . . in lieu of or in addition to" other statutory penalties. § 60-6,196(8).

The crime of DUI, first offense, of which Divis stands convicted, is a Class W misdemeanor. See Neb. Rev. Stat. § 28-106(1) (Reissue 1995). The statutory penalties prescribed therefor prior to and following enactment of the alcohol-evaluation-related provisions in question are or were found in §§ 28-106 and 60-6,196 and Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). To summarize, taken together, these statutory provisions, not set forth here, provide or provided penalties for individuals convicted of DUI, first offense, of, variously, imprisonment, a monetary fine, and driver's license revocation. §§ 28-106(1), 39-669.07(2)(a), and 60-6,196(2)(a). Although we recognize that § 60-6,196(8) applies to any person convicted

of DUI who has never been assessed for alcohol abuse in addition to persons convicted of DUI, first offense, for purposes of our analysis and based upon the facts of this case, we comment directly only on the penalties pertaining to DUI, first offense, which are applicable to Divis. We note, however, that our reasoning upholding the constitutionality of § 60-6,196(8) would be the same with regard to penalties applicable to offenders convicted of DUI who have never been assessed.

The essence of Divis' argument is that once the Legislature has established a sentencing scheme for a class of crime, it cannot thereafter constitutionally add alternative sentences to be imposed at the court's discretion to the penalty provisions already applicable to that crime. Divis' constitutionality argument is without merit.

The separation of powers clause is contained in Neb. Const. art. II, § 1. It provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

We have observed that the separation of powers clause "prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution itself otherwise directs or permits." *State v. Philipps*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). See *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

Divis bases her separation of powers argument on our decision in *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). Her reliance thereon is misplaced. In *Bainbridge*, we determined that a statute empowering the trial court to reduce a previously imposed driver's license revocation sentence invaded the domain of the Board of Pardons, a board in the executive branch, to which the commutation power had been entrusted pursuant to Neb. Const. art. IV, § 13. The statute in *Bainbridge* was unconstitutional as a violation of the separation of powers clause because it impermissibly authorized the invasion by one

branch of government of the authority constitutionally granted to another branch of government.

Divis observes that § 60-6,196(8) permits a sentencing court, at the time that the initial sentence is imposed, to ignore the penalty provisions of §§ 60-6,196(2)(a) through (c) and 28-106(1) in favor of following the alcohol-assessment recommendations. Divis notes that under the provisions of § 60-6,196(8), the sentencing court has discretion not to impose the statutory penalties previously created by the Legislature applicable to DUI, first offense. Divis is correct in this assessment of the effect of § 60-6,196(8). In contrast to the impermissible statute's effect in *Bainbridge*, however, § 60-6,196(8) does not grant a power to the judicial branch that it did not already have, nor does § 60-6,196(8) grant a power to the judicial branch that it is constitutionally prohibited from exercising. Instead, the Legislature has simply provided a penalty in § 60-6,196(8) that can be imposed by the sentencing court, in a case of DUI, first offense, and certain other DUI convictions, in lieu of or in addition to those penalties already in existence.

Divis' argument is premised on the incorrect notion that the Legislature cannot declare a range of criminal penalties to be applied by the judicial branch and thereafter amend the penalty scheme. On the contrary, the Legislature is empowered to define crimes and their penalties. It is well settled that the defining of a criminal act is purely a legislative function. We have recently stated: "[U]nder Nebraska law all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so." *State v. Burlison*, 255 Neb. 190, 194, 583 N.W.2d 31, 35 (1998). We have also held that the Legislature is that governmental body "empowered to define a crime." *Id.* at 195, 583 N.W.2d at 35. See, also, *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).

Similarly, the Legislature has the authority to fix the penalty range which can be imposed for the crimes it has defined. The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review. In this regard, in *State v. Tucker*, 183 Neb. 577, 579, 162 N.W.2d 774, 776 (1968),

quoting *State ex rel. Nelson v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926), we observed: " 'The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.' " See *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964).

We have previously stated: "The range of the penalty for any offense is a matter for legislative determination. The court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law." *Id.* at 392, 126 N.W.2d at 163. Thus, once the Legislature has defined the crime and the corresponding punishment for a violation of the crime, the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.

When enacting legislation, the Nebraska Legislature is presumed to know, and thus to have considered, all previous legislation on a subject. *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982). The legislative history of § 60-6,196(8) bears out this presumption.

Section 60-6,196(8) resulted from an amendment to 1992 Neb. Laws, L.B. 291, a bill revising Nebraska's DUI statutes. During debate on the amendment, the Legislature specifically acknowledged the existing statutory scheme for punishing DUI offenses. See Floor Debate, 92d Leg., 2d Sess. 12733, 12742, 12746 (Apr. 7, 1992). The penalties were then found in §§ 28-106(1) (Reissue 1989) and 39-669.07 (Cum. Supp. 1990). The Nebraska Rules of the Road provisions in chapter 39 have since been renumbered and transferred into chapter 60, with no effect for purposes of our analysis. See *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995). The Legislature's clear intent was to allow the sentencing courts to impose the alternative penalties provided for under § 60-6,196(8), with the objective of treatment rather than punishment "in lieu of or in addition to any penalties deemed necessary," which penalties were extant. Floor Debate, 92d Leg., 2d Sess. 12733 (Apr. 7, 1992).

It is the role of the court, to the extent possible, to give effect to the entire language of the statute, and to reconcile different

provisions of the statute, "so they are consistent, harmonious, and sensible." *Van Patten v. City of Omaha*, 167 Neb. 741, 751, 94 N.W.2d 664, 670 (1959). When considering a statute's meaning, it is appropriate for the court to consider "the evil and mischief attempted to be remedied, the objects sought to be accomplished, the scope of the remedy [to which] its terms apply, and [to] give [the statute] such an interpretation as appears best calculated to effectuate the design of the . . . legislative provisions." *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 872-73, 62 N.W.2d 288, 294 (1954).

In the instant case, § 60-6,196(8) is harmonious with other sentencing provisions relating to DUI. The statute does not impinge on some fundamental constitutional right or create a suspect classification. There was no improper delegation by the Legislature in placing sentencing alternatives for persons convicted of DUI, first offense, and for persons convicted of DUI who have not been assessed for alcohol abuse, within the judicial branch in general and at the discretion of the sentencing court in particular. Divis' claim that § 60-6,196(8) is unconstitutional is without merit. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VAL CUSHMAN, APPELLANT.
589 N.W.2d 533

Filed February 26, 1999. No. S-98-815.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Constitutional Law: Convictions: Statutes.** A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.

4. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.

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 for appellant.

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

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

GERRARD, J.

NATURE OF CASE

Val Cushman, the appellant, was convicted of operating a motor vehicle while intoxicated, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). Cushman now appeals the judgment and sentence, alleging that § 60-6,196 violates the separation of powers clause of Neb. Const. art. II, § 1, and that Neb. Rev. Stat. § 60-6,205 (Cum. Supp. 1996) violates the special legislation clause of Neb. Const. art. III, § 18. For the reasons stated herein, we affirm.

FACTUAL BACKGROUND

Cushman was arrested on January 26, 1998, after an officer of the Fremont Police Department observed Cushman driving at night without his vehicle's headlights fully activated. The officer stopped the vehicle and conducted several sobriety tests, on which Cushman performed poorly. Cushman then failed a preliminary breath test and was arrested and taken to the Fremont Police Department, where he submitted to a chemical breath test. The results of that test showed .130 grams of alcohol per 210 liters of breath.

Cushman was charged in the county court for Dodge County with operating a motor vehicle while intoxicated, in violation of § 60-6,196. Cushman moved to quash the proceedings, alleging

that § 60-6,196 violated the separation of powers clause and that § 60-6,205 violated the special legislation clause. The county court denied Cushman's motion to quash. The matter proceeded to trial on stipulated facts, and Cushman was convicted of driving while under the influence of alcohol, in violation of § 60-6,196. Cushman was given an alcohol assessment as part of the presentence investigative process. Thereafter, Cushman was sentenced to 6 months' probation.

Cushman appealed to the district court, claiming that the county court erred in denying his motion to quash. After a hearing, the district court affirmed the judgment and sentence of the county court. Cushman timely appealed, and his appeal was removed to the Nebraska Supreme Court docket pursuant to our authority to regulate our docket and that of the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Cushman alleges that the courts below erred in not finding (1) § 60-6,196 to be in violation of the separation of powers clause of Neb. Const. art. II, § 1, or (2) § 60-6,205 to be in violation of the special legislation clause of Neb. Const. art. III, § 18.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *State v. Divis, ante* p. 328, 589 N.W.2d 537 (1999); *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

ANALYSIS

SEPARATION OF POWERS

Cushman alleges that § 60-6,196 violates the separation of powers clause, because § 60-6,196(8) provides:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, submit to and participate in an alcohol assessment. The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense *in lieu of or in addition to any penalties deemed necessary.*

(Emphasis supplied.)

Cushman argues that this provision represents an unconstitutional delegation of legislative authority, alleging that it empowers the judiciary to set the minimum sentence for driving while intoxicated. We confronted this issue in *State v. Divis, ante* at 335, ___ N.W.2d at ___, and held that

> § 60-6,196(8) is harmonious with other sentencing provisions relating to [driving while intoxicated]. . . . There was no improper delegation by the Legislature in placing sentencing alternatives for persons convicted of [driving while intoxicated], first offense, and for persons convicted of [driving while intoxicated] who have not been assessed for alcohol abuse, within the judicial branch in general and at the discretion of the sentencing court in particular.

For the reasons set forth in *State v. Divis, supra,* we conclude that Cushman's first assignment of error is without merit.

SPECIAL LEGISLATION

Cushman next claims that § 60-6,205 violates the prohibition on special legislation found in Neb. Const. art. III, § 18. Cushman's argument also depends upon Neb. Rev. Stat. § 60-6,197(2) (Cum. Supp. 1996), which provides, in relevant part:

> Any peace officer who has been duly authorized to make arrests for violations of traffic laws of this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in

> actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs to submit to a *chemical test or tests of his or her blood, breath, or urine* for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine . . . .

(Emphasis supplied.)

It is further provided in § 60-6,205(3):

> If a person arrested pursuant to section 60-6,197 submits to the *chemical test of blood or breath* required by that section and the test discloses the presence of alcohol in any of the concentrations specified in section 60-6,196, the arresting peace officer, as agent for the [Director of the Department of Motor Vehicles], shall verbally serve notice to the arrested person of the intention to immediately impound and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days . . . . The arresting peace officer shall immediately forward to the director a sworn report stating (a) that the person was validly arrested pursuant to section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

(Emphasis supplied.)

Cushman points out that an arresting officer can require a driver to submit to a test of his or her blood, breath, or urine, but that by the plain language of the statute, the officer need report only the results of a blood or breath test to the Director of the Department of Motor Vehicles. Cushman argues that because § 60-6,205 provides different treatment for those drivers who submit to urine tests, it is special legislation as prohibited by Neb. Const. art. III, § 18.

We note, however, that § 60-6,205 is part of Nebraska's statutory scheme for administrative license revocation (ALR). This court has determined that proceedings under § 60-6,205 are not criminal proceedings, but are instead civil proceedings that may

result in a civil sanction. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The ALR statutes and the criminal statutes present entirely distinct mechanisms for enforcement, adjudication, and appeal. Compare § 60-6,196 and Neb. Rev. Stat. §§ 60-682 through 60-694 (Reissue 1998) (criminal procedures) with Neb. Rev. Stat. §§ 60-6,205 through 60-6,208 (Reissue 1993 & Cum. Supp. 1996) (civil ALR procedures). Cushman is endeavoring to attack the ALR scheme, not in an appeal from an ALR, but instead in an appeal from his criminal conviction.

It is well established that a defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution. *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998). Accord, *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988). See, also, *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966).

Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

While the ALR provisions and criminal prohibition against driving under the influence of alcohol relate to the same subject matter, the validity of § 60-6,205 is completely irrelevant to the instant case, which presents Cushman's appeal from his conviction for violating § 60-6,196. The record in this case contains only a passing reference to an ALR proceeding, and that reference indicates that the revocation of Cushman's license was, at the time of his sentencing in this case, being addressed in a separate appeal from that presented here. The record in the instant case does not demonstrate that the operation of § 60-6,205 is

depriving or is about to deprive Cushman of any constitutionally protected right.

Given these circumstances, it is clear that Cushman lacks standing to challenge § 60-6,205 in his present appeal. Cushman is attempting to attack his criminal conviction by collaterally attacking a statute that is irrelevant to his prosecution in the instant case. The county court correctly overruled Cushman's motion to quash, and the district court did not err in affirming the judgment of the county court.

CONCLUSION

Cushman's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

JOYCE DVORAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID DVORAK, DECEASED, APPELLEE AND CROSS-APPELLANT, V. BUNGE CORPORATION, A NEW YORK CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, LAUHOFF GRAIN COMPANY, AN ILLINOIS CORPORATION, APPELLEE, AND HAROLD K. SCHOLZ COMPANY, A NEBRASKA CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLEE.

590 N.W. 2d 682

Filed March 5, 1999. No. S-97-791.

1. **Judgments: Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of that of the trial court.
2. **Jurisdiction: Appeal and Error.** It not only is within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
3. **Motions for New Trial: Final Orders: Appeal and Error.** Where the record shows the filing of a motion for new trial but no final, appealable order by the trial court disposing of the motion, an attempted appeal in the action will be dismissed as prematurely taken.
4. **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.

5. ____. 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.
6. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
7. **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.
8. **Negligence: Contracts: Contractors and Subcontractors: Damages: Liability.** Under the accepted work doctrine, a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.

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

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

Patrick W. Healey and William A. Wieland, of Healey & Wieland Law Firm, for appellee Dvorak.

Brien M. Welch and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Scholz Company.

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

PER CURIAM.

NATURE OF CASE

This opinion addresses an appeal filed by Bunge Corporation (Bunge) and a cross-appeal by Joyce Dvorak (Dvorak), personal representative of the estate of David Dvorak, deceased, regarding summary judgments entered in favor of Harold K. Scholz Company (Scholz).

SCOPE OF REVIEW

The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of that of

the trial court. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

It not only is within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. *Id.*

FACTUAL BACKGROUND

In 1987, Lauhoff Grain Company (Lauhoff) began renovating the electrical power distribution system at its Crete Mills facility. Over the Labor Day weekend, the plant shut down in order to connect the new power distribution equipment. Scholz had been contracted by Lauhoff to assist in the renovation, and Scholz employees were working at Crete Mills during the Labor Day weekend shutdown.

As part of the renovation, Lauhoff decided to remove an old high-voltage disconnect that powered a lighting transformer and replace it with an updated high-voltage disconnect. In order to join the lighting transformer to the new disconnect, new power wires were installed. The new wires were fed through an existing 2-inch conduit that ran across the electrical vault room. The 2-inch conduit crossed an abandoned 3-inch conduit that ran out of the room and into the "E track area." In the process of removing the old disconnect, the grounding point to the 2-inch conduit was removed. The 2-inch conduit was not grounded elsewhere.

On July 29, 1992, David Dvorak, an employee of Lauhoff, was working in the E track area at Crete Mills. The evidence indicates that the insulation of the wiring inside the 2-inch conduit had failed, allowing high voltage to pass to the conduit itself. Because the 2-inch conduit was in close proximity to the abandoned 3-inch conduit, the 3-inch conduit also became energized with high voltage. When Dvorak came into contact with the 3-inch conduit, he became the source to ground and was electrocuted. The evidence indicates that the failure to ground the 2-inch conduit was in violation of both OSHA guidelines and the National Electrical Code.

The evidence is disputed as to who had removed the old disconnect and had installed the new wiring through the 2-inch conduit to attach it to the new disconnect. Benjamin D. Ens, the plant engineer at Crete Mills, testified by deposition that it was solely the job of Lauhoff employees to remove the old disconnect and install new wiring from the lighting transformer to the new disconnect. In contrast, Vernon C. Martin, the direct supervisor over the Lauhoff employees, stated in his deposition that it was his recollection that Lauhoff employees were not to do any high-voltage wiring as part of the Labor Day weekend shutdown. Alvin Duba, a Lauhoff electrician who worked over the Labor Day weekend shutdown, indicated in his deposition that he did not wire the 2-inch conduit and that such a job would not have been done by the electricians at Crete Mills because it dealt with high voltage. Duba described that the electricians at the Crete Mills facility generally worked with 480 volts or less and that contractors would be brought in to work with high voltage. The wiring contained in the 2-inch conduit was approximately 2,400 volts. Other expert witnesses likewise indicated that the Scholz electricians, who worked with high-voltage wiring, were more likely to have done the wiring in the 2-inch conduit.

PROCEDURAL BACKGROUND

Dvorak, as personal representative of the estate of David Dvorak, sued Bunge as the owner of Lauhoff. Lauhoff was joined in the action because of rights it might have by reason of workers' compensation benefits paid. Dvorak brought a similar action against Scholz, again naming Lauhoff because of rights it might have due to its payment of workers' compensation benefits.

Bunge then filed a third-party petition against Scholz, alleging that Bunge's negligence, if any, was passive compared to the negligence of Scholz and requesting that Scholz indemnify Bunge in the event that Bunge was found to be liable to Dvorak. Dvorak's actions against Bunge and Scholz were eventually consolidated.

Summary judgment motions filed by Scholz were sustained against both Dvorak and Bunge. The trial court then dismissed Dvorak's petition against Scholz and Bunge's third-party peti-

tion against Scholz. Dvorak and Bunge timely filed motions for new trial.

The trial judge's minutes for March 3, 1997, state: "Plaintiffs' motions for new trial are overruled." The record does not reflect that the trial court filed such minutes in the records of the district court or that the trial court announced such findings in open court.

On March 10, 1997, Dvorak filed a notice of intention to appeal from the order of March 3. This appeal was docketed in the Nebraska Court of Appeals as case No. A-97-267. On March 31, Bunge filed a similar notice of appeal, which was docketed in the Court of Appeals as case No. A-97-352.

In response to these notices of appeal, the Court of Appeals issued an order to show cause why Dvorak's and Bunge's appeals should not be dismissed. The Court of Appeals reasoned that because the cases had been consolidated by the trial court and Bunge's motion for new trial had not been ruled upon, the Court of Appeals lacked jurisdiction over the appeals.

The trial judge's minutes for June 26, 1997, state:

> The court has been shown Judge Hannon's order to show cause filed in the Appellate Court No. A-97-267 and A-97-352. This court declares that it was the trial court's intent to overrule all motions for new trial on March 3, 1997, including that of Third Party Plaintiff, Bunge Corporation, et al. Therefor[e], Bunge's motion for new trial is overruled now and retroactively to March 3, 1997.

Again, the record does not reflect that these minutes were filed in the records of the trial court or that the trial court announced such findings in open court.

On July 1, 1997, the trial court filed the following order with the clerk of the district court:

> On March 3, 1997, this matter came on for consideration on Defendant/Third Party Plaintiff Bunge Corporation's Motion for New Trial regarding the Court's sustaining of the Third Party Defendant's Motion for Summary Judgment and Dismissal of Third Party Plaintiff's Petition. Upon due consideration, the Court finds that the Defendant/Third Party Plaintiff's Motion for New Trial be and hereby is overruled.

However, no order was filed with the clerk setting forth the disposition of Dvorak's motion for new trial.

On July 25, 1997, Bunge filed a notice of intention to appeal from the trial court's order granting Scholz' motion for summary judgment and its "[o]rder denying the defendant's Motion for New Trial rendered on June 26, 1997." That appeal was docketed as case No. A-97-791, and we subsequently moved it to our docket.

On August 6, 1997, the Court of Appeals issued a "Memorandum Order" dismissing cases Nos. A-97-267 and A-97-352 for lack of jurisdiction. The court explained that the purported appeals were ineffective because at the time the parties filed their notices of appeal, there was an outstanding motion for new trial filed by Bunge which had not been ruled upon.

In the case at bar, case No. S-97-791, Bunge filed the operative notice of appeal and, thus, is designated "the appellant." Dvorak's brief sets forth a cross-appeal, and thus, she is designated "the cross-appellant." See Neb. Ct. R. of Prac. 9D(4) (rev. 1997). On January 14, 1998, Scholz moved to dismiss Dvorak's cross-appeal for lack of jurisdiction. The motion was overruled by this court.

ASSIGNMENTS OF ERROR

Bunge and Dvorak assert, in summary, that the trial court erred in failing to find that there was a genuine issue of material fact regarding whether Scholz negligently failed to perform the duties imposed upon it and whether the alleged negligence proximately contributed to or caused the injuries sustained by David Dvorak that resulted in his death.

ANALYSIS

JURISDICTION

We first consider the jurisdictional issues presented herein. It not only is within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of

jurisdiction sua sponte. *Id.* The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

In order to determine whether we have jurisdiction, we address whether there has been a final disposition of Dvorak's and Bunge's motions for new trial. Where the record shows the filing of a motion for new trial but no final, appealable order by the trial court disposing of the motion, an attempted appeal in the action will be dismissed as prematurely taken. See, *Jerabek v. Ritz*, 221 Neb. 448, 377 N.W.2d 540 (1985); *Vasa v. Vasa*, 163 Neb. 642, 80 N.W.2d 696 (1957); *Mueller v. Keeley*, 163 Neb. 613, 80 N.W.2d 707 (1957).

We have explained that under Neb. Rev. Stat. § 25-1301 (Reissue 1995), there are two occurrences, either of which constitutes a final order, which may begin the 30-day period in which a notice of appeal must be filed: (1) the rendition of a judgment, which occurs when an oral pronouncement of the judgment is made in open court and a notation of the judgment is made on the trial docket, or (2) the entry of a judgment, which is the act of the clerk of the court spreading on the court's journal both the proceedings had and the relief granted or denied. The journal of the trial court is the official record of the judgments and orders of that court. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). See, also, *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Most recently, in *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997), we explained that a rendition of judgment occurs when the court makes an oral pronouncement in open court and accompanies that pronouncement with a notation on the trial docket or, in the alternative, when some written notation of the judgment is filed in the records of the court.

As pointed out in the statement of facts, there is no record of an oral pronouncement by the trial court overruling either Dvorak's or Bunge's motion for new trial. Therefore, in this case, if there is a final order disposing of either motion, it must be found in the entry of a judgment, which is the act of the clerk of the court spreading on the court's journal both the proceedings had and the relief granted or denied. See, *Tri-County*

Landfill v. Board of Cty. Comrs., supra; § 25-1301. In other words, there must be some written notation of the judgment filed in the official records of the court. See *Reutzel v. Reutzel, supra.*

We note that these requirements have been a source of confusion for trial courts and have presented numerous difficulties to appellate courts. However, until the situation is addressed by legislative enactment, we must continue to determine jurisdiction in accordance with § 25-1301.

The only notations regarding the trial court's decision on Dvorak's motion for new trial are the judge's minutes for March 3 and June 26, 1997, indicating that the motion was overruled. A copy of the judge's minutes was not filed by the clerk in the records of the court. Because there has been no rendition of judgment regarding Dvorak's motion for new trial, we are without jurisdiction to address Dvorak's cross-appeal, and it is dismissed as premature.

In contrast to Dvorak's motion, the appellate transcript does contain an order by the trial court filed in the official records of the court on July 1, 1997, which states that Bunge's motion for new trial was overruled. This order became final and appealable when it was filed in the office of the clerk of the district court for Saline County on July 1. See *Tri-County Landfill v. Board of Cty. Comrs., supra.* Therefore, the requirements of a final order have been met, and Bunge has timely perfected its appeal from the final order which dismissed its third-party petition against Scholz.

MERITS

Having determined that we have jurisdiction over Bunge's appeal, we address whether the trial court erred in granting Scholz summary judgment on Bunge's third-party petition against it. 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. *Woodard v. City of Lincoln, ante* p. 61, 588 N.W.2d 831 (1999). 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. *Goff-Hamel v. Obstetricians & Gyns., P.C., ante* p. 19, 588 N.W.2d 798 (1999). Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998). 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. *Woodard v. City of Lincoln, supra.*

Scholz argues that under the "accepted work doctrine," as a matter of law, it cannot be held liable for any negligent acts it may have committed. Under the accepted work doctrine, a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998); *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984). The evidence is undisputed that Scholz had no contractual relation to Dvorak and that the work done at Crete Mills by Scholz had been completed and was accepted by Lauhoff.

However, under an exception to the accepted work doctrine, regardless of the fact that the work has been completed and accepted, a contractor remains subject to liability where the contractor was dealing with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer. See *id.* In *Erickson*, we held that the installation of a transformer was an inherently dangerous task such that the law would not relieve the contractors' liability for their negligence merely because the owner accepted the work.

Likewise, we conclude here that the installation of the high-voltage wiring through the 2-inch conduit and the connection of the wiring to the new disconnect were inherently dangerous tasks. Thus, Scholz will not be relieved of liability on the basis

that Lauhoff accepted the work completed by Scholz. Because the evidence, viewed in a light most favorable to Bunge, indicates that Scholz may have either performed the wiring in question or connected that wiring to the new disconnect, we conclude that the trial court erred in granting summary judgment in favor of Scholz. Thus, the trial court's judgment in this regard is reversed, and the cause is remanded for further proceedings as to Bunge's third-party petition against Scholz.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.
CROSS-APPEAL DISMISSED.

RHONDA SCHWEITZER, APPELLANT, V. AMERICAN NATIONAL RED CROSS AND SESOSTRIS SHRINE TEMPLE, APPELLEES.

591 N.W.2d 524

Filed March 5, 1999. No. S-97-1055.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record demonstrate that there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
4. **Pleadings: Waiver.** A judicial admission constitutes a waiver of all controversies so far as an adverse party desires to take advantage of it, and therefore it is a limitation of the issues.
5. **Jurisdiction: Courts: Legislature.** The Legislature cannot limit or control the jurisdiction of a district court.
6. **Jurisdiction: Constitutional Law: Courts: Legislature.** Where the Nebraska Constitution does not fix the jurisdiction of any class or grade of courts, the jurisdiction and powers of any such class may be regulated by the Legislature.
7. **Courts: Statutes.** A statutorily created court has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Rod Rehm for appellant.

Carl J. Sjulin and Daniel E. Klaus, of Rembolt Ludtke & Berger, for appellee Red Cross.

William L. Tannehill and Corey L. Stull, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee Shrine Temple.

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

MILLER-LERMAN, J.

NATURE OF CASE

Rhonda Schweitzer appeals an order of the district court for Lancaster County, in which the district court concluded that it was without jurisdiction to entertain Schweitzer's claim for damages and entered summary judgment in favor of the American National Red Cross (Red Cross) and Sesostris Shrine Temple (Shrine Temple) and dismissed Schweitzer's petition. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

Schweitzer injured her right wrist when she fell during a performance of the Shrine circus at Pershing Municipal Auditorium in Lincoln on March 19, 1995. Schweitzer was present at the circus with the Red Cross to provide emergency health services to circus patrons. Schweitzer slipped as she went up a flight of stairs to assist a circus patron who was having a seizure.

Schweitzer filed a petition in the district court for Lancaster County seeking damages against Red Cross and Shrine Temple on September 10, 1996. In paragraph 4 of her petition, Schweitzer alleged that Red Cross was her "direct employer." In paragraph 7 she alleged, inter alia, that she was a "statutory employee" of Shrine Temple "pursuant to Neb. Rev. Stat. §48-116 [Reissue 1998]." Chapter 48 contains Nebraska's

workers' compensation statutes, which provide for the handling of claims by "employees" for work-related injuries. Both Red Cross and Shrine Temple denied that Schweitzer was an employee of their organizations. Both Red Cross and Shrine Temple alleged Schweitzer was a volunteer. Schweitzer sought an award of special damages of $10,000 for medical expenses, compensation in an unspecified amount for lost wages and lost earning capacity, and an award of general damages for physical pain and mental suffering. Schweitzer alleged that she was entitled to damages generally because the Red Cross and Shrine Temple failed to provide her with a safe workplace. In connection with this allegation, she specified five failures, such as failure to provide adequate lighting. Schweitzer alleged that despite her "employee" status, neither Red Cross nor Shrine Temple "possessed a policy of workers' compensation insurance that was in effect to provide coverage for the plaintiff [Schweitzer]."

The trial court overruled the demurrers which Red Cross and Shrine Temple filed to Schweitzer's petition. In their respective answers, both Red Cross and Shrine Temple denied, inter alia, Schweitzer's allegation that they failed to carry workers' compensation insurance to cover her. Red Cross and Shrine Temple both affirmatively alleged that the district court was without jurisdiction to adjudicate Schweitzer's claims.

Red Cross and Shrine Temple subsequently moved for summary judgment. The substance of Red Cross' and Shrine Temple's motions for summary judgment was that the issues of whether Schweitzer was an employee as she claimed and whether Red Cross and Shrine Temple carried workers' compensation insurance for her were the exclusive province of the Workers' Compensation Court.

Red Cross offered, inter alia, Schweitzer's deposition testimony in support of the summary judgment motions. In her deposition, in answer to the question, "Do you consider Red Cross to be your employer?" Schweitzer testified, "Yes, I do."

In her deposition, Schweitzer testified that she fell going up a staircase, slipping on a step upon which she thought soda pop had been spilled. Schweitzer admitted that she had a flashlight for use while attending to circus patrons' health and safety needs in the semidarkened auditorium, but she was not using it

when she fell. Schweitzer testified as to the equipment which the Red Cross provided to its first-aid teams; the training required to be on the first-aid team; and the benefits conferred on the first-aid team members, such as food at the events at which they participated. Schweitzer stated that she understood that Red Cross had insurance and complained that the Red Cross had not paid for her medical treatment. She expressed no specific complaint against Shrine Temple.

Schweitzer offered two depositions in opposition to the summary judgment motions of Red Cross and Shrine Temple. Exhibit 2 is deposition testimony of Kathy Hill, who was employed as the Red Cross director of health and safety at the time Schweitzer was injured. One of Hill's duties was supervising first-aid teams which provided health assistance at public events. Hill testified that Schweitzer was a first-aid team member before Hill came to work for Red Cross. Hill did not testify regarding whether Schweitzer was an employee of Red Cross or Shrine Temple when she was injured. Hill did not testify about the existence of workers' compensation insurance.

Exhibit 3 offered into evidence by Schweitzer was the deposition testimony of Nora Barrett, a licensed practical nurse who was a Red Cross coordinator for Pershing events for the 5 years preceding Schweitzer's injury. Barrett described the safety equipment Red Cross provided at Pershing for emergency team use and the Red Cross manual describing team members' emergency response procedures. Barrett testified that she saw Schweitzer fall on the stairs and that she assisted Schweitzer in completing an incident report form. Barrett testified that she had no knowledge of the financial relationship between Red Cross and Shrine Temple regarding the circus performances. She offered no testimony regarding whether Schweitzer was an employee of Red Cross or Shrine Temple. Barrett did not testify about the existence of workers' compensation insurance.

The trial court sustained the summary judgment motions of Red Cross and Shrine Temple and dismissed the petition. In an order filed September 4, 1997, the trial court noted that in her petition, Schweitzer alleged that she was in the employ of the Red Cross when the accident causing her injuries occurred, and that

> [i]nasmuch as the plaintiff has based her cause of action on the theory that she was an employee of the Red Cross and that her injury occurred in the course of such employment, her remedy is limited to that available under the Workers' Compensation Act and this court has no jurisdiction.

This appeal followed.

ASSIGNMENT OF ERROR

Schweitzer claims that the trial court erred in concluding that the Workers' Compensation Court had exclusive jurisdiction over her claims and thus that the court erred in granting Red Cross' and Shrine Temple's motions for summary judgment and dismissing her petition.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record demonstrate that there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998).

In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998).

Subject matter jurisdiction is a question of law for the court. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998).

Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

ANALYSIS

SCHWEITZER'S EMPLOYEE STATUS

The existence of an employer-employee relationship is essential in establishing the nature and scope of the relief to which an employee is entitled for his or her work-related injury. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). Whether an employer-employee relationship exists must be decided on the facts of each case. See, *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995); *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975). Nebraska district courts have, in numerous instances, examined the existence of employee status for workers' compensation purposes in actions brought initially in district court in which the plaintiff has sought damages for injuries. See, e.g., *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1994).

In the instant case, Schweitzer seeks damages pursuant to the petition she filed in the district court. Based on her petition, Schweitzer admits that she is an "employee" of Red Cross and Shrine Temple and that Red Cross was her "direct employer" pursuant to the Nebraska Workers' Compensation Act (the Act) provisions found in chapter 48. An admission made in a pleading on which trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversies so far as an adverse party desires to take advantage of it, and therefore it is a limitation of the issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Sands v. School Dist. of City of Lincoln*, 7 Neb. App. 28, 581 N.W.2d 894 (1998). In this regard, we note that in her deposition testimony, Schweitzer reiterated her claim that she was a Red Cross employee injured in the course of performing her employment duties, and similarly, in her appellate brief, Schweitzer insists that she is an "employee" of Red Cross and Shrine Temple.

In the instant case, in support of their motions for summary judgment, Red Cross and Shrine Temple presented judicial admissions and offered evidence designed to establish that Schweitzer was an "employee" of Red Cross, and by admission, an employee of Shrine Temple. However, both Red Cross and

Shrine Temple denied in their respective answers that Schweitzer was an employee and affirmatively alleged that she was a volunteer. Thus, the record regarding Schweitzer's employment status was in conflict. Given the factual dispute in the record, for purposes of evaluating its exercise of jurisdiction, the trial court did not explicitly find that Schweitzer was an "employee," but nevertheless treated Schweitzer as having employee status under the Act. Thus, simply for purposes of reviewing the district court's order noting that "[i]nasmuch as the plaintiff has based her cause of action on the theory that she was an employee of the Red Cross and that her injury occurred in the course of such employment" and of evaluating the district court's legal conclusion that it lacked jurisdiction, we treat Schweitzer as an employee for workers' compensation purposes.

The Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. Neb. Rev. Stat. §§ 48-101 and 48-109 (Reissue 1998); *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999); *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997). Thus, an employee cannot normally maintain a negligence suit against his or her employer regarding an injury arising out of and in the course of employment; his or her sole remedy is a claim for workers' compensation, and all disputed workers' compensation claims "shall be submitted to the Nebraska Workers' Compensation Court." Neb. Rev. Stat. § 48-161 (Reissue 1993). Absent any other allegations, a determination of employee status under the Act is ordinarily sufficient for the district court to end its analysis and dismiss a purported negligence suit.

However, Schweitzer argues that notwithstanding the fact that her negligence suit is based upon an injury arising out of and in the course of employment, she may maintain her suit in district court because she alleged that Red Cross and Shrine Temple did not maintain workers' compensation insurance to cover her injury. Although Red Cross and Shrine Temple denied the allegation that they lacked appropriate insurance, there is no evidence one way or the other on this issue. Neb. Rev. Stat. § 48-145(3) (Reissue 1993) provides in pertinent part: "Every

employer who fails, neglects, or refuses to comply with the conditions [regarding the maintenance of insurance] shall be required to respond in damages to an employee for personal injuries . . . ." Such damages may be sought in district court. Thus, working on the assumption that Schweitzer has employee status, the resolution of the issue of whether Red Cross and Shrine Temple maintained proper insurance is determinative of whether Schweitzer may continue to pursue a negligence suit in district court.

DETERMINATION OF EXISTENCE OF WORKERS' COMPENSATION INSURANCE

In response to Schweitzer's assertion that the district court could properly determine the insurance issue, Red Cross and Shrine Temple argue that the district court found Schweitzer to be an employee and once it was established that Schweitzer was an employee under the Act, the Workers' Compensation Court had exclusive jurisdiction to determine the issue of the existence of workers' compensation insurance. Applying the current statutory law, we determine that although the existence of insurance may be decided in the Workers' Compensation Court in a claim before it under § 48-161, such jurisdiction is not exclusive, and the issue of the existence of workers' compensation insurance on the facts of this case is to be decided in the district court where the action was filed. Accordingly, the district court's conclusion that it lacked subject matter jurisdiction to determine the issue of the existence of insurance was incorrect, and we reverse the district court's grant of summary judgment and dismissal of Schweitzer's petition and remand the cause for further proceedings consistent with this opinion.

Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

Neb. Const. art. V, § 9, provides that "district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide." The district

court is not a court of limited jurisdiction. *Fisher v. Keeler*, 142 Neb. 79, 5 N.W.2d 143 (1942). Rather, its jurisdiction is general, original, and appellate in all matters civil and criminal, except where otherwise provided. *Id.* See, also, Neb. Rev. Stat. § 24-302 (Reissue 1995).

Because the district court's general jurisdiction emanates from the Nebraska Constitution itself, the Legislature cannot limit or control the jurisdiction of the district court. *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985). However, where the Constitution does not fix the jurisdiction of any class or grade of courts, the jurisdiction and powers of any such class may be regulated by the Legislature. *State v. Magney*, 52 Neb. 508, 72 N.W. 1006 (1897). A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute. *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995); *Shada v. Whitney*, 172 Neb. 220, 109 N.W.2d 167 (1961). Thus, for example, in *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990), we held that under the terms of the Act as it then existed, the Workers' Compensation Court was without jurisdiction to adjudicate insurance coverage disputes, because the Act did not specifically confer such authority upon it.

Following our opinion in *Thomas v. Omega Re-Bar, Inc., supra*, the Legislature amended § 48-161 and clarified that the Workers' Compensation Court is vested with jurisdiction "to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits." This statute was amended to vest the Workers' Compensation Court with the power to determine insurance coverage disputes in the claims before it, including the existence of coverage, and the extent of an insurer's liability. See 1990 Laws, L.B. 313. See, also, *Curtice v. Baldwin Filters Co.*, 4 Neb. App. 351, 543 N.W.2d 474 (1996); 9 Arthur Larson & Lex K. Larson, Workers' Compensation Law § 92.41 (1998).

While the 1990 amendment to § 48-161 generally created authority for the Workers' Compensation Court to determine all issues ancillary to a workers' compensation claim before it,

including insurance coverage disputes, § 48-161 as amended does not specify that the Workers' Compensation Court is the exclusive forum that may make such a determination. *Curtice v. Baldwin Filters Co., supra.* Had the Legislature intended the Workers' Compensation Court to be the exclusive forum for determining insurance coverage disputes, such would be expressed in § 48-161 or elsewhere in the Act. Absent such statutory expression, we cannot presume that the district court has been stripped of the jurisdiction to determine a workers' compensation insurance issue when that issue is, by statute, determinative of whether a negligence suit currently before it can be pursued in district court.

Where the Legislature has designated an exclusive forum for resolution of a claim or issue, a litigant may be required to follow the statutory scheme passed by the Legislature in order to gain relief. *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949). Where the law does not mandate an exclusive forum for a particular issue, the issue may be resolved in the district court according to the constitutional grant of general jurisdiction in the district court. *State v. Jones*, 209 Neb. 296, 307 N.W.2d 126 (1981). A litigant may ask the district court, a court of general jurisdiction, to exercise its inherent power. Doing so may not, however, toll the applicable statute of limitations on other aspects of the litigant's claim. *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). See, also, *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995) (in disputes regarding employment status for purposes of workers' compensation coverage, it may be advisable for litigant to file first in Workers' Compensation Court to preserve rights subject to statute of limitations applicable to workers' compensation claims).

Our determination that in a proper case, the district court has concurrent jurisdiction with the Workers' Compensation Court to examine the existence of insurance coverage as to a certain employee, is not inconsistent with other cases concluding that the district court's general, concurrent jurisdiction may be invoked where it is factually or legally appropriate to do so. See, e.g., *Curtice v. Baldwin Filters, supra* (holding that although Workers' Compensation Court was proper forum for insurance

coverage dispute under specific facts of that case, district court possessed concurrent jurisdiction because of general equity powers). In a number of areas, the appellate courts of this state have specifically held that the district court is a proper forum for resolution of other aspects of workers' compensation cases. See, e.g., *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993) (holding that district court had jurisdiction to issue writ of execution to collect unpaid interest on fees awarded in workers' compensation case); *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992) (holding that attorney could maintain action in district court for unpaid fees as result of workers' compensation award). Here, it is appropriate for the district court to determine the insurance issue because although the insurance *issue* in the instant case directly relates to workers' compensation provisions, the instant *claim* of negligence as alleged is not derived from the Act. In her petition filed in district court, Schweitzer asserts a negligence suit, not a workers' compensation claim. Absent some express statute to the contrary, the district court has jurisdiction to determine whether a lawsuit is properly before it.

Having concluded that the district court had jurisdiction to determine the existence of the insurance issue, we now examine the evidence on this issue in connection with the resolution of Red Cross' and Shrine Temple's motions for summary judgment. In the instant case, Schweitzer alleged in her petition that Red Cross and Shrine Temple did not maintain workers' compensation insurance to cover her. Both Red Cross and Shrine Temple denied this allegation. Somewhat inconsistently with her petition, Schweitzer testified in her deposition submitted as evidence in the summary judgment proceedings that she thought Red Cross had workers' compensation insurance. Notwithstanding their motions for summary judgment, neither Red Cross nor Shrine Temple offered any conclusive evidence whether or not they possessed workers' compensation insurance. Thus, the evidence submitted to the trial court on the issue of the existence of insurance raised by the summary judgment motions neither proved nor disproved the truth of Schweitzer's allegation that Red Cross and Shrine Temple did not maintain workers' compensation insurance. Taking the inferences in

favor of Schweitzer, on this record, there is a genuine issue of material fact as to the existence of workers' compensation insurance covering Schweitzer's alleged injuries if, indeed, they are compensable, a question we do not reach. Where a genuine issue of material fact exists, summary judgment cannot properly be granted. *Smith v. Paoli Popcorn Co.*, 255 Neb. 910, 587 N.W.2d 660 (1999).

Because we conclude that the district court had jurisdiction to decide the insurance issue and because there is a genuine issue of material fact as to the existence of applicable insurance maintained by both Red Cross and Shrine Temple, which, on these facts, should be decided by the district court, the grant of summary judgment and dismissal of Schweitzer's petition were improper.

CONCLUSION

The trial court made no explicit finding as to Schweitzer's employee status. The district court's grant of Red Cross' and Shrine Temple's motions for summary judgment and subsequent dismissal of the petition were based on a purported lack of subject matter jurisdiction to decide the issue of the existence of insurance that was an incorrect conclusion of law, and the order of judgment and dismissal is reversed. Because there are genuine issues of material fact regarding the existence of workers' compensation insurance applicable to Schweitzer maintained by Red Cross and Shrine Temple and regarding Schweitzer's employee status, the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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

590 N.W.2d 827

Filed March 5, 1999. No. S-97-1169.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. However, findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A seizure in the Fourth Amendment context occurs when in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Further, whenever a police officer restrains an individual's liberty by force or some show of authority, the officer has seized that person for purposes of the Fourth Amendment.
4. **Warrantless Searches: Police Officers and Sheriffs: Probable Cause: Weapons.** An officer who reasonably believes that a person is armed and dangerous is entitled for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, THOMAS B. DAWSON, Judge. Judgment of Court of Appeals affirmed.

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

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

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

STEPHAN, J.

In an adjudication order entered on November 3, 1997, the separate juvenile court of Lancaster County concluded that Andre W. was a child as defined by Neb. Rev. Stat. § 43-247(2) (Supp. 1997), because he had knowingly or intentionally possessed a controlled substance, crack cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1995). In his appeal from this order, Andre contended that the juvenile court erred in failing to grant his motion to suppress certain evidence. The Nebraska Court of Appeals affirmed, and we granted Andre's petition for further review. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

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

Miller is a detective sergeant with 18 years' experience assigned to the specialized drug unit of the Lincoln Police Department. On September 17, 1997, at approximately 9:50 p.m., Miller was supervising the execution of a search warrant at a Lincoln apartment. The warrant was a nighttime, no-knock warrant authorizing a search for controlled substances, other drug-related evidence, and an individual known as Crumb, who was described in the warrant as a "black male 5'7", thin build, wearing a white T-shirt and blue slacks."

The officers gained forcible entry into the apartment. Andre, then 15 years old and dressed in a white T-shirt, blue jeans, and high-top tennis shoes, was found in a bedroom of the apartment. He told the officers that he did not live at the apartment. Andre and other occupants of the apartment were handcuffed and taken outside so that a canine sniff of the apartment could be conducted. Miller testified that the occupants were handcuffed

and removed for safety purposes and that this was standard procedure for his unit.

After Andre was taken outside, Miller conducted a pat-down search of Andre's person. At the time of the search, Miller suspected that Andre was involved in distribution of crack cocaine. Informants had indicated that no one actually lived in the apartment and that it was used solely for the distribution of controlled substances. Andre fit the general description of the person referred to in the search warrant as "Crumb." Miller testified: "My purpose of searching was for officer safety, to make sure he didn't have any weapons on him because I didn't know who he was at the time."

As part of the pat-down search, Miller had Andre remove his high-top tennis shoes in order to search for weapons. Miller stated that he did so because people encountered in similar circumstances "frequently hide weapons in their socks and in their shoes." He stated that he had found knives and razor blades concealed in shoes on prior occasions but admitted that he had not personally found such weapons concealed within a person's sock. Miller further testified that persons who are removed from premises being searched for drugs are handcuffed for the safety of police but are also searched for weapons because "on several occasions I've had people that were able to slip the handcuffs — their arms from behind up to the front which gives them access to any weapons they may have on their person." While patting down Andre's socks, Miller felt an object inside one sock that he "immediately" recognized as crack cocaine, based on his training and experience. Miller then removed the crack cocaine and arrested Andre.

Following the hearing, the juvenile court overruled Andre's motion to suppress. On October 30, 1997, the case was tried on stipulated facts, and Andre preserved his objection to the receipt of the evidence obtained as a result of the search and seizure. Thereafter, the court found beyond a reasonable doubt that Andre had illegally possessed cocaine and exercised its jurisdiction over him. Andre appealed, and the Court of Appeals affirmed on the basis that the detention of Andre, the subsequent pat-down search, and the seizure of the crack cocaine were all constitutionally permissible. *In re Interest of Andre W.*,

7 Neb. App. 539, 584 N.W.2d 474 (1998). We granted Andre's petition for further review.

II. ASSIGNMENTS OF ERROR

On appeal, Andre assigned that the juvenile court erred in overruling his motion to suppress and in finding there was sufficient evidence to adjudicate him under the provisions of the Nebraska Juvenile Code. In his petition for further review, Andre assigns that the Court of Appeals erred in affirming the judgment of the juvenile court.

III. STANDARD OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 139, 142 L. Ed. 2d 112.

A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. However, findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. See, *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997); *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

IV. ANALYSIS

Andre contends that the actions of the police in detaining him constituted a seizure or an arrest within the meaning of the Fourth Amendment and that such a seizure or arrest was impermissible because the police did so without probable cause. The State contends that the detention was a permissible investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Andre argues that the actions of the police in detaining him, conducting a search which included the removal of his shoes, and seizing narcotics from inside his sock were beyond the scope of a permissible *Terry* stop and consti-

tuted a warrantless search done without probable cause. Thus, Andre argues that the warrantless seizure of cocaine from his sock violated his rights under U.S. Const. amend. IV, which protects citizens against unreasonable searches and seizures by the government. See *Craven, supra.*

1. APPLICABILITY OF FOURTH AMENDMENT

A seizure in the Fourth Amendment context occurs when "' "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ' " *Soukharith*, 253 Neb. at 320, 570 N.W.2d at 353. Further, "[w]henever a police officer restrains an individual's liberty by force or some show of authority, the officer has 'seized' that person for purposes of the fourth amendment." *State v. Caples*, 236 Neb. 563, 566, 462 N.W.2d 428, 430 (1990).

It is undisputed that Andre was handcuffed immediately before and during the pat-down search. Under such circumstances, a reasonable person clearly would not believe he or she was free to leave. Thus, the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment applies to this case, necessitating an examination of whether Andre's constitutional rights were violated.

2. DETENTION

Andre contends that the detention during which he was handcuffed and searched was an arrest without probable cause and therefore constitutionally impermissible. The Court of Appeals determined that the detention was a permissible investigatory stop pursuant to *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). *In re Interest of Andre W.*, 7 Neb. App. 539, 584 N.W.2d 474 (1998). We agree and adopt the reasoning of the Court of Appeals that under *Summers, supra*, the detention did not rise to the level of an arrest without probable cause and that the detention was a permissible investigatory stop pursuant to *Terry, supra.*

3. PAT-DOWN SEARCH

Andre argues that under *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the officers were not justi-

fied in searching his person based upon his mere presence in the apartment when the search warrant was executed. The Court of Appeals held that *Ybarra*, which involved a pat down of tavern patrons during the execution of a search warrant, was not controlling under the circumstances of this case, which involved patting down occupants of a private residence during the execution of a search warrant. Based upon the reasoning of *Summers, supra*, and *People v. Thurman*, 209 Cal. App. 3d 817, 257 Cal. Rptr. 517 (1989), and noting the evidence indicating that the apartment in which Andre was found had been used solely for the distribution of crack cocaine, the Court of Appeals determined the pat down was justified on the basis of a reasonable belief that persons in the apartment were engaged in criminal activity and were armed and dangerous. *In re Interest of Andre W., supra*. We agree with and adopt the reasoning of the Court of Appeals on this issue.

4. SCOPE OF PAT-DOWN SEARCH

Andre next contends that even if the police were justified in conducting a pat-down search, the actions of the police in asking him to remove his shoes and patting down his socks exceeded the permissible scope of a pat down for weapons under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The standard has long been that an officer who reasonably believes that a person is armed and dangerous is entitled for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her. See *id.*; *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997).

The majority of states which have addressed the issue have found that a pat-down search involving the removal of a shoe is permissible under *Terry* if the officer acted with the intent of finding concealed weapons. See, *C.G. v. State*, 689 So. 2d 1246 (Fla. App. 1997); *Stone v. State*, 671 N.E.2d 499 (Ind. App. 1996); *Hodges v. State*, 678 So. 2d 1049 (Ala. 1996). But see *State v. Mitchell*, 87 Ohio App. 3d 484, 622 N.E.2d 680 (1993) (search of shoes impermissible absent sufficient articulable facts indicating that reasonably prudent person would believe

defendant to be armed and dangerous); *Thompson v. State*, 551 So. 2d 1248, 1249 (Fla. App. 1989) ("[a]n officer may not continue to search the inside of a suspect's shoes in the hopes of finding contraband unless the officer reasonably believes the object concealed might be a weapon"); *Commonwealth v. Borges*, 395 Mass. 788, 482 N.E.2d 314 (1985) (search of shoe beyond scope permitted by *Terry*, absent evidence that officers feared for their safety in asking defendant to remove his shoes).

For example, in *Stone, supra*, police investigating a possible drug transaction conducted a pat-down search of a suspect that included the removal of his high-top tennis shoes. Noting that the officer's motivation in looking in the shoes was to uncover weapons that might be hidden there and not to look for drugs, the Indiana Court of Appeals held that such a search was permissible pursuant to *Terry, supra*. In particular, the court stated:

> [The officer] asked [the suspect] to remove his shoe solely for the purpose to ensure the safety of the situation. It is not unreasonable for a reasonable and prudent person to suspect a weapon could be hidden in an untied high top athletic shoe. Requesting the removal of a shoe is not overly intrusive given a situation where the officer sincerely fears a hidden weapon might be concealed. The nature of determining the appropriate scope of police action in any given situation is extremely fact sensitive.

Stone, 671 N.E.2d at 503. Likewise, in *Hodges, supra*, the court determined that police officers could lift a suspect's pant leg and look in the suspect's boot when the officers had a reasonable fear that the suspect could easily have hidden weapons there.

Miller testified that on the basis of his training and experience, persons encountered during execution of a warrant to search premises for controlled substances were known to conceal weapons in their socks and shoes, and that his search of Andre was for the specific purpose of finding concealed weapons. At the time of the search, Miller had a reasonable basis for suspecting that Andre was involved in illegal narcotics distribution, since Andre was encountered in what an informant had essentially described as a "crack house" and generally fit the description of the suspected drug dealer set forth in the

search warrant. Under the totality of the circumstances reflected in this record, we agree with the Court of Appeals that Miller had a reasonable and articulable suspicion that Andre might have a concealed weapon in his shoe or sock and that the removal of Andre's shoes and pat down of his socks constituted a reasonable, nonintrusive search for weapons which did not violate Andre's rights under the Fourth Amendment.

5. Seizure of Cocaine

Andre's final argument is that the police could not seize the cocaine based on what has been referred to as the "plain-feel" doctrine as established by *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), and adopted by this court in *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Noting that Miller testified that he "'immediately'" perceived the lump in Andre's sock to be crack cocaine and citing to our opinion in *Craven, supra*, the Court of Appeals determined that the seizure was appropriate pursuant to the plain-feel doctrine. *In re Interest of Andre W.*, 7 Neb. App. 539, 548, 584 N.W.2d 474, 480 (1998). We agree and adopt the reasoning of the Court of Appeals on this issue.

Finding no error, we affirm the judgment of the Court of Appeals.

AFFIRMED.

Central States Foundation, a Nebraska not-for-profit corporation, appellant, v. M. Berri Balka, Tax Commissioner, State of Nebraska, and the Nebraska Department of Revenue, appellees.

590 N.W. 2d 832

Filed March 5, 1999. No. S-97-1192.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

3. **Words and Phrases.** The phrase "relating to" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."
4. ____. The phrase "relating to" is to be read broadly and should be interpreted as being comprehensive of the subject indicated.
5. **Lotteries.** Documents belonging to a donee of pickle card proceeds that describe the donee's disposition of those proceeds are documents "relating to the conduct of lottery by the sale of pickle cards" within the meaning of Neb. Rev. Stat. § 9-322(9) (Reissue 1997).
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
8. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
10. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
11. **Injunction: Equity.** An action for injunction sounds in equity, and equitable remedies are generally not available where there exists an adequate remedy at law.
12. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
13. **Injunction.** An adequate remedy at law exists where a statute provides a litigant with an opportunity to raise the issues that would be presented in an injunction action.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Michael E. Kozlik and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

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

GERRARD, J.

NATURE OF CASE

The Youth Athletic Association (YAA) is a nonprofit organization licensed to sell pickle cards. Central States Foundation (Central States) is a nonprofit organization which is not licensed to sell pickle cards, but to which the YAA had donated pickle card proceeds. In order to determine that the YAA's pickle card proceeds were being disbursed lawfully, M. Berri Balka in his capacity as Tax Commissioner of the State of Nebraska and the Nebraska Department of Revenue (collectively the Department) notified Central States that the Department would conduct an audit of Central States.

Central States sued in Lancaster County District Court, seeking an injunction against the audit. The district court denied a permanent injunction, and Central States appealed. We moved the case to the Nebraska Supreme Court docket on our own motion. The question presented in this appeal is whether the Department may audit the records of an organization which is not licensed to sell pickle cards but does receive pickle card revenues from a licensee.

FACTUAL BACKGROUND

The Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. §§ 9-301 through 9-356 (Reissue 1997), provides for licensed nonprofit organizations to raise revenue by selling pickle cards. A pickle card is a form of lottery which affords a person the opportunity to win a cash prize by removing a tab from the card to reveal a set or combination of numbers, letters, or symbols. See § 9-315.

The Department is charged by statute with the responsibility of regulating the issuance, renewal, and revocation of licenses; to enforce the terms of the Nebraska Pickle Card Lottery Act; to regulate compliance with the requirements of the Nebraska Pickle Card Lottery Act; and to investigate potential violations. See §§ 9-306 and 9-322. The primary function of this enforcement and regulation capacity is to ensure that pickle card revenues are used for lawful purposes, which may be generally described as purposes which are charitable or benefit the public welfare. See § 9-309.

The Department conducted an audit of the YAA, as authorized by § 9-322(9), and discovered that much of the YAA's pickle card revenue was being directed to Central States. In total, the Department determined that of $177,365.90 designated by the YAA as "donated to charity" between July 5, 1995, and June 30, 1996, $159,000 was given to or benefited Central States.

The Department informed Central States by letter that the Department had scheduled an audit of Central States in order for the Department to review and examine all books and records pertaining to compliance with the Nebraska Pickle Card Lottery Act. Central States then filed a petition in district court against the Department, asking that the Department be enjoined from any examination of Central States' books and records pertaining to compliance with the Nebraska Pickle Card Lottery Act. Central States also alleged that an audit would be a violation of its rights under the Fourth Amendment to the U.S. Constitution.

The district court granted a temporary injunction against the audit, and a hearing was subsequently held to adduce evidence relating to Central States' request for permanent injunctive relief. After the hearing, the district court found that the evidence adduced indicated a "substantial interrelationship" between the YAA and Central States.

For instance, Thomas Prendergast, the president of Central States, is also a pickle card " 'sales agent' " for the YAA. The YAA donated most of its pickle card revenue to Central States, as detailed above. In addition, one of the payments made for Central States' benefit was the purchase of a $49,000 cashier's check on July 5, 1995. This coincided with the July 6 purchase of a day-care center by Central States for $50,000. Janet Breeling, the seller of the day-care center, reported that the sale was negotiated for Central States by F. Dennis French (French) and Lenore French, respectively the president and secretary-treasurer of the YAA. Central States had provided French with documents, including a " 'Special Power of Attorney.' " Breeling reported that she provided training in the operation of the day-care center to David Dowthitt, an officer of the YAA. Breeling indicated that the only officer of Central States she met was Prendergast, whom she met at the closing of the sale.

Furthermore, bank records obtained by the Department showed that payments were made by Central States to French, Dowthitt, and Prendergast. During March and April 1996, French received $6,907.03, Dowthitt received $2,654.22, and Prendergast received $1,388.21 from Central States. In addition, $2,400 was paid by Central States to Dowthitt "d/b/a Best Enterprises," a company that is in the business of selling and servicing pickle card dispensing machines.

Ultimately, the district court denied Central States' request for permanent injunctive relief. The district court determined that "the Department has the legitimate, legislatively authorized purpose of determining whether $159,000.00 (out of $177,000.00 available for charitable use) was used for legitimate purposes under the Nebraska Pickle Card Lottery Act." The district court dissolved the temporary injunction, denied Central States' motion for permanent injunction, and dismissed Central States' petition. Central States timely appealed.

ASSIGNMENTS OF ERROR

Central States assigns, restated, that the district court erred (1) in dissolving the temporary injunction and denying Central States' motion for a permanent injunction, (2) in concluding that the Nebraska Pickle Card Lottery Act authorizes the Department to conduct an audit of Central States, (3) in sustaining the Department's objection to portions of an affidavit submitted by Prendergast, (4) in overruling Central States' objection to the introduction of bank records, and (5) in concluding that the Department's actions did not violate Central States' right to be free from unreasonable searches and seizures.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999).

ANALYSIS

STATUTORY AUTHORITY TO AUDIT CENTRAL STATES

Central States claims that the Department has no authority to audit Central States' records. The Department argues that it is

authorized to do so pursuant to § 9-322(9). That statute provides, in relevant part, that the Department shall have the power, function, and duty to

> examine or to cause to have examined, by any agent or representative designated by the department for such purpose, any books, papers, records, or memoranda relating to the conduct of lottery by the sale of pickle cards of any licensee, to require by administrative order or summons the production of such documents or the attendance of any person having knowledge in the premises, to take testimony under oath, and to require proof material for its information. If any such person willfully refuses to make documents available for examination by the department or its agent or representative or willfully fails to attend and testify, the department may apply to a judge of the district court of the county in which such person resides for an order directing such person to comply with the department's request.

Id.

Central States argues that this section does not authorize the Department to audit any organization that is not a pickle card licensee. The Department maintains that it is empowered to audit an organization that receives pickle card revenues, regardless of whether that organization is itself licensed to sell pickle cards.

Resolution of this issue rests on the meaning of the phrase "books, papers, records, or memoranda *relating to the conduct of lottery* by the sale of pickle cards." (Emphasis supplied.) See *id.* In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Miller v. Meister & Segrist*, 255 Neb. 805, 587 N.W.2d 399 (1998).

It is well understood that "[t]he ordinary meaning of [the phrase 'relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L. Ed. 2d

157 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). Accord *Contractors Ass'n v. West Virginia DPS*, 189 W. Va. 685, 434 S.E.2d 357 (1993). Compare *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

Other courts have stated that "relating to" means "in respect to; in reference to; in regard to." *Snowden v. School Dist. No. 401*, 38 Wash. 2d 691, 698, 231 P.2d 621, 625 (1951). See, also, *Harris v. State*, 260 Ark. 646, 543 S.W.2d 459 (1976) (en banc).

It has also been stated that "[t]he ordinary meaning of 'relating to' is that there is a connection between two subjects, not that the subjects have to be the same." *Contractors Ass'n v. West Virginia DPS*, 189 W. Va. at 697, 434 S.E.2d at 369. See, also, *Matter of City of New York (Town of Hempstead)*, 125 A.D. 219, 109 N.Y.S. 652 (1908), *aff'd* 192 N.Y. 569, 85 N.E. 1117, *motion to amend remittitur denied* 194 N.Y. 587, 88 N.E. 1134 (1909).

The clear import of these well-established standards is that the phrase "relating to" is to be read broadly and should be interpreted as being comprehensive of the subject indicated. In this case, the subject indicated is "the conduct of lottery by the sale of pickle cards." See § 9-322(9). In the context of the overall legislative scheme of the Nebraska Pickle Card Lottery Act, the "conduct of lottery" must encompass not only the sale of pickle cards by the licensee, but also the use to which that licensee puts the revenue generated.

In other words, the "conduct of lottery by the sale of pickle cards" includes not only how a licensee makes money, but how a licensee spends money. This, of course, includes charitable donations from a licensee to an eligible nonprofit organization. Documents "relating to" those transactions may be found in the possession of both the pickle card licensee and the recipient of its pickle card funds.

Central States argues that the phrase "of any licensee" contained in § 9-322(9) limits the Department to auditing records in the possession of a licensee. Central States' position is contrary to the language of the statute. The statute provides that the Department may audit "books, papers, records, or memoranda relating to the conduct of lottery by the sale of pickle cards of any licensee." *Id.* The phrase "of any licensee" modifies the

phrase "the conduct of lottery by the sale of pickle cards." Restated, the statute provides that when "any licensee" engages in "the conduct of lottery by the sale of pickle cards," the Department may audit the "books, papers, records, or memoranda relating to" that conduct, regardless of whether the licensee itself possesses the relevant documentation.

Based on the foregoing analysis, we hold that documents belonging to a donee of pickle card proceeds that describe the donee's disposition of those proceeds are documents "relating to the conduct of lottery by the sale of pickle cards" within the meaning of § 9-322(9). This is true regardless of whether the donee is itself licensed to sell pickle cards.

We note, in that regard, that if the Legislature had intended to limit the scope of the Department's audits to pickle card licensees, it could have easily done so. Instead, the unambiguous language of § 9-322(9) defines the scope of the Department's authority to audit, not by reference to the party being audited, but by the nature of the documents being sought. The Department is authorized by the plain language of § 9-322(9) to review any records relating to a licensee's conduct of pickle card sales, and § 9-322(9) contains no limitation premised on the identity of the party holding the records. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

This conclusion is also supported when § 9-322 is considered in the larger context of the Nebraska Pickle Card Lottery Act. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998); *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997). A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *SID No. 1 v.*

Nebraska Pub. Power Dist., 253 Neb. 917, 573 N.W.2d 460 (1998); *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997).

For example, it is stated in § 9-302(1), in relevant part:

> The purpose of the Nebraska Pickle Card Lottery Act is to protect the health and welfare of the public, to protect the economic welfare and interest in pickle card sales and winnings, to insure that the profits derived from the operation of lottery by the sale of pickle cards are accurately reported in order that their revenue-raising potential be fully exposed, to insure that the profits are used for legitimate purposes, and to prevent the purposes for which the profits of lottery by the sale of pickle cards are to be used from being subverted by improper elements.

It would be difficult, if not impossible, for the Department to ensure that pickle card profits were "used for legitimate purposes," and to prevent those purposes from being "subverted by improper elements," if the Department is unable to investigate the organizations which received donations from pickle card revenue.

The Nebraska Pickle Card Lottery Act further contains sections that extensively define the purposes for which pickle card profits may lawfully be spent. See, e.g., §§ 9-309, 9-347, 9-347.01, and 9-349. When considered as a whole, the Nebraska Pickle Card Lottery Act, as the district court noted, "evidence[s] a clear concern by the Legislature regarding the ultimate use of pickle card proceeds, even after initial donation by a licensed organization." In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997). With that in mind, it is entirely appropriate that § 9-322(9) allows the Department to monitor the disposition of pickle card revenue with reasonable audits of organizations that receive that revenue.

We conclude that the Department is authorized by statute to audit Central States' records relating to its expenditure of

donated pickle card revenue and that the district court was correct in so finding. Accordingly, Central States' assignment of error is without merit.

PROPRIETY OF INJUNCTIVE RELIEF

Having determined that Central States falls within the scope of § 9-322(9), we must determine whether the provisions of that statute entitle Central States to seek injunctive relief. Specifically, we must decide if the statute provides an adequate remedy at law that would make injunctive relief inappropriate.

It is well established that an injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *State v. World Diversified, Inc.*, 254 Neb. 307, 576 N.W.2d 198 (1998). As noted previously, § 9-322(9) provides that if an entity refuses to honor a request for documents, the Department "may apply to a judge of the district court of the county in which such person resides for an order directing such person to comply with the department's request."

The federal courts have established that while an administrative agency may issue an administrative subpoena without first obtaining a search warrant, in order for the procedure to satisfy the Fourth Amendment to the U.S. Constitution, the subpoenaed party must have the opportunity for judicial review of the subpoena's requirements before suffering any penalties for refusing to comply. See, *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964). This is accomplished by requiring the agency to seek judicial enforcement of a subpoena at a contested hearing. *Id.* At such a hearing, if the subpoenaed party wishes to oppose enforcement, it may raise an appropriate challenge. See, *Donovan v. Lone Steer, Inc., supra*; *United States v. Powell, supra*; *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

The statute at issue in the present case, § 9-322, requires the Department to respond to noncompliance with its request by obtaining judicial enforcement from the district court, thus providing an opportunity for the contested hearing necessary to satisfy Fourth Amendment requirements. Although the statute does not explicitly state that a contested hearing is required before judicial enforcement can be obtained, we read the statute as including the procedural requirements necessary to satisfy the Fourth Amendment. See *id.* See, also, *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995) (holding statutes should be reasonably constructed in way that preserves constitutional validity).

In the instant case, the question is whether Central States could be entitled to injunctive relief even though it is possible to raise its defenses at the district court hearing that is required before the Department may obtain judicial enforcement of its request. An action for injunction sounds in equity, *Putnam v. Fortenberry, ante* p. 266, 589 N.W.2d 838 (1999), and it is well established that equitable remedies are generally not available where there exists an adequate remedy at law. *Vaccaro v. City of Omaha*, 254 Neb. 800, 579 N.W.2d 535 (1998). An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Id.*

It is equally well established that an adequate remedy at law exists where a statute provides a litigant with an opportunity to raise the issues that would be presented in an injunction action. See, e.g., *id.*; *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994).

Since § 9-322(9) requires the Department to seek judicial enforcement, and therefore judicial review, of its request for documents prior to enforcement, the statute provides Central States with an adequate remedy at law, and injunctive relief is not available in the instant cause. Stated another way, if the Department pursues its request by seeking judicial enforcement, Central States may raise any of its defenses at the judicial enforcement hearing.

CONCLUSION

For the foregoing reasons, we conclude that the Department is authorized by § 9-322(9) to audit Central States' records relating to its expenditure of donated pickle card revenue and that the statute provides an adequate remedy at law that precludes Central States' initiation of an action seeking injunctive relief. Accordingly, the district court did not err in determining that the Department was authorized to audit Central States and in denying injunctive relief, and the district court's judgment is affirmed. Having decided that injunctive relief is unavailable to Central States, we need not consider its other assignments of error.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL T. TORRES, APPELLANT.

590 N.W.2d 184

Filed March 5, 1999. No. S-98-118.

1. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **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.

Appeal from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Judgment of District Court reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Christopher J. Lathrop and Leslie E. Kendrick for appellant.

Don Stenberg, Attorney General, and, on brief, Jay C. Hinsley for appellee.

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

GERRARD, J.

NATURE OF CASE

Daniel T. Torres appeals from his sentence for violating the terms of his probation, claiming that he was not credited for time already served, as required by Neb. Rev. Stat. § 47-503 (Reissue 1998). We determine that Torres was not sentenced as required by statute, and we reverse, and remand this cause with directions.

FACTUAL BACKGROUND

Torres was charged with assault and battery in violation of a protection order on October 30, 1996. Torres pled no contest to the charge of violating the protection order, and the charge of assault and battery was dismissed. Torres was found guilty and sentenced by the Douglas County Court to 270 days' probation, the terms of which included professional counseling, abstention from alcohol and drug use, regular meetings with probation officers, and a $50 fine.

On May 30, 1997, Torres was charged with violating the terms of his probation, based on his probation officer's report that Torres had failed to appear for his scheduled appointments at the probation office, had not paid the fines and costs assessed as part of his sentence, and had provided no verification that he was receiving counseling. Torres entered a plea of guilty to the charge of violating his probation. The county court found there to be a factual basis for Torres' plea. The following exchange was then had regarding sentencing:

> THE COURT: . . . I'm ordering the defendant to serve a term of 90 days in jail, and his probation is terminated.
>
> [DEFENSE COUNSEL]: He was incarcerated for 26 days prior to bonding out, after the death of his wife. We're hoping for credit for 26 days.
>
> THE COURT: I took that into consideration. I'll set the appeal bond for $300. You're excused.

Torres appealed to the Douglas County District Court, assigning as error that he was not given credit for time already served, as required by § 47-503. The district court found that the county court had given Torres credit for time served, stating, "While it would perhaps be clearer for the judge to state a sen-

tence of 116 days, with credit for 26 days served, a sentence of 90 days, with the presentence time taken 'into consideration,' seems to meet the spirit and the letter of § 47-503." The district court affirmed the sentence, modified to reflect a term of 116 days with credit for 26 days served.

On February 6, 1998, Torres filed a timely appeal to the Nebraska Court of Appeals, and we ordered the case removed to our docket pursuant to our power to regulate the dockets of this court and the Court of Appeals.

ASSIGNMENT OF ERROR

Torres assigns that the district court erred when it affirmed the county court's sentencing order which failed to credit Torres for time served in jail while awaiting trial and sentence.

STANDARD OF REVIEW

A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

ANALYSIS

The statute relevant to this appeal is § 47-503, which provides, in relevant part:

> (1) Credit against a jail term *shall be given* to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. . . .
>
> . . . .
>
> (2) Credit to any person sentenced to a city or county jail who is eligible for credit pursuant to subsection (1) of this section shall be set forth as part of the sentence at the time such sentence is imposed.

(Emphasis supplied.)

The State's brief does not cite, nor does the State distinguish, the cases that are dispositive of this matter. We have repeatedly stated, with reference to functionally identical language of Neb. Rev. Stat. § 83-1,106 (Reissue 1994), that 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. See, *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993).

It is true that § 47-503 relates to city and county correctional facilities, while the cases cited above have dealt with § 83-1,106, which relates to state correctional facilities. Section 83-1,106 provides, in relevant part:

> (1) Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. . . .
>
> . . . .
>
> (5) . . . .
>
> (a) Credit to an offender who is eligible therefor under subsections (1), (2), and (4) of this section shall be set forth as a part of the sentence . . . .

In *State v. Esquivel*, 244 Neb. at 309, 505 N.W.2d at 736, the trial judge overruled the defendant's postsentencing motion seeking credit for time served, stating, "'I took the time served into consideration when I sentenced [Esquivel].'" We held that the use of the word "shall" in § 83-1,106 required the sentencing court to separately determine, state, and grant credit for time served, and we reversed, and remanded that cause with directions to grant credit for time served pursuant to the statute. *State v. Esquivel, supra*. See, also, *State v. Groff, supra*.

We find the facts of the present case, and the relevant statutory language, to be essentially indistinguishable from those presented in *State v. Esquivel, supra*. The sole distinguishing argument presented by the State is the contention that the district court order, affirming the county court's sentence as modified, was sufficient to satisfy the statute even if the county

court's initial sentence was not. This argument is not persuasive. It is clearly stated in § 47-503(2) that credit for time served shall be set forth "as part of the sentence at the time such sentence is imposed." Because compliance with § 47-503(2) must be achieved "at the time such sentence is imposed," the district court sitting as an appellate court cannot remedy a sentence which was not correctly pronounced in the first instance. The rule first set forth in *State v. Esquivel, supra*, requires that the order of the district court be reversed.

CONCLUSION

For these reasons, we conclude that the county court abused its discretion in failing, at the time that Torres' sentence was imposed, to separately determine, state, and grant Torres credit for jail time already served. Accordingly, the order of the district court is reversed, and the cause is remanded to the district court. The district court is directed to remand the cause to the county court, with directions to credit Torres' sentence for the time served in jail prior to sentencing.

REVERSED AND REMANDED WITH DIRECTIONS.

JAY ARTHUR DIVIS, APPELLANT, V. CLARKLIFT OF NEBRASKA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

590 N.W.2d 696

Filed March 12, 1999. No. S-97-905.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Products Liability: Limitations of Actions: Words and Phrases.** In a product liability action, a two-part test is used to determine whether the statute of repose should be recommenced when a product has been allegedly reconditioned or refurbished. First, a court must determine whether the reconditioning or refurbishing resulted in a new product. To determine whether the product should be considered new, the court must inquire whether the reconditioning or refurbishing has the effect of lengthening

the useful life of the product beyond what was contemplated when the product was first sold. Second, if the product is considered new, a suit will still be time barred unless the reconditioning or refurbishing was defective and actually caused the injury.

4. **Negligence: Proximate Cause: Damages: Proof.** In order to maintain a negligence action, a plaintiff must prove duty, breach, proximate cause, and damages.
5. **Warranty: Proximate Cause: Proof.** To maintain a warranty action, several factors must be proved: (1) The plaintiff must prove the defendant made a warranty, express or implied, under Neb. U.C.C. §§ 2-313, 2-314, or 2-315 (Reissue 1992); (2) the plaintiff must prove the goods did not comply with the warranty, i.e., the goods were defective at the time of the sale; (3) the plaintiff must prove the injury was caused, proximately and in fact, by the defective nature of the goods; and (4) the plaintiff must prove damages.

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

James R. Welsh, of Bradford, Coenen & Welsh, for appellant.

Robert D. Mullin, Jr., and Aaron A. Clark, of McGrath, North, Mullin & Kratz, P.C., for appellee Clarklift.

Michael C. Cox, of Koley, Jessen, Daubman & Rupiper, P.C., for appellee Clark.

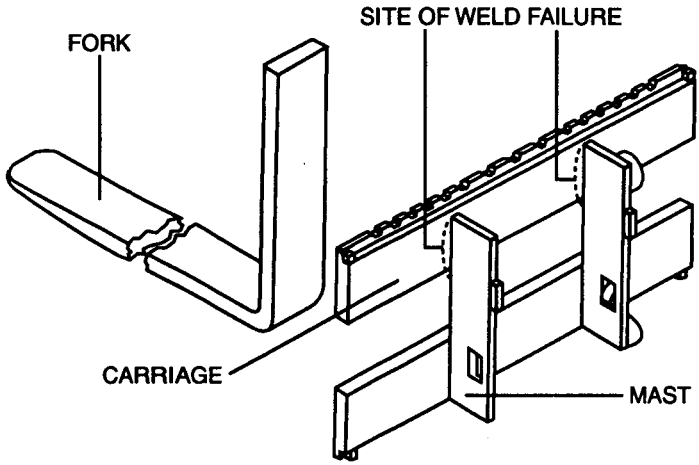
HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

I. INTRODUCTION

This is a product liability action brought by appellant, Jay Arthur Divis, against appellees, Clarklift of Nebraska, Inc. (Clarklift), Clark Material Handling Company (Clark), Wahoo Concrete Products, Co. (Wahoo Concrete), and Right Line Equipment, Inc., for the injuries he sustained in a forklift accident.

The forklift in question can best be described as follows: The forklift contains two vertically parallel members (masts) that raise up and down inside the framework of the forklift. Two other horizontally parallel members (carriages) are welded to the masts. The forks, which are L-shaped, are bolted to the top carriage.



The evidence indicates weld failure occurred at the point where the top carriage is welded to the masts.

II. BACKGROUND

In 1979, Clark designed and manufactured the forklift in question. On January 19, Clark shipped the forklift to Christy Equipment Company, Clarklift's predecessor. In July, Clarklift sold the forklift to Georgia-Pacific Corporation (Georgia-Pacific). Approximately 12 years later, in 1992, Wahoo Concrete sought to purchase a used forklift from Clarklift. In July, Clarklift repurchased the forklift from Georgia-Pacific for resale to Wahoo Concrete.

Prior to delivering the forklift to Wahoo Concrete, Clarklift installed an attachment known as a side-shifter at the request of Wahoo Concrete. A side-shifter is an accessory that bolts onto the carriage of the forklift and allows the forks to move vertically and horizontally. In this respect, Clark's procedures require that any installation of attachments to Clark forklifts be authorized and approved by Clark. Clarklift therefore requested authorization to install the side-shifter, which Clark provided.

Clarklift also refurbished the forklift. Clarklift contributed 30½ hours to refurbishing the forklift and spent $4,700 in parts and $1,825 in labor. The refurbishing consisted of such repairs

as removing the cab, sanding and painting, rebuilding the steering axle, installing the side-shifter, installing a new gas engine, adjusting the lift chains, replacing the upright bushings, replacing the side doors, repairing the shift linkage, installing new tires, repairing the sheet metal, and installing a new seat, as well as various other repairs which are indiscernible from the record.

At the time of sale, Clarklift issued a "Standard Industrial" warranty to Wahoo Concrete. Under the warranty, Clarklift warranted the drive train only. The drive train is defined in the warranty as the engine, transmission, and drive axle, excluding brakes. The warranty also excluded leaks, adjustments, and minor deficiencies.

Upon receipt of the forklift, Wahoo Concrete intended to use the forklift in the course of its business, manufacturing floorings for hog confinement facilities. The floorings are 10- by 10-foot concrete slabs weighing 1,800 pounds. The concrete slabs are manufactured by pouring concrete into metal forms. Once the concrete has set, the concrete must then be removed from the form. Wahoo Concrete accomplished this by operating the forklift with a steel extension (jib-boom) and chains.

The jib-boom in question is approximately 8 inches wide by 5¼ inches high by ¼ inch thick, and 9 feet long. The jib-boom contains two ¾-inch-diameter hooks welded to the bottom side of the attachment. One hook is positioned on the end of the jib-boom, and the other hook is positioned approximately 24 inches from the end. To use the jib-boom, the forks are moved to a position directly adjacent to one another. The jib-boom is attached to the forks, which are then positioned over the concrete slab and the form. A metal chain, which is attached to one of the hooks on the jib-boom, is then attached to the concrete slab, whereupon the forks are raised to lift the concrete slab out of the form.

On June 1, 1994, Divis was employed at Wahoo Concrete as a concrete finisher. One of Divis' responsibilities was to assist in manufacturing the concrete slabs, which included removing the slabs from the forms once the concrete was set. On the day of the accident, several Wahoo Concrete employees, including Divis, were in the process of removing a slab from a form when the slab became somewhat unbalanced. Attempting to act as a

counterbalance, Divis sat on the concrete slab while the slab was being raised out of the form. Divis' position, when sitting on the concrete slab, placed him under the masts and carriages of the forklift. While the slab was being raised out of the form, the welds on the top carriage and the masts failed. The carriage unit snapped, falling down on top of Divis, striking him on the head, pinching him between the slab and the jib-boom, and ultimately causing severe injuries.

On August 24, 1995, Divis filed a second amended petition against appellees based on negligence, strict liability, and breach of warranty. On January 16, 1997, Clark and Clarklift filed motions for summary judgment, alleging that Divis' claims were barred by the product liability statute of repose, Neb. Rev. Stat. § 25-224(2) (Reissue 1995). On March 6, 1997, a summary judgment hearing was held where evidence was adduced which included, inter alia, the opinions of several experts regarding the cause of the accident. The experts agreed that the accident was caused by a weld failure that occurred between the top carriage and the masts, that the weld failure was caused by a lack of fusion between the carriage and the masts, and that the lack of fusion occurred at the time of manufacture in 1979. Based on this evidence, the district court ruled in favor of Clark and Clarklift, finding, "The evidence presented is uncontroverted that this failure resulted from the original manufacture and not from acts of 'Clarklift.' "

III. ASSIGNMENTS OF ERROR

Rephrased and reordered, Divis claims that the district court erroneously granted summary judgment because (1) the statute of repose began anew when Clarklift reconditioned and refurbished the forklift, which Clark approved and authorized; (2) the statute of repose does not apply to the allegations of negligence Divis asserted against Clarklift; and (3) a factual issue exists regarding whether the "Standard Industrial" warranty issued by Clarklift falls with the exception in § 25-224(2).

IV. STANDARD OF REVIEW

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party

the benefit of all reasonable inferences deducible from the evidence. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998).

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

V. ANALYSIS

1. Reconditioned or Refurbished

Divis first claims that Clark and Clarklift should be held liable because the statute of repose began anew when Clarklift reconditioned and refurbished the forklift, which Clark approved and authorized. Divis essentially claims that a piece of machinery which has been refurbished becomes a "new product" for purposes of a product liability action, recommencing the statute of repose from the date of the new product's sale.

Courts have employed a two-part test to determine whether the statute of repose should recommence when a product has been refurbished. First, courts must determine whether the refurbishing resulted in a "new product." To determine whether the product should be considered "new," courts must inquire whether the refurbishing has lengthened the product's useful life beyond what was contemplated when the product was first sold. Second, if the product is considered "new," the suit will still be time barred unless the refurbishing was defective and proximately caused the injury. See, e.g., *Whitaker v. T.J. Snow Co., Inc.*, 953 F. Supp. 1034 (N.D. Ind. 1997); *Johnson v. Kempler Industries, Inc.*, 677 N.E.2d 531 (Ind. App. 1997); *Fritchie v. Alumax Inc.*, 931 F. Supp. 662 (D. Neb. 1996); *Richardson v. Gallo Equipment Co.*, 990 F.2d 330 (7th Cir. 1993); *Hinds v. CompAir Kellogg*, 776 F. Supp. 1102 (E.D. Va. 1991); *Reese v. National Mine Service Co.*, 672 F. Supp. 1116 (S.D. Ill. 1987).

(a) Clark

The record shows that Clark manufactured the forklift in 1979. Twelve years later, Clarklift refurbished the forklift and attached the side-shifter. While Clark did not authorize the refurbishing, the record shows that Clark authorized Clarklift to add the side-shifter. However, nothing in the record indicates

that Clark's authorization included permission to refurbish the forklift or that Clark manufactured the side-shifter or supplied the side-shifter to Clarklift. The record also lacks any evidence indicating or suggesting that the addition of the side-shifter, standing alone, extended the forklift's useful life.

The record undisputably demonstrates the accident was caused by a latent weld defect between the carriage and the masts dating back to the original manufacture of the forklift in 1979, not by the addition of the side-shifter. The affidavit of James Hummel, an employee of Clarklift, which was received into evidence without objection, provides that "the failed weld linking the crossbar to the mast of the forklift was a factory weld dating back to the original manufacture of the forklift." Divis' own expert stated that the weld defect occurred when the forklift was originally manufactured:

> Q. . . . Do you know what the problem was, if any problem in the welding, that caused the lack of fusion that you're talking about?
>
> A. I can only tell you that the normal reason for not fusing to a member is that the electrode is in the wrong position and the weld metal rolls up cold against the part and you do not melt the one side of the weld.
>
> Q. Do you know if that happened in this case?
>
> A. If that happened? I don't know of any other way of getting lack of fusion.
>
> Q. Okay. So is it your opinion that that's what happened in this case?
>
> A. That's what happened.
>
> Q. Okay. And do you know when that weld was performed or when that weld was done on this particular piece of equipment?
>
> A. No.
>
> Q. Do you know if it was done at the time of the original manufacture?
>
> A. All I can say is that it did not — it does not appear to be a repaired weld.
>
> Q. Okay. So more than likely, the problem with the welding occurred at the time of original manufacture?
>
> A. Yes.

Divis' expert further testified that in his opinion, the addition of the side-shifter was not a cause of the weld failure: "Q. Okay. Do you have any opinions with regard to the — or strike that. Has your opinion with regard to the weld failures, does it have anything to do with a side shifter? A. Not that I'm aware of."

Therefore, because none of Clark's actions extended the useful life of the forklift or proximately caused the injury, the statute of repose cannot be recommenced and Divis' claim against Clark is time barred by the statute of repose. As stated in *Richardson v. Gallo Equipment Co.*, 990 F.2d 330, 332 (7th Cir. 1993): "Unless the component is defective and caused the injury, the suit is barred by the statute of repose because then the defect must have been in the original product . . . ."

(b) Clarklift

Clarklift purchased the forklift from Clark in 1979 and sold it shortly thereafter to Georgia-Pacific. As the seller in 1979, Clarklift assumed the status of a manufacturer, pursuant to the product liability statutes. See Neb. Rev. Stat. § 25-21,180 (Reissue 1995) (defining a product liability action as "any action brought against a manufacturer, seller, or lessor of a product . . . ."). In 1992, Clarklift repurchased the forklift from Georgia-Pacific and significantly refurbished the forklift in preparation for resale to Wahoo Concrete.

Affording Divis every reasonable inference deducible from the evidence, we will assume that the refurbishing, together with the addition of the side-shifter, extended the useful life of the forklift with regard to Clarklift. See *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998). Nonetheless, Divis must still demonstrate the refurbishing was a proximate cause or a proximately contributing cause of the accident. See *Richardson v. Gallo Equipment Co., supra.* The evidence universally demonstrates the accident was not caused by the refurbishing, but, rather, by the latent weld defect in the masts of the forklift dating back to the original manufacture in 1979. Divis' attorney conceded during oral argument that the record is devoid of any evidence that the 1992 modifications caused the original weld to fail.

Given the absence of any evidence even remotely suggesting that the refurbishing was a proximate cause or a proximately

contributing cause of the weld failure, we conclude that Divis' claim against Clarklift was time barred by the 10-year statute of repose. See *id.*

2. Negligence Theory

Divis next claims the statute of repose does not apply to his negligence action against Clarklift because the claim arises from Clarklift's alleged negligence in refurbishing and repairing the forklift before it was sold to Wahoo Concrete in 1992. Assuming without deciding that Divis' position is correct, we determine that the negligence claim still fails.

In order to maintain a negligence action, a plaintiff must prove duty, breach, proximate cause, and damages. *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992). As previously discussed, there is simply no evidence in the record, nor any reasonable inferences to be drawn therefrom, that any action by Clarklift in refurbishing the forklift or installing the side-shifter was a proximate cause or a proximately contributing cause of Divis' injury. The lack of fusion in the weld on the masts of the forklift occurred during the manufacturing process. Divis has produced no evidence indicating that Clarklift had any prior knowledge of the defective weld or that the lack of fusion in the weld was known by Clarklift or could have been reasonably discovered during the course of refurbishing the equipment. The record simply lacks any evidence that Clarklift's alleged negligence played any role in the ultimate failure of the weld. Having failed to produce evidence of proximate causation, summary judgment was properly granted on this claim.

3. Breach of Warranty

Finally, Divis claims the district court erred in granting summary judgment because a factual issue exists regarding whether the "Standard Industrial" warranty issued by Clarklift falls within the exception in § 25-224(2) and thereby avoids the 10-year statute of repose. Divis essentially argues the "Standard Industrial" warranty created either an express or an implied warranty which should have survived summary judgment. See Neb. U.C.C. §§ 2-313, 2-314, and 2-315 (Reissue 1992).

Here again, assuming without deciding that Divis' claim falls within the exception in § 25-224(2), the claim still fails.

To maintain a warranty action, several factors must be proved: (1) The plaintiff must prove the defendant made a warranty, express or implied, under §§ 2-313, 2-314, or 2-315; (2) the plaintiff must prove the goods did not comply with the warranty, i.e., the goods were defective at the time of the sale; (3) the plaintiff must prove the injury was caused, proximately and in fact, by the defective nature of the goods; and (4) the plaintiff must prove damages. See *England v. Leithoff*, 212 Neb. 462, 323 N.W.2d 98 (1982). See, e.g., *Murphy v. Spelts-Shultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Delgado v. Inryco, Inc.*, 230 Neb. 662, 433 N.W.2d 179 (1988); *Geiger v. Sweeney*, 201 Neb. 175, 266 N.W.2d 895 (1978).

Clarklift issued a uniform used equipment warranty to Wahoo Concrete upon delivery of the forklift. The warranty classification was identified as "Standard Industrial." A "Standard Industrial" warranty, as defined in the document, included "the drive train (engine, transmission, drive axle, excluding brakes) for 30 days or 60 hours full parts and labor." Under the warranty explanation, the warranty again indicates that "the unit is covered by a 30-day drive train warranty . . . ."

The record shows that Divis sustained his injury almost 2 years after the forklift was delivered to Wahoo Concrete. This is clearly beyond the 30-day limitation period set forth in the warranty. In addition, the record lacks even a scintilla of evidence suggesting that the drive train components, as identified in the warranty, or any of the work performed on the forklift by Clarklift played any role, proximately or in fact, in the weld failure. See *England v. Leithoff, supra*. We therefore conclude that Divis' breach of warranty claim lacks merit and that the district court correctly granted summary judgment.

VI. CONCLUSION

Having addressed each of Divis' assignments of error, and finding none of them meritorious, we affirm the district court's grant of summary judgment.

AFFIRMED.

FATHER FLANAGAN'S BOYS' HOME, APPELLEE, V. KENNETH P. AGNEW, APPELLANT.

590 N.W. 2d 688

Filed March 12, 1999. No. S-97-1176.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry of the court is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's decision.
5. **Fair Employment Practices: Civil Rights.** The Nebraska Fair Employment Practice Act is patterned after part of the federal Civil Rights Act of 1964, and it is appropriate to look to federal court decisions construing similar and parent federal legislation in interpreting the act.
6. **Evidence: Proof: Words and Phrases.** Direct evidence is evidence which, if believed, proves existence of fact in issue without any inference or presumption.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

John L. Apker and Christopher D. Curzon, of Dwyer, Smith, Grimm, Gardner, Pohren, Lazer & Rogers, for appellant.

Sam Jensen, of Erickson & Sederstrom, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On October 14, 1997, the district court for Douglas County reversed the finding of the Nebraska Equal Opportunity Commission (NEOC) that Kenneth P. Agnew had been unlawfully discharged by Father Flanagan's Boys' Home (Boys Town) on the basis of his gender. Agnew appeals. We affirm the decision of the district court.

STATEMENT OF FACTS

Agnew began working for Boys Town in 1980, when he and his wife were hired as family teachers. Family teachers are married couples who live in homes on the Boys Town campus with children admitted to Boys Town. One family teacher couple is assigned to each residence, along with an assistant family teacher who supports the couple on a non-live-in basis. Residences are grouped in "communities," overseen by a community director. Each community director is assisted by two assistant directors, to whom specific homes within the community are assigned. The assistant directors' responsibilities include guiding the family teacher couples and the assistants through the daily operations of the homes and the raising and training of the children. Boys Town develops an individualized treatment plan for every child under its care, which plan addresses the training, social skills, and care needed by the child. Assistant directors are responsible for knowing and monitoring the plans for all children under their supervision. As part of their duties, assistant directors meet weekly with the family teacher couples they supervise to discuss issues concerning the homes, including each resident's treatment plan.

At the time of the administrative hearing in this case, Boys Town had seven residential communities. Initially, only boys were admitted to Boys Town. Later, girls were allowed to become residents. The children are divided into single-sex communities. At the time of the hearing, Boys Town Communities III, VI, and VII were all-girl communities.

In 1985, Agnew was promoted to senior assistant director of continuing care. In 1989, Agnew was promoted again, this time to the position of assistant director of Community VII, an all-girl community. Agnew continued to hold this position until his termination of employment. When Agnew first began working as the assistant director of Community VII, the community director was Mark Jones, a man. Later, Rita Borgstadt, a woman, became the director for Community VII. Agnew received satisfactory performance reviews while an assistant director. It was undisputed that but for the specific incident which preceded Agnew's termination from employment, he had not been at risk of being discharged.

In June 1994, a 17-year-old female, A.M., was a resident of Community VII, under the supervision of Gary Stessman and Brenda Stessman, her family teacher couple. At the time, A.M. was 8½ months pregnant. Part of A.M.'s treatment plan included medical care relative to her pregnancy and the anticipated birth of her child. During their weekly meetings, the Stessmans and Agnew would discuss A.M.'s medical condition and care.

In the later months of her pregnancy, A.M. had been experiencing "Braxton Hicks contractions." Part of Brenda Stessman's responsibilities included attending Lamaze classes with A.M. and teaching her to deal with the Braxton Hicks contractions. Due to her youth and inexperience, these contractions scared A.M., often causing her to panic and cry out in response to the contractions. The record shows that in May 1994, while watching Boys Town graduation ceremonies, A.M. tripped as she was walking up an aisle and began experiencing a series of contractions. According to Brenda Stessman,

> She was going up the aisle to take some pictures, and she tripped and fell in the aisle. And the scare it must have been caused her to have one of those Braxton-Hicks contractions, and she — it scared her, and she panicked a little bit.
>
> And so they called the rescue unit to come, and they just looked at her for a while, had her sit in the cruiser. They didn't take her to the hospital, but she sat in the ambulance for a little while, and they just monitored her vital signs, and she was fine.

There was some evidence at the hearing that A.M.'s response to the Braxton Hicks contractions may have been, in part, an effort to gain attention.

During her residency at Boys Town, A.M. was assigned to assist Ann Wickenhauser, Boys Town's greenhouse manager. Wickenhauser oversaw Boys Town's greenhouses, gardens, fountains, and flowerbeds. She supervised Boys Town children as they performed various gardening duties. On June 2, 1994, a group of students under Wickenhauser's supervision, including A.M., was cleaning portions of Dowd Chapel on the Boys Town campus. According to Wickenhauser's testimony, while supervising the cleaning duties, she found A.M. lying on her side in

the back of the chapel, crying and complaining that she had cramps. Wickenhauser tried to contact the Stessmans, and when she was unable to reach them, she paged Agnew, who was in a residence across the street from the chapel.

When Agnew called Wickenhauser, she explained the situation. According to Wickenhauser, Agnew responded that A.M. was using the incident to get attention and that Wickenhauser should just explain to A.M. that everything would be fine. Wickenhauser also stated that Agnew said A.M. "had gotten herself into a mess and—and a fix and she was going to have to expect some kind of pain—some kind of pain with it in response to the Braxton-Hicks, and he said, you know, that was part of it."

Wickenhauser testified she returned to A.M. and explained to her that she would be fine and that she was probably having Braxton Hicks contractions. Wickenhauser testified at the hearing that when A.M. continued to moan, she asked A.M. if she was going to be all right.

> And I said, "Are you going to be okay?" And she said, "I don't think so."
>
> And so I went back in, and we had a whole bunch of kids by that time that were around because the other church had finished their tasks. And so I went back, and I called, and I said, "We need to get her picked up." And [Agnew] said, "That's" — [sic] he was just across the street.
>
> "Go ahead and have her walk across the street." And I said — I left, and I said okay and left and told one of my staff to go get the truck because we were going to go and just deliver her. [Agnew] had given me directions where it was, and it wasn't very far.
>
> We were just going to deliver her to the house. Well, by the time I went to get her out of the pew, and by the time we got her out of the pew, she had collapsed. And so I sent all my kids away and ran back, called [Agnew] and said, "I'm calling the squad," kind of pretty much hung up on him and called the squad.

Upon hearing that the rescue squad had been called, Agnew walked across the street to the chapel. Agnew testified he talked

to A.M., who advised Agnew that the pain was a little bit different than it had been previously. The rescue squad evaluated A.M. and decided to take her to the hospital.

Agnew overheard the rescue squad personnel comment that they were planning to take A.M. to Methodist Hospital. Agnew recalled a prior directive from Fr. Val Peter, the director of Boys Town, that Boys Town residents should not be taken to Methodist Hospital, but, rather, should go to St. Joseph Hospital. Agnew contacted Father Peter and informed him of the situation. Father Peter wanted to know what A.M.'s treatment plan was, namely, who was her treating physician and at what hospital she was scheduled for treatment. Agnew did not know and instructed the rescue squad to call the Boys Town clinic to get the information. The clinic reported A.M.'s treating physician was a Dr. Grush and that A.M. should go to St. Joseph Hospital. In a statement taken as part of the investigation following the incident, which statement was admitted into evidence, Agnew admitted that the information did not "sound right but [he] didn't know."

Agnew was soon paged by Borgstadt, the director for Community VII, who wanted to know what was happening. When Agnew gave Borgstadt the report, she advised Agnew that A.M.'s treating physician was in fact a Dr. Chupp and that, according to her treatment plan, A.M. was to be taken to Bergan Mercy Hospital, where the baby was to be delivered. Borgstadt testified at the NEOC hearing that this information was all part of A.M.'s treatment plan and that Agnew should have known this information. A.M. was taken to Bergan Mercy Hospital for observation, and she was returned to Boys Town later that day.

Following the June 2, 1994, incident, Boys Town initiated a staff practice investigation into Agnew's handling of the episode. A staff practice investigation examines issues concerning the alleged violation of a child's rights at Boys Town, including the right to safety and care. During the investigation, statements and evidence are gathered, and after a report is prepared, a recommendation concerning staff discipline is made.

Agnew, Wickenhauser, A.M., and a nun in charge of Dowd Chapel were interviewed as part of the investigation. Thereafter, Dave Shanahan, the director of the Boys Town home campus

operations, met with Borgstadt to discuss the investigation report. Both Shanahan and Borgstadt agreed that the situation involved a potentially serious health issue and that Agnew's response was inappropriate. Shanahan was concerned about the remark Agnew allegedly made concerning A.M.'s pregnancy, as well as Agnew's failure to respond quickly to the situation. Borgstadt was concerned that Agnew did not immediately personally go to A.M., but instead relied upon a Boys Town staff member who was not trained as to A.M.'s treatment plan. Furthermore, Borgstadt felt that Agnew should have been more fully aware of A.M.'s medical plan. Based upon the information gathered during the staff practice investigation, Borgstadt concluded and Shanahan agreed that Agnew's employment with Boys Town should be terminated. Agnew was informed of his employment termination on June 8, 1994. No other Boys Town employees were disciplined as a result of their involvement in the incident.

Agnew filed a complaint with the NEOC alleging that his termination of employment constituted illegal gender discrimination, in violation of Neb. Rev. Stat. § 48-1104(1) and (2) (Reissue 1998) of the Nebraska Fair Employment Practice Act (NFEPA). An NEOC hearing was held on November 7 through 8, 1995. Six witnesses testified in person, and 22 exhibits were received into evidence. A "Recommended Order and Decision" was issued on April 1, 1996, by the hearing officer, which recommended a finding in favor of Agnew. The NEOC's final order adopting the hearing officer's recommendations was entered on April 9.

Boys Town appealed the final order to the district court, under Neb. Rev. Stat. § 84-917 (Reissue 1994) of the Administrative Procedure Act. The district court reversed the NEOC's order on the basis that there was "insufficient evidence" for the hearing examiner to find other than for Boys Town. Agnew appeals from the district court's decision.

ASSIGNMENTS OF ERROR

Agnew assigns the following three errors: (1) The district court erred in not properly allocating the burden of the parties, (2) the district court erred in finding there was no substantial

evidence to support the NEOC's finding of gender discrimination by Boys Town, and (3) the district court erred in not finding that Boys Town was liable for Agnew's attorney fees and "conducting affirmative acts."

STANDARD OF REVIEW

Boys Town appealed the NEOC decision pursuant to § 84-917 of the Administrative Procedure Act. Proceedings for review of an administrative agency's final decision are to the district court, which conducts the review without a jury de novo on the record of the agency. § 84-917(5)(a); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1994); *Wolgamott, supra*; *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). "When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable." *Wolgamott*, 253 Neb. at 354, 570 N.W.2d at 822. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997); *Ventura, supra*. In a gender discrimination case, the judgment will be affirmed "unless the evidence was such that it compelled a finding" of sex discrimination. *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 18, 266 N.W.2d 76, 78 (1978). When reviewing a question of law, however, an appellate court reaches a conclusion independent of the lower court's decision. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998); *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997); *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 564 N.W.2d 592 (1997).

ANALYSIS

The core of Agnew's complaint is that his employment was terminated based on gender, in contravention of the NFEPA.

Section 48-1104 of the NFEPA provides:

> It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire, to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin; or
>
> (2) To limit, advertise, solicit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee, because of such individual's race, color, religion, sex, disability, marital status, or national origin.

With respect to the jurisprudence under the NFEPA, we have previously stated: "Because the NFEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. §§ 2000e et seq. (1976), it is appropriate to look to federal court decisions construing similar and parent federal legislation." *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 856, 353 N.W.2d 727, 731 (1984). See, also, *Bluff's Vision Clinic v. Krzyzanowski*, 251 Neb. 116, 555 N.W.2d 556 (1996); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

Agnew's allegations raise a claim of gender discrimination based upon disparate treatment, that is, that as a male he was treated differently than a similarly situated female was or would have been under the circumstances. The U.S. Supreme Court has outlined a three-part test, commonly referred to as the "*McDonnell Douglas* test," to be applied in disparate treatment cases. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). This court has adopted this test for purposes of construing the NFEPA. See, *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985); *Zalkins Peerless Co., supra.*

Under a theory of disparate treatment, Agnew must initially establish a prima facie case of gender discrimination. At the hearing, Agnew demonstrated, without rebuttal from Boys Town, (1) that he was a male employee of Boys Town; (2) that he was discharged from employment by Boys Town; and (3) that after his discharge, a woman was hired to replace him. See *Airport Inn, supra.* Agnew, thus, established a prima facie case.

After Agnew successfully established his prima facie case, under the second part of the *McDonnell Douglas* test, the burden shifted to Boys Town to articulate a nondiscriminatory reason for Agnew's discharge. The U.S. Supreme Court, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), has analyzed and discussed the employer's burden, with the following explanation:

> [T]he *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i. e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." [*Texas Dept. of Community Affairs v.*] *Burdine*, 450 U.S. [248,] 254[, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)]. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254-255, and n. 8. It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S., at 253.

(Emphasis omitted.)

The U.S. Supreme Court further explained in *St. Mary's Honor Center*, 509 U.S. at 507-08:

> "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted." *Burdine*, 450 U.S., at 255, and "drops from the case," *id.*, at 255, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his

> own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," *id.*, at 256, and that [the protected characteristic] was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *Ibid.*

In sum, once the employer produces evidence of legitimate, nondiscriminatory reasons for its actions, no presumption of discrimination exists.

A review of the record shows that Boys Town set forth nondiscriminatory explanations for its decision to terminate Agnew's employment, thus carrying its burden of production. These explanations included Agnew's failure to respond promptly or appropriately to the situation involving A.M. and his failure to be informed of her treatment plan. According to Boys Town's evidence, these nondiscriminatory reasons led Boys Town to conclude that Agnew's employment should be terminated. In our appellate review, we are not required to evaluate the wisdom of the decision to discharge Agnew, but, rather, whether there appear errors on the record in connection with the district court's implicit finding that Boys Town produced evidence of a legitimate, nondiscriminatory reason for terminating Agnew's employment, which reason rebutted Agnew's prima facie case of discrimination, and that Agnew did not thereafter prove intentional discrimination. We find no such errors.

With Boys Town's having met its burden of production, Agnew no longer enjoyed the presumption of discrimination, and it became incumbent upon Agnew to prove by a preponderance of the evidence that Boys Town intentionally discriminated against him because of his gender. See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984) (citing *McDonnell Douglas* three-part test). See, also, *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). The district court found that Agnew failed to produce such evidence, and upon our review for errors on the record, we agree.

As one of his assignments of error, Agnew claims that the district court erred in its application of the burden of proof. This assignment of error is without merit.

In support of his contention that the district court misapplied the burden of proof, Agnew argues that if a plaintiff presents direct evidence of discrimination, the burden of proof, and not merely the burden of production, shifts to the employer. Thus, according to Agnew and certain cases of which this court is aware, it has been determined that when a plaintiff produces "direct evidence that the protected characteristic was a motivating factor in the employment action," the *McDonnell Douglas* test no longer applies. *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 421 (1st Cir. 1996). See, also, *Wall v. Trust Co. of Georgia*, 946 F.2d 805 (11th Cir. 1991); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769 (11th Cir. 1982). Because Agnew presented no direct evidence at the NEOC hearing that his termination of employment was based on his gender, we need neither address nor resolve whether under Nebraska jurisprudence the *McDonnell Douglas* test could become irrelevant in the face of direct evidence of discrimination based on a protected characteristic. On the record in this case, Agnew presented no direct evidence that his termination of employment was based upon his gender; therefore the analysis of his claim is confined to the traditional *McDonnell Douglas* test. See, *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984); *Zalkins Peerless Co., supra.*

We have previously stated that direct evidence is that evidence which " 'proves the fact in dispute directly.' " *Bland v. Fox*, 172 Neb. 662, 665, 111 N.W.2d 537, 540 (1961), quoting with approval 20 Am. Jur. *Evidence* § 4 (1939). When considering allegations of unlawful employment discrimination, it has been observed:

> Direct evidence . . . consists of statements by a person with control over the employment decision "sufficient to prove discrimination without inference or presumption.". . . The statements must reflect a "discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." . . . Further, the statements "must be made by a person involved in the challenged decision." . . . Evidence is not direct when the statement only "suggests discrimination" or "is subject to more than one interpretation." . . . Thus, "stray remarks ...

> statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" are not direct evidence.

(Citations omitted.) *Moore v. Alabama State University*, 980 F. Supp. 426, 433-34 (M.D. Ala. 1997) (holding that statements by employer that plaintiff would not be promoted because she was pregnant and because she was married mother constituted direct evidence of discrimination). See, also, *Lee*, 684 F.2d at 775 (holding that statements by school board members that classroom needed greater " 'white presence' " and testimony by principal that race was factor of employment decision were direct evidence of discrimination).

In the instant case, Agnew presented evidence, not repeated in detail here, for the purported purpose of demonstrating discrimination in connection with his discharge. The showing, however, was not direct evidence of discrimination in terminating Agnew's employment. Thus, for example, Agnew asserted that Boys Town had a policy that only women could serve as assistant family teachers in all-girl communities. Boys Town acknowledged this hiring practice and noted that because the assistant family teacher would on occasion spend the night in the all-girl residence when the family teacher couple was absent, the assistant should be a female. We do not address the reasonableness of such a restriction, which issue is not before the court, but note that this restriction, without more, does not amount to direct evidence of prohibited gender discrimination. See Neb. Rev. Stat. § 48-1108 (Reissue 1998) ("[i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances when . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). See, also, *Torres v. Wisc. Dept. of Health & Social Services*, 859 F.2d 1523, 1536 (7th Cir. 1988) (holding that employing only female correctional officers in women's prison living units was appropriate "bona fide occupational qualification," given business of prison), *cert. denied* 489 U.S. 1017, 109 S. Ct. 1133, 103 L. Ed. 2d 194 (1989). This evidence regarding hiring and other similar evidence were simply not direct evidence that Agnew was dis-

charged based on gender. Agnew did not present direct evidence of discrimination in connection with his discharge and, therefore, cannot avoid the application of the *McDonnell Douglas* test, which the district court properly applied.

CONCLUSION

We have reviewed this appeal for errors on the record. As required under the law, the district court conducted a de novo review of the record made before the NEOC. The district court found there was insufficient evidence in that record to sustain a finding of discrimination. There is competent evidence in the record to support this decision, and the decision conforms to the law and is neither arbitrary, capricious, nor unreasonable. We conclude that the district court did not err in reversing the NEOC's decision and dismissing the complaint. Because we affirm the district court's decision, we need not address Agnew's third assignment of error regarding attorney fees.

AFFIRMED.

CONNOLLY, J., not participating.

GERTRUDE PARKER, APPELLANT, V. LANCASTER COUNTY SCHOOL DISTRICT NO. 001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, APPELLEE.

591 N.W.2d 532

Filed March 12, 1999. No. S-97-1262.

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. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm

to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

4. **Negligence: Evidence: Proximate Cause.** A plaintiff in a negligence action is required to adduce evidence showing there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury.
5. **Negligence: Proof.** The mere happening of an accident is insufficient as a matter of law to prove negligence.
6. **Negligence: Proximate Cause.** An allegation of negligence is insufficient where the finder of fact must guess the cause of the accident.
7. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of a plaintiff's injury.
8. **Summary Judgment.** 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.
9. ____. Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted.
10. **Political Subdivisions Tort Claims Act: Pleadings.** The discretionary function exemption set forth in the Political Subdivisions Tort Claims Act is an affirmative defense which must be asserted by answer.
11. **Political Subdivisions Tort Claims Act: Liability.** When the facts are undisputed, the determination of whether the discretionary function exemption applies is a question of law.
12. **Political Subdivisions Tort Claims Act: Liability: Words and Phrases.** The discretionary function or duty exemption extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice.
13. **Political Subdivisions Tort Claims Act: Legislature: Intent.** The basis for the discretionary function exception was the desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
14. **Political Subdivisions Tort Claims Act: Liability.** The discretionary function exception insulates the government from liability if the action challenged in the case involves the permissible exercise of policy judgment.
15. **Political Subdivisions Tort Claims Act: Governmental Subdivisions: Notice: Negligence.** When (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental

entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. In such a situation, a governmental entity's failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exemption of the Political Subdivisions Tort Claims Act.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

William A. Wieland, of Healy & Wieland Law Firm, for appellant.

John M. Guthery and R.J. Shortridge, of Perry, Guthery, Haase & Gessford, P.C., for appellee.

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

STEPHAN, J.

Gertrude Parker brought this action pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1994), against Lancaster County School District No. 001, also known as Lincoln Public Schools (LPS), to recover damages for injuries she sustained in a fall which occurred on school premises owned and operated by LPS. Parker also asserted a professional negligence claim against the architectural firm which designed the building. We affirmed the district court's dismissal of that claim in *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998). The case is now before us on Parker's appeal from an order of the district court for Lancaster County granting summary judgment in favor of LPS. We conclude that summary judgment should not have been entered and, therefore, reverse, and remand for further proceedings.

BACKGROUND

Parker alleged that she was injured on October 1, 1995, when she fell in the multipurpose room of the Hulda Roper School in Lincoln, Nebraska. According to her petition, Parker "walked into an open entryway wherein an unmarked and unguarded

ramp or floor riser was present, causing her to fall into a wall and against the floor, proximately resulting in injuries and damages." Parker alleged that as the owner of the building, LPS should have been aware of the unguarded and unmarked floor riser and known that business visitors such as she would not discover the danger or would fail to protect themselves against it. Parker alleged that LPS was negligent in its "failure to provide a reasonably safe entryway . . . failure to use reasonable care to guard or barricade the floor riser . . . [and] failure to use reasonable care to mark or otherwise warn of the presence of the floor riser."

Viewed in a light most favorable to Parker, we note the record reflects the following uncontroverted facts: On October 1, 1995, Parker accompanied her daughter, Donna Ferguson, to the Hulda Roper School where Parker's great-grandson Tyler was a student. Their purpose was to attend an open house and dedication program for the recently opened school. After visiting Tyler's classroom, Parker and Ferguson proceeded to the multipurpose room, entering from a hallway through a set of double doors. They stopped briefly to determine where Tyler and his mother were sitting and then began to make their way in that direction.

Immediately to Parker's left as she entered the multipurpose room was a curved wall, adjacent to which were elevated portions of the floor which are referred to in the record as both "risers" and "steps." When viewed from the doorway through which Parker entered the room, these risers began as inclined ramps until reaching a certain elevation at which they became level. The ramp portion of the riser closest to the wall began a few feet inside the double doors, and the ramp portion of the second riser began a few feet beyond that. At its highest elevation, the riser immediately adjacent to the wall was higher than the one next to it so that when viewed from the center of the room, they appeared as two steps extending the length of the curved wall. The risers were not marked, and there were no warnings posted regarding their existence. The risers were covered by the same blue carpet as the adjacent floor area.

Parker and Ferguson had taken several steps into the room, with Parker walking slightly behind Ferguson and to her left, when Parker fell. Neither Ferguson nor anyone else actually

observed the fall. Parker, who was 82 years old at the time of the incident, sustained injuries to her left arm which required surgical treatment.

Judith Zabel, a school nurse, was called to the scene of the fall shortly after it occurred. In her deposition taken on September 17, 1997, Zabel stated that she did not specifically ask Parker what caused the fall, but that Parker stated several times while still lying on the floor, "I didn't see the step and I fell."

During Parker's deposition taken on December 19, 1996, she was unable to state the precise location where she fell or the cause of the fall. For example, when asked at her deposition to look at a photo and point to the place she fell, Parker stated, "I don't know. It was — I was going down this one, on this rug and I don't know, hit some kind of wall, I know that. But I don't know." When asked what caused her to fall, Parker stated, "I don't know. All of the sudden I was down. I didn't know." When she was shown a photograph of the area where the risers were located, the following colloquy occurred:

> Q. Does Exhibit No. 2 show any of the area of the floor where you were?
>
> A. It was all flat then, it was all flat.
>
> Q. Okay. You think it was all flat there?
>
> A. Uh-huh. I didn't see nothing.
>
> Q. All right.
>
> A. Otherwise I would have went around it someplace. There was nothing there.

At another point in her deposition, Parker again repeated that she did not know how she fell, in the following colloquy:

> Q. Do you remember tripping over anything, hitting anything before you fell?
>
> A. Wasn't nothing there.
>
> Q. You don't remember stepping off a step or a ledge?
>
> A. No. Level, level place like the table and all of the sudden down I went. I don't know what happened. I don't know.
>
> Q. I think you told us earlier, Ms. Parker, you don't really know what caused you to fall, do you?
>
> A. No, huh-uh, all of the sudden just —

. . . .

Q. [I]s there anything you wanted to show me on any of those pictures?

A. No, I just — this — I didn't see nothing. I didn't see that thing [presumably the riser]. I didn't see nothing. All of the sudden this blue rug, going down the street, and then —

. . . .

Q. And you don't know if — where you were as far as this picture is concerned when you fell, do you?

A. Going around — going down to the auditorium is all I know.

Q. But you don't really recognize this, do you?

A. It wasn't there, it wasn't there. All I seen was flat. Didn't see nothing. See this one, I didn't know that was there even.

Later in the same deposition, Parker testified as follows:

Q. Can you tell me what you think the Lincoln Public Schools did to cause your fall?

A. They should have — steps should have been sight — put something there, you know, so people knew it was there.

Q. Do you think you fell on the steps?

A. I don't know. All of the sudden I was down. I was going straight, I was going down straight flat bottom, straight sidewalk, floor. All of the sudden I hit my head.

The record includes Ferguson's affidavit stating that Parker did not suffer from fainting spells or blackouts, did not have a tendency to trip or fall, and was wearing bifocal glasses and stable shoes on the day of the incident. Ferguson further stated in her affidavit that she did not observe the risers until after Parker's fall.

Parker also submitted the affidavit of James R. Belina, a professional engineer, who expressed an opinion that the risers presented "an unreasonable risk of harm to persons who would be expected to traverse that area." However, Belina did not opine with regard to the specific cause of Parker's fall. LPS submitted evidence that the design of the multipurpose room met all applicable building and safety codes and that the school board

decided in its discretion to accept the design that had been recommended by the school district's professional architects.

Relying on *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997), the district court determined as a matter of law that the evidence did not establish causation and therefore granted summary judgment in favor of LPS. Parker perfected this appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.

ASSIGNMENTS OF ERROR

Parker assigns seven errors, all of which can be restated as assigning that the district court erred in granting summary judgment to LPS on the basis that Parker failed to state facts establishing causation.

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. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999).

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. *Id.*

ANALYSIS

Parker's injury occurred before our decision in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), which prospectively abolished the distinction between invitees and licensees with respect to premises liability. In her petition, Parker alleges that she had the status of a "business visitor" at the time of her injury. A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have

realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997).

A plaintiff in a negligence action is required to adduce evidence showing there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. See *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997). The mere happening of an accident is insufficient as a matter of law to prove negligence. *Id.* An allegation of negligence is insufficient where the finder of fact must guess the cause of the accident. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Swoboda v. Mercer Mgmt. Co., supra*; *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995). The key issue in this case is whether there is evidence supporting a reasonable inference that the floor risers were the proximate cause of Parker's fall and resulting injury.

The same issue under similar facts was presented in *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997), a case in which an elderly woman was injured when she fell on a stairway landing. The landing was a few inches lower than an adjacent wooden floor, and a brick ramp that was the same color as the landing extended from the wooden floor to the landing. There were no markings or safety devices to differentiate the ramp from the landing. Swoboda could not remember the circumstances of the fall. Her granddaughter, who was with her at the time, did not observe the fall itself but did observe Swoboda sitting on the wooden floor with her legs extended down the ramp. There was evidence that Swoboda did not have trouble walking and that the ramp was in violation of building codes. The district court granted summary judgment, reasoning that Swoboda's allegation that the ramp caused her fall was based

solely on speculation and conjecture and that therefore, no genuine issue of material fact existed. The Court of Appeals reversed, finding that while it was possible that Swoboda tripped over the top step, her path, physical condition, and the position in which she was seen immediately after the fall supported a reasonable inference that the ramp was the proximate cause of the fall. See *Swoboda v. Mercer Mgmt. Co.*, 96 NCA No. 10, case No. A-94-756 (not designated for permanent publication). We agreed with the district court's judgment and reversed the Court of Appeals' decision, stating that while circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of a plaintiff's injury. *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997). We further stated that while Swoboda was not required to eliminate all alternate theories regarding how the accident may have happened, she was "required to establish with a *reasonable probability* that the accident happened in the manner alleged in her petition." (Emphasis supplied.) *Id.* at 351, 557 N.W.2d at 632. We concluded that because there was no basis upon which a finder of fact could determine whether Swoboda tripped over the ramp or the top step, the evidence was insufficient as a matter of law to create an inference that the ramp was the proximate cause of the fall. *Id.*

In concluding that the present case was controlled by *Swoboda v. Mercer Mgmt. Co., supra*, the district court noted that "[t]he facts of the cases, other than the location, virtually are identical." It determined that in this case, as in *Swoboda*, a finder of fact "would be required to engage in guesswork to determine the cause of the plaintiff's fall."

Parker argues that her case is distinguishable from *Swoboda* because of her statements to Zabel at the scene of the accident. She contends that these statements would be admissible as excited utterances under Neb. Rev. Stat. § 27-803(1) (Reissue 1995), and LPS does not dispute their admissibility for purposes of its motion for summary judgment. Therefore, the question before us is whether the uncontroverted evidence, including Parker's statements to Zabel, would permit an inference that, with reasonable probability, the accident occurred in the

manner alleged in Parker's petition. Parker alleged that she "walked into an open entryway wherein an unmarked and unguarded ramp or floor riser was present, causing her to fall into a wall and against the floor" and causing injury to her left arm. Photographs of the accident scene establish that there were no warnings or markings to differentiate the floor risers from the adjacent floor area. The base of the first riser was located approximately 6 feet past the doorway through which Parker and Ferguson entered the multipurpose room. Parker had taken five to six steps into the room when she fell. When Ferguson saw her immediately after the fall, Parker was lying on her left side. Her body was perpendicular to the wall, with her head near the wall and her feet protruding over the edge of the first riser at the point where it became elevated in relation to the adjacent floor area. Ferguson, who had entered the room at the same time as Parker, did not observe the riser until after Parker fell. Parker customarily wore bifocals and was wearing them at the time of the fall. She was mentally alert and had no difficulty walking through the school parking lot and other areas of the school building prior to entering the multipurpose room. When she arrived at the scene of the accident, Zabel observed Parker lying across what Zabel described as the "top step." Under these circumstances, Parker's repeated statement to Zabel, "I didn't see the step and I fell," could reasonably be understood to mean that she fell *because* the step was not plainly visible. We conclude that this statement, when considered together with the circumstantial evidence summarized above, would support a reasonable inference that Parker's fall was caused by the unmarked and unguarded floor riser, as she alleged in her petition. By drawing this inference, the finder of fact could determine causation without resorting to conclusions based upon guess, speculation, or conjecture.

We acknowledge that Parker's deposition testimony approximately 14 months following her injury would support an inference that the cause of the fall is unknown. If this were the only evidence on the issue of causation, *Swoboda v. Mercer Mgmt. Co., supra*, would require affirmance. However, as noted above, the circumstantial evidence and Parker's statements to Zabel at the accident scene support a reasonable inference that the

unmarked floor riser was the cause of Parker's fall and resulting injury. 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. *Goff-Hamel v. Obstetricians & Gyns., P.C., ante* p. 19, 588 N.W.2d 798 (1999); *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998). Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted. *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998); *Blue v. Champion International Corp.*, 204 Neb. 781, 285 N.W.2d 511 (1979). This case involves conflicting inferences, and under our standard of review applicable to summary judgment, we are required to give Parker the benefit of the inference which supports her theory of causation. We therefore conclude that LPS was not entitled to summary judgment on the issue of causation.

LPS argues that it is entitled to summary judgment on the alternative ground that Parker's claim is barred by the discretionary function exemption to the Political Subdivisions Tort Claims Act, § 13-910(2). Although the district court did not reach this issue, we must do so in order to resolve the appeal. The Political Subdivisions Tort Claims Act, pursuant to which Parker asserts her claim against LPS, provides that it shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." § 13-910(2). We have held that this "discretionary function exemption" is an affirmative defense which must be asserted by answer. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). LPS has done so by alleging that "[t]he design, construction, guarding, warning, and use of the multipurpose room in the Hulda Roper school . . . were discretionary functions of the Defendant Lancaster County School District" and that Parker's claims were barred by "governmental and common law immunity." When the facts are undisputed, the determination of whether the discretionary function exemption applies is a question of law. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

The discretionary function or duty exemption extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. *Id.* "'"'[I]t is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case.'"...'" *Id.* at 957, 510 N.W.2d at 289. "'"In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. . . ."'" *Id.*

"'"Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. . . ."'" *Id.* at 957-58, 510 N.W.2d at 289. The basis for the discretionary function exception was the desire to "'"'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'. . ."'" *Id.* at 958, 510 N.W.2d at 289. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. "'"In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."'" *Id.*

LPS relies on *Chantal v. U.S.*, 104 F.3d 207 (8th Cir. 1997), for the proposition that it cannot be liable under the discretionary function exception. That case involved a personal injury claim by a person who fell on the steps of the Gateway Arch, which is a part of the Jefferson National Expansion Memorial National Historic Site in St. Louis, Missouri. The Eighth Circuit Court of Appeals affirmed a lower court's finding that the claim was barred by the discretionary function exception set forth in the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1994). The court of appeals reasoned that based upon unrebutted evidence that the step design was selected to aesthetically complement the Arch, the National Park Service was required to make a "'policy analysis'" which involved a balancing of "the safety benefit of making changes to the steps with the aesthetic effect

of such changes on the Memorial's overall design and its historic significance." *Chantal v. U.S.*, 104 F.3d 207 at 212.

We do not find *Chantal* persuasive under the facts of this case and our prior interpretation of the discretionary function exemption. The building in which Parker fell was a public school, not a historic landmark. In *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 647, 502 N.W.2d 80, 89 (1993), we held:

> [W]hen (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. In such a situation, a governmental entity's failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exemption of the Political Subdivisions Tort Claims Act.

Parker's allegations that LPS knew or should have known that the "unmarked or unguarded" floor riser involved an unreasonable risk of harm to business visitors and negligently failed to take measures to protect such persons from injury caused by the riser fall squarely within the holding of *Lemke*. We therefore conclude as a matter of law that the discretionary function exemption has no application in this case.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in entering summary judgment in favor of LPS and therefore reverse the district court's judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

MICHAEL G. DEUTH, APPELLEE, V. EILEEN RATIGAN, APPELLANT.

590 N.W.2d 366

Filed March 12, 1999. No. S-97-1280.

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 lower courts.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. ____: ____. It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Limitations of Actions: States: Appeal and Error.** Whether the statute of limitations of a sister state or that of Nebraska applies in a given case is a question of law which an appellate court must decide independently of the conclusion reached by the trial court.
6. **Statutes.** Statutes relating to the same subject matter will be construed to maintain a sensible and consistent scheme, so that effect is given to every provision.
7. **Foreign Judgments.** The filing of a foreign judgment in a Nebraska court pursuant to Neb. Rev. Stat. § 25-1587.03 (Reissue 1995) is not an action upon a foreign judgment within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1995).
8. **Foreign Judgments: Jurisdiction: Collateral Attack.** A foreign judgment filed in a Nebraska court pursuant to Neb. Rev. Stat. § 25- 1587.03 (Reissue 1995) may be collaterally attacked on the ground that the court which entered the judgment lacked jurisdiction to do so, and the resolution of this issue must be made by the Nebraska court.
9. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions for further proceedings.

Michael J. Leahy, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Daniel L. Johnson, of Latenser & Johnson, P.C., for appellee.

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

STEPHAN, J.

Pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act (NUEFJA), Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 1995), Michael G. Deuth filed a foreign judgment which he had obtained against Eileen Ratigan in the county court for Douglas County, Nebraska. The county court denied Ratigan's motion to vacate the judgment, and the district court for Douglas County affirmed. On her appeal to this court, we affirm in part, reverse in part, and remand with directions for further proceedings.

BACKGROUND

Deuth obtained a default judgment against Ratigan in the district court for Black Hawk County, Iowa, on November 30, 1979. He filed the judgment in the Douglas County Court and mailed notice of the filing to Ratigan on September 12, 1995, pursuant to §§ 25-1587.03 and 25-1587.04. An execution was issued by the county court on September 18 and returned unsatisfied. The court then issued an "Order in Aid of Execution" which required Ratigan to appear for a hearing on November 6 to give testimony regarding her property. Upon Ratigan's failure to appear, an "Order to Appear and Show Cause" was issued by the court on November 9. When Ratigan again failed to appear, a capias was issued on January 5, 1996.

Ratigan entered her voluntary appearance on July 10, 1996, and moved to quash the capias. A hearing was held on July 18, but the bill of exceptions contains a notation that the tape recording of the proceeding had been erased, and thus there is no verbatim record.

The county court entered an order dated August 14, 1996, which referred to an evidentiary hearing, presumably that of July 18. The order also referred to Ratigan's motion to quash the capias, but primarily addressed her contention that the Iowa court lacked jurisdiction over her person when it entered the judgment. In this regard, the court found:

> 2. The issue at bar arises from evidence that is diametrically opposed. [Deuth] has submitted a copy of a return showing that [Ratigan] was personally served with service of process of the commencement of the Iowa law suit,

which resulted in a judgment in the State of Iowa and the subsequent registration in this state. [Ratigan], on the other hand, adduces evidence refuting that any such service of process was had upon [her].

3. It is absolutely impossible for this Court to determine whether [Ratigan] was ever properly served with process, and thus the question of whether the original forum court in the State of Iowa ever had jurisdiction over [Ratigan] is placed in doubt. While the full faith and credit clause of the federal constitution requires one state to give recognition to the judgments of another state, that recognition does not extend where the original jurisdiction of the original forum court is suspect, Yost v. Yost, 161 Neb. 164, 72 N.W.2d 689 (1955). In the case at bar, the jurisdiction of the Iowa court has most definitely been placed in a suspect category, and in such a circumstance it is appropriate for this Court to defer any further post-judgment proceedings against [Ratigan], until after the validity of the Iowa judgment has been determined in the original forum court.

Based upon these findings, the county court canceled the capias; barred further efforts to collect the Iowa judgment until further order of the court; and stated that it would review the matter on November 1, 1996, to determine "what action, if any, [Ratigan] has taken to set aside or invalidate the original judgment entered in the State of Iowa." The court concluded:

> It is incumbent upon [Ratigan] to take action to set aside that judgment, and to do so expeditiously, since any further proceedings in the State of Nebraska are based on a determination of the validity of the Iowa judgment. If [Ratigan] does not expeditiously seek to have the original Iowa judgment set aside, between now and November 1, 1996, this Court will have no choice but to then grant full faith and credit to the Iowa judgment and allow post-judgment proceedings.

On August 21, 1996, Ratigan filed a motion requesting the county court to vacate the Iowa judgment. In her motion, Ratigan asserted that the proceeding was barred under Neb. Rev. Stat. § 25-205 (Reissue 1995), which establishes a 5-year limitation period for an "action upon a . . . foreign judgment."

In the alternative, Ratigan asserted that the Iowa judgment was unenforceable because execution had not occurred within 5 years as required by Neb. Rev. Stat. § 25-1515 (Reissue 1995).

The county court entered an order on October 7, 1996, which refers to a September 19 hearing on Ratigan's "Motion to Vacate Judgment." The bill of exceptions reflects that the tape recording of this hearing also was erased, and thus we have no verbatim record. In its October 7 order, the county court did not rule on the motion to vacate but again instructed Ratigan to have the validity of the judgment determined by the Iowa court, and further stated that it would review the matter on December 2 to determine whether Ratigan had complied with this order. The order concluded: "In the event no such action has been taken by December 2, 1996, this Court will thereafter allow execution to follow on its judgment."

On its own motion, the county court then set a hearing "for a determination as to what further proceedings should be held herein." At the hearing held on February 20, 1997, Ratigan's counsel advised the court that Ratigan could not afford counsel to challenge the judgment in Iowa pursuant to the court's previous direction but was willing to testify regarding her claim that the judgment was obtained without personal service upon her. Noting that it had previously ordered Ratigan to have the validity of the Iowa judgment determined by an Iowa court, the county court stated:

> The point is, is that you have got to get that Iowa judgement set aside and until you do, you are never going to get the problem cured. They can file their judgement in South Dakota and then refile it here. And then do we have to grant — even if we would find it to be an invalid judgement. So I guess what I — how do I have to get it through to you and your counsel that I don't want to have to keep coming back here unless you go to Iowa and do something about the Iowa judgement. Now, we have wasted how many months and you have done absolutely nothing to get the Iowa judgement set aside. I mean you may have — I'm sure that's probably inaccurate to say absolutely nothing. You have collected a lot of information, but until you set foot in the Iowa courtroom over there and ask that Court,

> whatever it might be, to vacate that old judgement, you are not going to get anywhere in my court, because that is what I have ordered you to do. Otherwise we just spin our wheels forever.

Ratigan's counsel then suggested that the judge enter a final order so that an appeal could be taken. On April 16, 1997, the county court entered an order finding that "the evidence adduced by [Ratigan] in this foreign judgment proceeding is not sufficient to convince this Court that the Iowa court had no jurisdiction" and thus determined that there was "no basis to vacate the registration of the Iowa judgment." In the same order, the county court found in favor of Deuth on the "statute of limitations issues." It concluded that the "foreign judgment previously registered herein shall remain in full force and effect."

On May 15, 1997, Ratigan filed her notice of appeal to the district court. In her "Statement of Errors" filed in the district court, Ratigan asserted that the county court erred (1) in ruling that she was not entitled to attack the validity of the Iowa judgment in the county court; (2) in prohibiting her from offering evidence on the question of whether the Iowa court had jurisdiction over her person when it entered the judgment; and (3) in ruling that Iowa law provided the applicable limitations period "for the registration and/or enforcement" of the foreign judgment.

On November 4, 1997, the district court affirmed the judgment of the county court, based upon a determination that the Iowa judgment was valid on its face, that the Iowa court "was not shown to be lacking in jurisdiction to enter the judgment" and that "[a]ny limitations on enforceability in the State of Nebraska would begin from the date the valid judgment is registered in this state." Ratigan perfected this appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts.

STANDARD OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998).

The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998); *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996).

ASSIGNMENTS OF ERROR

Ratigan asserts that the courts below erred in (1) determining that the Iowa judgment was not barred by Nebraska's 5-year statute of limitations for enforcing actions on foreign judgments and (2) ruling that she was not entitled to collaterally attack the jurisdiction of the Iowa court in Nebraska.

ANALYSIS

APPELLATE JURISDICTION

Deuth argues that the final order of the county court was the August 14, 1996, order on the motion to quash and that because Ratigan failed to appeal that order within 30 days, neither the district court nor this court has appellate jurisdiction. Ratigan counters that there was no final order until April 16, 1997, and that she properly filed her notice of appeal on May 15. Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *In re Complaints of McLeod Telemanagement et al.*, 255 Neb. 202, 583 N.W.2d 39 (1998). Therefore, we must determine whether Ratigan properly filed her appeal to the district court, as it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

In its order of August 14, 1996, the county court stated that if Ratigan failed to have the judgment set aside by an Iowa court, it would enter an order enforcing the judgment in Nebraska. We have held that orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable. See *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997) (judgment awarding attorney fees in amount to be determined at later date was not final, appealable order); *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995) (judgment imposing fine which could be reduced by defendant's

actions was not final order); *Schaad v. Simms*, 240 Neb. 758, 760, 484 N.W.2d 474, 475 (1992) ("'conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect'"), quoting *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Brozovsky v. Norquest*, 231 Neb. 731, 733, 437 N.W.2d 798, 800 (1989) ("'"'[w]hen no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action . . . it is interlocutory'"'"), quoting *Anson v. Kruse*, 147 Neb. 989, 25 N.W.2d 896 (1947).

In this case, the August 14, 1996, order was conditional because it contemplated further action by the parties and the court. The subsequent order entered by the county court on April 16, 1997, resolved Ratigan's challenge of the validity of the registered judgment against her and thus constituted a final order affecting a substantial right. Her subsequent appeals were perfected in a timely manner, and we therefore have appellate jurisdiction.

STATUTE OF LIMITATIONS

Ratigan argues that because the judgment was registered in Nebraska more than 5 years after its entry, this enforcement proceeding is barred by § 25-205, which provides in part that "an action upon a . . . foreign judgment, can only be brought within five years." Deuth contends that the 20-year limitation period for the enforcement of judgments as set forth in "Iowa Code Section 614.1" is applicable, brief for appellee at 10, and the judgment was therefore enforceable as of the date it was filed in Nebraska. Whether the statute of limitations of a sister state or that of Nebraska applies in a given case is a question of law which an appellate court must decide independently of the conclusion reached by the trial court. *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996).

Statutes relating to the same subject matter will be construed to maintain a sensible and consistent scheme, so that effect is given to every provision. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Section 25-205 is included in chapter 25, article 2, of the Nebraska Revised Statutes, which governs civil actions. See Neb. Rev. Stat.

§ 25-201 et seq. (Reissue 1995). Section 25-201 states that "[c]ivil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued." Section 25-204 provides that "[c]ivil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." Reading these statutes together, it is clear that the word "action" as used in § 25-205 refers to a "civil action." Thus, we must determine whether this enforcement proceeding under the NUEFJA is a "civil action" to which § 25-205 applies.

This court stated in *Miller v. Walter*, 247 Neb. 813, 816, 530 N.W.2d 603, 605 (1995), that the NUEFJA "provides the statutory framework for bringing an action on a foreign judgment in this state." *Miller* involved an enforcement action brought pursuant to the NUEFJA adopted from the 1948 version of the Uniform Enforcement of Foreign Judgments Act (UEFJA). See Neb. Rev. Stat. §§ 25-1587 to 25-15,105 (Reissue 1989). The NUEFJA required the judgment creditor to file a "petition for registration," § 25-1589, and have summons issued and served "as in an action brought upon the foreign judgment," § 25-1590. The NUEFJA further provided that "[a]ny defense, setoff or counterclaim, which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions." § 25-1594.

Effective January 1, 1994, the NUEFJA based on the 1948 version of the UEFJA was repealed and replaced with the NUEFJA adopted from the 1964 version of the UEFJA which is now codified at §§ 25-1587.01 to 25-1587.09 (Reissue 1995). See 1993 Neb. Laws, L.B. 458. Unlike its predecessor, the current version of the NUEFJA does not provide for pleadings or trial. Instead, it provides that when the foreign judgment is filed in the office of the clerk of a Nebraska court of competent jurisdiction, the judgment "is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner." § 25-1587.03.

We have not previously considered whether a proceeding to enforce a foreign judgment under the current version of the NUEFJA is a "civil action" within the meaning of our statutes of limitations applicable to such actions. This issue was addressed, apparently for the first time by any state court, in *Producers Grain Corporation v. Carroll*, 546 P.2d 285 (Okla. App. 1976). Noting that the 1964 version of the UEFJA was intended to eliminate certain procedural steps required to enforce a foreign judgment under the 1948 version of the UEFJA, the Oklahoma Court of Appeals concluded that an enforcement proceeding under the 1964 version of the UEFJA did not come within the scope of a statute of limitations applicable to civil actions to enforce foreign judgments because under the current version of the UEFJA, the foreign judgment becomes legally enforceable upon filing and notice without the necessity of a separate action.

Applying similar rationale, other courts have held that the filing of a foreign judgment under the 1964 version of the UEFJA is not subject to a statute of limitations applicable to actions to enforce foreign judgments. See, *Hill v. Value Recovery Group, L.P.*, 964 P.2d 1256 (Wyo. 1998) (filing of foreign judgment under UEFJA not "civil action" within meaning of state statute of limitations); *Wright v. Trust Company Bank*, 219 Ga. App. 551, 552, 466 S.E.2d 74, 75 (1995) (state statute of limitations not applicable to filings under UEFJA, "[r]ather, a foreign judgment so filed stands in the same shoes as a judgment of the court in which it is filed"); *Hunter Technology, Inc. v. Scott*, 701 P.2d 645 (Colo. App. 1985) (filing procedure under UEFJA not action within state statute of limitations).

Some courts have taken a different approach, holding that the filing of a foreign judgment under the UEFJA is subject to the statute of limitations of the state in which the filing is made. For example, in *Eschenhagen v. Zika*, 144 Ariz. 213, 696 P.2d 1362 (Ariz. App. 1985), the Arizona Court of Appeals concluded that nothing in the UEFJA precluded it from applying the Arizona statute of limitations applicable to enforcement of foreign judgments in determining whether a foreign judgment is enforceable under the UEFJA. In distinguishing the contrary result in *Producers Grain Corp. v. Carroll, supra*, the court noted that

the Arizona statute of limitations did not contain language limiting its applicability to "civil actions." In reaching the same result as *Eschenhagen*, the court in *Lawrence Systems v. Superior Feeders Inc.*, 880 S.W.2d 203, 207 (Tex. App. 1994), also noted that the Texas statute of limitations at issue was not limited to "civil actions." Additionally, some state courts have reasoned that a statute of limitations applicable to common law actions to enforce foreign judgments should be applied to enforcement proceedings under the UEFJA, since both have the same purpose and application of different limitations periods would lead to anomalous results. See, *National Union Fire Ins. v. Nicholas*, 438 Pa. Super. 98, 651 A.2d 1111 (1994); *Alexander Construction Co. v. Weaver*, 3 Kan. App. 2d 298, 594 P.2d 248 (1979).

We agree with the observation of the Supreme Court of Wyoming in *Hill v. Value Recovery Group, L.P., supra*, that the courts in *Eschenhagen* and *Lawrence Systems* "seem to confuse filing a judgment under the Uniform Enforcement of Foreign Judgments Act with commencing an action to enforce a foreign judgment." 964 P.2d at 1259. As noted above, the Nebraska statutes of limitations, including § 25-205, apply to "civil actions." See §§ 25-201 and 25-204. For purposes of computing the period of limitations, "[a]n action is commenced on the date the petition is filed with the court." Neb. Rev. Stat. § 25-217 (Reissue 1995). The NUEFJA in its current form does not require or permit the filing of a petition or the utilization of any other prejudgment pleadings or procedures applicable to civil actions in this state. Upon filing of the foreign judgment pursuant to § 25-1587.03 and notice to the judgment debtor pursuant to § 25-1587.04, the foreign judgment becomes enforceable in the same manner as a judgment of a Nebraska court without the necessity of a separate "action." Therefore, we hold that the filing of a foreign judgment in a Nebraska court pursuant to § 25-1587.03 is not an "action upon a . . . foreign judgment" within the meaning of § 25-205.

The NUEFJA recognizes an "optional procedure" whereby a judgment creditor may "bring an action to enforce his or her judgment instead of proceeding under the [NUEFJA]." § 25-1587.07. A common-law action to enforce a foreign judg-

ment would constitute a civil action subject to the limitations contained in § 25-205, while under our holding today, enforcement of the foreign judgment pursuant to the NUEFJA would not. Although we acknowledge this potential anomaly, we observe that its resolution would require legislative action.

COLLATERAL ATTACK: JUDGMENT ENTERED WITHOUT PERSONAL JURISDICTION

Ratigan's second assignment of error asserts that both the county and district courts abused their discretion in not allowing her to collaterally attack the Iowa judgment in Nebraska. In *Olson v. England*, 206 Neb. 256, 260, 292 N.W.2d 48, 50 (1980), a common-law action to enforce a foreign judgment, we stated: "There can be no doubt as to the general principle that a judgment of a foreign state can be collaterally attacked by evidence that the court was without jurisdiction." Further,

> "[a] judgment rendered in one State is subject to collateral attack in another State on the ground that the State in which the judgment was rendered had no jurisdiction over the defendant or over the subject matter, even though it appears in the judgment record that the court had jurisdiction and extrinsic evidence is necessary to establish its invalidity. . . ."

Id., quoting Restatement of Judgments § 12, comment *c.* at 71 (1942). If a judgment on its face appears to be one entered by a court with jurisdiction, such jurisdiction "'will be presumed, unless disproved by extrinsic evidence or by the record itself.'" *Olson*, 206 Neb. at 264, 292 N.W.2d at 52, quoting *Repp v. Repp*, 156 Neb. 45, 54 N.W.2d 238 (1952). We reaffirmed *Olson* in *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 746, 472 N.W.2d 386, 390 (1991), finding that "[w]hile it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction . . . ."

Similarly, we have held that a foreign judgment can be collaterally attacked in a Nebraska enforcement action brought pursuant to the NUEFJA adopted from the 1948 version of the UEFJA based upon evidence that the rendering court was without jurisdiction over the parties or the subject matter.

Walksalong v. Mackey, 250 Neb. 202, 549 N.W.2d 384 (1996); *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). It follows that the same principle should apply to a foreign judgment filed in a Nebraska court pursuant to the current version of the NUEFJA, which provides that when so filed, the foreign judgment "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state." § 25-1587.03. A judgment entered by a Nebraska court which lacks jurisdiction over the parties or subject matter is void and therefore subject to collateral attack. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996); *Ehlers v. Grove*, 147 Neb. 704, 24 N.W.2d 866 (1946). See, also, *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997) (stating that collateral attacks on previous proceedings are impermissible unless grounded upon court's lack of jurisdiction over parties or subject matter). Therefore, we hold that a foreign judgment filed in a Nebraska court pursuant to § 25-1587.03 may be collaterally attacked on the ground that the court which entered the judgment lacked jurisdiction to do so, and the resolution of this issue must be made by the Nebraska court. When Deuth filed his judgment in the Douglas County Court, Ratigan had a right to have that court decide whether her claim that the judgment was void and unenforceable because the Iowa court lacked jurisdiction over her person when it rendered the 1979 judgment was legitmate. The county court abused its discretion by requiring that Ratigan obtain a determination of this issue by an Iowa court and refusing to permit her to offer evidence at the February 20, 1997, hearing.

Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997). Although Ratigan was present and apparently ready to testify at the February 20, 1997, hearing, no formal offer of proof was made concerning her proposed testimony. However, the record reflects the following statement made by her counsel:

> If — if you read the original petition in this matter it was for wages owed to Rainbow. Eileen was just an employee of Rainbow. She has talked to someone who is still there, who was there back in '79. He is willing to testify and confirm that Eileen did not — was not working for Rainbow at the time that the judgement — or that the service allegedly occurred; and the service allegedly occurred at Rainbow. Eileen has — has also tried to track down her landlord at that time. She was living in Milwaukee at the time that she was allegedly served in Des Moines in this action and she has attempted to try and locate her landlord to — to get some evidence. She doesn't have any evidence from 17 years ago and she's trying to get some to show to this Court that she was not living in Des Moines or even the state of Iowa at the time that she was originally served. And she is certainly willing to take the stand and testify that she did not live there.

This record is sufficient for us to determine the substance of Ratigan's proposed testimony. If proved, Ratigan's absence from the State of Iowa on the date she was allegedly served with summons there would be relevant to the issue of whether the Iowa court had personal jurisdiction to enter the judgment which is the subject of this proceeding. The refusal of the county court to receive this testimony on the ground that Ratigan was obligated to have the issue determined by an Iowa court is an error requiring reversal because it affected Ratigan's substantial right to collaterally attack the foreign judgment in the Douglas County Court.

CONCLUSION

We affirm that portion of the judgment of the district court affirming the judgment of the county court which determined that Deuth's filing of the Iowa judgment pursuant to the NUEFJA is not time barred. However, we reverse that portion of the judgment which determined that the Iowa court was not shown to lack jurisdiction to enter the judgment because the county court erred in not permitting Ratigan to offer testimony on this issue at the hearing on February 20, 1997. We therefore remand the cause to the district court with directions to remand

to the county court for an evidentiary hearing and determination of Ratigan's claim that the foreign judgment is void and unenforceable because it was entered by a court which lacked jurisdiction over her person.

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

STEPHEN P. BECKER, APPELLEE, V. JAMES HOBBS, APPELLANT.

590 N.W.2d 360

Filed March 12, 1999. No. S-97-1366.

1. **Pleadings: Limitations of Actions.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a cause of action.
2. **Trial: Pleadings: Pretrial Procedure: Summary Judgment.** When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that.
3. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted.
4. **Pleadings: Motions to Strike.** The proper procedure by which to challenge a counterclaim is a motion to strike.
5. **Limitations of Actions: Recoupment.** The defense of recoupment survives as long as a plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.
6. **Actions: Pleadings.** Although a pleading should not leave uncertainty as to the theory on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
7. ____: ____. It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action.
8. **Pleadings: Claims.** A counterclaim in this jurisdiction must be an existing, valid, and enforceable cause of action in favor of a defendant against a plaintiff. It must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had.
9. ____: ____. A counterclaim, setoff, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff.

10. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
11. **Limitations of Actions: Claims: Statutes.** For purposes of the limitation statutes found within Neb. Rev. Stat. ch. 25, art. 2 (Reissue 1989 & Cum. Supp. 1992), a counterclaim, as an action, is commenced on the date the plaintiff's petition is filed.
12. **Limitations of Actions.** A statute of limitations provides a period of repose designed, if asserted, to prevent recovery on stale claims. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim.

Appeal from the District Court for Stanton County: ROBERT B. ENSZ, Judge. Reversed.

Lance D. Ehmcke and Patrick L. Sealey, of Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., for appellant.

C.J. Gatz and Ronald E. Temple, of Gatz & Fitzgerald, and John M. Thor for appellee.

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

CONNOLLY, J.

This appeal presents the question, May a party assert a counterclaim in which the applicable statute of limitations had run on the counterclaim at some point between the date that the plaintiff's petition was filed and the date that the counterclaim was filed? In this appeal, appellee Stephen P. Becker filed a negligence suit against appellant James Hobbs. Hobbs filed a timely answer which included a counterclaim asserting a negligence claim against Becker. The district court determined that Hobbs could not assert the counterclaim because the statute of limitations had run prior to the date Hobbs filed the counterclaim, even though the statute of limitations had not yet run on the date Becker filed his petition. We reverse, concluding that the limitation statutes in Neb. Rev. Stat. ch. 25, art. 2 (Reissue 1989 & Cum. Supp. 1992), do not bar a counterclaim so long as the counterclaim would not have been barred on the date the plaintiff's petition was filed and thus, that Hobbs may assert his counterclaim.

BACKGROUND

On November 28, 1992, motor vehicles driven by Becker and Hobbs collided on a county road south of Pilger, Nebraska. Both Becker and Hobbs suffered injuries from the collision.

On October 24, 1996, Becker filed this lawsuit against Hobbs, alleging that Hobbs operated his vehicle negligently and that his negligence proximately caused Becker damage. Becker prayed for general damages, special damages totaling $20,997.08, and future special damages then unascertainable. Hobbs was personally served with process on November 27.

On December 23, 1996, Hobbs filed an answer. Within the answer, Hobbs asserted affirmative defenses of contributory negligence and failure to mitigate damages, and also asserted a counterclaim against Becker. Hobbs' counterclaim alleged that in the same 1992 collision Becker was negligent and that his negligence proximately caused Hobbs damage. Hobbs prayed for general damages "which shall fairly and fully compensate the Counter claimant for the general damages and injuries sustained by him," special damages totaling $17,564.62, and future special damages then unascertainable.

Becker demurred to Hobbs' counterclaim, on the ground that the applicable statute of limitations had run prior to the date that Hobbs filed the counterclaim. See § 25-207. Hobbs resisted the demurrer, on the ground that his counterclaim arose out of the same occurrence as Becker's suit and thus related back to the date Becker filed his petition. Alternatively, Hobbs argued that his counterclaim did not seek an affirmative judgment but, rather, sought only recoupment against Becker's suit.

The district court sustained Becker's demurrer with leave to amend. The court stated that our decision in *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993), was dispositive of the issue. Once determining that Hobbs' counterclaim was a claim for affirmative relief, rather than a defense of recoupment, the court stated that *Ed Miller & Sons, Inc.* directed the result that the statute of limitations applied to, and continued to run against, the counterclaim. Thus, the court concluded that Hobbs' counterclaim was barred because it was filed more than 4 years after the cause of action arose.

After being given leave to amend, Hobbs filed an amended answer which asserted the same denials and affirmative defenses, but altered his previously asserted counterclaim. As amended, Hobbs again alleged under a section he entitled "Counterclaim" that Becker was negligent and that his negligence proximately caused Hobbs damage in the 1992 collision. After alleging over $17,500 in various damages Hobbs suffered from the collision, Hobbs stated: "HOBBS is entitled to recoup and recover from BECKER the amounts and damages set forth . . . and also to have them operate as a set-off against the claims made by BECKER in the petition in this action." Hobbs prayed "for judgment against . . . Becker, to recoup and recover from . . . Becker, all of the amounts set forth in . . . this counterclaim; and further to have those amounts operate as a set-off against any recovery while [Becker] may be awarded for the matters alleged in the petition in this action . . . ." Becker moved for summary judgment on Hobbs' counterclaim. Both parties advanced legal arguments to the court similar to those they had made in the hearing on the demurrer.

The court granted Becker summary judgment. The court stated in its order that the amended answer, while it requested the court to limit the relief to any judgment Becker was awarded, nonetheless still sought an affirmative judgment, and thus was not substantively a defensive pleading or demand for recoupment. Based on that finding and its analysis from its order sustaining Becker's earlier demurrer, the court granted Becker summary judgment and dismissed Hobbs' counterclaim. Hobbs appeals.

ASSIGNMENTS OF ERROR

Hobbs assigns that the district court erred in finding (1) that Becker's petition did not toll or suspend the running of the statute of limitations on Hobbs' counterclaim, (2) that Hobbs' counterclaim sought only affirmative relief, and (3) that Hobbs could not maintain his counterclaim under a theory of recoupment.

STANDARD OF REVIEW

A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient

facts to constitute a cause of action. See, *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988).

ANALYSIS

At the outset, we note that the proper procedure by which to challenge a counterclaim is a motion to strike. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969). However, Hobbs has waived his right to assign this procedural error because he has not objected to it.

Hobbs argues, first, that his amended, operative answer asserts a counterclaim. He then argues that either (1) Becker's petition tolled the statute of limitations against the counterclaim, asserting that our case law, including *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995), directs such a result, or (2) the applicable statute of limitations, § 25-207, does not apply to counterclaims. Hobbs alternatively contends that his "counterclaim" effectively asserts the defense of recoupment and is not subject to any statute of limitations. Becker asserts that Hobbs' "counterclaim" requests affirmative relief and thus cannot be construed as anything but a counterclaim. He then claims that Hobbs' counterclaim is barred because of § 25-207, which states that a personal injury action can be brought only within 4 years of the injury, and because of our decision in *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). In *Ed Miller & Sons, Inc.*, we stated

that a counterclaim is barred by a statute of limitations unless the counterclaim is filed within the applicable statutory period for commencement of an action.

Initially, we must determine the question of whether Hobbs' operative answer on appeal pleads a counterclaim or a recoupment defense. If the answer pleads recoupment, then Hobbs prevails, because the defense of recoupment "survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations." *Nathan v. McKernan*, 170 Neb. 1, 16, 101 N.W.2d 756, 766 (1960). Although a pleading should not leave uncertainty as to the theory on which the pleader wishes to proceed, we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. See, *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994); *Hutmacher v. City of Mead, supra*. It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

A counterclaim in this jurisdiction " 'must be an existing, valid, and enforceable cause of action in favor of the defendant against the plaintiff.' " *McGerr v. Marsh*, 148 Neb. 50, 58, 26 N.W.2d 374, 378 (1947). It "must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had . . . ." Neb. Rev. Stat. § 25-813 (Reissue 1995). On the other hand, recoupment can be used only defensively. See *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984), *overruled on other grounds, In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986). In summary, "there is a difference between recoupment and a counterclaim. The former is purely defensive, while the latter seeks to recover an affirmative judgment." *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 659, 472 N.W.2d 372, 377 (1991).

Hobbs' answer pleads the necessary facts to assert an independent negligence action, it seeks damages independent of those demanded by Becker, and although it contains some language to the contrary, it seeks an independent judgment for all damages Hobbs alleged he incurred. Thus, we conclude Hobbs' answer asserts a counterclaim.

The issue then is whether Hobbs' counterclaim is barred by the statute of limitations, when the applicable statute of limitations had not yet run on the date Becker's petition was filed, but had run at some point before the date Hobbs' counterclaim was filed. This is the first time this court has been presented with this precise issue.

In *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 306, 534 N.W.2d 746, 751 (1995), we stated:

> A counterclaim, setoff, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff.

See, *Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969); *Simpson v. Jennings*, 15 Neb. 671, 675, 19 N.W. 473, 475 (1884) (stating that "a claim on the part of a defendant . . . against the claim of a plaintiff against him must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff"). This rule is consistent with the statutory requirement that a "counterclaim . . . must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action . . . ." § 25-813.

Hobbs asserts that once a counterclaim meets the requirement that it would not have been time barred on the date the plaintiff's petition was filed, that determination is conclusive of the issue, and the counterclaim may be pursued. While Hobbs' interpretation would be consistent with *Davis Erection Co.* and *Weller*, those cases did not present the same factual circumstances, nor did they address the precise issue before us. In the instant case, the facts present a counterclaim that was enforceable as an independent action on the date the plaintiff's petition was filed but not independently enforceable on the date the counterclaim was filed. Thus, *Davis Erection Co.* and *Weller* are not controlling on the issue before us, and we must determine if the law provides any additional statute of limitations requirements for counterclaims.

Section 25-207, the applicable statute of limitations to both negligence claims in the instant case, reads in pertinent part:

"The following actions can only be brought within four years: . . . (3) an action for an injury to the rights of the *plaintiff*, not arising on contract, and not hereinafter enumerated." (Emphasis supplied.) A counterclaim in this jurisdiction must by definition be an enforceable cause of action in favor of the defendant. See *McGerr v. Marsh*, 148 Neb. 50, 26 N.W.2d 374 (1947). Therefore, a reading of § 25-207 suggests that a counterclaim, as an action, be considered separately from the action within the plaintiff's petition when applying the statute of limitations.

However, a reading of related statutes in conjunction with § 25-207 suggests that a counterclaim not be considered separately from the related petition. Section 25-201 states: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued." Section 25-217 reads in part: "An action is commenced *on the date the petition is filed* with the court." (Emphasis supplied.)

Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Section 25-217 states that actions are commenced, or "brought," to use the applicable word in § 25-207, on the date the petition is filed. To conclude that an action commences on a date other than that on which the petition is filed would render § 25-217 superfluous. For purposes of the limitation statutes found within chapter 25, article 2, a counterclaim, as an action, is therefore commenced on the date the plaintiff's petition is filed. It follows then that whether a counterclaim is barred by the applicable statute of limitations is determined by the date the plaintiff's petition was filed, rather than the date the counterclaim was filed.

Becker argues that our conclusion here is contradictory to our decision in *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). In *Ed Miller & Sons, Inc.*, the plaintiff sued upon a written lease contract for unpaid rent and repairs, on which the statute of limitations had not yet run. The defendant pleaded fraud both as a defense of recoupment and as a counterclaim in two separate areas of his pleading. In determining that the defendant's counterclaim in *Ed Miller & Sons, Inc.*

was barred by the applicable statute of limitations, we stated: "A counterclaim, seeking an affirmative judgment or relief, is barred by a statute of limitations unless the counterclaim is filed within the applicable statutory period for commencement of an action." *Id.* at 718-19, 502 N.W.2d at 452. In *Ed Miller & Sons, Inc.*, unlike in the instant case, the applicable statute of limitations had run on the counterclaim prior to the date that the plaintiff filed its petition. In fact, the statute of limitations on the counterclaim in *Ed Miller & Sons, Inc.* had run more than a year before the plaintiff filed its petition. See, § 25-207; *Ed Miller & Sons, Inc., supra* (plaintiff filed petition in December 1989 and defendant discovered evidence in January 1984 that indicated that alleged statement by plaintiff was misrepresentation). Thus, the defendant's counterclaim in *Ed Miller & Sons, Inc.* did not meet the requirement that the counterclaim be a viable action on the date that the plaintiff's petition is filed, and our conclusion is not contradictory to the facts in *Ed Miller & Sons, Inc.*

Moreover, policy and fundamental fairness also support a rule providing that the date the plaintiff's petition is filed determines whether a counterclaim is time barred. A statute of limitations provides a period of repose designed, if asserted, to prevent recovery on stale claims. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996).

> The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim.

Id. at 873, 546 N.W.2d at 784. Hobbs' claim, arising from the same facts and the same theory of recovery as Becker's claim, is no more stale than Becker's claim. Becker cannot claim prejudice by unfair surprise or an inability to prepare a defense to Hobbs' claim. Indeed, a counterclaim in this state must always arise from the same contract, transaction, or subject matter as the plaintiff's action, see § 25-813, and be an enforceable cause of action when the plaintiff's petition is filed, see *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746

(1995). We do not perceive how a plaintiff can be prejudiced by having a counterclaim filed against him or her that became unenforceable as an independent cause of action only after his or her petition was filed.

On the other hand, a rule that a statute of limitations continues to run against a counterclaim until it is actually filed would encourage great mischief. A plaintiff with a relatively weak claim, knowing that the defendant has a claim that could more than defeat the plaintiff's claim, could wait until the eleventh hour to file a petition and wait beyond the statute of limitations to serve process on the defendant, precluding any possibility of the defendant's being able to counter the plaintiff's action. The purpose of a statute of limitations is to prevent recovery of stale claims. The purpose "is not intended to bar nor smother any mere defense of a party so as to compel him to stand dumb and mute while his antagonist bludgeons his head with every weapon in the book of legal, offensive warfare." (Emphasis omitted.) *Liter v. Hoagland*, 305 Ky. 329, 332, 204 S.W.2d 219, 220 (1947).

Hobbs' counterclaim would not have been barred by the applicable statute of limitations, § 25-207, had he asserted it as an independent cause of action on the date Becker's petition was filed. Thus, Hobbs' counterclaim is not barred by the statute of limitations. With this conclusion, we need not consider Hobbs' other assigned errors.

CONCLUSION

The limitation statutes within chapter 25, article 2, require only that a counterclaim be an enforceable cause of action on the date the relevant plaintiff's petition is filed. Hobbs' counterclaim is not barred by the statute of limitations, as it would not have been barred had it been asserted as an independent cause of action on the date Becker's petition was filed. We therefore reverse the district court's grant of summary judgment to Becker.

REVERSED.

REINKE MANUFACTURING COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. EDWARD DAVID HAYES, DOING BUSINESS AS E-H ENGINEERING, APPELLEE.

590 N.W. 2d 380

Filed March 12, 1999. No. S-98-101.

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 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.
3. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
4. **Limitations of Actions: Contracts.** Neb. Rev. Stat. § 25-205 (Reissue 1995) is a general statute of limitations for written contract claims.
5. **Limitations of Actions: Malpractice.** Neb. Rev. Stat. § 25-222 (Reissue 1995) is a special statute of limitations for professional negligence.
6. **Limitations of Actions: Contracts.** Generally, absent a more specific statute, actions on written contracts may be brought within 5 years pursuant to Neb. Rev. Stat. § 25-205 (Reissue 1995).
7. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
8. **Limitations of Actions: Malpractice.** If all of a plaintiff's claims are based on a single professional relationship, they may not be separated into various parts to allow different periods of limitation to be applied.
9. **Limitations of Actions: Malpractice: Torts: Contracts.** If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) applies.
10. **Limitations of Actions.** Neb. Rev. Stat. § 25-222 (Reissue 1995) contains the limitations period applicable to an engineer rendering professional services.
11. **Words and Phrases.** In determining whether a particular act is of a professional nature or a professional service, the court must look to the nature of the act itself and the circumstances under which it was performed.
12. ____. A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge which is attained from often long and intensive preparation and instruction in skills and methods and the scientific, historical, and scholarly principles underlying such skills and methods.
13. **Limitations of Actions: Malpractice.** Nebraska follows the occurrence rule, under which a professional negligence suit accrues at the time of the act or omission causing injury.

14. ____: ____. A cause of action for professional negligence accrues when the alleged act or omission in rendering or failure to render professional services takes place.
15. **Malpractice: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct.
16. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
17. **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.
18. **Limitations of Actions: Malpractice.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
19. **Limitations of Actions: Damages.** A limitation period may begin to run even though the nature and extent of the damages are not known.
20. **Limitations of Actions.** For a limitation period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists.
21. **Limitations of Actions: Damages.** One need not know the full extent of one's damages before the limitation period begins to run, as a statute of limitations can be triggered at some time before the full extent of damages is sustained.
22. **Limitations of Actions: Damages: Words and Phrases.** In the context of statutes of limitations, "discovery" refers to the fact that one knows of the existence of an injury or damage, regardless of whether there is awareness of a legal right to seek redress in court.
23. **Limitations of Actions: Words and Phrases.** Discovery of an act or omission 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.
24. **Malpractice: Limitations of Actions.** The discovery exception permits an action to be commenced within 1 year from discovery where the cause of action could not have reasonably been discovered during the 2-year limitation period of Neb. Rev. Stat. § 25-222 (Reissue 1995). However, if facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence, the discovery exception to the statute of limitations is inapplicable.
25. **Limitations of Actions: Malpractice: Words and Phrases.** 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.
26. **Limitations of Actions: Malpractice.** In a cause of action for professional negligence, the continuous representation rule is inapplicable when a claimant discovers the alleged negligence prior to the termination of the professional relationship.
27. ____: ____. In a cause of action for professional negligence, a party may not avail itself of the continuous representation rule if the tort committed is neither continuous nor unlikely to be discovered prior to the termination of the professional relationship.

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

Joseph H. Murray, of Germer, Murray & Johnson, and Gregory C. Damman for appellant.

Robert T. Grimit and Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

This is an action arising from a contract for engineering design services. Appellant, Reinke Manufacturing Company, Inc. (Reinke), appeals from an order granting summary judgment to appellee, Edward David Hayes, doing business as E-H Engineering (Hayes), on the basis that Reinke's claims were barred by the 2-year statute of limitations applicable to professional negligence, Neb. Rev. Stat. § 25-222 (Reissue 1995). For the reasons that Reinke's professional negligence claims accrued more than 2 years prior to the filing of its cause of action and we find no exception tolling the statute of limitations, we affirm.

II. FACTUAL BACKGROUND

Reinke is a Nebraska corporation engaged in the manufacture and sale of agricultural center-pivot irrigation systems. On June 18, 1991, Reinke entered into an agreement for "engineering design services" with Hayes. The agreement established that Hayes would provide Reinke with engineering design services for the review, design, development, and documentation of the "CENTER PIVOT MASTER CONTROLLER SYSTEM" (the system).

In the spring of 1992, Reinke manufactured and sold approximately 35 center-pivot irrigation systems that were equipped with the system designed and developed by Hayes pursuant to the agreement. Thereafter, Reinke began receiving complaints from its customers regarding the system. After receiving these complaints, Reinke, with the assistance of Hayes, undertook to

correct the reported problems. On November 7, Reinke created a document that detailed the alleged defects and deficiencies of the system which were known to Reinke at that time.

Reinke alleges that in February 1993, it decided to seek the assistance of another engineering firm to work with Hayes toward solving the reported problems with the system. On May 7, Reinke hired engineers from Applied Micro Technology to work on the system. Although Hayes contends that he had completed all design and engineering work or services for Reinke prior to November 16, 1992, Reinke alleges that Hayes continued to work on the system and consult with Reinke until July 1993. Reinke further asserts that it did not became aware of the full extent and magnitude of the defects contained in the system until July 1993, when the new engineers advised Reinke that it would take more than minor fine-tuning and adjustment to correct the problems its customers had reported. On November 17, 1993, Reinke wrote a letter to Hayes and made a specific demand for damages resulting from the alleged design defects.

III. PROCEDURAL BACKGROUND

On November 30, 1994, Reinke filed a petition in the district court for Thayer County, Nebraska, alleging that Hayes had been negligent and had breached his contract with Reinke. In response, Hayes filed a demurrer, which the court sustained on the ground that Reinke failed to allege a fundamental act of negligence independent of the service contract. On February 5, 1996, Reinke filed a second amended petition, to which Hayes demurred on several grounds, including the statute of limitations. The trial docket states that Hayes' special demurrer to the negligence portion of the amended petition was sustained but that the balance of the demurrer was overruled. Reinke was then given another opportunity to amend its pleading, and on March 3, 1997, Reinke filed a third amended petition. Hayes again responded by filing a demurrer.

Although the record is unclear whether the court sustained or overruled Hayes' demurrer to Reinke's third amended petition, the court noted in its entry on the trial docket that Reinke's third amended petition did not plead a tort or tort damages. The court further stated that it appeared that a tort could not be pled and

instructed Hayes to further plead. On June 10, 1997, Hayes filed an answer to Reinke's third amended petition. Hayes then filed a motion for summary judgment asserting that Reinke's claims were barred by the applicable statute of limitations, § 25-222. In sustaining Hayes' summary judgment motion, the court noted in the trial docket that "E-H Engineering is a professional" and that Reinke knew the system had substantial problems based, in part, upon the complaints that Reinke's customers had made prior to November 1992. Reinke timely appealed the district court's decision to the Nebraska Court of Appeals. We removed the case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

IV. ASSIGNMENTS OF ERROR

Reinke contends the district court erred in (1) finding Reinke's cause of action for breach of contract time barred by § 25-222; (2) finding that Reinke's cause of action accrued more than 2 years prior to the time Reinke filed its petition; (3) not finding that the continuous representation rule applied to the professional relationship between the parties and, thereby, tolled the statute of limitations; and (4) sustaining Hayes' demurrer to Reinke's third amended petition because Reinke was entitled to plead both tort and contract theories of recovery.

V. 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. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999); *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999).

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. *Kratochvil v. Motor Club Ins. Assn., supra*; *Nicholson v. General Cas. Co. of Wis., supra.*

Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998). See, also, *Kratochvil v. Motor Club Ins. Assn., supra.*

VI. ANALYSIS

1. Summary Judgment

Reinke's first three assignments of error pertain to Hayes' motion for summary judgment, which the district court granted based upon its determination that § 25-222 barred Reinke's claims. Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

With regard to Hayes' motion for summary judgment, Reinke argues that the district court erred in determining that (1) Neb. Rev. Stat. § 25-205 (Reissue 1995) was not the "more applicable" statute of limitations for Reinke's breach of contract claim, (2) Reinke's cause of action accrued more than 2 years prior to filing its claims, and (3) the limitation period was not tolled by Reinke's "continuous relationship" with Hayes pursuant to the contract.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record dis-

close 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. *Kratochvil v. Motor Club Ins. Assn., supra*; *Nicholson v. General Cas. Co. of Wis., supra.*

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. *Kratochvil v. Motor Club Ins. Assn., supra*; *Nicholson v. General Cas. Co. of Wis., supra.*

(a) Statute of Limitations

Reinke contends the district court erred in determining that the statute of limitations for breach of a written contract, § 25-205, was not the more applicable statute of limitations for its breach of contract claim. Reinke focuses on the " 'breach of warranty' " language in § 25-222 and argues that it should be construed to apply only to a "warranty" arising solely from the existence of the professional relationship and should not apply if a separate writing exists. Brief for appellant at 21. Therefore, Reinke asserts that the "more direct statute" is § 25-205 because it makes an express reference to written contracts and § 25-222 does not. *Id.* Reinke further claims that even if the statutes are equally applicable to a breach of contract, § 25-222 is in conflict with § 25-205, and that therefore, the longer limitation period of § 25-205 should govern.

Section 25-205 is a *general* statute of limitations for written contract claims. See *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). Additionally, we have held that § 25-222 is a special statute of limitations for professional negligence. *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976). In *Kratochvil v. Motor Club Ins. Assn., supra*, we stated that, generally, absent a more specific statute, actions on written contracts may be brought within 5 years pursuant to § 25-205. We explained, however, that " '[a] special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.' " *Kratochvil*

v. Motor Club Ins. Assn., 255 Neb. at 986, 588 N.W.2d at 573 (quoting *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992)). Therefore, if Reinke's claims arise from its professional relationship with Hayes, then § 25-222 is the applicable statute of limitations and § 25-205 is not "more direct" or "equally applicable" to Reinke's breach of contract claim.

By alleging various theories of recovery, Reinke attempts to parse its claims in order to obtain the advantage of longer periods of limitation and avoid the statutory bar of § 25-222. If all of Reinke's claims are based on a single professional relationship, however, they may not be separated into various parts to allow different periods of limitation to be applied. See *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994). In *Swassing v. Baum*, 195 Neb. at 657, 240 N.W.2d at 28, we explained that "we do not believe that the Legislature in adopting the special statute of limitations for professional negligence, section 25-222, R. S. Supp., 1974, intended that the various aspects of the whole professional relationship should be separated . . . ." Therefore, if Reinke's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies. See, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983).

In determining whether the special statute of limitations for professional negligence applies to Reinke's claims, we must first establish whether Hayes is a professional and, additionally, we must determine whether Hayes was acting in a "professional" capacity. See *Maloley v. Shearson Lehman Hutton, Inc., supra*. Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998). See, also, *Kratochvil v. Motor Club Ins. Assn., supra*.

We conclude Hayes is a professional within the definition set out in *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998). See, also, *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Board of*

Regents v. Wilscam Mullins Birge, 230 Neb. 675, 433 N.W.2d 478 (1988). We have also held that § 25-222 contains the limitations period applicable to an engineer rendering professional services. *Lindsay Mfg. Co. v. Universal Surety Co., supra.*

Notwithstanding, we must determine whether Hayes was acting in a professional capacity in rendering the services upon which Reinke bases its claims. See *Maloley v. Shearson Lehman Hutton, Inc., supra.* In determining whether a particular act is of a professional nature or a professional service, the court must look to the nature of the act itself and the circumstances under which it was performed. *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976). A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge which is attained from often long and intensive preparation and instruction in skills and methods and the scientific, historical, and scholarly principles underlying such skills and methods. *Jorgensen v. State Nat. Bank & Trust, supra.*

Reinke does not dispute that the services upon which it bases its claims against Hayes were anything other than professional engineering services. Reinke's petition and the contract from which Hayes' duty to Reinke arose clearly reflect that the relationship between the parties was entirely based upon an agreement for professional engineering services. All of Reinke's claims refer to the performance of professional engineering services and specifically state the requirement of engineering expertise and training for the performance of the services. Accordingly, Hayes was acting in a professional capacity when he rendered the professional engineering services upon which Reinke bases its claims.

We therefore conclude that the district court properly applied the statute of limitations for professional negligence, § 25-222, to all of Reinke's claims.

(b) Accrual

Reinke also contends the trial court erred in determining that its cause of action accrued more than 2 years prior to the time Reinke filed its petition and that there is a genuine issue of material fact as to when Reinke was "injured." Reinke cites to

Rosnick v. Marks, 218 Neb. 499, 504, 357 N.W.2d 186, 190 (1984), in which we explained that the injury contemplated by § 25-222 is "legal injury," and argues that Reinke was not legally injured until after it had given Hayes an opportunity to resolve the problems with the system.

In response, Hayes argues that any alleged claim of malpractice accrued "before the systems were manufactured and sold by Reinke in early 1992" because all of Reinke's allegations relate to the design of the system. Brief for appellee at 12. Hayes asserts that delivery of the design of the system to Reinke constituted the last time Hayes could have committed any act or omission in rendering or failing to render professional services.

Reinke argues, however, that Hayes' work was not complete when the system was delivered to Reinke or to its customers in early 1992, because delivery of the system to customers was the method by which problems with the system could be identified, documented, and resolved. Reinke contends that a breach of contract or negligence action against Hayes would not have accrued until after Hayes was given an opportunity to correct the problems and failed to do so.

In order to determine when Reinke's cause of action accrued, we first determine what event constituted Reinke's injury. In *Gordon v. Connell*, 249 Neb. 769, 774, 545 N.W.2d 722, 726 (1996), we stated that Nebraska follows the " 'occurrence rule,' " under which a professional negligence suit accrues at the time of the act or omission causing injury. We have characterized the occurrence rule with regard to professional negligence, stating:

> In conjunction with § 25-222 every professional has a duty to render services in a reasonable and prudent manner. A negligent breach of that professional duty invades a legal right of one entitled to receive negligence-free services. Thus, tortious invasion of another's legal right is the triggering device for the statute of limitations.

Rosnick v. Marks, 218 Neb. at 505, 357 N.W.2d at 190. We pointed out in *Rosnick v. Marks, supra*, that the Legislature, by selecting the language "act or omission" found in § 25-222, rejected actual damage as the index for inception of the time limit for a suit based on malpractice. Accordingly, a cause of action for professional negligence accrues when the alleged act

or omission in rendering or failure to render professional services takes place. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

In *Lindsay Mfg. Co. v. Universal Surety Co., supra*, a case factually similar to the present case, the defendant engineering firm was employed by the plaintiff to provide design and engineering services and to prepare plans, specifications, and contract documents for the design and construction of a new hazardous waste disposal facility. The design plans included four monitoring wells, the installation of which in December 1982 was found to have contaminated the aquifer underlying the facility. The plaintiff alleged that although it was informed of a problem as early as September 25, 1984, it was not until June 12, 1986, that it was informed that the problem was due solely to the wells, which had been designed by the defendant engineering firm. We determined that the plaintiff's third amended petition essentially alleged negligence in the design and inspection of the wells and that, therefore, by the time the wells were complete in December 1982, the negligent act or omission had taken place. The fact that the plaintiff had not known the contamination of the aquifer was due solely to the alleged negligence in the design of the wells did not alter the date of accrual.

Similarly, all of Reinke's allegations relate to alleged acts of negligence by Hayes in the design of the system. The act or occurrence which constitutes Reinke's injury is manifested in the design of the system. Therefore, any act or occurrence of negligence in the design of the system occurred by the date Hayes had delivered the design to Reinke to begin manufacturing. The fact that Reinke was not aware of the magnitude of its injury does not alter the act or occurrence which constituted the injury. Legal injury is the wrongful act or omission which causes the loss; it is not *damage*, which is the loss resulting from the misconduct. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). Accordingly, the last possible date the alleged act of negligence could have occurred was the date Hayes delivered the design to Reinke, prior to the manufacturing of the system, sometime in the spring of 1992.

A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to

institute and maintain suit. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). 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. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Lindsay Mfg. Co. v. Universal Surety Co., supra*. If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998).

A limitation period may begin to run even though the nature and extent of the damages are not known. *Witherspoon v. Sides Constr. Co., supra*. It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem exists. *Lindsay Mfg. Co. v. Universal Surety Co., supra*. See, also, *Gordon v. Connell, supra* (holding that one need not know full extent of one's damages before limitation period begins to run, as statute of limitations can be triggered at some time before full extent of damages is sustained).

We have explained that "[i]n the context of statutes of limitations, 'discovery' refers to the fact that one knows of the existence of an injury or damage, regardless of whether there is awareness of a legal right to seek redress in court." *Weaver v. Cheung*, 254 Neb. at 356, 576 N.W.2d at 778. Accord *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). Discovery of the act or omission 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. *Weaver v. Cheung, supra*; *Gordon v. Connell, supra*.

The district court determined Reinke knew that the system had a substantial problem or problems based, in part, upon whatever complaints that its customers had made prior to November 1992. The undisputed facts of this case demonstrate that Reinke was aware of problems with the system as early as the summer of 1992 when customers began complaining. By November 1992, Reinke had documented a list of alleged defects and deficiencies in the design of the system. Reinke

began discussing the problems in the system with other engineers in November 1992, as evidenced by the document entitled "Design Deficiencies of RAMS Unit CPU Board Designed by EH Engineering," dated November 7, 1992, and a letter from Applied Micro Technology dated November 9, 1992. These facts are sufficient to constitute the existence of an injury prior to November, even though Reinke claims it did not believe it had a legal right to seek redress at that time.

Although Reinke claims it did not know that the problems with the system were unresolvable, Reinke was, nonetheless, on notice of the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of the injury. See, *Weaver v. Cheung, supra*; *Gordon v. Connell, supra*. Regardless of whether Reinke was aware of the full extent of its injury, Reinke discovered facts sufficient to put it on notice of its injury well within the statutory period of limitations.

Reinke attempts to argue that discovery of the magnitude of the problems with the system, in July 1993, is the occurrence which caused Reinke's injury. As we have explained, however, the act which caused Reinke's injury occurred prior to November 1992. Notwithstanding, assuming Reinke is arguing for this court to apply the discovery exception to its claims and allowing Reinke every favorable inference, Reinke's claims are still barred.

The discovery exception permits an action to be commenced within 1 year from discovery where the cause of action could not have reasonably been discovered during the 2-year limitation period of § 25-222. See *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998). However, if facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence, the discovery exception to the statute of limitations is inapplicable. *Lindsay Mfg. Co. v. Universal Surety Co., supra*.

We conclude that Reinke had sufficient notice to put it on inquiry of its injury during the 2-year limitation period of § 25-222 and that the discovery exception did not toll the statute.

(c) Continuous Representation

Reinke next asserts that even if § 25-222 applies to its claims, the district court erred in determining that the limitation period was not tolled by Reinke's "continuous relationship" with Hayes pursuant to the contract between the parties. Reinke argues that because the contract actually contemplated that there would be major problems and that the problems would need to be worked out during the third phase of the project, the cause of action did not accrue until Hayes was given an opportunity to resolve the problems and until Reinke discovered that the major problems could not be resolved. Reinke contends that because the resolution of problems with the system was continuous, an "injury" did not occur until Hayes lost the protection of the contract in July 1993, when Reinke was advised that the problems in the system could not be resolved and, thereby, ended the relationship. Reinke argues that there is a genuine issue of material fact as to when the professional relationship between Reinke and Hayes ended and that, therefore, the court erred in finding that the continuous representation exception did not toll the statute.

Before reaching a factual determination of when the relationship between Hayes and Reinke ended, we must first establish whether the contractual relationship between the parties was sufficient to create a continuous relationship that would toll the statute. 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 Exchange v. Cooperative Serv. Co.*, 230 Neb. 758, 433 N.W.2d 509 (1988). We explained in *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), that continuity does not mean mere continuity of the general professional relationship.

While it may be true that the contract between Reinke and Hayes contemplated that there may be "major problems" with the system, it did not go so far as to toll the statute of limitations by establishing a continuous relationship between the parties. The contract between Reinke and Hayes does not clearly establish a continuity of the services or relationship. There is no indi-

cation that the parties actually contracted for a certain time-frame or to continue the relationship until the resolution of major problems with the system. The contract simply provides for professional design services and acknowledges that there will be several phases in the project. In the section entitled "Phase III," the contract states, in relevant part, that "[d]uring this Phase *hopefully* all major problems will have been resolved and documented." (Emphasis supplied.) At the time of contracting, the estimated time and costs of "Phase III" were evaluated as " 'unknown at this time.' " This language is clearly not sufficient to establish a continuous relationship throughout the resolution of major problems with the system.

Notwithstanding, even assuming the contract went far enough to establish a continuous relationship, the continuous representation rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional relationship. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991). In *Economy Housing Co. v. Rosenberg, supra*, we stated that the appellant could not avail itself of the continuous representation rule, as the tort committed was neither continuous nor unlikely to be discovered prior to the termination of the professional relationship.

Reinke contends that it could not have discovered its injury prior to the termination of the professional relationship because the contract specifically contemplated that the parties would continue to work together to resolve any "major problems." Reinke, therefore, asserts that it could not have been injured until Hayes was no longer working with Reinke to resolve the major problems. Here, as in *Economy Housing Co. v. Rosenberg, supra*, however, Reinke discovered facts constituting notice of the alleged acts of negligence prior to the date Reinke alleges to be the termination of the professional relationship. There is adequate evidence in the record to establish that Reinke was put on inquiry of Hayes' alleged negligence at least by November 1992, well within 2 years of the alleged act or occurrence causing the injury and prior to the date Reinke alleges to be the termination of the professional relationship.

Accordingly, we find the contract between the parties insufficient to create a continuous relationship for purposes of applying the continuous representation exception, and further, even if a continuous relationship could have been established between the parties, the continuous representation exception would have been inapplicable under the facts of this case. It is therefore irrelevant when the professional relationship between the parties ended, and we find that § 25-222 was not tolled with respect to any of Reinke's claims against Hayes.

2. Demurrer

Reinke's final assignment contends the district court erred in sustaining Hayes' demurrer to Reinke's third amended petition. Reinke argues that the district court erred in forcing it to elect between consistent theories of recovery and that it should have been allowed to allege a negligence claim based in tort, in addition to its breach of contract claim. The record, however, is unclear as to what the trial court actually did with regard to Hayes' demurrer to Reinke's third amended petition. There is no order or notation in the record indicating that Hayes' demurrer was sustained in whole or in part. Nonetheless, Reinke argues that it is important for this court to decide what legal theories it may allege so that a longer statute of limitations period may be applied.

Even assuming Reinke's negligence claim was dismissed pursuant to Hayes' demurrer, such action is irrelevant to the disposition of this cause. As we have stated above, whether pled in tort or contract, § 25-222 applies to all of Reinke's claims against Hayes for professional malpractice. See, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). We, therefore, do not address Reinke's arguments with regard to this last assignment.

VII. CONCLUSION

The district court properly granted Hayes' motion for summary judgment on the basis that all of Reinke's claims were barred by the 2-year limitation for professional negligence.

Affirmed.

HIEN D. NGUYEN, APPELLANT, V. JAMES W. REZAC, APPELLEE.

590 N.W. 2d 375

Filed March 12, 1999. No. S-98-170.

1. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
2. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury 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. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Jury Instructions.** The instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and evidence call for such an instruction.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed.

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

J. Arthur Curtiss and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Hien D. Nguyen was involved in a motor vehicle accident with James W. Rezac in Lincoln, Nebraska. Nguyen sued Rezac, seeking recovery for personal injuries and property damage Nguyen alleged he suffered in the collision. At trial, a jury found in favor of Rezac in all respects. Nguyen appeals, claiming that the trial court improperly instructed the jury and erred in overruling his motion for new trial. We reverse.

STATEMENT OF FACTS

On February 17, 1993, at approximately 3:30 p.m., Nguyen was driving his 1978 Ford Thunderbird automobile north on 20th Street, approaching the intersection of 20th Street and Cornhusker Highway. As he approached the intersection, Nguyen was traveling at approximately 20 to 30 m.p.h. At the same time, Rezac was also driving on 20th Street, heading south. Rezac's car, a 1982 Lincoln Continental, stopped in a left turn lane on 20th Street at the Cornhusker Highway intersection in preparation for the left turn he intended to make to head east on Cornhusker Highway. The intersection of 20th Street and Cornhusker Highway is controlled by a traffic light. The traffic light was green for north-south traffic on 20th Street when the collision between Nguyen and Rezac occurred. This traffic light does not have a turn arrow or other signal specifically controlling the passage of vehicles turning from 20th Street onto Cornhusker Highway.

The parties gave differing accounts of the accident. According to Nguyen, as he drove north on 20th Street toward the Cornhusker Highway intersection, he saw that the light was green for north-south traffic on 20th Street, and he saw Rezac's vehicle moving slowly southward into the intersection. Nguyen stated that he expected that Rezac would stop and yield the right-of-way while Nguyen passed straight through the intersection. Nguyen testified that as he proceeded into the intersection, however, he saw Rezac accelerate and begin executing a left turn. Nguyen testified that he immediately applied his brakes, but he could not stop his car before it collided with Rezac's car.

According to Rezac, before the collision with Nguyen, Rezac had been heading south on 20th Street, and he stopped in the left turn lane on 20th Street when the traffic light at the Cornhusker Highway intersection turned red. When the light for north-south traffic on 20th Street again turned green, Rezac slowly pulled forward into the intersection, preparing to turn left, or east, onto Cornhusker Highway. Rezac stated that he had difficulty seeing whether the way was clear for his turn, because some northbound cars facing him on 20th Street were turning west onto Cornhusker Highway. Rezac testified that immediately south of

the Cornhusker Highway intersection, 20th Street curved, thereby complicating Rezac's assessment of whether the way was clear for him to safely execute a left turn. Rezac testified that he thought the way was clear when he began his turn onto eastbound Cornhusker Highway and that he had nearly completed the turn when his car was struck by Nguyen's vehicle.

The parties agreed that the extreme right front corner of Nguyen's automobile struck the right rear quarter panel of Rezac's vehicle. Police were called to the accident scene. After the police investigation was complete, both Nguyen and Rezac left the scene in their own vehicles. Nguyen refused emergency medical assistance at the accident scene.

Nguyen filed a petition against Rezac in the district court for Lancaster County on August 11, 1994, alleging that as a result of the collision, Nguyen sustained personal injuries and property damage. Nguyen alleged that Rezac negligently caused the collision by failing to yield the right-of-way to Nguyen at the 20th Street and Cornhusker Highway intersection, by failing to maintain a proper lookout, and by failing to keep Rezac's automobile under proper control. Nguyen sought an award of $29,500 in special damages and general damages in an unspecified amount.

In his answer to Nguyen's petition, Rezac denied that he was negligent. Rezac affirmatively alleged that Nguyen was contributorily negligent in failing to maintain a proper lookout, in failing to keep reasonable control of his vehicle, and in traveling at an excessive rate of speed.

The case was tried to a jury December 1 through 3, 1997. At a jury instruction conference, Nguyen objected unsuccessfully to the court's jury instruction No. 7, which read as follows:

> Nebraska statutes provide that drivers who have a green light may proceed straight through an intersection and they may turn right or left unless there is a sign prohibiting such a turn. They do not, however, have an absolute right to do so. Drivers who have a green light still must exercise such care as a reasonably careful driver would exercise under the circumstance.
>
> They must yield the right-of-way to traffic that is already lawfully in the intersection.

> When turning left, they must yield the right-of-way to drivers approaching from the opposite direction who are in the intersection or so close to the intersection and traveling at such a speed that it is not safe to proceed with the left turn.

Jury instruction No. 7 was based upon NJI2d Civ. 7.07A. NJI2d Civ. 7.07A contains an unnumbered first paragraph pertaining to proper conduct of drivers who have a green light, which paragraph is the same as the first paragraph in instruction No. 7 quoted above. Thereafter, NJI2d Civ. 7.07A contains four numbered subparagraphs pertaining to yielding of the right-of-way by persons who have the green light in circumstances involving (1) cross traffic, (2) traffic turning right or left, (3) traffic turning left, and (4) the presence of emergency vehicles.

As given by the trial court, the second paragraph of instruction No. 7 modified NJI2d Civ. 7.07A(1). NJI2d Civ. 7.07A(1) provides that a driver who has a green light "must yield the right-of-way to *cross* traffic that is lawfully within the intersection." (Emphasis supplied.) Instead, instruction No. 7 stated that the right-of-way must be yielded to vehicles already *lawfully* in the intersection. Nguyen objected to the second paragraph of instruction No. 7. The third paragraph of instruction No. 7 is the same as NJI2d Civ. 7.07A(3) and is not the subject of Nguyen's objection.

The trial court overruled Nguyen's objection to the second paragraph in instruction No. 7. Nguyen did not tender any instructions for the court's consideration. The trial court refused four jury instructions proffered by Rezac. Instruction No. 7, as set forth above, was given to the jury, which after deliberation found for Rezac and against Nguyen.

Nguyen timely moved for a new trial. He asserted, inter alia, that jury instruction No. 7 was erroneous and inconsistent with the Nebraska pattern jury instructions. The trial court overruled Nguyen's motion for new trial. Judgment was entered in favor of Rezac. Nguyen appeals.

ASSIGNMENTS OF ERROR

On appeal, Nguyen claims that the trial court erred in overruling his objection and in giving instruction No. 7 to the jury.

Nguyen also claims that the trial court erroneously overruled his motion for new trial.

STANDARD OF REVIEW

A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). Furthermore, in an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Wheeler v. Bagley, supra.*

ANALYSIS

Nguyen argues on appeal that the trial court erroneously deviated from NJI2d Civ. 7.07A(1) by modifying it in jury instruction No. 7, thereby prejudicing Nguyen. Referring to Nebraska statutes and NJI2d Civ. 7.07A, Nguyen claims that jury instruction No. 7 as given was an incorrect statement of the law and confused the jury regarding competing right-of-way priorities such that the jury was in effect instructed that the right-of-way belonged to whichever party could "race to the intersection first." Brief for appellant at 16. Although the second paragraph of instruction No. 7 standing alone is a correct statement of law, we agree with Nguyen that given the evidence in this case, the manner in which the trial court modified NJI2d Civ. 7.07A(1) resulted in an instruction which was misleading, confused the jury, and was prejudicial error requiring reversal.

As noted above in the statement of facts, the evidence relating to the accident was in dispute. According to Nguyen, Rezac pulled in front of Nguyen to execute a left turn. According to Rezac, after looking at oncoming traffic, he concluded that the

left turn he intended to execute could be accomplished safely. The second paragraph of instruction No. 7 implies that Nguyen, who had the green light, was required to yield to Rezac, who was "lawfully" in the intersection. However, whether Rezac was lawfully in the intersection was a fact in dispute.

Nguyen refers to two statutes found within the Nebraska Rules of the Road, see Neb. Rev. Stat. § 60-601 et seq. (Reissue 1993), in support of his challenge to instruction No. 7.

The first statute relevant to our analysis, § 60-6,123, is found under the subheading "Traffic Control Devices." Section 60-6,123(1)(a) provides:

> Vehicular traffic facing a circular green indication may proceed straight through or turn right or left unless a sign at such place prohibits either such turn, but vehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such indication is exhibited.

The second statute to which Nguyen refers is § 60-6,147, which is found under the subheading "Right-of-Way." Section 60-6,147 provides:

> The driver of a vehicle who intends to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard.

We have compared jury instruction No. 7 as given with these statutes, and we observe that jury instruction No. 7 as given by the trial court adequately reflects § 60-6,123(1)(a) in the first paragraph and § 60-6,147 in the third paragraph. Instruction No. 7 is not improper on this basis. However, the second paragraph of instruction No. 7 is not derived from these statutes, and although it may be a correct statement of the law, its contents were misleading and confusing to the jury on the facts of this case. See *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). It is on this basis that instruction No. 7 was rendered improper and prejudicial.

Nguyen also claims that instruction No. 7 was given in error, for the reason that the instruction is not a verbatim recitation of NJI2d Civ. 7.07A. In this regard, Nguyen claims that NJI2d Civ. has been endorsed by the Nebraska Supreme Court and, therefore, that the instructions contained therein must be given verbatim. However, this court has previously held that "'the instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings *and evidence* call for such an instruction.'" (Emphasis supplied.) *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 850, 560 N.W.2d 451, 457 (1997). The fact that instruction No. 7 in the instant case deviates from NJI2d Civ. 7.07A is not a basis upon which to find it per se erroneous. "To so hold would essentially deny a court the opportunity to properly formulate instructions that are tailored to the case at hand." *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. at 850, 560 N.W.2d at 457. See, also, *Rigatuso v. Lowe*, 1 Neb. App. 134, 503 N.W.2d 845 (1992).

The purpose of a jury instruction is to furnish guidance to the jury in its deliberations and to aid the jury in arriving at a proper verdict. *Mahoney v. Nebraska Methodist Hosp., supra.* A jury instruction should clearly and concisely state the issues of fact and the principles of law which are necessary for the jury to accomplish its purpose. *Id.* Here, the trial court modified NJI2d Civ. 7.07A by eliminating a reference to cross traffic within the intersection, presumably because the collision between the parties was not a cross-traffic incident, and instead, instruction No. 7 referred to traffic lawfully in the intersection. Given the factual accounts of the accident, which were in dispute, this modification implied that Nguyen, who had a green light, should have yielded to Rezac because Rezac was "lawfully in the intersection." This issue was in dispute, and its resolution should have been left to the jury. Instruction No. 7 as modified was confusing, prejudiced Nguyen, and requires reversal.

We are aware that jury instructions must be read conjunctively, not separately or in isolation, and that if the instructions given, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to the jury, there is no prejudicial error concerning the instructions

necessitating a reversal. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). Notwithstanding a panoply of separate proper instructions elsewhere in the trial court's charge, instruction No. 7 was misleading, and the instructions taken as a whole were prejudicial.

Because we have concluded that under the facts of this case, the giving of the second paragraph of jury instruction No. 7 constituted prejudicial error, we necessarily find that the trial court abused its discretion by overruling Nguyen's motion for new trial based on instruction No. 7.

CONCLUSION

The rulings of the trial court with respect to instruction No. 7, the order of the trial court entering judgment upon the jury verdict in Rezac's favor, and the order overruling Nguyen's motion for new trial are reversed.

REVERSED.

IN RE INTEREST OF KELLEY D. AND HEATHER D., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. LARRY D., APPELLANT.

590 N.W.2d 392

Filed March 12, 1999. Nos. S-98-221, S-98-222.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.

4. **Child Custody: Jurisdiction.** Physical presence of a child in this state alone is sufficient to confer jurisdiction on a court to make a child custody determination under Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1998).
5. **Child Custody: Jurisdiction: Courts: States.** To determine whether a court is an inconvenient forum under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), the court considers the following factors, among others, to determine if it is in the best interests of the child that another state assume jurisdiction: (1) Another state is or recently was the child's home state; (2) another state has a closer connection with the child and his or her family; (3) substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by a court of this state would contravene a purpose of the act.
6. ____: ____: ____: ____. A paramount consideration in determining whether a state is a convenient forum under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), is a determination of what court is most able to act in the best interests of the child.
7. **Child Custody: Jurisdiction.** Emergency jurisdiction under Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1998) is by its very nature limited.
8. ____: ____. Emergency jurisdiction under Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1998) is temporary in nature and confers only the power to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998).
9. **Juvenile Courts: Parental Rights: Proof.** When adjudicating whether a juvenile is dependent or neglected within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997), the State must establish its allegations by a preponderance of the evidence.
10. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
11. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
12. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
13. **Trial: Evidence: Presumptions: Appeal and Error.** In a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the judgment.

Appeal from the County Court for Nemaha County: CURTIS L. MASCHMAN, Judge. Affirmed.

Louie M. Ligouri for appellant.

Marcia J. Scott, guardian ad litem, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The father, Larry D., appeals from separate orders of the Nemaha County Court, sitting as a juvenile court, adjudicating his daughters, Kelley D. and Heather D., to be juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997) and ordering a home study and the development of a case plan.

SCOPE OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998).

The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *In re Interest of Floyd B., supra.*

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

FACTS

Kelley and Heather lived with their father and stepmother in Laredo, Texas, for several years. On approximately June 2,

1997, Kelley, age 10, and Heather, age 9, went to Auburn, Nebraska, for a summer visit with their paternal grandmother. The grandmother felt that the girls were withdrawn, and she sent them to see Maureen Schultz, a mental health practitioner. Schultz counseled the girls approximately once a week and noted that they both exhibited feelings of hopelessness and helplessness, a wish to die, withdrawal, and low self-esteem. She diagnosed the girls as suffering from adjustment disorder with depression and concluded that their condition was caused by physical and emotional abuse perpetrated in Texas by their father and stepmother.

Schultz contacted the Nebraska Department of Health and Human Services in Auburn, and on August 14, 1997, the County Attorney for Nemaha County filed petitions in Nemaha County Court, alleging that Kelley and Heather were juveniles who lacked proper parental care by reason of the fault or habits of their father, as described in § 43-247(3)(a). The father objected to the jurisdiction of the court for the reasons that the home state of the girls was Texas and that the alleged abusive acts occurred in Texas.

Over the father's objection, affidavits were received for the limited purpose of issues relating to availability of witnesses, determination of the home state, and determination of jurisdiction. The affidavits stated, inter alia, that there were no proceedings relating to Kelley or Heather in another jurisdiction; the only professional counseling for the girls occurred in Nemaha County; the paternal grandmother, aunt, and uncle all reside in or near Nemaha County; at the time of the hearing, the girls had resided in Nemaha County for 6 months; and the well-being of the girls depended upon the continued jurisdiction of the Nemaha County Court, as they would be in danger of further abuse and neglect if returned to the home of their father and stepmother. The court determined that it had emergency jurisdiction pursuant to § 43-1203(1)(c).

In consideration of the girls' ages and the nature of the allegations, the juvenile court authorized accommodation for their testimony so they would be seated in such a way as to not be required to look directly at their father. The court overruled the father's objection that this accommodation violated his right to

confrontation. When testifying, the girls sat diagonally toward the bench, and counsel were allowed to approach the bench during questioning. The girls sat at approximately a 90-degree angle to their father. While sitting at counsel table, the father's counsel was able to see the sides of the girls' faces, but not their eyes, and the father was able to see mostly their backs.

Kelley testified that her father had hit her with a belt on the back of her thighs on between 5 and 10 different occasions. Once in the spring of 1997, her father hit her approximately 20 times, leaving bruises. Kelley testified that during the week, the girls were not allowed to go to the bathroom before or during breakfast and that they were not allowed to sit down while eating. Kelley stated that her father regularly called her names, such as "BBBT," which stood for "big butted bird turd"; "stupid"; "idiot"; and "asshole." Kelley stated that her stepmother hit the girls on many occasions with a shoe or a flyswatter. According to Kelley, on one or two occasions the stepmother also made the girls stand with their hands against a wall and their feet away from the wall for half an hour. Kelley testified that on other occasions, her father made her stand with her lips against the wall for more than half an hour. She further stated that sometimes her father would painfully pull her hair. Kelley testified that she was afraid of her father because he hit the girls a lot.

Heather testified that both her father and stepmother had hit her in May 1997. Heather stated that her stepmother would hit the girls almost every day with her hand, a sandal, or a flyswatter and that she would hit them on whatever part of their bodies she could reach. Heather described an incident where their stepbrother tried to hit the girls with a toy baseball bat and the stepmother grabbed the bat and began hitting the girls to demonstrate to the stepbrother how it was done. Heather stated that her father would hit her once or twice a week with a special belt, although on cross-examination, she agreed with Kelley's statement that it was 5 to 10 occasions. Heather stated that the belt sometimes caused bruising and that the girls were usually asked to bring their father the belt. She described the belt as leather with metal diamonds and "half worlds" going down it. Heather also testified that the girls were not allowed to go to the bath-

room before or during breakfast and that they had to eat standing up. Heather stated that on one occasion the previous year, when the stepmother refused to let her use the bathroom while Heather was washing dishes, she wet her pants. Heather stated that several times, her stepmother would make the girls stand with their hands on the wall "so that we would get tired faster than just standing in the corner" and that they had to stand that way for half an hour or an hour. At other times, their father would make them stand with their noses to the wall, sometimes for over half an hour. Heather testified that her father called the girls bad names, including "butt-head," "asshole," "dummy," and "stupid." Heather testified that she was afraid of her father.

Kelley and Heather's uncle also testified on their behalf. The uncle testified that he went with the girls' grandmother to pick them up for the summer visit and that he stayed at the girls' home in Texas for 3 days. During that time, he observed that the father never called the girls by their proper names, but, instead, called them "dummy" or "stupid." The uncle stated that he had observed that Kelley feared her father and that he observed one occasion where the father belittled her about having a training bra and grabbed and snapped her bra strap in front of company. On another occasion, the uncle observed the father get angry with Kelley and threaten her with his belt.

The father generally denied the truth of the statements made by Kelley, Heather, the uncle, and Schultz. The father stated that there had been a couple of times when he spanked the girls with a belt, but not hard enough to leave marks. He stated that the bra-snapping incident was all in good humor. The father admitted that on one occasion, he may have called one of the girls "dummy" and explained that "[b]ig fat bird turd" was a joke.

On February 10, 1998, the juvenile court made findings of fact, which we have summarized as follows: (1) The evidence in this matter regarding the type and severity of discipline imposed is in conflict; (2) in the spring of 1997, the father used inappropriate punishment by striking the girls with a belt, causing bruising, and there are other instances of use of a belt and inappropriate discipline measures by both the father and the stepmother that have occurred within the past 12 months; (3) the father has engaged in language and behavior which is demean-

ing and belittling to the girls; (4) the father is lacking in parenting skills, which affects the best interests of the girls; (5) the girls have suffered and are suffering psychological damage as a result of the father's and stepmother's behavior, such as depression, withdrawal, feelings of helplessness, and nightmares; (6) the girls are genuinely afraid of their father; and (7) on or about August 11, the girls were residing with their grandmother in Nemaha County, Nebraska, when their summer stay was about to end and the girls would be required to return to Texas with their father upon his demand for their return.

The juvenile court concluded that the girls were within its jurisdiction and fell under the provisions of § 43-247(3)(a), in that they lacked proper parental care by reason of the fault or habits of their father relating to his ability to properly administer and supervise proper discipline and to properly care for and provide for the mental health needs of the girls. The court suspended further proceedings and ordered a case plan and report to be prepared by the Department of Health and Human Services, including a home study. The court found that the department should continue to undertake reasonable efforts to prevent or eliminate the need for removal of the girls from the parental home and to make appropriate arrangements for visitation and parental contact.

The father appeals from the February 10, 1998, orders rendering an adjudication that the girls were juveniles within the meaning of § 43-247(3)(a) and ordering that a case plan be developed.

ASSIGNMENTS OF ERROR

The father assigns as error the following: (1) The juvenile court erred in rejecting the State of Texas as the home state and proper forum for the exercise of jurisdiction under the NCCJA; (2) the juvenile court erred in denying him the right of confrontation under Neb. Rev. Stat. § 43-279.01 (Reissue 1998) and applicable provisions of the Bill of Rights encompassed within the Nebraska and U.S. Constitutions; (3) the proceedings below, including the unilateral actions undertaken to divest the State of Texas of jurisdiction in favor of the State of Nebraska; the preadjudication affidavits setting forth opinions and other

expressions of credibility, culpability, and guilt; and the ongoing process of promoting the juveniles' being fostered in a household in direct custodial opposition to their father, are contrary to Neb. Rev. Stat. § 43-246(4) and (5) (Cum. Supp. 1996) and are error upon the record presented; and (4) the purported evidentiary facts introduced at the adjudication hearing did not correspond to the harm alleged by the State within the amended petition, and the juvenile court's order of adjudication is contrary both to law and to the applicable facts.

ANALYSIS

JURISDICTION

We first address the issue of whether the juvenile court properly exercised jurisdiction over Kelley and Heather. The guardian ad litem argues that the court properly exercised emergency jurisdiction pursuant to § 43-1203(1)(c)(ii) of the NCCJA. In contrast, the father argues that the court did not properly exercise jurisdiction under the NCCJA because the State of Texas is the home state and proper forum for the exercise of jurisdiction.

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998). The question as to whether jurisdiction existing under the NCCJA should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *Id.*

Section 43-1203(1) of the NCCJA, the "emergency jurisdiction provision," provides in part that 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 the child is physically present in this state and it is necessary in an emergency to protect the child because he or she

has been subjected to or threatened with mistreatment or abuse or is otherwise neglected. Section 43-247(3)(a) is incorporated into the NCCJA and provides in part that the juvenile court in each county shall have jurisdiction of any juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian." See, *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992); § 43-1202(3)(b).

Physical presence of the child in this state alone is sufficient to confer jurisdiction on a court to make a child custody determination under § 43-1203(1)(c). *In re Interest of Floyd B., supra*; *In re Interest of L.W., supra*. Thus, in *In re Interest of Floyd B.*, we held that the juvenile court properly exercised emergency jurisdiction over a child even though neither the child nor his parents resided in Nebraska and the alleged abusive acts did not occur in Nebraska.

In *In re Interest of Floyd B.*, the child had been placed in the protective custody of the then Department of Social Services, now the Department of Health and Human Services, while he and his father were visiting relatives in Nebraska over a Thanksgiving holiday. Family members had noticed bruising on the child and contacted the police. The evidence indicated that although the department of social services in the father's home state had conducted an investigation, there were no proceedings pending there.

We explained that the evidence presented at the hearing of an ongoing pattern of abuse, coupled with the fact that the child was physically present in Nebraska, conferred emergency jurisdiction on the juvenile court. We further explained that the emergency was ongoing because return of the child to either parent would put him at risk for future maltreatment.

We also concluded that Nebraska was a convenient forum for the proceedings. To determine whether a court is an inconvenient forum under the NCCJA, the court considers the following factors, among others, to determine if it is in the best interests of the child that another state assume jurisdiction: (1) Another state is or recently was the child's home state; (2) another state has a closer connection with the child and his or her family; (3) substantial evidence concerning the child's present or future care, protection, training, and personal relation-

ships is more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by a court of this state would contravene a purpose of the NCCJA. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998); § 43-1207(3). A paramount consideration in the balancing of these various factors is a determination of what court is most able to act in the best interests of the child. See *In re Interest of Floyd B., supra.*

We stated that despite the fact that Nebraska was not the home state, the Nebraska court was most able to act in the child's best interests. We noted that the Department of Social Services' investigation took place in Nebraska and that the Child Protective Services worker who had seen the child and his bruises was in Nebraska. We also noted that no other state had sought to exercise jurisdiction to protect the child.

When the petitions were filed in the instant case, Kelley and Heather were physically present in Nebraska, and the evidence at the adjudication hearing indicated an ongoing pattern of abuse and a danger to the girls if they were returned to their father. While the father argues that there are many witnesses in Texas who could testify that they had never seen bruises or other evidence of abuse, this fact was undisputed at the hearing. Thus, the fact that these witnesses are located in Texas does not indicate that Nebraska is an inconvenient forum. In contrast, other witnesses, such as Schultz, who assessed the psychological damage caused by the abuse, and the girls themselves, are currently in Nebraska. Other than the father and stepmother, there appears to be no significant witness in Texas to the abuse, and the Texas courts have not undertaken any proceedings to protect the girls. Thus, we conclude that the Nemaha County Court, sitting as a juvenile court, had emergency jurisdiction and that it did not abuse its discretion in exercising such jurisdiction.

However, we are concerned by the fact that in its exercise of emergency jurisdiction, the juvenile court ordered a case plan and report to be prepared by the Department of Health and Human Services, including a home study. Emergency jurisdiction under § 43-1203(1)(c) is by its very nature limited. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). It is temporary in nature and confers only the power to make tem-

porary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the NCCJA. *In re Interest of Floyd B., supra.*

If the juvenile court attempts to continue to exercise jurisdiction over Kelley and Heather, it must do so under another provision of the NCCJA. Texas is the home state of the girls, and they were merely visiting Nebraska at the time they were taken into protective custody. Section 43-1203(1)(d), the "default provision," provides for jurisdiction if another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child and if it is in the best interests of the child that this state assume jurisdiction. See *In re Interest of Floyd B., supra.* In order to assume jurisdiction under § 43-1203(1)(d), a communication must be received from the other state informing this state that it has declined jurisdiction and considers this state to be the more appropriate forum. See § 43-1207(9). Such information may be provided by one of the parties or obtained by the juvenile court; however, in obtaining such information, the court should avoid communications outside the presence of the parties. See *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). The parties or the court may attempt to gain such information pursuant to the mechanisms provided in the NCCJA, but absent such information from Texas, the Nemaha County Court should not attempt to continue to exercise jurisdiction.

Whether Orders Were Supported by Evidence

We next address the father's assertion that the juvenile court's orders were not supported by the evidence. The father points out that many of the allegations against him were not established at the hearing and that there were certain inconsistencies between the testimony of Kelley and Heather.

Section 43-279.01(3) provides that when adjudicating whether a juvenile is dependent or neglected within the purview of § 43-247(3)(a), the State must establish its allegations by a preponderance of the evidence. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350

(1998). Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

The testimony of Kelley and Heather indicates that they were hit by the father with a belt, causing bruising; that they were made to eat breakfast daily while standing up and having not been allowed to use the restroom; and that they were regularly called names by the father such as "dummy," "stupid," "butthead," and "asshole." Schultz diagnosed the girls with adjustment disorder with depression and concluded that their condition was caused by physical and emotional abuse perpetrated in Texas by their father and stepmother. We conclude that the State has shown by a preponderance of the evidence that in accordance with § 43-247(3)(a), the girls lacked proper care by reason of the fault or habits of a parent.

CONFRONTATION

The father also argues that Kelley and Heather's positioning while testifying and the admission of certain affidavits denied him his right to confront and cross-examine witnesses. The father concedes that the right to confrontation under the Sixth Amendment to the U.S. Constitution does not directly apply to proceedings in juvenile court, but he argues that his right to confrontation derives from his right to fundamental due process and his rights as set forth in § 43-279.01.

The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and

cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker. *Id.*

Section 43-279.01(1) states in part that when the petition alleges the juvenile to be within the provisions of § 43-247(3)(a) and the parent or custodian appears, the court shall inform the parties of the right to confront and cross-examine witnesses. In deciding due process requirements in a particular case, we must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). Due process is flexible and calls for such procedural protections as the particular situation demands. *In re Interest of L.V., supra.*

Both Kelley and Heather testified in the courtroom, and the finder of fact was able to fully see their facial expressions. The father sat approximately 10 to 12 feet from the girls and had a means of communicating with his counsel during their testimony. The juvenile court was able to control the examination and rule on objections, and the father's counsel was able to fully view the witnesses' facial expressions during his cross-examination. We conclude that in these proceedings for temporary adjudication, the manner in which the girls were situated during questioning did not violate any right of fundamental fairness or confrontation, nor did it violate § 43-279.01(1)(d).

The affidavits which the father complains denied him his right to confront and cross-examine were entered solely for the purpose of determining jurisdiction. Thus, the juvenile court received them to determine where, for example, relevant witnesses resided. The court did not receive them for the veracity of the statements, which the father asserts accuse him of committing abusive acts without such accusations' being subject to cross-examination.

Regardless, in a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain

the judgment. *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985).

Even if we were to assume that the affidavits were inadmissible and violated the father's right to confrontation, we have reviewed the other evidence de novo on the record and find that it is sufficient to support the juvenile court's order.

§ 43-246

Finally, the father asserts that the actions of the juvenile court are contrary to § 43-246(4) and (5). Section 43-246 provides that the Nebraska Juvenile Code shall be construed to effectuate certain listed purposes. Section 43-246(4) states that the code seeks to achieve its purposes in the juvenile's own home whenever possible, separating the juvenile from his or her parent only when necessary for his or her welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual juvenile in all placements, to consider relatives as a preferred potential placement resource, and to assure every reasonable effort possible to reunite the juvenile and his or her family. Section 43-246(5) states that the code is to provide a judicial procedure through which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced.

As far as we can ascertain from the father's argument, the actions alleged to be contrary to § 43-246 are (1) the exercise of jurisdiction outside the home state, (2) the way in which Kelley and Heather were positioned on the witness stand, and (3) the admission of affidavits setting forth opinions of credibility, culpability, and guilt. These issues have been adequately addressed by the foregoing discussion, and we find the father's argument that the juvenile court violated § 43-246 to be without merit.

CONCLUSION

The judgments of the juvenile court are affirmed.

AFFIRMED.