REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 5, 1995 and SEPTEMBER 9, 1996

IN THE

Nebraska Court of Appeals

VOLUME IV

PEGGY POLACEK

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1997

By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

RICHARD D. SIEVERS, Chief Judge[1]
LINDSEY MILLER-LERMAN, Chief Judge[2]
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge[3]
RICHARD D. SIEVERS, Associate Judge[4]
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge

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

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

TABLE OF CASES REPORTED

LIST OF CASES DISPOSED OF
BY MEMORANDUM OPINION
AND JUDGMENT ON APPEAL
(Author judge listed first.)

No. A-93-836: **Langone v. Langone.** Affirmed as modified. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-93-1043: **Russell v. Commercial Fed. Bank.** Affirmed. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-94-069: **Schank v. TAS Truckline, Inc.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-94-244: **Mucha v. Pittco, Inc.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-94-318: **Anderson v. Anderson.** Affirmed as modified. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-327: **Bennett v. Farmers Mut. Ins. Co. of Neb.** Affirmed. Per Curiam.

No. A-94-372: **M & M Grain Co. v. Axmann.** Affirmed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-94-420: **Benting v. Benting.** Affirmed as modified. Howard, District Judge, Retired, and Sievers, Chief Judge, and Hannon, Judge.

No. A-94-441: **Eisenberg v. Abramson.** Reversed and remanded with directions. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-94-462: **Snyder v. Abramson.** Reversed and remanded for further proceedings. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-94-463: **Erickson v. Department of Motor Vehicles.** Reversed and remanded with directions. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-506: **Village of Winside v. Jackson.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-94-564: **State v. Richmond.** Affirmed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-94-566: **Sweetman v. Sweetman.** Reversed and remanded. Inbody, Hannon, and Sievers, Judges.

No. A-94-591: **State v. Taylor.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-94-651: **Hutchison v. Mosser.** Appeal dismissed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-94-681: **Volesky v. Caspers Constr. Co.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-94-689: **Amsberry Trucking Co. v. Starr.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-696: **Omaha Manor v. Nebraska Dept. of Soc. Servs.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-94-702: **Meyer v. Meyer.** Affirmed in part, and in part reversed and remanded with directions. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-94-733: **Grow v. Abramson.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-94-734: **Sutherland v. Shoemaker.** Reversed and remanded for further proceedings. Inbody, Hannon, and Sievers, Judges.

No. A-94-753: **State v. Marion.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-94-754: **Weber v. Weber.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-94-759: **Beauvais v. Nebraska Pub. Power Dist.** Affirmed in part, and in part reversed. Miller-Lerman, Hannon, and Irwin, Judges.

No. A-94-807: **Balderson v. Dundy County Bd. of Equal.** Affirmed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-94-817: **Harwager v. Harwager.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-94-827: **Gallner v. Gallner.** Affirmed as modified. Inbody, Hannon, and Sievers, Judges.

No. A-94-840: **Trans-Lux Consulting Corp. v. Gil Grady & Assocs.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-94-852: **Kohout v. Kohout.** Appeal dismissed, and cause remanded with directions. Mues, Hannon, and Sievers, Judges.

No. A-94-855: **Nebraska Equal Opp. Comm. v. Heartland Indus.** Reversed and remanded. Hannon, Sievers, and Inbody, Judges.

No. A-94-858: **Kapperman v. Kapperman.** Affirmed as modified. Sievers, Hannon, and Inbody, Judges.

No. A-94-859: **Johnson v. Johnson.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-94-892: **City of Plattsmouth v. Jaeggi.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-94-913: **Doe v. Golnick.** Reversed and remanded for further proceedings. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-94-914: **Schumacher v. Schumacher.** Affirmed. Miller-Lerman, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-94-944: **Rudol v. Elder.** Reversed and remanded. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-94-967: **Beach v. Beach.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-94-978: **State v. Handy.** Affirmed. Mues, Hannon, and Irwin, Judges.

No. A-94-981: **State Farm Mut. Auto. Ins. Co. v. McKinnon.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-94-982: **State v. Tillman.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-94-996: **Johnson v. Union Pacific RR. Co.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-94-997: **Schweer v. Ostendorf.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-94-1002: **Barrett v. Barrett.** Affirmed in part, reversed in part, and remanded for further proceedings. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-94-1021: **Maul v. Ketelhut.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-94-1022: **Myron Andersen Constr. v. Ganz.** Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Hannon, and Sievers, Judges.

No. A-94-1031: **Wiebelhaus v. Nagengast.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-94-1104: **Schmitz v. Ullman.** Reversed and remanded. Hannon, Sievers, and Inbody, Judges.

No. A-94-1110: **Simmons v. Connot.** Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-94-1111: **Saylor v. Nebraska Dept. of Corr. Servs.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-94-1115: **Federal Deposit Ins. Corp. v. Slangal.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-94-1121: **Haught v. Farm Bureau Ins. Co. of Neb.** Reversed and remanded. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-94-1128: **State v. Reed.** Reversed and remanded for further proceedings. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-94-1147: **State v. Owen.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-94-1148: **Jones v. Johns.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-94-1196: **Farm Credit Bank of Omaha v. Cashler.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

Nos. A-94-1228, A-95-147, A-95-148: **State v. Stickney.** Remanded with directions. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-94-1229: **State v. Robinson.** Affirmed. Hannon, Miller-Lerman, and Inbody, Judges.

No. A-94-1237: **State v. Goodjohn.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-94-1242: **State v. Vanoteghem.** Affirmed. Hannon, Miller-Lerman, and Inbody, Judges.

No. A-94-1253: **Joseph v. Dahm.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-001: **Brown v. Safeway Cab, Inc.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-006: **Rolfsmeyer v. Stoehr-Kreps.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-010: **State v. Chacon-Murillo.** Affirmed. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-95-021: **Robinson v. Robinson.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-034: **Wynn v. Hathaway.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-063: **Renken v. McCarthy.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-064: **MS Company v. Wright.** Affirmed in part, and in part appeal dismissed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-070: **Maw v. Heartland Co-op.** Reversed and remanded with directions to dismiss. Mues, Judge, and Sievers, Chief Judge, and Irwin, Judge.

No. A-95-080: **Olson v. S.I.D. No. 177.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-093: **Kolbeck v. Kolbeck.** Reversed and remanded. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-095: **State v. Erickson.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-95-107: **Luciano v. Armour Food Co.** Affirmed. Norton, District Judge, Retired, and Hannon and Irwin, Judges.

No. A-95-109: **Le v. Le.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-113: **In re Interest of Cody S.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-114: **Forrest v. Gateway Mobile & Modular Homes.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-123: **State v. Green.** Affirmed. Sievers, Irwin, and Inbody, Judges.

No. A-95-124: **State v. Herrley.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-95-132: **Ferguson v. Village of Miller.** Reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-133: **State v. Schave.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-141: **State v. Harris.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-144: **Schmidt v. Schmidt.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-95-150: **Aksarben Nsg. Ctrs. v. Department of Soc. Servs.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-152: **Griffin Dewatering Corp. v. Gould.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-167: **Whitaker v. Whitaker.** Reversed and remanded with directions. Norton, District Judge, Retired, and Hannon and Irwin, Judges.

No. A-95-171: **State v. Mitchell.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-95-177: **Dau v. Hellbusch.** Reversed and remanded for a new trial. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-181: **Glandt v. Tetschner.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-190: **State v. Scott.** Affirmed. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-95-214: **Cole v. Department of Corr. Servs.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-227: **State v. Hatfield.** Affirmed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-95-228: **Woods v. Woods.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-249: **Nolte v. Greene.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-267: **State v. Taylor.** Affirmed as modified. Per Curiam.

No. A-95-273: **In re Interest of Brandon W.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-95-283: **State v. Rodriguez.** Affirmed. See Rule 7A(1). Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-95-285: **State v. Fowler.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-289: **Cook v. Anderson.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-316: **Mulder v. State.** Reversed and remanded. Sievers, Hannon, and Mues, Judges.

No. A-95-344: **Rol v. Rol.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-348: **State v. Solomon.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-95-353: **Moore v. Robertson.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-362: **In re Interest of Benjamin M.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-369: **State v. Bach.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-383: **In re Interest of Dickson.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-397: **Springer v. Springer.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-409: **Allen v. Alliance Nat. Bank.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-422: **In re Interest of Rynell H. et al.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-424: **Mahler v. Mahler.** Affirmed. Per Curiam.

No. A-95-427: **Meek v. Colbert.** Appeal dismissed. Miller-Lerman, Chief Judge, and Mues and Inbody, Judges.

No. A-95-432: **Keegan v. Department of Labor.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-440: **Virgilito v. Omaha Housing Auth.** Affirmed. Irwin, Hannon, and Miller-Lerman, Judges.

No. A-95-443: **Schrein v. Bartee.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-95-465: **Protex Central, Inc. v. Davis.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-469: **Mapes Indus. v. United States F. & G. Co.** Reversed and remanded for further proceedings. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

Nos. A-95-474, A-95-475, A-95-476: **In re Interest of Brandon L.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-480: **State v. Lechleitner.** Affirmed. Howard, District Judge, Retired, and Sievers, Chief Judge, and Hannon, Judge.

No. A-95-512: **State v. Leviston.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-513: **State v. Bruhn.** Reversed and vacated. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-95-518: **State v. Weltikol.** Affirmed. Sievers, Hannon, and Irwin, Judges.

No. A-95-522: **State v. Burling.** Affirmed. Inbody, Hannon, and Miller-Lerman, Judges.

Nos. A-95-524, A-95-525: **In re Interest of Alfredo G. et al.** Appeal dismissed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-95-526: **State v. Hopper.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-531: **Estate of Stine v. Chambanco, Inc.** Reversed and remanded. Irwin, Sievers, and Inbody, Judges. Sievers, Judge, dissenting.

No. A-95-533: **In re Interest of Kenneth D.** Affirmed. Sievers, Chief Judge, and Mues and Inbody, Judges.

No. A-95-554: **In re Interst of Jasper H.** Reversed and remanded for further proceedings. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-559: **State v. Booth.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-95-579: **State v. Anderson.** Affirmed as modified. Per Curiam.

No. A-95-592: **State v. Aguirre.** Appeal dismissed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-615: **State v. Johnson.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-618: **State v. Hunt.** Affirmed. Per Curiam.

Nos. A-95-630, A-95-631: **State v. Moore.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-95-648: **Malzahn v. Transit Auth. of City of Omaha.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-659: **State v. Allen.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-668: **State v. Kelly.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-680: **State v. Vinton.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-95-706: **State v. Dawson.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-715: **McCormick v. McCormick.** Affirmed in part, and in part remanded with directions. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-718: **State v. Johnson.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-720: **Jochem v. White.** Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-723: **State v. Barnett.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-724: **Estrada v. Department of Corr. Servs.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-729: **State v. Messenbrink.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-732: **State v. Schlund.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-95-739: **In re Interest of Garrett N. et al.** Affirmed in part, and in part vacated. Sievers, Hannon, and Inbody, Judges.

No. A-95-741: **Wright v. Wright.** Affirmed as modified. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

Nos. A-95-746, A-95-747: **State v. Petty.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-749: **State v. Sturm.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-95-758: **In re Interest of Amanda L.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-770: **In re Interest of Cardell B.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-779: **State v. Arandus.** Affirmed. Inbody, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-780: **In re Interest of Kerisse S.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-795: **In re Interest of Terry D.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-809: **State v. Naber.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-813: **State v. Koperski.** Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-95-818: **State v. Flegg.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-831: **In re Interest of Erin S.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-832: **State v. Bryant.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-835: **McNeil v. McNeil.** Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-841: **State v. Roth.** Affirmed. Warren, District Judge, Retired, and Hannon and Mues, Judges.

No. A-95-871: **State v. Cox.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-872: **State v. Hyde.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-873: **In re Interest of Jessica R.** Remanded with directions to vacate in part. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-883: **Hardin v. Joseph.** Reversed and remanded for further proceedings. Mues, Hannon, and Sievers, Judges.

No. A-95-915: **State v. Middleton.** Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-917: **Andrews v. Andrews.** Dismissed in part and affirmed in part. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-922: **State v. Kinser.** Reversed and remanded. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-939: **Thomsen v. State.** Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-95-943: **State v. Ackerman.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-946: **Johnson v. Johnson.** Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-962: **Billups v. Billups.** Affirmed. Per Curiam.

No. A-95-972: **Escamilla v. Lockwood Corp.** Affirmed. Moran, District Judge, Retired, and Sievers and Inbody, Judges.

No. A-95-986: **State v. Thompson.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-95-1001: **State v. Pruitt.** Affirmed in part, reversed in part and remanded. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1003: **State v. Nelson.** Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1006: **Miller v. Greenberg.** Affirmed. Sievers, Hannon, and Mues, Judges. Hannon, Judge, concurring.

No. A-95-1016: **In re Interest of Antonio R. et al.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1032: **State v. Mitchell.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-95-1040: **Swearingen v. Swearingen.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-95-1058: **State v. Whitefoot.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-1063: **State v. Mackey.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1064: **State v. Hendryx.** Affirmed. Sievers, Hannon, and Irwin, Judges.

No. A-95-1111: **In re Interest of Leonard D.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1135: **Booton v. Booton.** Affirmed as modified. Hannon, Sievers, and Mues, Judges.

Nos. A-95-1146, A-95-1147: **State v. Beeder.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1162: **State v. White.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1186: **Swinney v. First Nat. Bank of Gordon.** Affirmed, Mues, Hannon, and Sievers, Judges.

No. A-95-1189: **State v. Vanderneck.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-1190: **State v. Taylor.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-95-1206: **State v. McCleery.** Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-1229: **FirsTier Bank v. Zimmerman.** Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-95-1240: **In re Interest of Colton K.** Affirmed. Sievers, Irwin, and Inbody, Judges.

No. A-95-1244: **In re Interest of Phillips.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1246: **State v. Beaudouin.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1254: **State v. Garber.** Affirmed. Inbody, Irwin, and Sievers, Judges.

Nos. A-95-1275, A-95-1276: **State v. Kennedy.** Reversed and remanded for further proceedings. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1310: **State v. Lingel.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1319: **Morrill v. Morrill.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-1323: **Stanczyk v. Stanczyk.** Affirmed. Howard, District Judge, Retired, and Hannon and Sievers, Judges.

No. A-95-1344: **Henry v. Scholtz.** Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-1347: **Marsh v. Marsh.** Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-95-1353: **State v. Longoria.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-1356: **State v. Smith.** Affirmed and remanded for resentencing. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1357: **In re Interest of Baumann.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1373: **Garden County v. Hogan.** Dismissed. Mues, Hannon, and Sievers, Judges.

Nos. A-95-1378, A-95-1379: **State v. Root.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-96-014: **State v. Mata.** Reversed. Mues, Judge.

No. A-96-034: **State v. Green.** Reversed and remanded for further proceedings. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-057: **State v. Holder.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-073: **Saltz v. Rose Lane Home.** Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-96-076: **Fritchie v. R & R Plastering, Inc.** Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Sievers, and Inbody, Judges.

No. A-96-269: **In re Interest of Pablo.** Reversed and remanded with directions to dismiss. Inbody, Irwin, and Sievers, Judges.

No. A-96-464: **State v. McDaniel.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-91-885: **America West Airlines v. Buntain.** Stipulation allowed; appeal dismissed with prejudice.

No. A-93-516: **County of Banner v. Brauer.** Affirmed. See Rule 7A(1).

No. A-93-935: **Stowell v. Stowell.** Stipulation allowed; appeal dismissed.

No. A-94-313: **Midwest Elec. v. Bogiot.** Affirmed. See Rule 7A(1).

No. A-94-328: **Wells v. Abramson.** Affirmed. See Rule 7A(1).

No. A-94-412: **State of Iowa ex rel. Midlang v. Midlang.** Appeal dismissed. See Rule 7A(2). See, also, *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984).

No. A-94-472: **Meis v. Meis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-613: **In re Estate of Schmitt.** Stipulation allowed; appeal dismissed.

No. A-94-653: **Holan v. Holan.** Stipulation allowed; appeal dismissed.

No. A-94-741: **Jameson v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-742: **Rains v. Rains.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-851: **Boro v. Merritt.** Stipulation allowed; appeal dismissed.

No. A-94-910: **Villarreal v. Villarreal.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-1039: **Owens v. Owens.** Appeal dismissed. See Rule 7A(2).

No. A-94-1043: **Wentling v. Norfolk Elks Lodge #653.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-1076: **Baugher v. Baugher.** Affirmed. See Rule 7A(1).

No. A-94-1109: **Hergott v. Hergott.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-1154: **Environmental Resource Servs. v. Nebraska Dept. of Envtl. Quality.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-95-068: **State v. Guiterrez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-117: **Doub v. Doub.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-137: **Richter v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-157: **State v. West.** Stipulation allowed; appeal dismissed.

Nos. A-95-168, A-95-169: **State v. Howard.** Sentences vacated, and cause remanded for resentencing.

No. A-95-197: **State v. Nolan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-199: **State v. Thomas.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-202: **State v. Marion.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-219: **State v. Caddy.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-221: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-240: **State v. Epp.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-241: **State v. Jacobs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-243: **State v. Epp.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-245: **Kagy v. Jurgensmeier.** Affirmed. See Rule 7A(1).

No. A-95-264: **State v. Dallman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-265: **State v. Dallman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-270: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-292: **State v. Wieneke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-303: **State v. Kula.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-306: **Wray v. Department of Corrections.** Motion of appellant to dismiss appeal as moot sustained; appeal dismissed.

No. A-95-309: **State v. Rediger.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-310: **State v. Rediger.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-314: **State v. Lampkin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-318: **State v. Celaya.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-324: **Babl v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-326: **State v. Vandemark.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-327: **In re Interest of Lyons.** Affirmed. See Rule 7A(1).

No. A-95-328: **In re Interest of Lyons.** Affirmed. See Rule 7A(1).

No. A-95-329: **In re Interest of Lyons.** Affirmed. See Rule 7A(1).

No. A-95-345: **In re Trust Created by Searle v. Delacourt.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-346: **Shelby v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-349: **State v. Buckner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-355: **State v. McKee.** Affirmed. See Rule 7A(1).

No. A-95-372: **State v. Ruley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-377: **State v. Bauer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-393: **State v. Homan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-398: **State v. Tarin.** Motion of appellee for summary affirmance sustained; jugment affirmed. See Rule 7B(2).

No. A-95-400: **State v. Saighman.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-402: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-403: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-411: **State v. Perales.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-415: **State v. Howell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-417: **Gwynne v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. A-95-429: **Lewis v. Omaha Supportive Living.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-442: **First Sec. Bank v. Daggett.** Affirmed. See Rule 7A(1)d.

No. A-95-447: **State v. Rahn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-448: **State v. Rahn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-449: **State v. Overton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-450: **State v. Overton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-454: **State v. Thirtle.** Affirmed. See Rule 7A(1).

No. A-95-459: **Symington v. State.** Stipulation allowed; appeal dismissed with prejudice.

No. A-95-460: **Symington v. State.** Stipulation allowed; appeal dismissed with prejudice.

No. A-95-464: **State v. Harris.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-468: **State v. Sherman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-470: **Reynolds v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-471: **State v. Bigelow.** Affirmed. See Rule 7A(1).

No. A-95-481: **State v. Turner.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-482: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-484: **State v. Pixler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-490: **Skiles v. Abramson.** Sitpulation allowed; appeal dismissed at cost of appellant.

No. A-95-492: **State v. Fackler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-493: **State v. Bowers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-494: **State v. Groothuis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-495: **State v. Nelson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-496: **State v. Loyd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-497: **State v. Loyd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-498: **State v. Brandenburg.** Appellee's motion for remand sustained. See *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994).

No. A-95-499: **Kelly v. Department of Motor Vehicles.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-506: **In re Interest of Votipka.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-509: **State v. Huestis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-510: **State v. Bennett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-511: **State v. Bennett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-515: **Parks v. Tracy Corp.** Stipulation allowed; appeal dismissed.

No. A-95-519: **State v. Harden.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-538: **Ameritas Life Ins. Corp. v. Misle Bros. Real Estate.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-543: **State v. Groothuis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-544: **State v. Thomas.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-550: **In re Interest of Carter.** Stipulation allowed; appeal dismissed.

No. A-95-558: **State v. Henson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-567: **Deberry v. Deberry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-571: **Negron v. Negron.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-95-573: **Watkins v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-574: **Watkins v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-578: **State v. Halcott.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-589: **Castle v. Orr.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-95-591: **State v. Christie.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-594: **State v. Wilson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-598: **State v. Plater.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-599: **State v. Plunkett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-601: **Heimbuch v. Slovek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-602: **In re Interest of Decker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-609: **Prudential Ins. of America v. Rubens.** Stipulation allowed; appeal dismissed.

No. A-95-613: **Day v. Day.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-617: **Ray v. Sullivan.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-622: **Eby-Hughes v. National Cellular Ltd. Partnership.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-623: **In re Interest of Parker.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-628: **State v. Meehan.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-632: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-633: **State v. Nunnally.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-634: **State v. Perez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-639: **Schaffer v. Chimney Rock Pub. Power Dist.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-641: **State v. Shriner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-643: **State v. Knorr.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-645: **State v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-650: **State v. Hitz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-652: **State v. Disney.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-653: **State v. Albery.** Affirmed. See Rule 7A(1).

No. A-95-654: **State v. Hernandez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-656: **State v. Disney.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-658: **Yekel v. Pieper.** Appeal dismissed. See Rule 7A(2).

No. A-95-661: **Carlson v. State Claims Bd. of Neb.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-665: **Spanel v. Doane.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-670: **State v. Karnes.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-672: **State v. Wisely.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-677: **State v. Bacon.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-678: **Bodeen v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-689: **Can-Am Invs., Ltd. v. Chandler Ins. Co., Ltd.** As appellant has filed a consent to and joinder in the motion to dismiss this appeal for mootness, the court does hereby grant the motion to dismiss the appeal.

No. A-95-690: **Heavrin v. Heavrin.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-691: **Puls v. Bishop.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs and attorney fees.

No. A-95-695: **Elmore v. Elmore.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-697: **State v. Hulsebus.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-700: **Munnelly v. Anding.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-702: **Fine v. Fine.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-703: **State v. Sepulveda.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-711: **Rebillet v. Shelter Mut. Ins. Co.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-713: **State v. Bishop.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-719: **State v. Ramirez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-733: **State v. Gomez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-734: **State v. Gomez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-735: **State v. Schafersman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-740: **Woodward v. Sostad.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-743: **In re Interest of Ingwerson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-744: **In re Interest of Harris.** Affirmed. See Rule 7A(1).

No. A-95-748: **State v. Johnson.** Appeal dismissed. See Rule 7A(2).

No. A-95-755: **State v. Plunkett.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-756: **State v. Plunkett.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-759: **State v. Murphy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-763: **Williams v. Williams.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-766: **State v. Venus.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-771: **State v. Duke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-773: **State v. Olivas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-774: **State v. Boye.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-775: **State v. Rawson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-783: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-791: **State v. Gilsdorf.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-792: **State v. Richter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-793: **State v. Johnson.** Affirmed. See Rule 7A(1) and *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

No. A-95-794: **State v. Flores.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-799: **State v. Dorsey.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-807: **State v. Hittle.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-808: **State v. Requejo.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-812: **Deckard v. Nebraska Bd. of Parole.** Affirmed. See Rule 7A(1).

No. A-95-815: **Lambrecht v. Sobansky.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-816: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-817: **State v. McCoy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-820: **State v. Meyer.** Stipulation allowed; appeal dismissed.

No. A-95-823: **State v. Chapman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-824: **Agri-Plex, Inc. v. Massey-Ferguson, Inc.** Appeal dismissed. See Rule 7A(2).

No. A-95-825: **Jorn v. Jorn.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-95-827: **State v. Webster.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-830: **Bill v. O'Hara.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-833: **State v. Rivera.** Appeal dismissed. See Rule 7A(2).

No. A-95-834: **State v. Robinson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-840: **State v. Pettus.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-842: **State v. Gullicksen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-845: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-854: **Sculley Land Co. v. Dawson Cty. Land Co.** Stipulation allowed; appeal dismissed.

No. A-95-855: **State v. Wagner.** Affirmed. See Rule 7A(1).

No. A-95-856: **State v. Armstrong.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-863: **Good Samaritan Hosp. v. Buhr.** Motion of appellee for summary dismissal sustained. Appeal dismissed for failure to file briefs.

No. A-95-864: **In re Estate of Pruss.** Stipulation allowed; appeal dismissed.

No. A-95-869: **State v. Barfield.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-878: **State v. Bryant.** Appeal dismissed. See Rule 7A(2).

No. A-95-879: **Bykerk v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. A-95-880: **Plaza Dental Group v. Weber.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-884: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-889: **Pratt v. Bartee.** Appeal dismissed. See Rule 7A(2).

No. A-95-890: **Lane v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-893: **Woods v. Nebraska Dept. of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-894: **McBride v. Waldron.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-896: **Hammond v. Hammond.** Appeal dismissed. See Rule 7A(2).

No. A-95-897: **Engel v. Engel.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-898: **Carlson v. Two Rivers Auto.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-900: **Kuhn v. O'Doherty.** Appeal dismissed for lack of jurisdiction. Because there is no final, appealable order in county court, judgment of district court is vacated.

No. A-95-901: **Sullivan v. Nebraska Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-902: **State v. Delezene.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-903: **State v. Bush.** Affirmed. See Rule 7A(1)d and *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

No. A-95-906: **Pearson v. Pearson.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-95-907: **State v. Seip.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-910: **Cole v. Green.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-911: **Ameritas Life Ins. Corp. v. Misle Bros. Real Estate.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-912: **State v. Schwaderer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-914: **State v. Vidales.** Motion of appellant to dimiss appeal sustained; appeal dimissed.

No. A-95-916: **State v. Parker.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-918: **State v. Paul.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-919: **In re Interest of Maich.** Appeal dismissed. See Rule 7A(2).

No. A-95-923: **Jack Verschuur & Assocs. v. Goodwin.** Stipulation allowed; appeal dismissed.

No. A-95-932: **Looney v. Moore.** Motions of appellees to dismiss appeal for lack of prosecution sustained. Appeal dismissed.

No. A-95-936: **Amodeo v. Amodeo.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-95-938: **Rieker v. Rieker.** Appeal dismissed. See Rule 7A(2).

No. A-95-944: **State v. Greenhagen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-947: **Coash v. Coash.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-948: **Randa v. Randa.** Appeal dismissed, and cause remanded with directions.

No. A-95-950: **In re Interest of Garrett.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-951: **In re Interest of Leazer.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-952: **In re Interest of Garrett.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-955: **Omni Corporate Park v. Douglas Cty. Bd. of Equal.** Appeal dismissed. See Rule 7A(2).

No. A-95-956: **In re Interest of Litz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-957: **State v. Meyer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-960: **Durand v. Foster.** Motion of appellants to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-95-965: **State v. Holroyd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-966: **State v. Holroyd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-971: **Demma Fruit Co., Ltd. v. Kroese.** Stipulation allowed; appeal dismissed with prejudice.

No. A-95-974: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-975: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-976: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-978: **Wray v. Department of Corrections.** Motion of appellee to dismiss appeal as moot sustained; appeal dismissed.

No. A-95-981: **State on behalf of Lynch v. Malone.** Appeal dismissed. See Rule 7A(2).

No. A-95-983: **State v. Stanoscheck.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-987: **State v. Ramirez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-988: **State v. Herman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-989: **State v. Worden.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-992: **Brilhart v. Brilhart.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-995: **State v. Garcia.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-998: **State on behalf of Higgins v. Brown.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-999: **State v. Owens.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1004: **Baldridge v. Baldridge.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1008: **Russell v. Green.** Appeal dismissed. See Rule 7A(2).

No. A-95-1011: **State v. Wulf.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1013: **Security Pac. Fin. Servs. of Iowa v. Ramirez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1014: **State v. Johnson.** Stipulation allowed; appeal dismissed.

No. A-95-1018: **McCoy v. McCoy.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-1026: **State v. Mowitz.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1028: **State v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1029: **State v. Washington.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1030: **State v. Angell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1031: **State v. Walker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1034: **Eddy v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-95-1035: **Eddy v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-95-1036: **State v. Mix.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1038: **Schulz v. Department of Soc. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1041: **In re Estate of Devier.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1042: **Ruhter v. Ruhter.** Stipulation allowed; appeal dismissed.

No. A-95-1046: **Jackson v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-95-1049: **Green v. Wisman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1051: **State v. Engman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1052: **State v. Carfield.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1054: **State v. Hill.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-1056: **Allen v. Sherman.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-1057: **State v. Kuenning.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-1061: **Cramer v. Cramer.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-1065: **State v. Honeywell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1069: **State v. Hansen.** Stipulation allowed; appeal dismissed.

No. A-95-1073: **State v. Skiles.** Appeal dismissed. See Rule 7A(2).

No. A-95-1074: **State v. Gugel.** Appeal dismissed. See Rule 7A(2).

No. A-95-1076: **Simpkins v. Simpkins.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1078: **State v. Hansen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1079: **State v. Mahlin.** Motion of appellee for summary affirmance sustained because there are no assignments of error and no plain error found.

No. A-95-1081: **State v. Smith.** Affirmed. See Rule 7A(1).

No. A-95-1082: **State v. Armstrong.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1085: **Welsh v. Schmitt.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-95-1087: **State v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1088: **State v. Jandreau.** Appeal dismissed. See Rule 7A(2).

No. A-95-1089: **Prince v. Prince.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-1090: **State v. Harrison.** Affirmed. See Rule 7A(1).

No. A-95-1092: **Venditte v. Brooks.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1098: **State v. Clatanoff.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1100: **In re Interest of Blake.** Stipulation allowed; appeal dismissed.

No. A-95-1101: **In re Interest of Peterson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1102: **Foss v. State.** Appeal dismissed under Rule 7B(1) because the district court lacked jurisdiction.

No. A-95-1103: **State v. Forman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1104: **State v. Krusemark.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-1107: **State v. Clayton.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

Nos. A-95-1108, A-95-1109: **State v. Mata.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1113: **Anderson v. Consolidated Freightways.** Stipulation allowed; appeal dismissed without prejudice.

No. A-95-1114: **State v. Johannsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1115: **State v. Johannsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1116: **State v. Sanchez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1117: **State v. Wallace.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1121: **Watson v. Watson.** Stipulation allowed; appeal dismissed.

No. A-95-1126: **Johnson v. Sapp Bros. Trucks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1127: **Morgan v. Morgan.** Stipulation allowed; appeal dismissed.

No. A-95-1129: **State v. Rasmussen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1134: **Robinson v. Department of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-95-1136: **Rodgers v. First Nat. Bank of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1148: **State v. Root.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1151: **In re Interest of Anaya.** Appeal dismissed.

No. A-95-1154: **State v. Thompson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1155: **State v. Bell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1156: **State v. Harper.** Appeal dismissed. See Rule 7A(2).

No. A-95-1157: **State v. Lamere.** Appeal dismissed. See Rule 7A(2).

No. A-95-1158: **Coash v. Coash.** Motion of appellee for summary dismissal sustained. See *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976); *Friedman v. State*, 183 Neb. 9, 157 N.W.2d 855 (1968); and *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963).

No. A-95-1159: **State v. Bell.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1160: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1167: **State v. North.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1168: **State v. Creek.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1170: **State v. Lynch.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1171: **State v. Lynch.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1172: **State v. Relford.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1173: **State v. Nichols.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1174: **State v. Cook.** Stipulation allowed; appeal dismissed.

No. A-95-1176: **State v. Freeman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1185: **Biodrowski v. Biodrowski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1187: **Kramer v. Kramer.** Appeal dismissed. See Rule 7A(2).

No. A-95-1188: **Podany v. Papio-Missouri River NRD.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-1191: **State v. Urban.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1194: **State v. Hooker.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1199: **Starkey v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1200: **Bowen v. Department of Health.** Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-95-1201: **In re Estate of Christ.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1202: **State v. Kreikemeier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1212: **Nowlin v. Papio-Missouri River NRD.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-1214: **In re Interest of Doyle.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1215: **State v. Schlotfeld.** Appeal dismissed. See Rule 7A(2).

No. A-95-1216: **State v. Schlotfeld.** Appeal dismissed. See Rule 7A(2).

No. A-95-1218: **State v. Carrizales.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1219: **State v. Carrizales.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1220: **State v. Bartak.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1221: **In re Interest of Boss.** Appeal dismissed as moot.

No. A-95-1222: **In re Interest of Bowie.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1223: **Paulsen v. Paulsen.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-1227: **State v. Root.** Appeal dismissed. See Rule 7A(2).

No. A-95-1230: **State v. Kirk.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1232: **State v. Snider.** Appeal dismissed. See Rule 7A(2) and *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-95-1234: **State v. Hilbers.** Stipulation allowed; appeal dismissed.

No. A-95-1236: **State v. Svoboda.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-95-1239: **State v. Cannaday.** Appeal dismissed. See Rule 7A(2).

No. A-95-1243: **Morse v. Morse.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-95-1247: **Randolph v. Randolph.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-1248: **State v. Young.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1249: **Krueger v. Agnew.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1250: **Siedhoff v. Siedhoff.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-1251: **State v. Ringle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1252: **State v. Ringle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1255: **State v. Proulx.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1258: **In re Interest of Reichert.** Motion of appellee guardian ad litem for summary dismissal sustained. See Rule 7B(1).

No. A-95-1259: **State v. Walker.** Appeal dismissed. See Rule 7A(2).

No. A-95-1260: **State v. Walker.** Appeal dismissed. See Rule 7A(2).

No. A-95-1261: **State v. Cantu.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1263: **Roeber v. Roeber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1264: **State v. Haase.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-95-1265: **State v. Banks.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1269: **Stava v. Stava.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1273: **State v. Minton.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-1274: **State v. Mitchell.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1278: **In re Jones Revocable Trust.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-1279: **State v. Gude.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1280: **State v. Orcutt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1281: **State v. Orcutt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1282: **State v. Hairston.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1284: **Kraft v. Kraft.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1286: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1292: **State v. Gividen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1294: **State v. Gann.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1297: **State v. Novotny.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1298: **Wagner v. Hansen.** Appeal dismissed. See Rule 7A(2) and *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-95-1299: **Laws v. Green.** Appeal dismissed for lack of jurisdiction as filed out of time. See Neb. Rev. Stat. #s 25-1912 (Reissue 1995).

No. A-95-1303: **Adamy v. Burlington Northern RR. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1306: **State v. Steinbach.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1307: **State v. Krason.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1313: **State v. Thomas.** Appeal dismissed for lack of jurisdiction. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-95-1316: **Willis v. County of Lancaster.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1317: **Saathoff v. Horton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1320: **Bowley v. Bowley.** Stipulation allowed; appeal dismissed.

No. A-95-1325: **State v. Jensen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1326: **State v. Coon.** Appeal dismissed. See Rule 7A(2).

No. A-95-1327: **Ridder v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1331: **State v. Badger.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1339: **State v. Barrios.** Appeal dismissed. See Rule 7A(2).

No. A-95-1340: **Fritzler v. Land.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1341: **State v. Lessley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1342: **State v. Lessley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1345: **Reinbrecht v. Qualley.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1348: **Stewart v. Department of Motor Vehicles.** Affirmed. See Rule 7A(1) and *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

No. A-95-1350: **State v. Carlson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1354: **State v. Lehn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1355: **State v. Garcia.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-95-1361: **Advanced Resource Technology v. Applied Communications.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1363: **In re Adoption of Trabert.** Appeal dismissed for failure to meet time requirements of Neb. Rev. Stat. § 25-2729 (Reissue 1995).

No. A-95-1366: **State v. Talley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1368: **In re Interest of Litz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1371: **State v. Wittmuss.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1372: **Jeffrey Lake Dev. v. Central Neb. Pub. Power & Irr.** Appeal dismissed. See Rule 7A(2); *Jerabek v. Ritz*, 221 Neb. 448, 377 N.W.2d 540 (1985); and Neb. Rev. Stat. § 25-1912(2) (Reissue 1989).

No. A-95-1381: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1382: **State v. Coy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1383: **State v. Webb.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1384: **State v. Cooper.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-1385: **State v. Frederick.** Appeal dismissed under Rule 7A(2) for lack of jurisdiction due to the absence of a final order.

No. A-95-1386: **State v. Green.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1387: **Wells v. Obermeyer.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-1389: **Nicholson v. Nicholson.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-1398: **State ex rel. Chambers v. Daub.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-1399: **Downey v. Downey.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-95-1402: **State v. Monroe.** Appeal dismissed. See Rule 7A(2).

No. A-96-001: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-004: **State v. Bonow.** Appeal dismissed. See Rule 7A(2) and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-96-005: **In re Interest of Kennedy.** Affirmed. See Rule 7A(1).

No. A-96-008: **State v. Harton.** Affirmed. See Rule 7A(1).

No. A-96-009: **Gerweck v. Gerweck.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-96-010: **State v. Billups.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-016: **State v. Langone.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-020: **Koenigsman v. Department of Pub. Inst.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-022: **Tschacher v. Tschacher.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-025: **State v. Russell.** Appeal dismissed. See Rule 7A(2).

No. A-96-026: **State v. Hurst.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-027: **State v. Woods.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-028: **State v. Hobbs.** Remanded for restitution hearing in accordance with *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993).

No. A-96-029: **Marshall v. Woolrich, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-030: **In re Estate of Eggli.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-033: **State v. Magee.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-035: **State v. Dupree.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-036: **State v. Dupree.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-037: **State v. Dupree.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-040: **State v. Willmore.** Appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Reissue 1995).

No. A-96-041: **United Nebraska Bank v. Schutt.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-044: **State v. Hike.** Appeal dismissed. See Neb. Rev. Stat. § 25-2729(1)(b) (Supp. 1995) and *Henry v. Reeves*, 234 Neb. 794, 452 N.W.2d 750 (1990).

No. A-96-045: **State v. Marco.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-046: **State v. Marco.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-047: **State v. White.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-048: **In re Estate of Springer.** Order vacated and matter remanded for further proceedings.

No. A-96-051: **Pratt v. Clarke.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-052: **State v. Tyler.** Appeal dismissed. See Rule 7A(2).

No. A-96-053: **State v. Tyler.** Appeal dismissed. See Rule 7A(2).

No. A-96-054: **State v. Martinez-Hernandez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-055: **State v. Seebold.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-056: **State v. Seebold.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-060: **State v. Bratetic.** Stipulation allowed; appeal dismissed.

No. A-96-072: **Summers v. Lush.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-074: **State v. Beu.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-080: **Kitten v. Nebraska Dept. of Revenue.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-081: **State v. Jones.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-082: **Kovalskas v. Kovalskas.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-086: **State v. Mesner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-088: **State v. Ducharme.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-090: **Hoschler v. Kozlik.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-093: **Chief Indus. v. Eihusen.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-097: **Gnirk v. School Dist. No. 3 of Stanton Cty.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-098: **Muhummad v. Muhummad.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-100: **State v. Warmington.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-101: **State v. Warmington.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-102: **In re Conservatorship of Newton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-105: **State v. Arrellano.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-106: **State v. McManamon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-117: **State v. Hill.** Stipulation allowed; appeal dismissed.

No. A-96-118: **State v. Richards.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-125: **State v. Smith.** Appeal dismissed. See Rule 7A(2).

No. A-96-126: **Rodriguez v. Millard Processing Servs.** Stipulation allowed; appeal dismissed.

No. A-96-128: **Martin v. Martin.** Appeal dismissed. See Rule 7A(2).

No. A-96-131: **Clements v. Olson.** Stipulation allowed; appeal dismissed.

No. A-96-133: **State v. Humbert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-134: **State v. Nielsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-135: **State v. Grone.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-136: **State v. Grone.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-140: **Crumrine v. Schulz.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-142: **State v. McGee.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-143: **State v. Scheffler.** Stipulation allowed; appeal dismissed.

No. A-96-144: **State v. Washa.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-145: **In re Interest of Kosmicki.** Motion of appellee Department of Social Services for summary dismissal sustained. See Rule 7B(1).

No. A-96-147: **Johnson-Rogers v. Rogers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-150: **Wolpert v. Burlington Northern RR. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-155: **State v. Finley.** Stipulation allowed; appeal dismissed.

No. A-96-156: **Lopez v. Department of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-96-157: **State v. Richardson.** Appeal dismissed. See Rule 7A(2) and Neb. Rev. Stat. § 25-2729(1) (Reissue 1995).

No. A-96-164: **State ex rel. Rochester Armored Car Co. v. Ashford.** Stipulation allowed; appeal dismissed.

No. A-96-165: **Reibold v. Mental Health Bd. of Douglas Cty.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-166: **State v. Wiseman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-175: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-176: **State v. Tobin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-180: **State v. Alcorta.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-184: **State v. Richardson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-185: **State v. Stewart.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-186: **State v. Obershaw.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-189: **Hall Cty. Hous. Auth. v. Fry.** Appeal dismissed as moot.

No. A-96-202: **State v. Shipley.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-209: **Coates v. Coates.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-216: **Pacific Leasing Servs. v. Kate, Inc.** Affirmed. See Rule 7A(1).

No. A-96-218: **Yrkoski v. Yrkoski.** Stipulation allowed; appeal dismissed.

No. A-96-219: **In re Interest of Marlena M.** Stipulation allowed; appeal dismissed.

No. A-96-220: **State v. Collins.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-221: **State v. Webb.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-224: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-228: **State v. Schlagenhauff.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-229: **State v. Schlagenhauff.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-230: **State v. Ortgies.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-233: **State v. Yoder.** Appeal dismissed for lack of jurisdiction. See *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-96-234: **State v. Tietjen.** Affirmed. See Rule 7A(1)d and *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

No. A-96-235: **State v. Polivka.** Affirmed. See Rule 7A(1)d and *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

No. A-96-236: **State v. Patrick.** Affirmed. See Rule 7A(1)d and *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

No. A-96-238: **State v. Salazar.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-239: **State v. Erickson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-241: **State v. Stahr.** Appeal dismissed. See Rule 7A(2).

No. A-96-242: **State v. Pratt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-244: **State v. Minzel.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-249: **In re Interest of Roebuck.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-254: **Alvarez v. Alvarez.** Appeal dismissed. See Rule 7A(2).

No. A-96-256: **State v. Rose.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-257: **State v. Richter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-258: **State v. Richter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-261: **Davis v. Stuart Fertilizer & Grain.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-262: **Gridley v. City of Scottsbluff.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-263: **George v. George.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-264: **State v. Zimmerman.** Affirmed. See Rule 7A(1)d; *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996); and *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

No. A-96-265: **State v. Wiltshire.** Affirmed. See Rule 7A(1)d; *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996); and *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

No. A-96-267: **State v. Valerio.** Stipulation allowed; appeal dismissed.

No. A-96-268: **State v. Schneider.** Appeal dismissed. See Rule 7A(2).

No. A-96-270: **State v. Schoen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-271: **State v. Reed.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-276: **Gerritsen v. Vanderford.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-281: **State v. Vongrasmy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-282: **Buchmeier v. Buchmeier.** Appeal dismissed.

No. A-96-284: **In re Interest of Panek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-286: **Mary Lanning Memorial Hosp. v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-289: **Prairie Constr. Co. v. City of Papillion.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-96-291: **State v. Ruch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-292: **State v. Morrow.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-294: **State v. Klesath.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-295: **State v. $800.** Stipulation allowed; appeal dismissed without prejudice.

No. A-96-296: **State v. Osby.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-306: **Wyant v. Ostdiek.** Appeal dismissed. See Rule 7A(2).

No. A-96-311: **Kissinger v. Rothell.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-319: **Meis v. Meis.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-321: **State v. Rezabek.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-329: **State v. Nunnenkamp.** Appeal dismissed. See Rule 7A(2).

No. A-96-330: **Seraaj Family Homes v. Harvey.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-331: **State v. Williamson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-332: **State v. Finley.** Stipulation allowed; appeal dismissed.

No. A-96-345: **State v. Afraid of Hawk.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-350: **Strese on behalf of Larsen v. Larsen.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-352: **R & M Enters. v. Thermo King Christensen, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-357: **State v. Gonzalez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-358: **State v. Gonzalez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-359: **State v. Nickolite.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-363: **Barney v. Isaacson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-366: **State v. Dercole.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-371: **State v. Phillips.** Affirmed.

No. A-96-382: **State v. Wilke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-383: **State v. Cross.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-389: **State v. Hohnstein.** Appeal dismissed. See Rule 7A(2); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990); and *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-96-394: **State v. Snodgrass.** Appeal dismissed, and matter remanded. See *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-96-410: **Lynch v. Becton Dickinson & Co.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-411: **State v. Gustafson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-412: **State v. Longshore.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-418: **State v. Glandt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-96-421: **State v. Berens.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-96-422: **Yuma Cogeneration Assocs. v. Raytheon Engrs. & Constructors.** Stipulation allowed; appeal dismissed with prejudice.

No. A-96-428: **State v. Fitzgerald.** Stipulation allowed; appeal dismissed.

No. A-96-438: **In re Interest of Vinson.** Appeal dismissed. See Rule 7A(2).

No. A-96-446: **Hannan v. Hannan.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-448: **State v. Roberts.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-449: **City of West Point v. General Drivers & Helpers Local No. 5.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-458: **Dana Commercial Credit v. International Spices, Ltd.** Stipulation allowed; appeal dismissed.

No. A-96-462: **In re Interest of Wilkinson.** Appeal dismissed. See Rule 7A(2).

No. A-96-471: **State v. Johnson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-472: **State v. Fraser.** Appeal dismissed. See Rule 7A(2).

No. A-96-474: **In re Interest of Weatherspoon.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-479: **State v. Merrill.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-498: **In re Interest of Marsh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-501: **State on behalf of Burdick v. Edwards.** Stipulation allowed; appeal dismissed.

No. A-96-505: **State v. Karel.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-96-521: **Faaborg v. Faaborg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-522: **Wolfenden v. Hubert.** Stipulation allowed; appeal dismissed.

No. A-96-535: **Emig v. Emig.** Stipulation allowed; appeal dismissed.

No. A-96-537: **State v. Merrill.** Appeal dismissed. See Rule 7A(2).

No. A-96-539: **Novotny v. Schrier.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-541: **State Street Bank & Trust Co. v. Equivest Financial.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-545: **State v. Wilson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-556: **BeSure Elec. Co. v. Pfeister.** Appeal dismissed. See Rule 7A(2).

No. A-96-566: **Wineberg v. Austin.** Appeal dismissed. See Rule 7A(2).

No. A-96-573: **State v. Brown.** By order of the court, appeal dismissed.

No. A-96-602: **State v. Martin.** Appeal dismissed. See Rule 7A(2) and Neb. Rev. Stat. § 25-1912(2) (Reissue 1995).

No. A-96-613: **Govig v. Govig.** Appeal dismissed. See Rule 7A(2).

No. A-96-632: **Blankemeyer v. Federal Land Bank of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-646: **Peak v. Peak.** Stipulation allowed; appeal dismissed.

No. A-96-652: **Hoven v. Department of Corr. Servs.** Appeal dismissed. See Rule 7A(2) and *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-96-678: **State v. Nauden.** Appeal dismissed. See Rule 7A(2).

No. A-96-728: **State v. Lee.** Appeal dismissed. See Rule 7A(2).

No. A-96-731: **Cole v. Shanahan.** Affirmed. See Rule 7A(1) and *Knight v. Hays*, 4 Neb. App. 388, 544 N.W.2d 106 (1996).

No. A-96-736: **Lisco Elevator v. Landreville.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-737: **Hunt v. Hooker.** Appeal dismissed. See Rule 7A(2) and Neb. Rev. Stat. §§ 30-1601 and 25-1912 (Reissue 1995).

No. A-96-740: **El-Tabech v. Department of Corr. Servs.** Appeal dismissed. See Rule 7B; Neb. Rev. Stat. #s 83-4,123 (Reissue 1994); and *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-96-765: **State v. Price.** Appeal dismissed as filed out of time. See Neb. Rev. Stat. §§ 25-1912 and 25-2221 (Reissue 1995).

No. A-96-771: **State v. Reuter.** Stipulation allowed; appeal dismissed.

No. A-96-810: **Poteet v. Poteet.** Appeal dismissed. See Rule 7A(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

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

No. S-92-687: **Shuck v. Jacob**, 95 NCA No. 33. Petition of appellant for further review sustained on November 15, 1995.

No. A-93-134: **Knapp v. Nebraska Pub. Power Dist.**, 95 NCA No. 40. Petition of appellant for further review overruled on November 15, 1995.

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

No. A-93-413: **Hanus v. Sears Roebuck & Co.** Petition of appellant for further review overruled on October 25, 1995.

No. A-93-513: **Hanus v. Sears Roebuck & Co.**, 95 NCA No. 26. Petition of appellant for further review overruled on October 25, 1995.

No. S-93-622: **Solar Motors v. First Nat. Bank of Chadron**, 4 Neb. App. 1 (1995). Petition of appellee for further review sustained on October 25, 1995.

No. A-93-719: **Abboud v. Papio-Missouri Riv. Nat. Res. Dist.**, 95 NCA No. 34. Petition of appellant for further review overruled on October 17, 1995.

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

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

Nos. A-93-768, A-93-769: **Urban v. Kircher**, 95 NCA No. 34. Petition of appellee for further review overruled on October 17, 1995.

No. S-93-817: **Kubat v. Kubat**. Petition of appellant for further review dismissed on December 8, 1995, as having been improvidently granted. See S-93-817, *Kubat v. Kubat*, 3 Neb. App., List of Cases on Petition for Further Review.

No. S-93-819: **Payne v. Nebraska Dept. of Corr. Servs.**, 3 Neb. App. 969 (1995). Petition of appellant for further review sustained on October 17, 1995.

No. A-93-857: **General Fin. Servs. v. Santee Sioux Dev. Corp.**, 95 NCA No. 25. Petition of appellant for further review overruled on September 27, 1995.

No. A-93-933: **Becker v. Allen**, 96 NCA No. 11. Petition of appellant for further review overruled on June 26, 1996.

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

No. A-93-1037: **Ebke v. Ebke**, 95 NCA No. 33. Petition of appellant for further review overruled on October 13, 1995.

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

No. A-94-019: **Betterman & Katelman v. Pipe & Piling Supplies**, 95 NCA No. 38. Petition of appellee for further review overruled on November 22, 1995.

No. A-94-037: **Dinsmore v. Madonna Ctrs., Inc.**, 95 NCA No. 37. Petition of appellant for further review overruled on December 13, 1995.

No. A-94-038: **Downs v. Downs**, 95 NCA No. 31. Petition of appellant for further review overruled on September 20, 1995.

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

No. A-94-088: **State v. Winter**, 95 NCA No. 8. Petition of appellant for further review overruled on November 29, 1995.

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

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

No. A-94-190: **Nichols v. Nichols**, 95 NCA No. 39. Petition of appellant for further review overruled on November 15, 1995.

No. A-94-194: **Robbins v. Robbins**, 3 Neb. App. 953 (1995). Petition of appellant for further review overruled on November 22, 1995.

No. S-94-216: **Ainslie v. Ainslie**, 4 Neb. App. 70 (1995). Petition of appellee for further review sustained on November 8, 1995.

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

No. A-94-240: **Franzen v. Jensen Irrigation, Inc.**, 95 NCA No. 30. Petition of appellant for further review overruled on September 13, 1995.

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

No. A-94-267: **FirsTier Bank v. Cashler**, 95 NCA No. 29. Petition of appellants for further review overruled on September 13, 1995.

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

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

No. A-94-308: **Becker v. Board of Regents**, 96 NCA No. 4. Petition of appellant for further review overruled on May 22, 1996.

No. A-94-327: **Bennett v. Farmers Mut. Ins. Co. of Neb.** Petition of appellant for further review overruled on November 15, 1995.

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

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

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

No. A-94-400: **Wahrman v. Wahrman**, 95 NCA No. 28. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-405: **White v. State Farm Mut. Auto. Ins. Co.**, 95 NCA No. 35. Petition of appellant for further review overruled on October 17, 1995.

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

No. A-94-566: **Sweetman v. Sweetman**. Petition of appellant for further review overruled on May 16, 1996.

No. A-94-579: **In re Estate of Snover**, 4 Neb. App. 533 (1996). Petition of appellee for further review overruled on June 12, 1996.

No. A-94-595: **In re Interest of Kari F.** Petition of appellant for further review overruled on September 13, 1995.

No. A-94-595: **In re Interest of Kari F.** Petition of appellee for further review overruled on September 13, 1995.

No. S-94-608: **Sandoval v. O'Neal**, 96 NCA No. 11. Petition of appellant for further review sustained on May 1, 1996.

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

No. S-94-621: **Marten v. Staab**, 4 Neb. App. 19 (1995). Petition of appellees for further review sustained on October 17, 1995.

No. A-94-625: **State v. Illig**, 95 NCA No. 39. Petition of appellee for further review overruled on November 8, 1995.

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

No. A-94-651: **Hutchison v. Mosser**. Petition of appellant for further review overruled on December 13, 1995.

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

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

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

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

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

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

No. S-94-712: **Boss v. Fillmore Cty. Sch. Dist. No. 19**, 4 Neb. App. 624 (1996). Petition of appellee for further review sustained on July 2, 1996.

Nos. A-94-719, A-94-720, A-94-721: **State v. Donlan**, 95 NCA No. 38. Petitions of appellants for further review overruled on November 8, 1995.

Nos. A-94-730, A-94-980: **Travelers Ins. Co. v. Nelson**, 4 Neb. App. 551 (1996). Petition of appellant for further review overruled on June 19, 1996.

No. A-94-753: **State v. Marion**. Petition of appellant for further review overruled on May 16, 1996.

No. S-94-756: **Swoboda v. Mercer Mgt. Co.**, 96 NCA No. 10. Petition of appellee for further review sustained on May 30, 1996.

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

No. S-94-797: **Pettit v. State**, 95 NCA No. 28. Petition of appellee for further review sustained on October 17, 1995.

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

No. A-94-810: **Vorderstrasse v. Vorderstrasse**, 95 NCA No. 29. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-827: **Gallner v. Gallner**. Petition of appellant for further review overruled on May 30, 1996.

No. A-94-831: **City of Pierce v. Lambrecht**, 96 NCA No. 13. Petition of appellant for further review overruled on May 16, 1996.

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

No. A-94-834: **State v. Moore**, 95 NCA No. 36. Petition of appellant for further review overruled on November 8, 1995.

Nos. S-94-842, S-94-843: **In re Interest of Noelle F. & Sarah F.**, 3 Neb. App. 901 (1995). Petition of appellant for further review sustained on November 15, 1995.

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

No. A-94-876: **State v. Clark**, 95 NCA No. 32. Petition of appellant for further review overruled on October 17, 1995.

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

No. S-94-913: **Doe v. Golnick**. Petition of appellee for further review sustained on May 30, 1996.

No. A-94-914: **Schumacher v. Schumacher**. Petition of appellant for further review overruled on October 25, 1995.

No. S-94-935: **State v. Hansen**, 95 NCA No. 28. Petition of appellant for further review sustained on September 27, 1995.

No. A-94-940: **Rezabek v. Rezabek**, 96 NCA No. 15. Petition of appellant for further review overruled on July 2, 1996.

No. A-94-944: **Rudol v. Elder**. Petition of appellee for further review overruled on May 1, 1996.

No. A-94-970: **State v. Svoboda**, 95 NCA No. 34. Petition of appellant for further review overruled on November 8, 1995.

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

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

No. A-94-996: **Johnson v. Union Pacific RR. Co.** Petition of appellant for further review overruled on May 16, 1996.

No. A-94-1031: **Wiebelhaus v. Nagengast**. Petition of appellant for further review overruled on May 22, 1996.

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

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

No. A-94-1056: **State v. Davis**, 95 NCA No. 31. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-1058: **State v. Moore**, 95 NCA No. 28. Petition of appellant for further review overruled on September 13, 1995.

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

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

No. S-94-1070: **Kapperman v. Kapperman**, 95 NCA No. 28. Petition of appellant for further review sustained on November 15, 1995.

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

No. A-94-1081: **Simpson v. Yellow Freight Sys.**, 95 NCA No. 32. Petition of appellant for further review overruled on September 27, 1995.

No. A-94-1087: **State v. Hayes**, 3 Neb. App. 919 (1995). Petition of appellant for further review overruled on November 15, 1995.

No. A-94-1093: **State v. Smith**, 95 NCA No. 41. Petition of appellant for further review overruled on December 13, 1995.

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

No. A-94-1110: **Simmons v. Connot**. Petition of appellants for further review overruled on July 17, 1996.

No. A-94-1121: **Haught v. Farm Bureau Ins. Co. of Neb.** Petition of appellee for further review overruled on July 17, 1996.

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

No. A-94-1139: **In re Interest of Mickey B. & Amanda B.**, 95 NCA No. 38. Petition of appellee Allen B. for further review overruled on November 22, 1995.

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

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

No. A-94-1177: **State v. Sweeney**, 95 NCA No. 41. Petition of appellee for further review overruled on November 8, 1995.

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

No. S-94-1193: **State v. Brozovksy**. Petition of appellant for further review sustained on September 27, 1995.

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

No. S-94-1198: **Allemang v. Kearney Farm Ctr.**, 96 NCA No. 17. Petition of appellant for further review sustained on May 30, 1996.

No. A-94-1204: **Geist v. Geist**, 95 NCA No. 30. Petition of appellant for further review overruled on October 17, 1995.

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

No. A-94-1224: **Grobe v. Food 4 Less**, 95 NCA No. 30. Petition of appellee for further review overruled on September 20, 1995.

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

Nos. S-94-1239, S-94-1240, S-95-761, S-95-762: **In re Interest of Joshua M. et al.**, 4 Neb. App. 659 (1996). Petition of appellee for further review sustained on July 17, 1996.

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

No. S-94-1249: **State v. Dodson**, 95 NCA No. 30. Petition of appellant for further review sustained on October 17, 1995.

No. A-95-013: **Larsen v. Grabowski**, 96 NCA No. 12. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-015: **State v. Rhoades**, 95 NCA No. 41. Petition of appellant for further review overruled on November 29, 1995.

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

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

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

No. A-95-029: **Crabb v. Bishop Clarkson Memorial Hosp.**, 95 NCA No. 33. Petitions of appellant for further review overruled on November 22, 1995.

No. A-95-034: **Wynn v. Hathaway**. Petition of appellant for further review overruled on June 26, 1996.

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

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

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

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

No. A-95-068: **State v. Guiterrez**. Petition of appellant for further review overruled on October 25, 1995.

No. A-95-070: **Maw v. Heartland Co-op**. Petition of appellee for further review overruled on November 15, 1995.

No. A-95-071: **Swenson v. Furnas Cty. Farms**, 95 NCA No. 32. Petition of appellant for further review overruled on November 15, 1995.

No. S-95-080: **Olson v. S.I.D. No. 177**. Petition of appellant for further review sustained on June 26, 1996.

No. S-95-103: **Dittrich v. Department of Corr. Servs.** Petition of appellant for further review sustained on September 20, 1995.

No. A-95-105: **Crisman v. Beef America, Inc.**, 95 NCA No. 31. Petition of appellant for further review overruled on September 20, 1995.

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

No. A-95-116: **State v. Zimmerman**, 95 NCA No. 29. Petition of appellant for further review overruled on September 13, 1995.

No. A-95-141: **State v. Harris**. Petition of appellant for further review overruled on November 29, 1995.

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

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

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

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

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

No. A-95-202: **State v. Marion**. Petition of appellant for further review overruled on November 15, 1995.

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

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

No. A-95-215: **In re Interest of John T.**, 4 Neb. App. 79 (1995). Petition of appellee for further review overruled on December 13, 1995.

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

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

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

No. A-95-237: **Mueller v. Bohannon**, 96 NCA No. 26. Petition of appellee for further review overruled on August 2, 1996, for lack of jurisdiction.

No. A-95-244: **State v. May**. Petition of appellant for further review overruled on November 22, 1995.

No. A-95-244: **State v. May**. Petition of appellant for further review overruled on December 11, 1995.

No. A-95-254: **State v. Gaston**, 96 NCA No. 5. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-283: **State v. Rodriguez**. Petition of appellant for further review overruled on November 22, 1995.

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

No. A-95-291: **State v. Lomack**, 4 Neb. App. 465 (1996). Petition of appellee for further review overruled on May 16, 1996.

No. A-95-301: **State v. Blair**. Petition of appellant for further review overruled on October 17, 1995.

No. A-95-332: **Hroch v. Farmland Indus.**, 4 Neb. App. 709 (1996). Petition of appellant for further review overruled on July 9, 1996, as filed out of time.

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

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

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

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

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

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

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

No. A-95-373: **State v. Tunender**, 4 Neb. App. 680 (1996). Petition of appellant for further review overruled on July 17, 1996.

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

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

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

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

No. A-95-410: **In re Interest of Shannon R.**, 96 NCA No. 6. Petition of appellant for further review overruled on May 22, 1996.

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

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

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

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

No. A-95-455: **In re Interest of Theodore W.**, 4 Neb. App. 428 (1996). Petition of appellant for further review overruled on May 16, 1996.

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

No. A-95-484: **State v. Pixler**. Petition of appellant for further review denied on November 3, 1995, for lack of jurisdiction.

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

No. A-95-509: **State v. Huestis**. Petition of appellant for further review overruled on November 15, 1995.

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

No. A-95-563: **State v. Vice**. Petition of appellant for further review overruled on September 13, 1995.

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

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

No. A-95-590: **State v. Kennedy**, 96 NCA No. 16. Petition of appellant for further review overruled on June 12, 1996.

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

No. A-95-604: **State v. Brachtenbach**, 96 NCA No. 10. Petition of appellant for further review overruled on May 22, 1996.

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

No. A-95-618: **State v. Hunt**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-626: **State v. Adams**, 96 NCA No. 16. Petition of appellant for further review overruled on June 12, 1996.

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

No. A-95-646: **State v. Tiff**, 96 NCA No. 13. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-659: **State v. Allen**. Petition of appellant for further review overruled on June 19, 1996.

No. S-95-669: **State v. Adams**, 96 NCA No. 18. Petition of appellee for further review sustained on July 2, 1996.

No. A-95-715: **McCormick v. McCormick**. Petition of appellant for further review overruled on May 22, 1996.

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

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

No. A-95-741: **Wright v. Wright**. Petition of appellee for further review overruled on July 17, 1996.

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

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

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

No. S-95-785: **In re Interest of Thomas M.**, 96 NCA No. 13. Petition of appellee for further review sustained on May 16, 1996.

No. S-95-800: **State v. Lundahl**, 96 NCA No. 12. Petition of appellant for further review sustained on May 22, 1996.

No. A-95-812: **Deckard v. Nebraska Bd. of Parole**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-849: **Pratt v. Nebraska Parole Board**. Petition of appellant for further review overruled on November 15, 1995.

No. S-95-853: **State v. Swift**, 96 NCA No. 17. Petition of appellant for further review sustained on June 12, 1996.

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

No. A-95-861: **State v. Ford**, 96 NCA No. 16. Petition of appellant for further review overruled on May 30, 1996.

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

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

No. A-95-942: **State v. Gray**, 96 NCA No. 23. Petition of appellee for further review overruled on July 17, 1996.

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

No. A-95-963: **In re Interest of Teela H.**, 4 Neb. App. 608 (1996). Petition of appellant for further review overruled on June 26, 1996.

No. S-95-964: **State v. Konfrst**, 4 Neb. App. 517 (1996). Petition of appellant for further review sustained on May 22, 1996.

No. A-95-973: **In re Interest of Christopher L.**, 96 NCA No. 21. Petition of appellant for further review overruled on July 17, 1996.

No. A-95-986: **State v. Thompson**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-1026: **State v. Mowitz**. Petition of appellant for further review overruled on May 30, 1996.

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

No. S-95-1045: **Memorial Hosp. of Dodge Cty. v. Porter**, 4 Neb. App. 716 (1996). Petition of appellee for further review sustained on July 17, 1996.

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

No. A-95-1054: **State v. Hill**. Petition of appellant for further review overruled on May 1, 1996.

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

No. S-95-1119: **Dougherty v. Swift-Eckrich, Inc.**, 4 Neb. App. 653 (1996). Petition of appellee for further review sustained on June 12, 1996.

Nos. A-95-1139 through A-95-1142: **In re Guardianship of Alice D. et al.**, 4 Neb. App. 726 (1996). Petition of appellant for further review overruled on July 17, 1996.

No. A-95-1176: **State v. Freeman**. Petition of appellant for further review overruled on June 19, 1996.

No. A-95-1191: **State v. Urban**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-1223: **Paulsen v. Paulsen**. Petition of appellant for further review overruled on May 30, 1996.

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

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

No. A-95-1307: **State v. Krason**. Petition of appellant for further review overruled on June 26, 1996.

No. A-95-1313: **State v. Thomas**. Petition of appellant for further review overruled on June 12, 1996.

No. A-95-1366: **State v. Talley**. Petition of appellant for further review overruled on June 12, 1996.

No. A-95-1371: **State v. Wittmuss**. Petition of appellant for further review overruled on May 16, 1996.

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

No. A-95-1389: **Nicholson v. Nicholson**. Petition of appellant for further review overruled on July 2, 1996.

No. A-96-020: **Koenigsman v. Department of Pub. Inst**. Petition of appellant for further review overruled on June 26, 1996.

No. A-96-047: **State v. White**. Petition of appellant for further review overruled on July 17, 1996.

No. A-96-176: **State v. Tobin**. Petition of appellant for further review overruled on July 17, 1996.

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-93-134: **Knapp v. Nebraska Pub. Power Dist.** 95 NCA No. 40. Affirmed. Mues, Judge.

No. A-93-579: **Meyer v. Meyer.** 95 NCA No. 45. Affirmed as modified. Hannon, Judge.

No. A-93-933: **Becker v. Allen.** 96 NCA No. 11. Affirmed. Mues, Judge.

No. A-93-947: **Prigge v. Department of Motor Vehicles.** 95 NCA No. 40. Reversed and remanded with directions. Howard, District Judge, Retired.

No. A-93-987: **Mercer v. Conrad.** 95 NCA No. 41. Affirmed. Mues, Judge.

No. A-93-1005: **Breunig v. Breunig.** 95 NCA No. 39. Affirmed. Inbody, Judge.

Nos. A-93-1027, A-93-1028: **State v. Sharp.** 95 NCA No. 42. Affirmed. Hannon, Judge.

No. A-93-1059: **Swiercek v. McDaniel.** 95 NCA No. 43. Affirmed. Mues, Judge.

No. A-93-1061: **Salvation Army v. Williams.** 95 NCA No. 41. Affirmed. Sievers, Chief Judge.

No. A-93-1092: **Weiss v. Weiss.** 95 NCA No. 46. Affirmed as modified. Hannon, Judge.

No. A-93-1134: **Benjamin v. Benjamin.** 95 NCA No. 46. Reversed and remanded for a new trial. Hannon, Judge.

No. A-94-001: **Gibson v. Gibson.** 95 NCA No. 40. Affirmed as modified. Sievers, Chief Judge.

No. A-94-019: **Betterman & Katelman v. Pipe & Piling Supplies.** 95 NCA No. 38. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-94-022: **In re Estate of Wingate.** 95 NCA No. 50. Reversed and remanded. Miller-Lerman, Judge.

No. A-94-037: **Dinsmore v. Madonna Ctrs., Inc.** 95 NCA No. 37. Affirmed. Sievers, Chief Judge.

No. A-94-044: **Klein v. Maldonado.** 95 NCA No. 38. Affirmed as modified. Miller-Lerman, Judge.

No. A-94-063: **State v. Shelby.** 95 NCA No. 40. Affirmed. Irwin, Judge.

No. A-94-070: **Trease v. Trease.** 96 NCA No. 3. Affirmed. Sievers, Chief Judge.

No. A-94-079: **Schmidt v. Schmidt.** 95 NCA No. 41. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-108: **Murphy v. Murphy.** 95 NCA No. 42. Affirmed. Irwin, Judge.

No. A-94-124: **State v. Hammond.** 95 NCA No. 47. Affirmed. Hannon, Judge.

No. A-94-132: **In re Estate of Springer.** 96 NCA No. 1. Affirmed. Mues, Judge.

No. A-94-134: **Stidhem v. Stidhem.** 95 NCA No. 45. Reversed and remanded with directions. Inbody, Judge.

No. A-94-140: **Trimble v. Trimble.** 95 NCA No. 51. Affirmed. Miller-Lerman, Judge.

No. A-94-158: **Store Kraft Mfg. Co. v. Meints.** 95 NCA No. 39. Affirmed. Inbody, Judge.

No. A-94-160: **Wright Concrete, Inc. v. Siegfried.** 95 NCA No. 50. Affirmed. Mues, Judge.

No. A-94-161: **State v. Lott.** 95 NCA No. 41. Affirmed. Inbody, Judge.

No. A-94-181: **Cole v. Leech.** 95 NCA No. 46. Affirmed. Irwin, Judge.

No. A-94-185: **Irfan v. Irfan.** 95 NCA No. 49. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge.

No. A-94-190: **Nichols v. Nichols.** 95 NCA No. 39. Reversed and remanded with directions. Irwin, Judge.

No. A-94-221: **Young v. Young.** 95 NCA No. 48. Affirmed. Norton, District Judge, Retired.

No. A-94-222: **Priest v. Priest.** 96 NCA No. 4. Affirmed in part, and in part reversed and remanded with directions. Miller-Lerman, Judge.

No. A-94-249: **Raymond v. Harper.** 95 NCA No. 45. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-264: **State v. Etherton.** 95 NCA No. 41. Affirmed. Miller-Lerman, Judge.

No. A-94-268: **Aksarben Nsg. Ctrs. v. Department of Soc. Servs.** 95 NCA No. 46. Affirmed. Miller-Lerman, Judge.

No. A-94-270: **D.K. Buskirk & Sons v. State.** 96 NCA No. 6. Reversed and remanded for further proceedings. Miller-Lerman, Chief Judge.

No. A-94-282: **Van Horn v. Van Horn.** 95 NCA No. 40. Reversed and remanded with directions. Hannon, Judge.

No. A-94-307: **Morello v. City of Omaha.** 96 NCA No. 4. Affirmed. Sievers, Chief Judge.

No. A-94-308: **Becker v. Board of Regents.** 96 NCA No. 4. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge.

No. A-94-322: **Dean v. White.** 96 NCA No. 2. Affirmed. Hannon, Judge.

No. A-94-333: **In re Estate of Marten.** 95 NCA No. 35. Appeal dismissed. Sievers, Chief Judge.

No. A-94-338: **Geisler v. Geisler.** 95 NCA No. 51. Affirmed in part, and in part remanded with directions. Sievers, Chief Judge.

No. A-94-352: **State v. Zemunski.** 95 NCA No. 35. Affirmed. Inbody, Judge.

No. A-94-359: **Roesler v. Roesler.** 96 NCA No. 2. Affirmed as modified. Mues, Judge.

No. A-94-370: **State v. Davis.** 95 NCA No. 41. Affirmed. Irwin, Judge.

No. A-94-377: **Irwin v. Irwin.** 95 NCA No. 43. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-395: **Wambold v. Wambold.** 95 NCA No. 43. Affirmed as modified. Hannon, Judge.

No. A-94-396: **Lyle v. Lyle.** 96 NCA No. 4. Affirmed. Inbody, Judge.

No. A-94-405: **White v. State Farm Mut. Auto. Ins. Co.** 95 NCA No. 35. Affirmed. Per Curiam.

No. A-94-409: **Knight v. Food-4-Less.** 95 NCA No. 43. Affirmed. Sievers, Chief Judge.

No. A-94-440: **Wagner v. Lewis.** 96 NCA No. 3. Affirmed. Sievers, Chief Judge.

No. A-94-459: **Jerman v. Department of Motor Vehicles.** 95 NCA No. 46. Reversed. Miller-Lerman, Judge.

No. A-94-477: **Wick v. Wick.** 95 NCA No. 48. Affirmed. Norton, District Judge, Retired.

No. A-94-480: **Janssen v. Tomahawk Oil Co.** 95 NCA No. 50. Reversed and remanded for a new trial. Mues, Judge.

No. A-94-481: **Barnes v. Dvorak.** 95 NCA No. 47. Affirmed and remanded with direction. Mues, Judge.

No. A-94-487: **Cole v. Leonard.** 96 NCA No. 3. Affirmed. Per Curiam.

No. A-94-500: **Moulton v. Larson.** 96 NCA No. 11. Reversed. Howard, District Judge, Retired.

No. A-94-501: **Moser v. Bulin.** 96 NCA No. 4. Affirmed. Howard, District Judge, Retired.

No. A-94-513: **Sober v. Craig.** 96 NCA No. 1. Affirmed. Sievers, Chief Judge.

No. A-94-527: **Buschkamp v. Buschkamp.** 96 NCA No. 2. Affirmed. Hannon, Judge.

No. A-94-536: **Kaplan v. Black.** 96 NCA No. 2. Reversed and remanded for further proceedings. Miller-Lerman, Judge.

No. A-94-539: **State v. Stewart.** 96 NCA No. 4. Affirmed. Sievers, Chief Judge.

No. A-94-544: **In re Estate of Mitchell.** 96 NCA No. 2. Affirmed. Hannon, Judge.

No. A-94-553: **State v. Armstrong.** 96 NCA No. 21. Affirmed as modified. Mues, Judge.

No. A-94-604: **Fred v. Jones.** 96 NCA No. 2. Affirmed. Mues, Judge.

No. A-94-608: **Sandoval v. O'Neal.** 96 NCA No. 11. Affirmed. Mues, Judge.

No. A-94-610: **Kabourek v. Village of Brainard.** 96 NCA No. 7. Reversed. Mues, Judge.

No. A-94-625: **State v. Illig.** 95 NCA No. 39. Reversed and remanded with directions. Per Curiam.

No. A-94-643: **State ex rel. Meints v. Meints.** 96 NCA No. 12. Affirmed. Miller-Lerman, Chief Judge.

No. A-94-644: **Meints v. Meints.** 96 NCA No. 12. Affirmed. Miller-Lerman, Chief Judge.

No. A-94-645: **McGurk v. Abramson.** 95 NCA No. 45. Affirmed. Hannon, Judge.

No. A-94-652: **Kiester v. First State Bank of Scottsbluff.** 95 NCA No. 49. Affirmed. Sievers, Chief Judge.

No. A-94-655: **State v. Nichols.** 96 NCA No. 2. Affirmed. Miller-Lerman, Judge.

No. A-94-659: **Tyler v. Siebert.** 96 NCA No. 15. Reversed and remanded with directions. Moran, District Judge, Retired.

No. A-94-688: **Hand v. Starr.** 96 NCA No. 2. Affirmed. Inbody, Judge.

No. A-94-698: **First Nat. Bank of York v. Critel.** 95 NCA No. 51. Affirmed. Per Curiam.

Nos. A-94-719, A-94-720, A-94-721: **State v. Donlan.** 95 NCA No. 38. Affirmed. Sievers, Chief Judge.

No. A-94-731: **Konat v. Schmitz.** 96 NCA No. 25. Affirmed as modified. Inbody, Judge.

No. A-94-738: **Lierman v. Lierman.** 96 NCA No. 11. Affirmed. Moran, District Judge, Retired.

No. A-94-747: **State on behalf of Madsen v. Long Soldier.** 96 NCA No. 15. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-749: **Thompson v. Henney.** 96 NCA No. 3. Affirmed. Irwin, Judge.

No. A-94-751: **Taylor v. Taylor.** 95 NCA No. 38. Affirmed. Miller-Lerman, Judge.

No. A-94-756: **Swoboda v. Mercer Mgt. Co.** 96 NCA No. 10. Reversed and remanded. Inbody, Judge.

No. A-94-760: **Townsend v. Blain.** 95 NCA No. 48. Affirmed. Hannon, Judge.

No. A-94-802: **Remmen v. Zweiback.** 96 NCA No. 7. Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings. Hannon, Judge.

No. A-94-806: **Jones v. Ruff.** 96 NCA No. 12. Affirmed. Mues, Judge.

No. A-94-811: **Bartunek v. Geo. A. Hormel & Co.** 96 NCA No. 15. Affirmed as modified. Hannon, Judge.

No. A-94-826: **Bohl v. Bohl.** 96 NCA No. 17. Affirmed. Hannon, Judge.

No. A-94-831: **City of Pierce v. Lambrecht.** 96 NCA No. 13. Affirmed. Moran, District Judge, Retired.

No. A-94-834: **State v. Moore.** 95 NCA No. 36. Affirmed. Inbody, Judge.

No. A-94-839: **Bartolome v. Bartolome.** 96 NCA No. 11. Affirmed. Miller-Lerman, Chief Judge.

No. A-94-861: **Harrison v. Seagroves.** 95 NCA No. 51. Affirmed. Inbody, Judge.

No. A-94-879: **Robinson v. Robinson.** 96 NCA No. 14. Affirmed as modified. Mues, Judge.

No. A-94-919: **Hass v. Nebraska Dept. of Motor Vehicles.** 96 NCA No. 11. Reversed and remanded with directions. Sievers, Judge.

No. A-94-940: **Rezabek v. Rezabek.** 96 NCA No. 15. Affirmed. Hannon, Judge.

No. A-94-949: **Coates v. Coates.** 96 NCA No. 14. Affirmed in part, and in part reversed. Hannon, Judge.

No. A-94-973: **State v. McWilliams.** 95 NCA No. 42. Affirmed. Inbody, Judge.

No. A-94-974: **Glens Falls Ins. Co. v. Region I Office.** 95 NCA No. 50. Affirmed. Sievers, Chief Judge.

No. A-94-984: **Utter v. Utter.** 96 NCA No. 15. Affirmed in part, and in part reversed and remanded with direction. Miller-Lerman, Chief Judge.

Nos. A-94-985, A-94-1044: **In re Interest of Kayla F.** 95 NCA No. 38. Judgments affirmed. Miller-Lerman, Judge.

No. A-94-989: **Morris v. Clay Cty. Mut. Ins. Co.** 96 NCA No. 20. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-1036: **State v. Clark.** 95 NCA No. 50. Affirmed. Irwin, Judge.

No. A-94-1042: **Jamison v. Kenzy.** 96 NCA No. 21. Affirmed. Inbody, Judge.

No. A-94-1068: **State v. Tlamka.** 95 NCA No. 49. Affirmed. Inbody, Judge.

No. A-94-1077: **State v. Johnson.** 95 NCA No. 41. Affirmed. Mues, Judge.

No. A-94-1093: **State v. Smith.** 95 NCA No. 41. Affirmed. Howard, District Judge, Retired.

No. A-94-1102: **State v. Waldmann.** 96 NCA No. 4. Affirmed. Inbody, Judge.

No. A-94-1107: **State v. Brown.** 95 NCA No. 39. Affirmed. Inbody, Judge.

No. A-94-1117: **Devers v. Mitchell Broadcasting Co.** 96 NCA No. 15. Affirmed. Inbody, Judge.

No. A-94-1118: **Martin v. Martin.** 95 NCA No. 41. Affirmed as modified. Irwin, Judge.

No. A-94-1129: **State v. Reed.** 95 NCA No. 40. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-94-1139: **In re Interest of Mickey B. & Amanda B.** 95 NCA No. 38. Affirmed. Irwin, Judge.

No. A-94-1140: **State v. Krutsinger.** 95 NCA No. 38. Affirmed. Irwin, Judge.

No. A-94-1168: **State v. Osmon.** 95 NCA No. 39. Affirmed. Irwin, Judge.

No. A-94-1177: **State v. Sweeney.** 95 NCA No. 41. Reversed and remanded for a new trial. Inbody, Judge.

No. A-94-1179: **State v. Griffith.** 95 NCA No. 44. Affirmed. Hannon, Judge.

No. A-94-1198: **Allemang v. Kearney Farm Ctr.** 96 NCA No. 17. Affirmed as modified. Sievers, Judge.

No. A-94-1203: **Peterson v. Peterson.** 96 NCA No. 19. Affirmed. Hannon, Judge.

No. A-94-1207: **Parker v. Baker's Supermarkets.** 96 NCA No. 22. Affirmed. Norton, District Judge, Retired.

No. A-94-1223: **In re Interest of Carl U., Jr., et al.** 95 NCA No. 43. Affirmed. Mues, Judge.

Nos. A-94-1228, A-95-147, A-95-148: **State v. Stickney.** 96 NCA No. 15. Judgment in No. A-94-1228 affirmed in part, and in part vacated and remanded for further proceedings. Judgment in Nos. A-95-147 and A-95-148 affirmed. Sievers, Judge.

No. A-94-1231: **Lewis v. Lewis.** 95 NCA No. 37. Affirmed in part, and in part remanded with directions. Sievers, Chief Judge.

No. A-94-1238: **Geary v. Geary.** 96 NCA No. 22. Affirmed as modified. Mues, Judge.

No. A-94-1243: **State v. Bowers.** 95 NCA No. 50. Affirmed in part, and in part reversed and remanded with directions. Hannon, Judge.

No. A-94-1244: **Quiring v. Quiring.** 96 NCA No. 16. Affirmed as modified. Warren, District Judge, Retired.

No. A-94-1251: **Harvey v. Harvey.** 95 NCA No. 45. Affirmed as modified. Mues, Judge.

No. A-94-1252: **Light v. Glass.** 96 NCA No. 24. Appeal dismissed. Hannon, Judge.

No. A-95-003: **State v. Sherrod.** 95 NCA No. 42. Affirmed. Howard, District Judge, Retired.

No. A-95-013: **Larsen v. Grabowski.** 96 NCA No. 12. Affirmed in part, and in part vacated and set aside. Moran, District Judge, Retired.

No. A-95-015: **State v. Rhoades.** 95 NCA No. 41. Affirmed. Hannon, Judge.

No. A-95-017: **State v. Fischer.** 95 NCA No. 39. Reversed. Sievers, Chief Judge.

No. A-95-025: **Ivers v. Dillard Dept. Store.** 95 NCA No. 38. Affirmed. Miller-Lerman, Judge.

No. A-95-026: **Jackson v. Uldrich.** 96 NCA No. 24. Affirmed. Norton, District Judge, Retired.

No. A-95-028: **Custer Feed Products v. Hansen.** 96 NCA No. 24. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Judge.

No. A-95-033: **Vinderslev v. Gibreal Auto Sales.** 96 NCA No. 21. Affirmed. Warren, District Judge, Retired.

No. A-95-040: **Weltruski v. Thompson.** 96 NCA No. 23. Affirmed. Hannon, Judge.

No. A-95-047: **In re Interest of Moderow.** 95 NCA No. 43. Affirmed. Miller-Lerman, Judge.

No. A-95-048: **In re Interest of Alan L., Jr., & Nickalus L.** 95 NCA No. 44. Affirmed. Sievers, Chief Judge.

No. A-95-051: **Volk v. Volk.** 95 NCA No. 42. Affirmed in part, and in part reversed and remanded with directions. Miller-Lerman, Judge.

No. A-95-053: **Howard v. Howard.** 95 NCA No. 40. Affirmed as modified. Hannon, Judge.

No. A-95-061: **Bargmann v. Bargmann.** 95 NCA No. 42. Affirmed. Howard, District Judge, Retired.

No. A-95-089: **State v. Hackwith.** 95 NCA No. 43. Affirmed. Howard, District Judge, Retired.

No. A-95-090: **State v. Sanchez.** 95 NCA No. 43. Affirmed. Inbody, Judge.

No. A-95-098: **State v. Olson.** 95 NCA No. 41. Affirmed. Mues, Judge.

No. A-95-125: **Pope v. Pope.** 96 NCA No. 21. Reversed and remanded with directions. Norton, District Judge, Retired.

No. A-95-145: **Glines v. ShopKo Stores.** 96 NCA No. 14. Affirmed. Hannon, Judge.

No. A-95-155: **State v. Turner.** 96 NCA No. 8. Reversed and remanded for a new trial. Sievers, Chief Judge.

No. A-95-162: **State v. McGurk.** 95 NCA No. 45. Reversed and remanded with directions. Hannon, Judge.

No. A-95-165: **State v. Williams.** 95 NCA No. 39. Exception sustained, and cause remanded for further proceedings. Miller-Lerman, Judge.

No. A-95-184: **Walter v. Pizza Hut of America.** 96 NCA No. 32. Affirmed. Hannon, Judge.

No. A-95-193: **Drevo v. Drevo.** 96 NCA No. 2. Affirmed. Howard, District Judge, Retired.

No. A-95-196: **State v. Freed.** 95 NCA No. 44. Reversed. Miller-Lerman, Judge.

No. A-95-198: **State v. Hatcliff.** 95 NCA No. 45. Affirmed. Miller-Lerman, Judge.

No. A-95-201: **Berggren v. Grand Island Accessories.** 95 NCA No. 45. Reversed and remanded with directions to dismiss. Miller-Lerman, Judge.

No. A-95-204: **Eliason v. Eliason.** 95 NCA No. 51. Affirmed. Hannon, Judge.

No. A-95-205: **Prince v. Prince.** 96 NCA No. 25. Affirmed. Sievers, Judge.

Nos. A-95-210, A-95-224: **In re Interest of Michael K. & Hether K.** 95 NCA No. 51. Affirmed. Inbody, Judge.

No. A-95-213: **Heger v. A-Help, Inc.** 95 NCA No. 44. Affirmed. Norton, District Judge, Retired.

No. A-95-217: **State v. Williams.** 95 NCA No. 43. Appeal dismissed. Irwin, Judge.

No. A-95-222: **State v. Johnson.** 95 NCA No. 45. Affirmed. Hannon, Judge.

No. A-95-225: **Moore v. Moore.** 96 NCA No. 6. Affirmed. Miller-Lerman, Judge.

No. A-95-226: **State v. Dahl.** 96 NCA No. 8. Exception sustained, and cause remanded with direction. Hannon, Judge.

No. A-95-237: **Mueller v. Bohannon.** 96 NCA No. 26. Affirmed in part, and in part reversed and remanded for further proceedings. Mues, Judge.

No. A-95-239: **In re Interest of Alvin P.** 95 NCA No. 48. Affirmed. Inbody, Judge.

No. A-95-242: **In re Interest of Jimmy B. et al.** 95 NCA No. 42. Affirmed. Howard, District Judge, Retired.

No. A-95-246: **Hruza v. Holt.** 96 NCA No. 23. Affirmed as modified. Mues, Judge.

No. A-95-252: **State v. McCauley.** 95 NCA No. 50. Affirmed. Warren, District Judge, Retired.

No. A-95-254: **State v. Gaston.** 96 NCA No. 5. Affirmed. Miller-Lerman, Judge.

No. A-95-274: **Haskell v. National Crane Corp.** 95 NCA No. 45. Affirmed. Norton, District Judge, Retired.

No. A-95-276: **In re Interest of Anthony C.** 95 NCA No. 48. Affirmed. Hannon, Judge.

No. A-95-277: **In re Interest of Christopher N.** 95 NCA No. 43. Affirmed. Hannon, Judge.

No. A-95-282: **Dirkschneider v. United Parcel Serv.** 95 NCA No. 49. Affirmed. Hannon, Judge.

No. A-95-284: **State v. Orduna.** 95 NCA No. 50. Affirmed. Warren, District Judge, Retired.

No. A-95-298: **Herbig v. Coolidge Center.** 95 NCA No. 51. Affirmed. Warren, District Judge, Retired.

No. A-95-334: **Shafer v. Shafer.** 96 NCA No. 33. Affirmed as modified. Sievers, Judge.

No. A-95-335: **State v. Lenczowski.** 95 NCA No. 51. Affirmed. Warren, District Judge, Retired.

No. A-95-336: **State v. Frieson.** 96 NCA No. 9. Affirmed. Sievers, Judge.

No. A-95-343: **Rodriguez v. Millard Processing Servs.** 95 NCA No. 48. Affirmed. Miller-Lerman, Judge.

No. A-95-358: **State v. Valdez.** 96 NCA No. 7. Affirmed. Mues, Judge.

No. A-95-361: **State ex rel. Clanton v. Clanton.** 96 NCA No. 33. Reversed and remanded for further proceedings. Howard, District Judge, Retired.

Nos. A-95-365, A-95-366: **State v. Freeman.** 96 NCA No. 9. Affirmed. Hannon, Judge.

No. A-95-367: **State v. Sullivan.** 95 NCA No. 49. Affirmed in part, and in part reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-95-376: **Smith v. Papio-Missouri River NRD.** 96 NCA No. 34. Reversed and remanded for a new trial. Hannon, Judge.

No. A-95-384: **State v. Hernandez-Soto.** 95 NCA No. 43. Affirmed. Miller-Lerman, Judge.

No. A-95-389: **In re Interest of Tiffany P.** 95 NCA No. 50. Reversed and remanded for further proceedings. Miller-Lerman, Judge.

No. A-95-394: **State v. Mead.** 96 NCA No. 4. Affirmed. Mues, Judge.

No. A-95-406: **Yerkes v. Mark Hopkins Homes, Inc.** 96 NCA No. 32. Affirmed in part, and in part reversed and vacated. Sievers, Judge.

No. A-95-410: **In re Interest of Shannon R.** 96 NCA No. 6. Affirmed. Mues, Judge.

No. A-95-412: **State v. Coffey.** 95 NCA No. 49. Appeal dismissed, and cause remanded with directions. Warren, District Judge, Retired.

No. A-95-413: **Klinginsmith v. Wichmann.** 96 NCA No. 29. Affirmed. Howard, District Judge, Retired.

No. A-95-419: **State v. Beeder.** 96 NCA No. 9. Affirmed. Mues, Judge.

No. A-95-430: **Young v. Young.** 96 NCA No. 21. Affirmed as modified. Norton, District Judge, Retired.

No. A-95-435: **Chain v. Carlson.** 96 NCA No. 35. Affirmed. Sievers, Judge.

No. A-95-445: **State v. Hernandez.** 96 NCA No. 7. Affirmed. Mues, Judge.

No. A-95-446: **State v. Cornell.** 96 NCA No. 2. Affirmed. Mues, Judge.

No. A-95-466: **Moulton v. City of Lincoln.** 96 NCA No. 34. Affirmed. Hannon, Judge.

No. A-95-486: **In re Interest of Ashley V.** 95 NCA No. 50. Affirmed. Irwin, Judge.

No. A-95-491: **Dunn v. Dunn.** 96 NCA No. 8. Affirmed as modified. Miller-Lerman, Chief Judge.

No. A-95-505: **State v. Ballard.** 96 NCA No. 4. Affirmed. Howard, District Judge, Retired.

No. A-95-507: **Gibson v. Gibson.** 96 NCA No. 34. Affirmed as modified. Howard, District Judge, Retired.

No. A-95-530: **In re Interest of Margarita T.** 95 NCA No. 50. Affirmed. Mues, Judge.

No. A-95-533: **State v. Stolley.** 95 NCA No. 42. Reversed and remanded with directions. Hannon, Judge.

No. A-95-537: **State v. Murtaugh.** 96 NCA No. 10. Affirmed. Sievers, Judge.

No. A-95-540: **Conklin v. Conklin.** 96 NCA No. 29. Affirmed. Hannon, Judge.

No. A-95-542: **Clark v. Abramson.** 96 NCA No. 25. Reversed and remanded for further proceedings. Norton, District Judge, Retired.

No. A-95-560: **State ex rel. Kavan v. Clarke.** 96 NCA No. 6. Affirmed. Miller-Lerman, Judge.

No. A-95-565: **In re Interest of Angelaura P.** 96 NCA No. 6. Affirmed. Mues, Judge.

No. A-95-568: **Allied Mut. Ins. Co. v. Farmers Ins. Exch.** 96 NCA No. 32. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-590: **State v. Kennedy.** 96 NCA No. 16. Affirmed. Hannon, Judge.

No. A-95-603: **Dixon v. Dixon.** 96 NCA No. 3. Affirmed. Inbody, Judge.

No. A-95-604: **State v. Brachtenbach.** 96 NCA No. 10. Affirmed. Moran, District Judge, Retired.

No. A-95-605: **State v. Hawes.** 96 NCA No. 11. Affirmed. Moran, District Judge, Retired.

No. A-95-616: **State v. Hruby.** 96 NCA No. 9. Affirmed. Sievers, Judge.

No. A-95-619: **In re Interest of Frank R.** 96 NCA No. 7. Reversed and remanded with directions to dismiss. Inbody, Judge.

No. A-95-626: **State v. Adams.** 96 NCA No. 16. Affirmed. Warren, District Judge, Retired.

No. A-95-627: **State v. Perry.** 96 NCA No. 7. Affirmed. Inbody, Judge.

No. A-95-642: **State v. Taylor.** 96 NCA No. 9. Affirmed. Miller-Lerman, Judge.

No. A-95-644: **State v. Middleton.** 96 NCA No. 5. Affirmed as modified. Miller-Lerman, Judge.

No. A-95-646: **State v. Tiff.** 96 NCA No. 13. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-651: **State v. Heckman.** 96 NCA No. 8. Affirmed. Moran, District Judge, Retired.

No. A-95-669: **State v. Adams.** 96 NCA No. 18. Reversed and remanded. Mues, Judge.

No. A-95-681: **State v. Paul.** 96 NCA No. 11. Affirmed. Hannon, Judge.

No. A-95-693: **Wilmart v. Cook Family Foods.** 96 NCA No. 9. Affirmed. Moran, District Judge, Retired.

No. A-95-707: **State v. Graham.** 96 NCA No. 13. Affirmed. Moran, District Judge, Retired.

No. A-95-738: **Loeffler v. Imperial Manor Nsg. Home.** 96 NCA No. 10. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-745: **In re Interest of Borius H. et al.** 96 NCA No. 21. Appeal dismissed in part, and in part reversed and remanded with directions. Inbody, Judge.

No. A-95-750: **State v. Sevener.** 96 NCA No. 12. Affirmed. Moran, District Judge, Retired.

No. A-95-769: **Becker v. Becker.** 96 NCA No. 14. Affirmed in part, and in part reversed and remanded with directions. Mues, Judge.

No. A-95-785: **In re Interest of Thomas M.** 96 NCA No. 13. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge.

No. A-95-800: **State v. Lundahl.** 96 NCA No. 12. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-801: **Allbaugh v. Scotts Bluff County.** 96 NCA No. 28. Affirmed. Sievers, Judge.

No. A-95-803: **State v. Wood.** 96 NCA No. 25. Affirmed. Norton, District Judge, Retired.

No. A-95-806: **State v. Bates.** 96 NCA No. 8. Affirmed. Inbody, Judge.

No. A-95-810: **State v. Martinez.** 96 NCA No. 21. Affirmed. Warren, District Judge, Retired.

No. A-95-851: **State v. Merrick.** 96 NCA No. 5. Affirmed. Irwin, Judge.

No. A-95-853: **State v. Swift.** 96 NCA No. 17. Affirmed. Warren, District Judge, Retired.

No. A-95-861: **State v. Ford.** 96 NCA No. 16. Affirmed. Warren, District Judge, Retired.

No. A-95-868: **State v. Bock.** 96 NCA No. 22. Affirmed. Mues, Judge.

No. A-95-875: **In re Interest of Zachary G.** 96 NCA No. 10. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-886: **State v. Knaub.** 96 NCA No. 13. Affirmed. Inbody, Judge.

No. A-95-942: **State v. Gray.** 96 NCA No. 23. Affirmed in part, and in part reversed and remanded for resentencing. Warren, District Judge, Retired.

No. A-95-973: **In re Interest of Christopher L.** 96 NCA No. 21. Affirmed. Mues, Judge.

No. A-95-990: **State v. Beistline.** 95 NCA No. 48. Affirmed in part, and in part reversed. Miller-Lerman, Judge.

No. A-95-993: **Spotanski v. Spotanski.** 96 NCA No. 21. Affirmed. Warren, District Judge, Retired.

No. A-95-1002: **State v. Gutierrez.** 96 NCA No. 17. Sentence of restitution vacated, and cause remanded with directions. Sievers, Judge.

No. A-95-1007: **Engel v. York Farmers Co-op.** 96 NCA No. 29. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-1021: **State v. Erickson.** 96 NCA No. 21. Affirmed. Norton, District Judge, Retired.

No. A-95-1044: **State v. Dragoo.** 96 NCA No. 20. Affirmed. Warren, District Judge, Retired.

No. A-95-1055: **State ex rel. Dalia v. Johnson.** 96 NCA No. 29. Affirmed. Miller-Lerman, Chief Judge.

No. A-95-1077: **Zoucha v. United Parcel Service.** 96 NCA No. 25. Affirmed. Norton, District Judge, Retired.

No. A-95-1083: **Hood v. Nebraska Plastics, Inc.** 96 NCA No. 23. Affirmed. Warren, District Judge, Retired.

No. A-95-1144: **Reid v. Girouard.** 96 NCA No. 28. Affirmed as modified. Sievers, Judge.

No. A-95-1175: **State v. Freeman.** 96 NCA No. 32. Affirmed in part, and in part vacated and remanded with direction. Mues, Judge.

No. A-95-1193: **State v. Crippen.** 96 NCA No. 18. Sentence of restitution vacated, and cause remanded with directions. Hannon, Judge.

No. A-95-1217: **State v. Mitchell.** 96 NCA No. 27. Reversed and remanded with directions. Mues, Judge.

No. A-95-1237: **State v. Harris.** 96 NCA No. 25. Affirmed. Sievers, Judge.

No. A-95-1245: **State v. Freeman.** 96 NCA No. 25. Affirmed. Norton, District Judge, Retired.

No. A-95-1285: **Feltz v. City of Ogallala.** 96 NCA No. 33. Reversed and remanded for further proceedings. Sievers, Judge.

No. A-95-1333: **State v. Roberts.** 96 NCA No. 31. Affirmed. Mues, Judge.

No. A-96-015: **State v. Salmons.** 96 NCA No. 25. Sentence vacated, and case remanded for resentencing. Irwin, Judge.

No. A-96-260: **State v. Stivers.** 96 NCA No. 27. Affirmed. Sievers, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

SOLAR MOTORS, INC., FORMERLY KNOWN AS BAKER CHRYSLER, PLYMOUTH, DODGE, INC., AND BRETT R. BAKER, APPELLEES AND CROSS-APPELLANTS, V. FIRST NATIONAL BANK OF CHADRON, APPELLANT AND CROSS-APPELLEE.

537 N.W.2d 527

Filed September 5, 1995. No. A-93-622.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party.
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. **Uniform Commercial Code: Loans: Contracts.** Lenders, as do other parties to a contract, have a general obligation of good faith and fair dealing under the Uniform Commercial Code.
4. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
5. **Uniform Commercial Code: Promissory Notes.** The general duty of good faith under the Uniform Commercial Code does not require a lender to call a demand note only pursuant to a good faith business judgment.
6. **Acceleration Clauses: Words and Phrases.** "Acceleration" requires a change in the date of maturity from the future to the present.
7. **Uniform Commercial Code: Promissory Notes.** Neb. U.C.C. § 1-208 (Reissue 1992) does not apply to a note payable on demand.
8. **Promissory Notes.** The holder of a demand note may demand payment at any time for any reason or for no reason.
9. ____. When a note is overdue and in default, a lender is entitled to call it.
10. **Contracts: Parol Evidence.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
11. **Promissory Notes: Parol Evidence.** A note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol

evidence.

12. **Uniform Commercial Code: Words and Phrases.** A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.
13. **Uniform Commercial Code: Contracts.** The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade, and course of dealing controls usage of trade.
14. **Uniform Commercial Code: Words and Phrases.** Course of performance is defined in the Uniform Commercial Code only in reference to sales.
15. **Contracts: Liability.** A modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded.

Trev E. Peterson and Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Steven M. Olsen, of Simmons, Olsen, Ediger & Selzer, P.C., for appellees.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

HANNON, MILLER-LERMAN, and INBODY, Judges.

HANNON, Judge.

This is a lender liability action in which Solar Motors, Inc., and Brett R. Baker sued the First National Bank of Chadron on the basis that it failed to finance the plaintiffs' business as promised. The trial court submitted the case to the jury on the theory that the bank breached its obligation of good faith and fair dealing by calling the two loans it made to Solar Motors, but refused to submit the case to the jury on a "breach of contract" theory. The jury awarded the plaintiffs a verdict for $204,357, and the bank appeals from that verdict. The plaintiffs cross-appeal, alleging that the trial court erred in failing to submit the case on a breach of contract theory and that it did not correctly define the term "good faith" in the jury instructions. We conclude that the bank did not breach any obligation of good faith or fair dealing when it demanded

payment of the promissory notes, that the court should have directed a verdict, and that the court correctly refused to submit the case to the jury on the theory of breach of contract. Other issues argued by the parties are considered moot and not discussed. We reverse, and remand with directions to set aside the judgment and dismiss the action.

I. SUMMARY OF FACTS

Since we conclude that the outcome of this action is determined by the terms of written documents, the oral conversations between the parties and their previous dealings will only be discussed as necessary to frame the issues.

Baker was employed by Northwest, Inc., as its office manager from 1985 to October 1988. That company was engaged in the business of selling both farm implements and automobiles in Chadron, Nebraska, and it operated a Chrysler franchise in Crawford, Nebraska. In September 1988, Baker had the opportunity to buy Northwest's automobile business, including the parts and service departments and its Chrysler franchise. In order to buy this business, it was necessary for Baker to arrange to buy a building and equipment from a third party, Jake Brill, to make a specific agreement with Northwest about purchasing its automobile business, to obtain Chrysler's agreement to issue him a franchise and to finance his new car inventory, and to obtain First National's agreement to finance his used car inventory and the purchase of parts and equipment. Baker made these arrangements during the fall of 1988.

On October 5, 1988, Baker purchased Northwest's car business, paying $133,000 for parts, tools and equipment, the Chrysler franchise, and a covenant not to compete. On October 10, 1988, Baker and his wife purchased the building, furniture, fixtures, equipment, and inventory of Solar Motors Inc. (a different entity than the plaintiff corporation in this action), for $200,333.12 payable in installments. During this time, the bank agreed to finance his used-car inventory and the purchase of parts and equipment. On December 20, during Baker's dealings with Chrysler, the bank wrote a letter to Chrysler stating that it had "agreed to finance the Used Car line with a new Corporation owned by Brett Baker" and to finance the purchase

of equipment on a 7-year amortized loan. On December 23, First National issued a letter addressed "To whom it may concern," stating that it had committed itself to lend the corporation Baker was forming $40,000 to purchase parts from Northwest "to be returned to Chrysler" and $40,000 on a 7-year amortization for the purchase of equipment.

During this time, Baker formed a new corporation that is one of the plaintiffs in this action, and by the time this action was started, that corporation was named "Solar Motors, Inc." Baker conducted all of his car business through that corporation. He and his wife retained ownership of the contract under which they purchased the property from Brill, and they rented that equipment and property to Solar Motors. Solar Motors was the only business entity that did business with the bank concerning the subject of this action. Baker is the president of Solar Motors and manages its operations.

The business was not put together all at one time. On December 19, 1988, Solar Motors signed a $125,000 promissory note to the bank for the floor plan financing of used automobiles. From time to time, when the outstanding balance of this loan exceeded $125,000, Solar Motors issued additional temporary notes to cover the excess. On December 19, Solar Motors also executed a financing statement and a security agreement purporting to give the bank a perfected security interest in much of the corporation's property to secure any existing or future debts. On May 11, 1989, Solar Motors executed the $40,000 loan for equipment. Both of these notes were prepared on identical, standard forms that contained the requisite blanks for a variety of different note types. The $125,000 note was filled out to provide for payment on demand, and the $40,000 note was filled out to require monthly payments of $728 over 7 years. The $125,000 note was later replaced with a note identical to the first except for date and interest rate.

Solar Motors made a profit in some months and lost money in other months. In June 1989, the bank complained that some cars had been on the floor plan for more than 6 months, and it also advised Solar Motors that it had commenced a new policy whereby it would hold the titles to all floor planned vehicles.

The bank honored Solar Motors' overdrafts as it had those of Northwest while Baker was working there. However, on February 16, 1990, it returned for insufficient funds two checks drawn by Solar Motors to pay Chrysler. On February 20, the money that was due because of the returned checks was wired to Chrysler, and the bank's president wrote Chrysler a letter at Baker's request in which he tried to allay any fears the returned checks might have engendered in Chrysler's representatives.

On March 5, 1990, First National wrote Solar Motors a letter stating that after reviewing the financial information it recently obtained, "we will require the following changes to be made in order to continue with the $125,000 floor plan line." Among the several changes listed in that letter were a limitation of the age of the vehicle the bank would finance, a rule that no personal draws would be financed, the imposition of a "hard charge" on Solar Motors' account because the bank thought the account was unprofitable, and an increase in the interest rate on the floor plan obligation. The letter caused considerable discussion between the parties. In its instructions to the jury, the court refers to the plaintiffs' claim that Solar Motors was not in default under the terms of this letter.

On August 23, 1990, First National wrote Solar Motors a letter demanding payment of the balance on both loans, which at the time was $35,984.15 on the equipment note and $100,564.32 on the note to finance the floor plan. Baker asked the bank to continue its financing, and in a letter dated November 6, 1990, the bank wrote Solar Motors, offering to make a "new commitment" under the terms specified in that letter. In that letter, the bank offered to continue for only 6 months if the stated requirements were followed by Baker and said that Baker must show "improvement at the end of the 6 month period for us to continue." That letter stated the offer remained open until November 15. The evidence does not show Solar Motors accepted the offer. Baker sought financing from other banks, but he found their terms to be unsatisfactory. On April 1, 1991, the bank wrote Solar Motors a letter stating that if the obligations were not paid in full by April 22, legal action would be commenced. On May 7, a new demand was made for payment of the balance of $33,702.72 on the equipment note

and $42,219.82 on the floor plan note. Later, the matter was turned over to the bank's attorney, and the notes were paid in full on June 24, 1991.

After the bank initially demanded that Solar Motors pay its notes, it did not loan Solar Motors any additional money to finance its used-car inventory. Solar Motors made payments on the floor plan note as it sold vehicles covered by it. Baker testified that the decline in Solar Motors' business was attributable to its inability to accept trade-in vehicles when selling new vehicles due to First National's refusal to continue Solar Motors' used-car floor plan financing. The business in Solar Motors' parts department also declined after August 1990 due to a decline in new-car purchases. Solar Motors voluntarily terminated its Chrysler franchise effective January 1991. Baker attempted to obtain financing for Solar Motors from other lending institutions, but either the institutions would not make the loan or Solar Motors was unwilling to accept the terms of any loan offered by other banks.

The plaintiffs introduced substantial evidence tending to establish their damages by way of lost profits, lost value of the franchise, and other expenses incurred. Since we find the plaintiffs failed to establish liability, we will not summarize the evidence on damages.

II. PLAINTIFFS' PETITION

In summary, the plaintiffs' petition alleges the purchase of the property by Baker and Solar Motors as outlined above; that in 1988, and again in 1990, the bank agreed to provide financing for Solar Motors' inventory of used automobiles and the purchase of equipment and parts from Northwest to stock the new business; that the agreement was "made verbally" and was then reflected in the letters described above dated December 20 and 23, 1988, and the promissory notes described in this opinion; and that the plaintiffs relied upon the bank's advice, encouragement, representations, and previous course of dealing in purchasing the property both as a corporation and as an individual. The plaintiffs further allege that when the bank demanded payment in August 1990, it breached its agreement to continue the floor plan financing established by the bank's

pattern and custom and the expectations of the plaintiffs in relying upon such pattern and custom, and that the bank did not provide financing for the $40,000 for parts as agreed.

Upon the basis of these allegations, the plaintiffs pled five theories of recovery, calling them "causes of action," under the following headings: (1) breach of contract, (2) breach of contract—good faith and fair dealing, (3) negligence, (4) misrepresentation, and (5) breach of fiduciary duty. Without being specific, the plaintiffs prayed for $413,718 in damages. The trial court instructed the jury only upon the second listed theory of breach of the duty of good faith and fair dealing.

In summary, the trial court instructed the jury that the plaintiffs claimed the bank agreed to provide financing and "breached that agreement to provide financing under the floor line note"; breached the covenant of good faith and fair dealing by calling that note on August 23, 1990; breached its agreement with the plaintiffs for continued floor plan financing established by the bank's pattern and custom and by the plaintiffs' expectations resulting therefrom; and treated them in a manner not in good faith. The court instructed the jury that it should find for the plaintiffs if it found by a preponderance of the evidence that the parties entered into the contract; that "the obligation to perform a contract in good faith and fair dealing requires that actions be taken based on a reasonable, good faith business judgment"; and that the bank breached the obligation of good faith and fair dealing, which resulted in damages. The jury awarded the plaintiffs a verdict of $204,357, and they were also awarded costs.

III. ASSIGNMENTS OF ERROR

First National appeals, alleging the district court erred as follows: (1) in determining that an implied covenant of good faith and fair dealing could govern the bank's decision to call a demand note, (2) in instructing the jury on both an objective and a subjective definition of good faith, (3) in submitting the issue of good faith to the jury, and (4) in submitting Baker's individual claim for damages. In addition, First National assigns errors in connection with damages. However, our conclusion regarding the issue of liability raised under its first assignment

of error makes consideration of its other assignments moot. Regarding the fourth assignment of error, the inclusion of Baker individually as a plaintiff in this case is confusing and probably improper. However, we do not consider this question because it would not affect the outcome of this appeal.

Solar Motors and Baker cross-appeal, alleging the district court erred in refusing to instruct the jury on the breach of contract theory. This issue will be separately considered later in this opinion. Solar Motors also alleges the trial court erred by instructing the jury on a subjective standard for the duty of good faith and fair dealing. This assignment is rendered moot by our decision on First National's appeal.

IV. STANDARD OF REVIEW

[1,2] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). 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. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

V. DISCUSSION

1. Good Faith and Demand Note

There are no Nebraska cases that consider whether a holder of a demand note may demand payment in the absence of a good faith business judgment to do so. A number of other jurisdictions have considered this question, and the vast majority of them have concluded that the holder of a demand note may demand payment at any time for any reason or for no reason.

In *Mirax Chemical v. First Interstate Commercial*, 950 F.2d 566 (8th Cir. 1991), the court held the demand provision in the loan agreement made the loan a demand obligation and that neither an unnecessary acceleration clause nor § 1-208 of the Uniform Commercial Code imposed the duty of good faith on

the lender when making a demand. In *Kham & Nate's Shoes No. 2 v. First Bank*, 908 F.2d 1351 (7th Cir. 1990), the court held the lender had the right to call demand notes for any reason satisfactory to itself. In this appeal from the ruling of a bankruptcy judge, the court stated, "The principle is identical to that governing a contract for employment at will: the employer may sack its employee for any reason except one forbidden by law, and it need not show 'good cause.' " *Id.* at 1358. The court further stated, "[W]e are not willing to embrace a rule that requires participants in commercial transactions not only to keep their contracts but also do 'more'—just how much more resting in the discretion of a bankruptcy judge assessing the situation years later." *Id.* at 1356.

In *Taggart & Taggart Seed v. First Tenn. Bank Nat.*, 684 F. Supp. 230 (E.D. Ark. 1988), *aff'd* 881 F.2d 1080 (8th Cir. 1989), the court held the defense of good faith under § 1-203 of the Uniform Commercial Code was not available to prevent collection of a demand note and cited § 1-208 as one of the reasons.

In *Pavco Industries v. First Nat. Bank*, 534 So. 2d 572 (Ala. 1988), the lender obtained summary judgment against the borrower's claim that the lender made an oral promise not to demand payment and the borrower's claim that the default provisions effected a change in the demand note.

The situation of the parties in *Centerre Bank of Kansas City v. Distributors*, 705 S.W.2d 42 (Mo. App. 1985), was similar to that of the parties in the instant case. In *Centerre Bank of Kansas City*, the borrowers were operating a business which had been purchased with a loan from a bank evidenced by a demand note. Later, the bank demanded payment of the note. A jury awarded the borrowers a $7,528,880 verdict on the basis that the bank did not make the demand in good faith. In reversing that decision, the Missouri court stated the following:

> The imposition of a good faith defense to the call for payment of a demand note transcends the performance or enforcement of a contract and in fact adds a term to the agreement which the parties had not included. . . . The

> parties by the demand note did not agree that payment would be made only when demand was made in good faith but agreed that payment would be made whenever demand was made.

Id. at 48.

The following cases from other jurisdictions have similar holdings: *Spencer Companies v. Chase Manhattan Bank, N.A.*, 81 B.R. 194 (D. Mass. 1987); *Simon v. New Hampshire Sav. Bank*, 112 N.H. 372, 296 A.2d 913 (1972); *Flagship Nat. Bank v. Gray Distribution Syst.*, 485 So. 2d 1336 (Fla. App. 1986); *Fulton National Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980); and *Allied Sheet Met. v. Peoples Nat'l Bk.*, 10 Wash. App. 530, 518 P.2d 734 (1974).

There are a few cases with a minority view. In *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), a loan agreement contained a demand provision, and no notice of demand was given. The court stated, "[t]he demand provision is a kind of acceleration clause, upon which the Uniform Commercial Code and the courts have imposed limitations of reasonableness and fairness." *Id.* at 760. We do not agree that a demand provision is a kind of acceleration clause. The *K.M.C. Co., Inc.* court cites § 1-208 of the Uniform Commercial Code and *Brown v. AVEMCO Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979), to support that proposition. *Brown* deals exclusively with the good faith requirement of various types of acceleration clauses and does not mention demand notes at all. *Brown* is concerned with using the acceleration clause as an excuse to advance the due date of a promissory note and as such does not consider the question we are considering. *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9 (1st Cir. 1987), is also considered to be a case espousing the minority view and cites *K.M.C. Co., Inc.* as authority. In *Reid*, a loan agreement provided for a loan commitment, and the lender demanded payment under the demand note before the commitment was fulfilled.

The cases from other jurisdictions that considered this issue address some or all of the three following arguments put forth by borrowers to support their positions. They are:

(a) Good Faith Under § 1-203

[3] First, the plaintiffs argue that the bank's demand is controlled by Neb. U.C.C. § 1-203 (Reissue 1980), which provides, "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." To support their argument on this point, the plaintiffs rely upon *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); *Gilbert Central Corp. v. Overland Nat. Bank*, 232 Neb. 778, 442 N.W.2d 372 (1989); and *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985). These cases do not consider the rights of a holder of a demand note, but, rather, the limits of good faith when a lender refuses to fulfill a commitment to make a loan. They support the proposition that lenders, as do other parties to a contract, have a general obligation of good faith and fair dealing under the Uniform Commercial Code. However, these cases do not address whether the general obligation to act in good faith limits the rights of a holder of a demand note to call the note at any time for any reason or for no reason.

[4] "Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below." *Anderson v. Nashua Corp.*, 246 Neb. 420, 425, 519 N.W.2d 275, 280 (1994).

> In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

Durand v. Western Surety Co., 245 Neb. 649, 651, 514 N.W.2d 840, 842 (1994).

[5] Large lending institutions rarely call a demand note because they need the money, but, rather, from concerns somehow related to the ultimate collection of the money loaned. The principal reason lenders call notes is that the lenders believe the borrowers might be heading in a direction where it would be more difficult or impossible to collect the loaned funds. An experienced banker once observed, partly in jest, that

anyone can loan money; the secret is in getting it back. As long as the borrower agrees, we see nothing legally wrong with a lender reserving the right to call a loan at any time. Such an arrangement gives the lender a clear right to protect his, her, or its position by calling the loan at any time, unfettered by any concern that a judge or a jury might not agree with the lender's judgment. Traditionally, lenders obtain the right to call a loan at any time for any reason or for no reason by loaning on a demand note. If a lender could only call a demand note based upon a good faith business judgment, a loan upon a demand note would become a loan for indefinite time. We conclude the proper interpretation of § 1-203 is that the general duty of good faith does not require a lender to call a demand note only upon a good faith business judgment.

(b) Acceleration Clause

The second argument is based upon the interpretation of a demand promissory note that also contains an acceleration clause. The documents in this case have an acceleration clause as quoted below in this opinion. Such a provision is obviously unnecessary in the case of a demand note. In the case at hand, all of the promissory notes were prepared from a standard form. These standard forms necessarily include acceleration provisions for those instances when the note is to be an installment note, or a term note. The security agreement used to secure Solar Motors' obligation also contains a similar acceleration clause. If the bank had called the $125,000 note under the acceleration clause and not the demand provision, Neb. U.C.C. § 1-208 (Reissue 1992), discussed below, would have allowed the bank to call the loan only upon a good faith opinion that the security was impaired or if the risk of the loan's defaulting had increased.

(c) Effect of § 1-208

The third argument is based upon § 1-208, which reads as follows:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import

> shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

[6] The plaintiffs argue that a demand is an acceleration, and therefore, this statute imposes the burden of good faith in demanding payments. We disagree. A demand is not an acceleration. "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated." Neb. U.C.C. § 3-108 (Reissue 1980). "'Acceleration' requires a change in the date of maturity from the future to the present." *Production Credit Ass'n of Fargo v. Ista*, 451 N.W.2d 118, 122 (N.D. 1990). A payment date, which does not by definition exist in a demand note, cannot be moved.

Also, under the "Purposes" section of the comment for § 1-208, the following is stated: "Obviously this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an agreement or to paper which in the first instance is payable at a future date." Section 1-208 simply does not apply to demand notes.

[7] As stated previously, when interpreting a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994). We conclude that § 1-208 does not apply to a note payable on demand.

[8] We conclude that the holder of a demand note may demand payment at any time for any reason or for no reason.

2. Parol Evidence

(a) Promissory Notes

The petition and the jury instructions seem to ignore the distinction between the $125,000 note and the $40,000 note. By its terms, the $125,000 note was payable on demand. The

$40,000 promissory note was a 7-year amortized obligation. Obviously, the bank could not demand payment of the 7-year note at any time. However, the 7-year promissory note contains provisions that would cause the note to be in default and thus payable. The two provisions which might apply in this case are as follows:

> The Borrower shall be in default [when] (1) the Borrower shall fail to pay, when due, any amount required hereunder [or] (5) any change . . . occurs in the condition or affairs (financial or otherwise) of the Borrower or any Guarantor of this promissory note which, in the opinion of the Lender, impairs the Lender's security or increases its risk with respect to this promissory note.

The note also provides that "[u]nless prohibited by law, the Lender may, at its option, declare the entire unpaid balance of principal and interest immediately due and payable without notice or demand at any time after default, as such term is defined in this paragraph."

[9] The evidence does not show that Solar Motors had failed to keep its payments current before the bank's demand on August 23, 1990, and whether the bank would have been justified in calling the note based on some opinion of increased risk would be a jury question. However, we do not reach this question. The bank did not seek to foreclose, and Solar Motors did not pay the balance after the demand on August 23. The note was not paid until June 24, 1991, after considerable negotiations and a further demand by the bank on May 7. At that time, the note was in default under the express terms of the note because Solar Motors had not made all of the monthly payments. There is no question that when a note is overdue and in default, a bank is entitled to call it. See *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991). There is no question that the $125,000 note was payable on demand.

We next consider whether other evidence might change the effect of the provision in the promissory notes Solar Motors gave to First National.

(b) Effect of Parol Evidence Rule

The plaintiffs' petition is based upon the theory that the contract controlling the parties' rights is composed of an agreement "made verbally" in the fall of 1988 regarding the bank's willingness to finance Solar Motors, along with the letters of December 1988 and the provisions in the $125,000 and $40,000 notes, and the bank's statement that it would not continue financing Solar Motors unless it agreed to the changes listed in the letter dated March 5, 1990, along with the bank's pattern and custom and the expectations of the plaintiffs in relying upon such pattern and custom of the bank with other customers. The court's jury instructions submitted this theory, but limited it to the plaintiffs' claim that the bank breached an implied obligation not to call the note financing the used-car inventory by a call not based upon a good faith business judgment. In the following discussion, we conclude the plaintiffs' position is incorrect because the parol evidence rule bars the admissibility of prior oral agreements to a written contract, and the evidence of "pattern and custom" cannot modify the terms of a promissory note that is not ambiguous. Furthermore, evidence does not establish that the letter dated March 5, 1990, changed the terms of the promissory note because that letter does not propose any change in the demand provision of the loan documents, and even if it did, there is no evidence that these terms were accepted.

[10,11] The usual statement of the parol evidence rule is that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement. *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977). "The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement." *Five Points Bank v. White*, 231 Neb. 568, 571, 437 N.W.2d 460, 462 (1989). "A note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence." *Id.* The terms of repayment are dictated by the terms contained in a promissory note.

Assuming but not deciding that in the fall of 1988, the bank made a binding commitment to loan Baker money to establish

a car business, the terms of that agreement were fulfilled insofar as the loan to finance the used-car inventory is concerned by the loan made in December 1988, and the commitment to make the equipment loan was fulfilled by the loan of May 11, 1989. Under the parol evidence rules summarized above, the obligations of the parties for those loans are controlled by the written instruments executed in connection with those loans, and the previous conversations, letters, etc., cannot be used to vary their terms.

(c) Pattern and Custom

The plaintiffs pled that an agreement was established by the bank's pattern and custom and the plaintiffs' expectations in reliance on said pattern and custom. The court instructed the jury upon that notion. We are unable to find the phrase "pattern and custom" in the Uniform Commercial Code; however, the term "custom" appears in Neb. U.C.C. § 1-102(2) (Reissue 1980). This section states in significant part: "(2) Underlying purposes and policies of this act are . . . (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . . ." In the index of the Nebraska Uniform Commercial Code, the word "custom," listed as "custom and usage," references code sections covering course of dealing and usage of trade. See Neb. U.C.C. § 1-205 (Reissue 1992). The word "pattern" does not appear in the Uniform Commercial Code.

In their brief, the plaintiffs make the following argument:

> [T]he Bank refuses to recognize the existence of a pattern and custom of dealing between the parties, of which the jury was instructed without objection, and which existed from the time the relationship started in 1988. That pattern and custom specifically involved the existence of a loan agreement that included notes for the floor planning of used vehicles and the purchase of equipment with that obligation amortized over seven years, agreements to loan funds for the purchase of parts and building improvements, the agreement to provide financial statements, specific agreements on curtailments and other similar arrangements.

Brief for appellees at 21.

We do not believe Nebraska law envisions a contract composed of a mishmash of oral agreements, practice and custom of the parties, and written agreements.

[12-14] "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." § 1-205(2). Clearly the facts that the plaintiffs rely upon to establish pattern and custom are not encompassed within this definition. The events relied upon by plaintiffs as quoted in their brief cannot be "course of dealing" because that term applies to "a sequence of previous conduct between the parties to a particular transaction," § 1-205(1), and the events stated in the plaintiffs' brief relate to things that happened after the demand note was signed.

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

§ 1-205(4). The matters relied upon by plaintiffs as a pattern and custom could perhaps be included in the term "course of performance"; however, that term is defined in the code only in reference to sales. See Neb. U.C.C. § 2-208 (Reissue 1992).

The $125,000 note and the security documents executed at the same time are completely integrated documents insofar as the floor plan financing is concerned. The replacement note was likewise an integrated document, and its provisions were not ambiguous. The same is true with regard to the later executed $40,000 note. Neither of these documents can be varied by pattern and custom of the parties, course of dealing, usage of trade, or course of performance.

(d) Subsequent Agreements

[15] The trial court's jury instructions refer to the plaintiffs' claim that Solar Motors was not in default under the terms of the March 5, 1990, letter. Plaintiffs do not plead the letter of March 5 as a contract or a novation, or that it changed the terms

of a contract that existed at the time it was written. The letter by its terms merely states that if certain changes were not made the bank would not continue the line of credit; it cannot be interpreted to mean that if the changes are accomplished, the loan will become payable only upon a good faith demand. Furthermore, it could not be a modification of the existing contract because it was not pled as such, and "[a] modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective." *Grand Island Prod. Credit Assn. v. Humphrey*, 223 Neb. 135, 138-39, 388 N.W.2d 807, 810 (1986). There is no evidence of mutual assent.

We conclude that there was no enforceable agreement that would change the effect of the demand provision in the $125,000 note or the default provision of the $40,000 note and that both notes were due by their terms, and the bank's right to demand payment was not limited by any requirement of good faith.

VI. PLAINTIFFS' CROSS-APPEAL

In their cross-appeal, Solar Motors and Baker allege the district court erred in refusing to instruct the jury regarding breach of contract and in instructing the jury on a subjective instead of an objective standard for the duty of good faith and fair dealing.

The plaintiffs' position regarding an instruction on the breach of contract theory can best be explained by a quote from their brief. In their brief, the plaintiffs refer to loan agreements between the bank and Baker entered into in October 1988 and in the following months of 1988 and 1989, which the plaintiffs state were later reduced to writing through letters and promissory notes. The brief then states the following:

> Baker maintains that the Bank breached these agreements by terminating the credit relationship at a time when the obligations owed by Baker to the bank were current; by failing to follow the initial agreement that contemplated a business relationship for more than one year; by failing to loan funds for the purchase of parts as agreed; by failing to loan funds for the making of building improvements as

> agreed, and; by failing to abide by its agreement to loan funds for the purchase of equipment, which note was amortized over a period of seven years and was called by Bank at a time when Baker was current in the payments on the note.

Brief for appellees on cross-appeal at 39.

As the above quote demonstrates, the cross-appeal merely presents the same claim under a breach of contact theory as was presented under the good faith and fair dealing theory, and it is rejected for the reason that the parol evidence rule prevents one from establishing a cause of action for contract upon a hodgepodge of negotiations and preliminary agreements.

The plaintiffs never developed a clear agreement with regard to any commitment the bank might have made to loan Solar Motors or Baker $40,000 to purchase parts. We are therefore unable to consider the possibility that the bank might have breached such a commitment. We therefore conclude the trial court should be affirmed on its refusal to submit the case to the jury on the plaintiffs' theory of breach of contract.

VII. CONCLUSION

We conclude that the trial court should not have submitted the case to the jury on the basis of alleged bad faith on the part of the bank. The trial court is directed to set aside the judgment of $204,357 and dismiss the case.

REVERSED AND REMANDED.

KARL F. MARTEN AND ADAM J. MARTEN, APPELLEES, V. BARBARA A. STAAB AND JUDITH M. MARTEN, COPERSONAL REPRESENTATIVES OF THE ESTATES OF FRED J. MARTEN AND RUTHANNA MARTEN, DECEASED, APPELLANTS.

537 N.W.2d 518

Filed September 5, 1995. No. A-94-621.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.

2. **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, when credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Auctions: Words and Phrases.** An auction is a public sale of property to the highest bidder by one licensed and authorized to do so and the goal is to obtain the best financial return for the seller by free and fair competition among bidders.
4. **Auctions.** In an auction with reserve, the bidder is deemed to be the party making the offer while the auctioneer, as agent for the seller, is the offeree. In a with reserve auction, the principal may choose to withdraw the property at any time, before the hammer falls, and if the bidding is too low—the auctioneer need do nothing and there is no contract between the seller and the bidder.
5. ____. In an auction without reserve, also known as an absolute auction, the seller becomes the offeror and the bidder becomes the offeree by reason of the collateral contract theory. In a without reserve auction, the seller is absolutely committed to a sale once a bid has been entered, no matter what the level of bidding is or the property's true value. In a without reserve auction, once one bid has been made the seller's offer to sell is held to be irrevocable.
6. **Auctions: Words and Phrases.** The collateral contract present in a without reserve auction is simply the owner's agreement with all potential bidders that he will not withdraw the property from sale, regardless of how low the highest bid might be, and therefore the highest bona fide bidder at an auction without reserve may insist that the property be sold to him or that the owner answer to him in damages.
7. **Auctions.** An auction is deemed to be conducted with reserve unless there is an express announcement or advertisement to the contrary before the auction takes place.
8. **Contracts: Specific Performance.** Fundamental to a decree of specific performance is a meeting of the minds of the parties to the contract.
9. **Contracts: Specific Performance: Proof.** In order to establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance.
10. **Auctions: Statute of Frauds.** A memorandum of sale or contract must be signed by the seller in an auction sale of real estate in order to comply with the statute of frauds.

Appeal from the District Court for Thomas County: JOHN P. MURPHY, Judge. Reversed.

Claude E. Berreckman, of Berreckman & Berreckman, P.C., for appellants.

Robert E. Wheeler for appellees.

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

SIEVERS, Chief Judge.

We are called upon in this case to review the law of auctions. The dispute arises from an auction of a 2,840-acre ranch located in Thomas and Cherry Counties, Nebraska, which was owned by the decedents, Fred J. and Ruthanna Marten.

This action was brought in the district court for Thomas County by Karl F. Marten and Adam J. Marten, who contended they were the successful bidders for the Marten ranch at the auction. Karl and Adam contended that they were entitled to a decree of specific performance conveying the ranch to them.

FACTUAL BACKGROUND

Fred J. and Ruthanna Marten ranched on land located in Thomas and Cherry Counties, Nebraska. They had two sons, Karl F. and Herman, and two daughters, Barbara A. Staab and Judith M. Marten. Adam J. Marten, Karl's son, is the grandson of Fred and Ruthanna.

Fred died in May 1985, Ruthanna died in January 1991, and neither had a last will and testament. Although Karl had leased the ranch in partnership with his brother, Herman, prior to 1983, in 1983 Karl became the sole lessee of the ranch. Upon his father's death, Karl and his mother were appointed copersonal representatives of Fred's estate, and upon his mother's death, Karl and his sister Judith were copersonal representatives of that estate. The actual management of the estates was left to Karl, but he failed to properly perform his duties, and he was removed as personal representative of both estates in March 1993. Karl's sisters, Judith and Barbara, were appointed copersonal representatives and they, through their attorney, Tedd Huston, conducted the auction at issue to sell the Marten ranch. Huston was also a licensed real estate broker.

On September 30, 1993, an auction for the Marten ranch was held at the Thomas County courthouse in Thedford, Nebraska. The sale was tape-recorded by counsel for Karl and Adam and transcriptions of the tape are in the record before us, as well as the actual tape.

Huston began by describing the land and setting forth the legal description and improvements. In his initial remarks about the property and the sale, Huston stated, "This will be an

auction with no protected bids, however, the sale is upon authority of the county court . . . ." Huston was asked before the bidding began if the tracts were going to be tied together, and the following exchange then occurred:

> HUSTON: It's going to be sold only by the tracts and we're not going to have one overall bid for all.
>
> ADAM MARTEN: Is this an absolute sale?
>
> . . . HUSTON: This is a sale subject to confirmation by the court, as I just read. It will have to be approved by the county court.

The land was offered in five separate tracts. As he called for bids on each separate tract, Huston announced a starting or minimum bid. The only bidder at the sale was Adam, who offered bids well below the starting bid for each tract.

At the conclusion of the sale, Mike Moody, a rancher and official with the Purdum State Bank, delivered his personal check for $52,200 to the clerk of the sale, Howard Furgeson, and to Huston. This check recited bids of "$125" on Tracts 1 and 2 and "$75" on Tracts 3, 4, and 5, which were the amounts per tract bid by Adam. The memo portion of the check stated, "20% down on 2840 acres Fred J. Marten Estate."

Moody's involvement requires reference to exhibit 9, a document entitled "Agreement for Option to Purchase Real Estate," dated October 7, 1993. Moody is designated therein as "Seller," and Karl and Adam are designated as "Buyer[s]." This agreement recites:

> Seller and Buyer had on September 29, 1993 made an oral agreement that Adam J. Marten would bid at the sale of the real property of the Estates of Fred Marten and Ruthanna Marten on September 30, 1993 for Michael L. Moody as real purchaser, who would pay the consideration for the purchase, and in whose name the real property would be placed as buyer . . . .

This October 7 agreement further provided that Moody, the "real purchaser," granted "an option to buy the premises" to Karl and Adam on terms conforming to the terms of the purchase "of the real estate by Michael L. Moody from the Estates of Fred Marten and Ruthanna Marten." The option is said to be "severable and may be exercised in whole or in part,"

although there is no evidence in the record that the option was ever exercised. Paragraph 13 of the agreement provides in part, "This option may be exercised by Buyer, jointly or severally, with prior ten day notice to the other buyer, by payment of the consideration and costs set out herein."

TESTIMONIAL EVIDENCE

Moody testified that he made the downpayment at the sale and that the check was returned to him thereafter, but he is ready, willing, and able to perform the contract once marketable title is established. Moody admitted hearing Huston state that Adam's bids were inadequate and could not be accepted. Furgeson and Huston testified that Moody and Adam were told that the proffered check would not be cashed. The check was never presented for payment, and Huston returned the check to Moody with a letter dated December 8, 1993.

Karl testified that he had an option agreement to purchase the real estate and that he had financing for that purpose through the Purdum State Bank or Moody. Karl testified that he was "ready, willing and able to purchase this property under the option if the deed is delivered to Adam Marten from that sale." The parties then stipulated that Adam's testimony would be the same as Karl's as to the option agreement and that Adam "was the sole bidder at the sale."

Huston testified that when conducting sales such as the one on September 30, he believes it is necessary at the end of the auction to secure a written contract of sale from a successful bidder and that is his typical practice. No contract was executed in this instance.

DISTRICT COURT DECISION

In this lawsuit by Karl and Adam, Karl claims "[t]hat by reason of the Option Agreement [he] has an interest in the sale of the premises to Adam J. Marten." The prayer of the petition asks that the court order that "the defendants and their attorney specifically perform the contract above-alleged upon tender by the plaintiffs of the final payment due under that contract."

After trial, the district court found in favor of Adam on his petition for specific performance and ordered the personal representatives to provide evidence of good title and, upon

payment of the balance of the amount bid on the five tracts, to deliver the deeds to the tracts of land to the highest bidder at the auction, Adam. The district court reasoned that a valid sale of the land had occurred at the auction, since the only bids made and "marked down" were those of Adam. The court further found that the auctioneer and clerk accepted a check for the 20 percent downpayment on the property and that the auctioneer also stated that the bids would be submitted to the county court for confirmation. However, the district court noted that the auctioneer's statement that the matter would be submitted to the county court for confirmation was a "condition" that was really a "noncondition," since the county court had no authority to accept or reject any bids. The district court further reasoned that there was no evidence that there was a "protected bid" or that the personal representatives were reserving the right to reject any bids below a certain amount and thus the property was to sell absolutely to the highest bidder. The district court concluded that the action of the auctioneer and the clerk in marking down Adam's bids and in accepting the check for the downpayment signified that the land had been sold. Finally, the district court determined that the statute of frauds was satisfied by Moody's check.

STANDARD OF REVIEW

[1,2] An action for specific performance sounds in equity. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). 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, when credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

District Court Decree of Specific Performance.

[3] An auction is a public sale of property to the highest bidder by one licensed and authorized to do so and the goal is to obtain the best financial return for the seller by free and fair competition among bidders. 7A C.J.S. *Auctions and*

Auctioneers § 1 (1980). There are essentially two kinds of auctions: those "with reserve" and those "without reserve." Although not specifically so stated, the import of the district court's decision was that this auction was without reserve and that, as a consequence, the land had to be sold to Adam—the only, and necessarily the highest, bidder. The facts are essentially undisputed as to what happened and what was said at the auction held September 30.

Although there is not a decided Nebraska case which comprehensively discusses the nature of auctions, our review of the literature leads us to the conclusion that the law of auctions is rather well established and does not vary in any appreciable degree from jurisdiction to jurisdiction. Nebraska has statutory provisions governing the sale of goods by auction under the Uniform Commercial Code, see Neb. U.C.C. § 2-328 (Reissue 1992), but none specifically addressing sales of real estate which impact this case.

[4] One of the most complete discussions of the law of auctions is found in *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541 (Wyo. 1980), and we rely extensively on the detailed analysis of the Wyoming court. In an auction with reserve, the bidder is deemed to be the party making the offer while the auctioneer, as agent for the seller, is the offeree. *Id.* The ramification of a with reserve auction is that the principal may choose to withdraw the property at any time, before the hammer falls, and if the bidding is too low—the auctioneer need do nothing and there is no contract between the seller and the bidder. *Id.* See, also, 1 Corbin on Contracts, § 4.14 (Joseph M. Perillo rev. ed. 1993); 7A C.J.S., *supra*, §§ 1-27.

[5] In contrast, an auction without reserve, or a no reserve auction, is where the legal relationship between the seller and the bidder is reversed. This is also called an "absolute auction." See 1 Corbin on Contracts, *supra*. See, also, *Holston v. Pennington*, 225 Va. 551, 304 S.E.2d 287 (1983) (holding that absolute auction is equivalent to auction without reserve). In the without reserve auction, the seller becomes the offeror and the bidder becomes the offeree by reason of the collateral contract theory. *Pitchfork Ranch Co., supra*. This role switching results in a significant readjustment of rights and obligations. For

example, in a without reserve auction, the contract is consummated with each bid, subject only to a higher bid being received because the seller makes his offer to sell when he advertises or announces the sale as a without reserve sale to the highest bidder. Consequently, the seller may not withdraw his property once any legitimate bid has been submitted, as he may do at any time before the hammer falls in a with reserve auction. In the without reserve situation, the seller is absolutely committed to a sale once a bid has been entered, no matter what the level of bidding is or the property's true value. *Id.* See, also, 7A C.J.S., *supra*, § 11. Accord, *Holston, supra*; *Zuhak v. Rose*, 264 Wis. 286, 58 N.W.2d 693 (1953); *Wilcher v. McGuire*, 537 S.W.2d 844 (Mo. App. 1976). In a without reserve auction, once one bid has been made the seller's offer to sell is held to be irrevocable. 1 Corbin on Contracts, *supra*.

[6] The collateral contract present in a without reserve auction is simply the owner's agreement with all potential bidders that he will not withdraw the property from sale, regardless of how low the highest bid might be, and therefore the highest bona fide bidder at an auction without reserve may insist that the property be sold to him or that the owner answer to him in damages. *Wilcher, supra*, citing *Drew v. Deere Co.*, 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963).

[7] An auction is deemed to be conducted *with reserve* unless there is an express announcement or advertisement to the contrary before the auction takes place. *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied* 381 U.S. 904, 85 S. Ct. 1449, 14 L. Ed. 2d 286 (1965); *Chevalier v. Town of Sanford*, 475 A.2d 1148 (Me. 1984); 7A C.J.S., *supra*. When an auctioneer presents an article for sale, he ordinarily is not making an operative offer and such an auction is "with reserve." This is true even though the seller has advertised or made statements that the article will be sold to the highest bidder, as such statements are usually "merely preliminary negotiation, not intended and not reasonably understood to be intended to affect legal relations." 1 Corbin on Contracts, *supra* at 639–40.

What kind of auction was held on September 30 at the sale of the Marten ranch? The sale bill does not even advertise an auction, but, rather, advertises an "estate sale." The only terms

set forth are "20% down on date of sale. Balance upon confirmation by the Court. Possession March 1, 1994." The legal notice, published once a week for 4 weeks before the sale, simply says "public auction" and sets forth the same terms quoted above, but does not contain any characterization of the auction as "absolute" or "without reserve." The legal notice also states that the sale is authorized by the county court. Thus, on the basis of the sale bill and the legal notice, this certainly was not a without reserve auction. In *Holston v. Pennington*, 225 Va. at 557, 304 S.E.2d at 290, the court noted that the words " 'subject to seller's confirmation' " would have negated an auction without reserve if they had been uttered before the sale. However, in that case, at the time those words were uttered, an absolute auction had already been announced, conducted, and terminated, and therefore, the words were too late to have any effect. In *Wilcher v. McGuire*, 537 S.W.2d at 847, a sale advertised as "subject to confirmation by the owner" provided recognition of the fact that the owner had only authorized a " 'with reserve' " sale. In the instant case, the sale was clearly advertised as conditional, and it seems elementary that conditional sales are generally inconsistent with absolute auctions.

Huston began the sale with Tract 1, which was 640 acres known as the Marten home place. Before calling for bids, Huston stated, "We're going to open the bidding on Tract Number 1 at $200 per acre. That's our starting bid, $200 per acre." Karl stated, "I'll give you $125 for that." Huston advised that Karl's bid would not be accepted unless he submitted a letter of credit, which had not been done, and therefore Karl's bid was rejected. (There is no contention made in this appeal that Karl should have been allowed to bid.) At this point, Adam, Karl's son, bid $125, and Huston responded, "I can't accept that because our opening is $200 per acre." An exchange then occurred between Huston and Adam's attorney, Robert Wheeler, as to whether there was a bid in hand for $200 per acre, and Huston ultimately said, "The only one we have here is for $125. Adam, is that what you said? Alright. We'll move on to Tract Number 2 which is the north half of section 12." Huston stated, "We've agreed to start the bid on this tract of land which

includes irrigated crop land at $300 per acre. I will accept bids in multiples of five. Do we have any bids." Adam then bid $125 per acre for that tract. A discussion then ensued as to whether that bid was accepted, and Huston responded, "What do you want, Adam, I just said he marked it down. Does anyone make a bid other than the $125 that's been offered by Adam?"

Huston then offered Tract 3, stating, "The starting bid on Tract Number 3 is $100 per acre. Do we have any other bids?" Adam stated, "I bid $75 per acre." Huston responded, "Mark it down. Are there any other bids over $100 per acre? Seeing none, I'll move on to Tract Number 4." Huston described Tract 4 and stated, "We'll accept any bids over $100 per acre for this tract. Do we have any bids?" Adam stated, "$75 per acre," and Huston responded, "$75. Do we have any other bids?" Huston then offered Tract 5, stating, "We'll accept bids over $100 for Tract Number 5." Adam stated, "Bid $75 per acre," and Huston responded, "We have a bid that we've marked down for $75 per acre. Are there any other bids?"

At this point, Huston stated that he would declare a recess, come back, and go through the process again, but he stated:

> I can tell you this, however, that none of the bids which have been submitted after this date will be confirmed by the court. You might keep that in mind when we come back. We'll take it for about 15 minutes.
>
> . . . Folks, we're going to start in a few minutes but I'll have to tell you this, if we don't have any more strong enthusiasm than we had before we'll probably walk away from here without a sale. Right now the court won't confirm any of the bids. If you're interested in any of this property and you want to make a bid this is your chance to do it, and if you don't get the bids that we think are probable or reasonable it probably will not be confirmed by the court, so I just want you to understand we have gone to a lot of trouble and cost to produce this sale. And if we don't have any more enthusiasm than we've had we probably will not have a sale. OK, are you all ready to begin?

Then Huston was asked whether he was "saying that if [sic] you don't have the bids that you stated from the start?" Huston's

response was as follows:

> HUSTON: We have bids that have been written down on paper but I can tell you that they, we would not ask that they be confirmed by the court, and I'm sure the court would not confirm them.
>
> SALE ATTENDEE: We do have an opening bid, then, that you've stated on each tract?
>
> . . . HUSTON: Yes. OK, with that in mind we'll start out with Tract Number 1, this is the home place. We have a bid I believe of $125. Do we have any other bids on Tract Number One? If we have anyone interested in that tract, please show me your card. Are there any other bids on Tract Number One?
>
> SALE ATTENDEE: Can I ask a question?
>
> . . . HUSTON: You may.
>
> SALE ATTENDEE: Is your bidder at the sale today?
>
> . . . HUSTON: No.
>
> . . . WHEELER: That raises another question. I thought you said you had a bid of $125, is that Adams' [sic] bid?
>
> . . . HUSTON: We have Adam's bid.

No further bids were received and Huston announced:

> [HUSTON:] These bids have been recorded, they'll be reported to the court and we'll take no further bids. These bids have been recorded, they'll be reported to the court. I can assure you that probably the court will not confirm any of these because they are inadequate. If any of you are interested in purchasing any of this property in small tracts that we have here, it can be sold at a private sale and if you are please contact me or one of the co-personal representatives of the estate. Thank you all for coming.
>
> . . . WHEELER: Mr. Huston, before you close,
>
> . . . HUSTON: The sale has been open for an hour, and is now officially closed.
>
> . . . WHEELER: Mr. Huston, I don't think it's been open an hour from the time you started the bidding[.]
>
> . . . HUSTON: We started at . . .
>
> . . . WHEELER: Well I know that's the time you started, but may I ask you, you had bids and from my

> understanding it's an absolute sale. Are you then accepting the bids of Adam[?]
>
> . . . HUSTON: First of all, it's not an absolute sale. What we've done, we've posted this, and we've told your [sic] several times "These bids will be submitted to the court and the court will either confirm or not confirm[.]"
>
> . . . WHEELER: So are you saying you are accepting Adam's bid to submit to the court for confirmation?
>
> . . . HUSTON: It's the only one we have to submit to the court so obviously since we have no other bids. We will submit it.
>
> . . . WHEELER: Thank you.
>
> . . . HUSTON: Thank you all for coming. The sale is adjourned.

Huston testified that he had established "starting bids" but admitted that he did not have in hand anyone willing to pay that price. In his testimony, Huston admits that at the sale he announced the "starting bid" on each tract which was not completely accurate because prior to the sale no one had actually bid on the land. Huston was asked what he meant when he announced, "there is no protected bid," and his response was that "the co-personal representatives of the estate were not going to bid personally on the sale." However, in his deposition, Huston answered the same question by stating, "I meant that we didn't have anybody that was going to protect the estate at all except the court." Huston testified that he did not accept any of Adam's bids, but, rather, "marked them down" by having the clerk of the sale record the bids made by Adam.

We find on our de novo review that there was no advertised or announced intention to sell the ranch without reserve or at absolute auction. The evidence in this regard is quite clear.

Neither the sale bill nor the published notice advertised an "absolute" auction or a "without reserve" auction. We next look to the statements of Huston before bidding began. The principal statement of Huston relied upon by the appellees to show a without reserve auction is: "This will be an auction with no protected bids, however, the sale is upon authority of the county court . . . ." This statement must be reviewed with reference to the totality of the circumstances. Before the bidding began,

Adam asked, "[I]s this an absolute sale?" Huston did not respond affirmatively, but, rather, stated, "This is a sale subject to confirmation by the court, as I just read. It will have to be approved by the county court." If this answer, clearly setting forth a condition of sale, does not negate any notion that this was an absolute or without reserve auction, then the announcement, before the bidding began, of the need for bids above the "starting bids" surely does so.

It makes no difference whether the sellers set starting bids, announced that they would not accept Adam's bids, or said that the sale was subject to confirmation by the court. The fact of the matter is that there was never any expressed intention or promise by Huston to hold an unconditional, absolute, or without reserve sale of the land to the high bidder on September 30, irrespective of the price bid for the land. The personal representatives on two occasions stated, through their agent, that it was not an absolute sale, advised what the "floor" was in terms of price for each tract, and stated that although they would submit Adam's bids to the court (which they probably were not obligated to do under the law of auctions), Huston nonetheless announced that they would not ask the court to confirm the bids. Finally, they asked those in attendance to contact them about a private sale. We find it difficult to conceive how it could be more clear that this was not an absolute, or without reserve, auction.

In this trial, the principal witness for Karl and Adam was Allan D. Woodward, a Broken Bow resident who has been an auctioneer nearly 33 years, handling both personal and real property. Bearing in mind the comments of Huston during the auction, we quote the following testimony from Woodward, elicited by the trial judge:

> Q Okay. If I'm going to run an auction and say there are no protected bids, and I say I have a starting bid of a thousand dollars, and somebody bids $995, do I have to accept that bid?
>
> A No.
>
> . . . .
>
> Q . . . Let me back-up. I may not have asked that question very artfully: If I say this is not a protected bid

> sale, and I say, instead of saying I have a starting bid of X, I say "I will open the bidding at X" and somebody comes in below that, do I have to accept that bid?
>
> A No.

We contrast the facts of this case with those of *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541 (Wyo. 1980), which was unquestionably a without reserve auction. In *Pitchfork Ranch Co.*, Jerry Housel was selling the 70,000-acre Bar TL Ranch, and the brochure circulated to prospective bidders contained the following language: " '[The] 70,000 acre BAR TL RANCH properties will be offered at public auction by KENNEDY & WILSON AUCTIONEERS, INC., of Los Angeles, California in cooperation with George McWilliams, Auctioneer, Bozeman, Montana. *There will be no minimums and no reserves. . . .*' " (Emphasis in original.) *Id.* at 544. The Wyoming court also recited that advertising placed in newspapers around the world stated that the sale was an " 'absolute no minimum auction.' " *Id.*

Pitchfork Ranch was the second highest bidder at the auction and sued for specific performance. Housel, doing business as the Bar TL Ranch, had secured an assignment of the rights of the highest bidder as a solution to the problem described by the Wyoming court in the following terms:

> In the no-reserves situation, the seller is absolutely committed to the sale once a bid has been entered, no matter what the level of bidding or the seller's notion of the property's true value. This is the catastrophic situation in which Housel found himself where $4,000,000.00 worth of his property was being bid at the $1,600,000.00 level. He could not extricate his property from the sale because he had committed it to sale to the highest bidder (no matter how low the bid)—but that was his only commitment—that he would sell to the highest bidder. He was not committed to selling to the next highest bidder.

(Emphasis omitted.) *Id.* at 549. Housel and the Bar TL did manage to extricate themselves from this catastrophe because they had acquired the rights of the high bidder, under an arrangement undisclosed in the Wyoming court's opinion, and thus Pitchfork Ranch did not get the Bar TL. The instant case

is factually dissimilar from *Pitchfork Ranch Co.*, although the law extensively discussed and analyzed therein is applicable. Moreover, the facts of *Pitchfork Ranch Co.* are instructive on what is said or done before bidding begins in order to create an absolute auction. Since the seller is at the mercy of an uncertain bidding process, which may or may not be fair and open, it is logical that there be clear intent and express designation as such before absolute, or without reserve, auctions are held to have occurred. This is not present in the instant case.

[8,9] Fundamental to a decree of specific performance is a meeting of the minds of the parties to the contract. *Horn v. Stuckey*, 146 Neb. 625, 20 N.W.2d 692 (1945). At the most elemental level, there was no meeting of the minds here. A with reserve auction was clearly conducted on September 30, and Adam's bids were all below the clearly announced bidding floor for each tract. There is no evidence of the sellers' acceptance of Adam's bids for any purpose except for submission to the county court, an unnecessary procedure in any event, since in a with reserve auction the sellers can reject—which was done in several different ways by Huston. Huston told Adam that they would not ask for confirmation and that the bids were inadequate. To establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance. *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988). Unconditional acceptance of Adam's bids is absent, and thus, there was no sale.

[10] Even if one could find a meeting of the minds and thus a sale, which we cannot, we nonetheless also reject the district court's conclusion that there was compliance with the statute of frauds. *Benson v. Ruggles & Burtch v. Benson*, 208 Neb. 330, 303 N.W.2d 496 (1981), held that a memorandum of sale or contract must be signed by the seller in an auction sale of real estate in order to comply with the statute of frauds. The personal check proffered and signed by Moody does not meet that requirement in any way. It was received by Huston with the statement that it would not be presented for payment; it was not so presented and was returned. Given the peculiar facts of Moody's involvement, we are uncertain what status to assign to him. However, we at least know that he was not the seller.

Nothing was signed by the seller, the personal representatives, or their agent, Huston, to bind them to a sale.

CONCLUSION

We have found that this was not an absolute or without reserve auction; therefore, the sellers were free to reject Adam's bids, which they unquestionably did. Since unconditional acceptance by the sellers in a with reserve auction is necessary to decree specific performance, it naturally follows that the district court erred in granting specific performance.

REVERSED.

WORLD RADIO LABORATORIES, INC., A NEBRASKA CORPORATION, APPELLEE, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLANT.

538 N.W.2d 501

Filed September 12, 1995. No. A-93-739.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party.
2. **Damages: Juries: Appeal and Error.** The question of the amount of damage is one solely for the jury, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.
3. **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.
4. **Limitations of Actions: Accountants: Negligence.** Unless there is some circumstance changing the rule, the statute of limitations on any error committed in an audit begins to run when the audit report is delivered to the client.
5. **Limitations of Actions.** If there is no dispute on the facts, the determination of when a statute of limitations begins to run is a question of law for the court.
6. **Limitations of Actions: Appeal and Error.** When the facts are in dispute on the issue of when a statute of limitations begins to run, the finding of the trial court will not be set aside unless clearly wrong.
7. **Limitations of Actions: Negligence: Notice: Words and Phrases.** Discovery under Neb. Rev. Stat. § 25-222 (Reissue 1989) means notice of facts which

would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts.

8. **Limitations of Actions: Accountants: Malpractice: Negligence.** Evidence of contributory negligence of a client in the case of malpractice of an accountant auditing a company's books has a definite limit because of the nature of an auditor's task.
9. **Accountants.** It is clear that an audit of an institution's financial records serves, at least in part, as a check on the authority and expertise of the institution's own financial personnel.
10. **Principal and Agent: Presumptions.** The general rule is that agents are conclusively presumed to have performed their duty to communicate facts concerning their agency to their principal.
11. **Corporations.** A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, deals with the corporation as a private individual, and in no way represents it in the transaction.
12. **Corporations: Accountants.** The failure of a corporate officer to disclose information to an auditor is not attributed to the corporation as a matter of law when the corporate officer's failure to disclose the information was not for a corporate purpose.
13. **Damages: Words and Phrases.** Profits are the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.
14. **Jury Instructions: Damages.** It is the duty of the court, on its own motion, to instruct on all material issues raised by the pleadings and evidence. The jury should be told the manner in which the damages sustained by the plaintiff are to be measured and arrived at.
15. **Jury Instructions.** Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence.
16. **Jury Instructions: Damages.** It is the duty of the trial court to refrain from submitting to the jury the issue of damages where the evidence is such that the jury cannot determine that issue without indulging in speculation and conjecture.
17. **Damages: Appeal and Error.** Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
18. ____: ____. Where the measure of damages had been challenged by objections to the pleadings or evidence, or by motion for a directed verdict or by the tendering of an instruction, the rule that the theory of damages relied upon by the parties in the trial will be accepted does not apply.
19. **Malpractice: Attorney and Client: Proof.** In order to recover for legal malpractice, the plaintiff must prove (1) duty, (2) breach of duty, (3) proximate cause, and (4) resulting damages.
20. **Accountants.** Accountants are held to the same standard of care as lawyers, doctors, architects, and other professional people engaged in furnishing skilled services for compensation.
21. **Directed Verdict: Damages.** A directed verdict may be granted on the issue of damages if the plaintiff fails to prove any damages.
22. **Damages: Proof.** The rule that lost profits from a business are too speculative

and conjectural to permit the recovery of damages therefor is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof.

23. ____: ____. The plaintiff must plead and prove damages. Further, the plaintiff's burden of proof cannot be sustained by evidence which is speculative and conjectural.
24. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
25. ____: ____. Where it has been proved that damage has resulted and the only uncertainty is as to the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. Data for an exact calculation is not necessary.
26. **Real Estate: Valuation.** To permit a person, even a qualified one, to appraise a tract of land on the basis of capitalization of income by an estimate of the operation of a typical business would be guesswork at every stage.
27. **Accountants: Malpractice.** While minor inaccuracies in an audit or report may be overlooked, where by reason of the accountant's negligence, inaccuracies and failure to report facts of serious character appear, he or she is not entitled to compensation.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Jeff A. Anderson, of Kutak Rock, William G. Campbell, of Rogers & Wells, Philip A. Lacovara and Lynne M. Raimondo, of Mayer, Brown & Platt, and Maureen E. McGrath for appellant.

Joseph E. Jones and Michael L. Schleich, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

In this action, World Radio Laboratories, Inc. (WR), sued Coopers & Lybrand (C & L), an accounting partnership, for professional malpractice in connection with the latter's audit of WR's financial statements for the fiscal years ending in the last week of May or first week of June in the years 1981 through 1984. WR alleges C & L was negligent in auditing WR's annual reports for those years because it did not discover a large account payable that was not listed on WR's balance sheets for 1981 through 1984 and because it failed to advise WR's

management that its accounting system did not contain adequate internal controls. The undiscovered payable was $890,111 at the time of C & L's last audit, which covered the fiscal year ending June 2, 1984. In spite of the claim that C & L's malpractice made WR insolvent, WR continued in business and made a profit for the years 1986 and 1987, but it suffered a loss in 1988 and filed for bankruptcy in 1989. In submitting the case to the jury, the court instructed it to determine the damages for each year separately. The jury awarded WR damages of $0 for 1981, $10,300 for 1982, $12,000 for 1983, and $17,018,000 for 1984.

C & L maintains that the statute of limitations bars recovery for 1982 and 1983 and that contributory negligence bars any recovery as a matter of law. C & L also assigns a myriad of alleged errors concerning damages. We conclude that neither the statute of limitations nor contributory negligence bars recovery as a matter of law and that the verdict of liability should be affirmed. We also conclude the jury was not properly instructed on the measure of damages and that the principal evidence relied upon by WR to establish significant damages is speculative and conjectural as a matter of law. We therefore affirm in part, in part reverse, and remand for a new trial on the issue of damages.

BACKGROUND AND FACTS

Leo Meyerson started WR in 1935 and sold radio equipment and supplies to amateur radio operators by mail order. Larry Meyerson, Leo's son, joined the company in 1961. In 1967, the company opened its first retail store in Omaha. This store sold not only radios and electronic equipment and parts, but also hi-fi equipment and sound recordings. Later the company expanded into TV, video, stereo, and similar equipment. In 1984, the company began to sell extended warranties for the electronics equipment it sold. The company quit the mail-order business in 1970. By 1979, the company operated 10 stores. By January 1985, it operated 21 stores. At its peak in 1986, it operated 28 stores that were situated in various cities in Nebraska, Iowa, Missouri, Kansas, and Illinois. By 1980, sales were better than $8 million per year; by 1984, $25,839,043; and by 1987, $40,562,746.

During the first half of the 1980's, WR was a growing company that appeared to have excellent prospects for continued growth. Larry Meyerson owned more than 85 percent of the outstanding stock of WR and was its president, and his father was chairman of its board of directors, but did not attend meetings. Larry Meyerson hoped WR would have 50 stores by 1987. Toward that end, in 1979 he hired Joseph Riha, a C.P.A. who had worked for C & L, as the chief financial officer for WR. Riha became vice president and treasurer of WR and remained in charge of the accounting department until June 1985. In the early 1980's, Meyerson dreamed of "going public," that is, of offering WR stock to the public. By 1983, he mentioned the subject to C & L accountants. They introduced him to a man from New York, Tom Fitzpatrick, and in 1984 or late 1985, C & L arranged for Fitzpatrick to meet with Meyerson in Omaha concerning "going public." Fitzpatrick told Meyerson that when WR had approximately $2 million in net profits before taxes it could consider an initial public offering of its stock. Meyerson expected profits would be near that figure by June 1985. He wanted to sell WR stock to the public to raise money for expansion.

WR used 13 accounting periods per year, each with 4 weeks. Through 1985, WR's fiscal year ended in the last week in May or first week of June of each year. After 1985, the fiscal year was changed to end in the last week of January or first week of February. These practices resulted in WR's fiscal year ending on a slightly different date each year.

In the early 1980's, WR installed a computer system. This system did all of the company's accounting as well as inventory and sales reporting. The system automatically recorded every sale at all of the stores, determined the cost price of the item that was sold and subtracted it from the sale price, and computed the gross profit on each sale, or gross margin. The system produced on a daily basis the total figures of the gross sale price, the cost price, and the gross margin for all sales of all stores. This information was interfaced with the general ledger in the computer.

Part of WR's inventory was financed by a "floor plan." Under a floor plan system, the company selling products to a

retailer delivers the products to the retailer, but is paid by a financing company. When the company financing the floor plan pays the supplier, it sends a statement to the retailer. The retailer then pays the financing company according to the terms provided in an agreement between the retailer and the financing company. Usually the financing company obtains a discount from the supplier, and therefore, the retailer does not pay the financing company interest if it pays the financing company on time. When products are delivered under the floor plan, the financing company sends a notice, or invoice, to the retailer showing the merchandise delivered, its cost, and the date or dates by which the retailer must pay the financing company.

WR started financing its floor plan with Westinghouse Credit Corporation (WCC) in 1982. WCC became one of WR's largest creditors. During the fiscal year ending in June 1984, WR did $3 or $4 million of business with WCC. Most of the invoices sent by WCC allowed WR to pay the amount due on the invoice in more than one installment. Riha claimed the computer system could not handle invoices which contained multiple payment dates under the same invoice number, and therefore, the records of WR's account with WCC could not be kept on computer. Amazingly, in this day of computerization, WR kept track of its debt to WCC by putting the unpaid invoices in a special drawer in the desk of a particular accounting clerk. The clerk manually kept track of the dates when payments were required to be paid according to the invoices and manually prepared checks to pay WCC before each due date. Meyerson or Riha signed the checks. The debt to the General Electric Credit Corporation, the company that financed WR's floor plan before WCC, was handled in the same fashion.

The WCC payable was not automatically listed with the other accounts payable on the trial balance maintained by WR's computer accounting system. In order to reflect that debt on the balance sheet, someone would have needed to manually add the WCC debt to WR's liabilities and make an appropriate adjustment of the income statement. This was never done, and therefore, WR's balance sheets all showed total liabilities to be too low by the amount of the WCC payable and the profits for each year to be too high by the amount that the WCC obligation

increased during the particular accounting year. The financial statements that C & L audited and the monthly financial statements that Riha prepared and presented to Meyerson and the company's bank were simply wrong. As of the date of the last audit, June 2, 1984, the liability to WCC was $890,111.

C & L audited WR financial statements each year from 1970 through 1984. In addition, C & L accountants attended quarterly management meetings and consulted with Meyerson from time to time. C & L auditors did not locate the missing payable.

Apparently WR had no clouds on its horizon until May 21, 1985. Riha testified that on that date, he first discovered the WCC payable was not on the financial statements audited by C & L for the fiscal year ending June 2, 1984. Immediately, he told Meyerson. Meyerson immediately contacted his lawyer and another accountant. By May 23, 1985, C & L had agreed that the WCC liability had not been included as a payable in the June 1984 balance sheet. WR's banker was told of the problem, and Riha resigned a short time later.

Understandably, the management of WR faced severe problems upon learning of the missing account payable. In summary, WR's evidence showed that WR's management found it did not have a financial statement to present to its bank or to its suppliers. New manufacturers in particular required a current financial statement before selling merchandise. Thus, WR was unable to acquire new product lines. It was unable to advertise competitively. WR's bank required Meyerson to personally guarantee WR's loan at the bank. The bank would not extend the additional credit necessary to accommodate desired growth. Management was required to spend 14 to 15 hours per day coping with the problems, and employee morale decreased.

WR introduced much additional testimony to show how its financial condition prevented it from expanding or meeting competition head on, which it otherwise could have done, and thus encouraged its competitors to enter its markets. WR implies these handicaps ultimately caused its bankruptcy in 1989.

Arthur Young (AY), another national accounting firm, replaced C & L as WR's auditor shortly after the problem was

discovered. AY auditors reported they were unable to prepare an income statement for the fiscal year ending June 1, 1985, because WR's existing accounting system lacked adequate internal accounting controls.

By a letter dated April 10, 1986, AY formally reported to the stockholders of WR that the accounting system existing on June 1, 1985, and for several year prior thereto, lacked the internal controls necessary to safeguard assets, to ensure transactions were executed as authorized, and to permit the preparation of financial statements in accordance with generally accepted accounting principles (GAAP). This malpractice represents a substantial part of WR's claim against C & L, and WR claims this malpractice and the failure to discover the obligation to WCC combined to support WR's claims. For this reason, we summarize the report in some detail.

In summary, the AY report dated April 10, 1986, states WR's accounting procedures were deficient as follows: (1) Debts to WCC and its predecessor were not included in the general ledger or year-end or monthly reports, annual balance sheets were not reconciled to income statements, the system lacked financial reporting by store or special sales events, and Riha had access to the company computer system by his home computer; (2) the numerical order of sales invoices was not maintained or controlled, and items such as sales reports, rebates, and contract sales were not reconciled to the general ledger; (3) too many people had the ability to change inventory records; in the case of special sales held out of the stores, the merchandise was not inventoried before and after the sale and the inventories were not reconciled with the merchandise sold; the inventory was not integrated with sales and other reports; and while perpetual inventory records were adjusted to physical counts, no attempt was made to investigate the differences between the actual counts and the perpetual inventory; (4) accounts payable were not investigated and reconciled, payables could be removed from the "payable file," and receiving reports were uncontrolled; (5) numerical controls over checks were not maintained, bank accounts had not been reconciled in a timely manner, too many people had check-writing authority, and blank checks and voided checks were not controlled. The letter

indicated that many of the above matters had been corrected between June 1, 1985, and the date of the letter, but AY complained that the chief financial officer still had unlimited check-writing authority.

The record contains a great deal of testimony about these missing controls and the effect of their absence. Stanley Scott, a well-qualified C.P.A., testified as an expert on accounting standards. Scott's testimony is sufficient to support a finding that the auditor is responsible for discovering and then advising management on any deficiency in the accounting system concerning accounting controls. Scott testified that a material deficiency in such controls allows a risk or an error of such magnitude that it would adversely impact the financial statements of the company. The evidence establishes that GAAP require an auditor to discover and disclose missing controls to management and that C & L did not do so for at least the years 1982 through 1984. Scott opined C & L did not follow GAAP in auditing WR.

Luke Northwall, a C.P.A. who formerly worked for AY, started working for WR on June 25, 1985. He replaced Riha. Northwall testified that WR's management probably had the entire accounting system changed to comply with AY's recommendations by the fall of 1985. However, he testified that prior to this, an interstore transfer system would not prevent somebody from stealing. He felt the gross margin reports were accurate, but they should have been integrated with the general ledger. The cash systems would not safeguard company assets, and there were "weaknesses" in the key city funds, co-op advertising claims, and layaway and loaner policies.

Meyerson testified that he was not aware of these deficiencies in the company's accounting system until 1985, and upon learning of the need for change he set about to correct the system. If he had been advised of the need for a better system, he would have incorporated the changes immediately. Also, had he known about the WCC payable, he would not have paid bonuses.

After an inventory was completed on or about June 1, 1985, it was apparent that WR was insolvent. There was at least a $2.8 or $3 million decrease in inventory from that on the books

versus what was counted. By March 28, 1986, AY had prepared a balance sheet which shows that as of June 1, 1985, WR had assets of $9,929,528, liabilities of $10,177,692, and a negative net worth of $248,164. In order to obtain an income statement, AY prepared a financial statement for the short period from June 2, 1985, through February 1, 1986. The income statement showed a net income for that period of $1,224,663. That report showed the stockholders' equity had increased to $934,482 by February 1, 1986.

After AY closed its Omaha office, Peat Marwick audited WR for the fiscal year ending January 31, 1987. That report showed a net income of $1,229,782 for that year and that the stockholders' equity had increased to $2,157,594 as of January 31, 1987. The audit report for the year ending January 30, 1988, showed a loss of $1,529,659 and a stockholders' equity on that date of $346,809. In March 1988, the Meyerson family stock was redeemed, and Malcolm Ballinger and Northwall became the owners of WR. The company filed for bankruptcy on March 29, 1989.

WR'S ALLEGATIONS OF DAMAGES

The operative petition was filed February 25, 1987, before the losses of 1988 and before the bankruptcy of 1989. In this petition, WR pled that C & L's negligence proximately caused it to be damaged in 15 various ways as specified in 15 subparagraphs. Mainly, the petition lists the problems and difficulties WR encountered as a result of its inability to prepare a financial statement, its limited capital, and its inability to obtain more capital, and the petition lists the business opportunities WR lost as a result of these difficulties. No value is pled for any of these alleged damages. The petition also contains allegations of incurred expenses for attorneys, accountants, and polygraph operators, as well as for overtime expense, bonuses paid, and profit-sharing contributions made, but no value is assigned to any of these items. It also contains allegations of lost discounts, lost rebates, and inventory losses suffered by WR and alleges that stockholders' equity and the value of the business are less than they would have been. No value is placed on any of the above items, but that section of the

petition ends with the allegation that WR has been damaged in the amount of $18,151,945.

EVIDENCE OF DAMAGES

Exhibit 180.

Northwall testified to establish the foundation for exhibit 180. His testimony and this exhibit are the bases for WR's experts' testimony to establish damages. Northwall and other accountants testified that a financial statement for the year ending June 1, 1985, could not be prepared, because of the inadequate accounting controls existing before AY was retained as WR's accounting firm.

A balance sheet was prepared by AY for June 1, 1985, and an earnings statement was prepared by AY for the period from June 2, 1985, to February 1, 1986. The period contained 9 periods of 4 weeks each. Peat Marwick prepared an earnings statement for the next fiscal year ending January 31, 1987. For ease of expression, we will call this approximately 22-month period the 1986-87 period.

Northwall computed what percentage the expenses during the 1986-87 period bore to the gross sales during that period. For instance, he determined direct operating expenses during the 1986-87 period were 22.09 percent of the gross sales revenues during that same period. He found that during that period, the cost of merchandise sold was 69.73 percent of gross sales. He then assumed that the direct operating expenses and the various rebates, costs, and expenses for each of the years 1981 through 1984 would be the same percentage of gross sales for each respective year. He testified that he had confidence that the gross margin reports of 1983 through 1985 were substantially correct, that he used these, and that the figures he obtained for gross margin for 1981 and 1982 were accurate. In this way, he computed the net income for each of these years separately.

By this procedure, Northwall arrived at his opinion of what the net profit of WR both before and after taxes would have been had C & L not been negligent. The results of these computations are shown in the first two columns below. For comparison purposes, similar figures obtained from WR's actual annual financial statements are shown in the last two columns:

Earnings

Year Ending	Northwall's Net Before Taxes	Northwall's Net After Taxes	WR Fin/St Net Before Taxes	WR Fin/St Net After Taxes
5/30/81	$ 641,296	$ 320,648	$ 111,084	$ 90,084
5/29/82	538,131	269,066	31,726	33,926
5/28/83	906,721	453,360	349,441	239,441
6/2/84	1,072,770	536,385	584,110	376,140
6/1/85	1,380,615	690,307	none available	
2/1/86	(short year)		1,360,734	1,309,834
1/31/87			1,537,487	825,687

Northwall added the net-income-after-taxes figure he obtained for each year to stockholders' equity shown on the balance sheet that C & L had prepared for May 31, 1980. By this method, Northwall computed what he opined to be the stockholders' equity of WR at the end of each fiscal year from 1982 through 1985, if C & L had not been negligent. The results of these computations are shown in the first column in the table below. For comparison purposes, we have shown the value of stockholders' equity as shown on the actual financial statements of WR, together with a note as to which accounting firm prepared the particular financial statement:

Stockholders' Equity

Year Ending	From Ex. 180	From WR's Records	Audited by
5/31/80		$ 790,691	C & L
5/30/81	$1,118,941	888,647	C & L
5/29/82	1,389,581	924,147	C & L
5/28/83	1,858,380	1,179,027	C & L
6/2/84	2,416,798	1,555,170	C & L
6/1/85	3,138,293	none available	
2/1/86		934,482	AY
1/31/87		2,157,594	Peat M
1/30/88		346,809	Peat M

WR's expert on value, Laurie Shahon, relied directly upon Northwall's opinion that WR should have had a net profit for

the fiscal year ending on June 1, 1985, of $690,307, although she testified she was aware of the other information contained on exhibit 180, but she did not explain any significance it might have had.

Shahon's Opinion.

Shahon, an investment banker working out of New York, testified for WR on the value of WR as of May/June 1985. Her qualifications as an investment banker to testify on the value of WR, as distinguished from the factual bases upon which her testimony was based, are not questioned. We therefore will not detail her education or experience other than to say that she appears to have extensive experience working with private corporations "going public." She explained that for a company "to go public," the company sells stock to the public and creates a market where the stock can be bought and sold publicly. She also had experience in this field with companies that were in the business of retail sales of electronics equipment "going public." WR retained her to give her opinion on the value of WR.

As background for her testimony, Shahon gathered public information on seven consumer electronics companies that had "gone public" as of early 1985, such as Audio/Video Affiliates, Inc.; Best Buy Co., Inc.; Circuit City Stores, Inc.; et cetera. These companies operated stores in different parts of the United States. She testified to extensive investigation of the capital structure and other aspects of each of these companies that were available publicly. She testified on the different aspects of these companies, their varying debt-to-asset ratios, et cetera. She made no attempt to correlate this information with reference to the price/earnings ratios she collected and relied upon for her opinion. She made no attempt to explain or to depreciate the difference between the differing price/earnings ratios for the various companies or for the variation of the ratios for one company from one month to the next. She determined that the price/earnings ratios of five companies were relevant to a determination of the price/earnings ratios of WR, and she compiled the price/earnings ratios of these companies for each month from January through May 1985. These price/earnings ratios varied for each month for each company, and they were

as high as 20.38 and as low as 11.11.

She testified that she was asked to value WR for the May/June period of 1985 as if WR "Exhibit 180 had been the case." She testified that "assuming the numbers contained on Exhibit 180" had been the case, "World Radio was worth between 8 and 11 million dollars." She also testified that the value of WR under the situation in which it actually found itself in June 1985 as disclosed by its balance sheet showing a $250,000 negative net worth was "virtually worthless."

Shahon testified that she based her opinion on WR's value from exhibit 180 and upon her determination that companies such as WR would have a price/earnings ratio in the range of 11:1 to 16:1, that is, the value of its stock would be from 11 to 16 times its annual earnings rate. Exhibit 180 showed the earnings for the year ending June 1, 1985, to be $690,307. She used $700,000 and multiplied that figure by 11 and 16 and arrived at values of $7,700,000 to $11,200,000. There is no other expert testimony showing a loss in WR's profits or the value of its capital.

There is evidence which shows that WR paid fees to C & L for auditing of $13,000, $14,000, and $15,000 for 1982, 1983, and 1984, respectively. In addition, for the same years, WR paid nonauditing fees of $4,232, $10,207, and $10,920, respectively. There is also evidence that WR paid $94,810.50 to AY for auditing services it performed after June 1, 1985, but this amount appears to include $5,000 for services to Meyerson personally and for other services that do not appear to be caused by the negligence of C & L.

Meyerson, Northwall, and other witnesses also testified to the problems, difficulties, and lost opportunities that WR's management encountered between the discovery of the problem and bankruptcy, but no attempt was made to place a dollar value on these matters. WR's arguments both before the jury and before this court establish that WR relies upon Northwall's and Shahon's testimony to establish damages.

Jury Instructions.

In instruction No. 18, the court instructed the jury that it "must fix the amount of money which will fairly and fully

compensate the plaintiff for its loss proximately caused by the alleged negligence of the defendant." Instruction No. 18 also told the jury that the law recognizes only compensatory damages and that the award of damages must be based upon evidence, not speculation, guess, or conjecture, and not be influenced by prejudice or sympathy. In addition, the court gave instruction No. 19, which stated the following:

> The plaintiff seeks damages in the form of lost profits by claiming that the negligent conduct of the defendant prevented its established business from earning profits. In order to do so, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that it is reasonably certain that such profits would have been realized except for the negligence, and (2) that the lost profits can be ascertained and measured from the evidence with reasonable certainty.
>
> While lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. The evidence must show with reasonable certainty both that such damages did, in fact, occur and the extent of those damages.

The court gave no other instructions on damages. Thus, the only element of damages upon which the court instructed the jury was that of lost profits.

ASSIGNMENTS OF ERROR

C & L assigns 12 errors. Space limitations require that these assignments be organized and simplified. In summary, C & L alleges the trial court erred (1) by not holding the statute of limitations barred recovery for the years 1982 and 1983 and (2) by not holding contributory negligence barred recovery as a matter of law. The remainder of the assignments of error are concerned with damages, which will be explained in the damages section of this opinion.

STANDARD OF REVIEW

[1-3] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993);

Bartunek v. Geo. A. Hormel & Co., 2 Neb. App. 598, 513 N.W.2d 545 (1994). " 'The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.' " *American Tel. & Tel. Corp. v. Thompson*, 193 Neb. 327, 330, 227 N.W.2d 7, 9 (1975) (quoting *Van Wye v. Wagner*, 163 Neb. 205, 79 N.W.2d 281 (1956)). 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. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

STATUTE OF LIMITATIONS

The jury awarded no damages for 1981, and C & L claims recovery for any malpractice that might have occurred in 1982 and 1983 is barred by the statute of limitations. The jury award for these years is insignificant when compared to the verdict for 1984, but C & L argues that the improper submission of these years had an adverse effect on the award for the following year.

[4] Neb. Rev. Stat. § 25-222 (Reissue 1989) provides claims for professional negligence shall be brought within 2 years after the alleged act, omission, or failure to render the professional service. Unless there is some circumstance changing the rule, the statute of limitations on any error committed in an audit begins to run when the audit report is delivered to the client. *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). The audit report for the fiscal year ending in 1982 was mailed on October 5, 1982, and the report for the next year was mailed on August 5, 1983. This action was filed on May 20, 1986. The statute of limitations has run on these years unless it is extended on some recognized basis.

Section 25-222 also provides: "[I]f 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 . . . ."

[5,6] The issue was separately tried by the court under Neb. Rev. Stat. § 25-221 (Reissue 1989), and the court made a general finding that the statute of limitations did not bar recovery. If there is no dispute on the facts, the determination of when a statute of limitations begins to run is a question of law for the court. *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988); *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). However, when the facts are in dispute on that issue, the finding of the trial court will not be set aside unless clearly wrong. *Norfolk Iron & Metal, supra.*

[7] The evidence shows that on May 21, 1985, Riha and Meyerson suspected and perhaps learned that C & L had failed to discover that the WCC payable was not on the audited financial statement for 1984 and possibly for the earlier years. Discovery under § 25-222 means " ' " 'notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts.' " ' " *Norfolk Iron & Metal*, 230 Neb. at 422, 432 N.W.2d at 23 (citing *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935)). The evidence clearly would support a finding that Riha and Meyerson did not know about this matter before May 21, 1985. The transcript shows the petition was filed on May 20, 1986, which is within 1 year after Meyerson learned of the problem.

With regard to the negligent failure to advise WR's management of the lack of adequate internal accounting controls, the record would support a finding that WR's management did not know about this negligence until after it learned of the other problem, and therefore, recovery of any damages for this negligence is likewise not barred.

C & L argues that circumstantial evidence establishes that Riha and Meyerson had knowledge of facts which should have put them on notice before May 21, 1985, and that this knowledge on the part of Riha and Meyerson would have put WR on notice before May 21, 1985, insofar as the statute of limitations is concerned. On this basis, C & L argues the statute of limitations prevents recovery. If the evidence would support such a conclusion, the trial judge did not accept this interpretation, and of course, in the later trial, the jury did not

accept it. Whether the knowledge possessed by these corporate officers would have constituted an earlier discovery for purposes of the statute of limitations as a matter of law raises the same basic question as to whether such knowledge required a finding that WR was contributorily negligent as a matter of law. We shall consider that question in the next section of this opinion, and we conclude that it does not.

We conclude the trial court was not clearly wrong in holding the statute of limitations did not bar WR's action for 1982 and 1983.

CONTRIBUTORY NEGLIGENCE

C & L does not dispute the correctness of the jury's finding that it was negligent. However, it argues that recovery is nonetheless precluded by contributory negligence. C & L alleges that the corporate officers, namely Riha and Meyerson, either knew the WCC payable existed and deliberately hid that fact from C & L or should have known it existed, and therefore, WR was contributorily negligent as a matter of law. Both Riha and Meyerson denied they knew that the WCC payable was not included within the audited financial statement. There is no evidence that would require a finding as a matter of law that Meyerson knew or should have known that the WCC liability was not included in the financial statements.

The evidence shows that Riha set up the system in which the records of the debt to WCC were kept in a desk drawer. He knew this debt was not contained on the list maintained on computer. He prepared a monthly financial statement by hand, and the evidence shows that he did not add the WCC account payable to the liabilities on the balance sheets that he prepared monthly. He would necessarily have obtained the accounts payable list from the computer, and he offered no explanation of why he did not realize this list did not contain the account which he claimed he determined could not be put on computer. His explanation was "I blew it. I mean I missed it." This is an admission that he was negligent.

[8] Evidence of contributory negligence of a client in the case of malpractice of an accountant auditing a company's books has a definite limit because of the nature of an auditor's task.

"[T]he contributory negligence of the client is a defense only where it has contributed to the accountant's failure to perform the contract and to report the truth." *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 442, 345 N.W.2d 300, 307 (1984). In the case at hand, Riha's failure to realize that the WCC payable was not on the financial statements is clearly negligence, but whether that negligence contributed to C & L's failure to perform its duty to find and to report the truth is a question of fact for the jury. See *id.*

[9] Riha was the chief financial officer of WR. As observed by the Michigan Court of Appeals, "It is clear that an audit of an institution's financial records serves, at least in part, as a check on the authority and expertise of the institution's own financial personnel." *Harper v Inkster Pub Sch*, 158 Mich. App. 456, 461, 404 N.W.2d 776, 778 (1987). A large part of the function of the audit by C & L was necessarily to check on the system Riha was managing. Riha would naturally be responsible for any mismanagement of accounting functions of WR, and to hold that a corporation was bound by such an officer's negligence would defeat a large part of the purpose of an audit.

Riha's conduct in this connection would probably support a finding that he knew the payable was not on the balance sheet and deliberately chose to hide it. Even Meyerson conducted an investigation to ascertain if Riha was guilty of some sort of malfeasance, and found none. Even assuming Riha hid the WCC debt, there is no suggestion that he did so for a corporate purpose, as opposed to an individual purpose.

[10,11] C & L seeks to attribute Riha's knowledge of the missing payable to the corporation. The general rule is that agents are conclusively presumed to have performed their duty to communicate facts concerning their agency to their principal. *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983). However, " '[a] corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction.' " *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 82, 54 N.W.2d 392, 403 (1952)

(quoting *Koehler v. Dodge*, 31 Neb. 328, 47 N.W. 913 (1891)).

[12] This notion has been applied to the attribution of the knowledge of a corporate officer in audit situations where the corporate officer would be guilty of fraud. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) (the Court held this rule is governed by state law, but the state's rule in the case was not discussed in detail); *F.D.I.C. v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992); *Comeau v. Rupp*, 810 F. Supp. 1127 (D. Kan. 1992). In summary, we think the rule is that the failure of a corporate officer to disclose information to an auditor is not attributed to the corporation as a matter of law when the corporate officer's failure to disclose the information was not for a corporate purpose. Riha's failure to inform C & L of the existence of the payable may have been done for some personal reasons, i.e., to protect his job; however, there is no evidence that would require a finding it was done for a corporate purpose.

We therefore conclude that WR was not contributorily negligent as a matter of law so as to prevent recovery against C & L for its negligence. However, we do not conclude the reverse, that is, that the evidence would not support a finding of contributory negligence sufficient to decrease recovery under the comparative negligence doctrine.

INSTRUCTING JURY ON DAMAGES

The court instructed the jury only on the measure of damages under the theory of lost profits. Shahon testified that she was asked to value WR "assuming the numbers contained on Exhibit 180." She does not pretend to predict lost profits, but, rather, gives an opinion on value. The end result of Northwall's opinion contained in exhibit 180 is based upon his opinion of the amount of profits WR would have had without C & L's negligence. The end result of WR's evidence on damages does not appear to be lost profits, but, rather, an opinion of the value of a theoretical corporation at a certain time, June 1, 1985. We must first determine what are "lost profits" and therefore whether the court properly instructed the jury on the issues raised by the evidence.

Meaning of Lost Profits.

[13] " 'Profits are the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.' " *King Features Synd. v. Courrier*, 241 Iowa 870, 882, 43 N.W.2d 718, 726 (1950) (quoting Restatement of Contracts § 331, comment *b*. (1932)).

Black's Law Dictionary 1211 (6th ed. 1990) defines profit in part as follows:

> Most commonly, the gross proceeds of a business transaction less the costs of the transaction; *i.e.* net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures.
>
> Profit means accession of good, valuable results, useful consequences, avail, gain, as an office of profit, excess of returns over expenditures or excess of income over expenditure.

Webster's Encyclopedic Unabridged Dictionary of the English Language 1149 (1989) defines profit in part as follows:

> **1.** Often, **profits.** *Econ.* **a.** pecuniary gain resulting from the employment of capital in any transaction. Cf. **gross profit, net profit. b.** the ratio of such pecuniary gain to the amount of capital invested. **c.** returns, proceeds, or revenue, as from property or investments. **2.** the monetary surplus left to a producer or employer after deducting wages, rent, cost of raw materials, etc.

We note that Northwall did give an opinion of the excess of revenues over expenses for each of the years 1981 though 1985, and it could be argued that such was evidence of the profits WR lost for each of these years. However, the jury did not award any significant damages for any year except 1984. In that year, Northwall opined, WR would have had net income of $536,385, and the verdict for 1984 was $17,018,000. Northwall testified that the total profits that WR would have made during the 5 years from 1981 through 1985 had C & L not been negligent was $2,269,766. He made no attempt to testify to the amount of profits WR actually made during any of these years. Furthermore, in both this court and before the jury, WR's

counsel supports the verdict recovery upon Shahon's opinion, not Northwall's. WR places no significance on Northwall's opinions on profits, except that they provide the basis for Shahon's opinion of value.

The combined expert opinions of Northwall and Shahon establish the value WR would have had if C & L had not been negligent as alleged. This theory of damages has nothing to do with lost profits. It is essentially a "before and after" or a "with or without" theory of damages which is commonly used when property is damaged by a tort.

Duty of Trial Court.

The court only instructed upon the general right of WR to recover such damages as it sustained, and upon lost profits when, as we have concluded above, there was insufficient evidence of lost profits. The record shows that neither party objected to the instruction given by the court or offered any jury instruction on the measure of damages.

[14,15] "It is the duty of the court, on its own motion, to instruct on all material issues raised by the pleadings and evidence. The jury should have been told the manner in which the damages sustained by the plaintiff are to be measured and arrived at." *Ranchland Auto, Inc. v. Cleveland*, 188 Neb. 804, 805, 199 N.W.2d 702, 703 (1972). "Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence." *Worth v. Schillereff*, 233 Neb. 628, 630, 447 N.W.2d 480, 483 (1989). In *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987), the trial court instructed only on the plaintiffs' general right to recover all damages sustained, and neither party objected to the instruction. The *Omaha Mining Co.* court affirmed the granting of a new trial on the issue of damages, saying the trial court is under a duty to correctly instruct on the law.

[16] " 'It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.' " *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 704, 261 N.W.2d 358, 363 (1978)

(quoting *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975)). See, also, *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972). " 'Notwithstanding absence of a request for a specific instruction, a trial court must instruct a jury on material or relevant issues presented by the pleadings and supported by the evidence.' " *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 706, 515 N.W.2d 121, 127 (1994) (quoting *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988)).

[17,18] There is also a general rule that " '[w]here a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.' " *Third Party Software v. Tesar Meats*, 226 Neb. 628, 631, 414 N.W.2d 244, 246 (1987) (quoting *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960), and citing *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982)). In *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964), the plaintiff relied on this rule, but the record showed the defendant had moved for a directed verdict. The *Beveridge* court held that where the measure of damages had been challenged by objections to the pleadings or evidence, or by motion for a directed verdict or by the tendering of an instruction, the above rule that the theory of damages relied upon by the parties at trial will be accepted does not apply.

In this case, C & L did not object to the jury instruction. Prior to the trial, C & L filed a motion in limine in which it alleged the document that was later introduced as exhibit 180 "does not establish the fact that WR sustained any damage in the form of lost profits, nor does it provide any reasonable basis for calculating such damages. Plaintiff should be precluded from offering Exhibit [180] and from offering any testimony concerning the method of calculation of damages used therein . . . ." The motion was overruled, and at trial C & L did object to the introduction of exhibit 180. Counsel combined his argument with his objection, and he never explicitly stated that he objected to the evidence because it was on a theory different

than that which WR pled. In summary, he objected on the grounds that the information contained in the exhibit was speculative and conjectural, irrelevant, and immaterial. The record shows that C & L maintained exhibit 180 was not proper proof of lost profits. In admitting the exhibit, the trial judge commented that without the exhibit, WR "can't prove their case."

In addition, at the close of WR's evidence C & L moved for a directed verdict, and among the reasons stated for that motion was that WR had produced no evidence that any damages were proximately caused by the alleged negligence, and as a matter of law the court should determine the jury could not consider the alleged damages.

We conclude that the record shows C & L did not accept the measure of damages embraced by WR's evidence as the proper measure of damages in this case and made its position known. Accordingly, the trial court's obligation to correctly instruct the jury on the correct measure of damages applies.

The court instructed the jury only upon the theory of damages for lost profits, and as explained above, the evidence does not support submission of lost profits to the jury. The jury instructions did not tell the jury the manner in which any other damages sustained by WR were to be measured under the evidence, and this failure is reversible error.

SUFFICIENCY OF EVIDENCE ON DAMAGES

[19-21] In order to recover for legal malpractice, the plaintiff must prove (1) duty, (2) breach of duty, (3) proximate cause, and (4) resulting damages. *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). While the Nebraska Supreme Court has not expressly stated so, "Accountants are held to the same standard of reasonable care as lawyers, doctors, architects, and other professional people engaged in furnishing skilled services for compensation." *Vernon J. Rockler & Co. v. Glickman, Etc.*, 273 N.W.2d 647, 650 (Minn. 1978). C & L argues that the trial judge should have granted it a directed verdict on the damages issue. A directed verdict may be granted on the issue of damages if the plaintiff fails to prove any damages. See *Nebraska Truck Serv. v. U.S.*

Fire Ins. Co., 213 Neb. 755, 331 N.W.2d 266 (1983). We therefore must determine the general sufficiency of WR's evidence to support a verdict on any theory or element of damages, assuming the jury was properly instructed on the issue.

Sufficiency of Northwall-Shahon Opinion.

[22] While the measure of damages under the Northwall-Shahon approach is not lost profits, their opinion on the value of the company is necessarily based upon an estimate of lost profits. The sufficiency of exhibit 180 must be tested by the same rules that are applicable to test direct evidence on lost profits. A review of the authority on that issue will be helpful.

> The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor, however, "is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof. . . . Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the *amount* is not."

(Emphasis in original.) *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 705, 261 N.W.2d 358, 363-64 (1978) (quoting *Fisher v. Hampton*, 44 Cal. App. 3d 741, 118 Cal. Rptr. 811 (1975)).

[23] "[W]e stated that the plaintiff must plead and prove damages . . . . Further, the plaintiff's burden of proof cannot be sustained *by evidence which is speculative and conjectural.*" (Emphasis in original.) *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 593, 419 N.W.2d 143, 148 (1988).

In *III Lounge, Inc.*, the court held some of the evidence on damages was a projection coupled with an assumption and was therefore unrealistic, speculative, and lacking the general certainty required as a basis for assessment of damages.

[24] "[A] claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness." *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 165, 368 N.W.2d 795, 798 (1985).

In *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991), an expert testified on lost profits due to the defendant not being permitted to expand its store into adjacent space. The expert determined the yearly revenue per square foot at the location to which the store moved and multiplied that figure by the square footage of the adjacent space. He then multiplied the result of this arithmetic by the gross profit margin and subtracted therefrom his estimate of additional expenses incident to the increased space. He then divided that figure by 12 to obtain what he designated as lost profits per month, and that figure was then multiplied by the number of months to obtain the total loss: The court observed the expert assumed the only difference between the two locations was square footage, that he used sales figures from a different time period, that no studies were made to establish whether there was any change due to these differences, and that he did not evaluate whether there was a change in the number of competitors or consumer interest in the products. The court determined this witness' figures were "mere speculation and conjecture." *Id.* at 663, 472 N.W.2d at 380.

In *Katskee*, the defendant also called a person with a degree in corporate finance and many years in operating sporting goods stores who opined that Nevada Bob's lost $130,000. He based this opinion on his experience, his investigation of the corporate records, the substantial similarity between the two locations, and discussions with other store operators. He opined the store had an identical customer base. The court concluded his testimony was speculative and conjectural.

In *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988), engineers had breached their employment contracts with the plaintiff by leaving and then competing with the plaintiff. The plaintiff sought to prove damages with an expert witness and by proving the gross earnings of the engineers that had left the firm and multiplying that figure by the percentage that the plaintiff's net profit bore to its gross earnings. The Supreme Court cited many of the same cases we have quoted above and concluded the plaintiff had completely failed to prove damages.

[25] " 'Where it has been proved that damage has resulted

and the only uncertainty is as to the exact amount, it is sufficient if the record shows "data from which the extent of the injury . . . can be ascertained with reasonable certainty . . . . Data for an exact calculation is not necessary." . . .' " *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 134, 77 N.W.2d 900, 914–15 (1956) (quoting *Jaeger v. Hackert*, 241 Iowa 379, 41 N.W.2d 42 (1950)). See, also, *Delp v. Laier*, 205 Neb. 417, 288 N.W.2d 265 (1980).

The most identifiable act of negligence on the part of C & L was its failure to discover the huge account payable to WCC. C & L did not create that liability and is not responsible for it or the consequences of its existence as distinguished from the consequences of WR's management not knowing the true picture of the company's debts. A close reading of the missing internal accounting controls shows that all the deficiencies relate to preventing the disappearance of assets and procedures to discourage employee theft or to catch them if they do steal. There is some evidence that when AY inventoried WR's assets and compared that inventory with the perpetual inventory at the time, there was approximately $3 million in missing inventory. The evidence also shows that WR had always taken physical inventory and compared it with the perpetual inventory. Evidence of the missing inventory was not developed in spite of WR's counsel's argument on appeal on the subject. However, even assuming that WR was missing approximately $3 million in inventory in June 1985, there is no evidence that would support a finding that C & L was responsible for that deficiency because it failed to advise WR's management of additional accounting controls which should have been used. Understandably, WR did not rely upon this evidence to establish damages.

Scott, an experienced accountant, testified that the methodology used in exhibit 180 is "typically relied on by accountants and others." This is far different from an opinion that such a methodology produces a fair and reasonable prediction of the earnings WR would have had if C & L had found the overlooked payable to WCC and advised WR's management of the proper internal accounting controls.

The question is whether exhibit 180 is based upon

speculation and conjecture. Northwall's estimates are based upon profits made during a period that was 1 1/2 to 2 1/2 years after the end of the 5-year period for which he seeks to estimate possible earnings. There is no evidence to support his assertion that expenses for each year would be the same percentage of gross sales. No attempt was made to confirm his assumption by reference to actual expenses in the years 1981 through 1985 or to prove by any independent data that the relationship of such expenses to gross sales does remain constant.

Furthermore, the accounting controls that Northwall claimed make WR's actual records unreliable all relate to the protection of assets. On cross-examination, Northwall stated that his largest concern with the accounting controls at the store level was that there was no guarantee that every sales ticket written up by a sales clerk was entered into the computer. There is no evidence that those accounting controls would have decreased labor, rent, electricity, and other expenses or increased profits. In considering this matter, it must be remembered that WR actually kept the books, and there is no evidence which would support a conclusion that these books contained a gross understatement of the company's expenses over a 5-year period. The evidence really established that profits shown on the financial statements for the years 1982 through 1984 were too high by at least the amount of the WCC payable.

Northwall's opinion is based upon the assumption that the margin of profits in relation to sales for each year remained the same as WR grew from 10 stores in 1981 to 22 stores in fiscal 1985 and 28 stores by 1986. In *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991), the experts assumed substantial similarity between businesses in two different locations, and this was held to be inadequate. In *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988), the Supreme Court held that damages could not be established by proving two engineers' gross earnings and deducting the percentage that the plaintiff's expenses bore to its gross revenues.

Northwall chose not to use the figures for 1988 and 1989, but chose to use 1986 and 1987. Some evidence shows the years 1986 and 1987 were not the same as 1981 through 1985 because

of definite management decisions. For example, Meyerson testified that in August 1984, they realized they had too much inventory in almost every area, and they worked diligently to reduce it and did so. Northwall testified that in June 1985 a decision was made to reduce inventory by $1 million and turn it into cash. The reduction was part of his survival plan to allow WR to survive through the Christmas season of 1985. This created cash and reduced inventory costs, but reduced sales because of less merchandise to sell.

WR did not own the buildings used by its stores, and the rent expense was significant. However, two buildings were owned by Meyerson personally. To cut expenses, WR paid Meyerson's mortgage payments on these two buildings rather than rent and made up the shortage later. This saved WR approximately $1,000 per month in 1985 on one of the buildings owned by Meyerson.

Northwall testified that during the 1986-87 period the company was in dire straits and the company took some cost-cutting measures: "We tried to cut corners as much as we could and operate as efficiently as we could to save cash." When asked if these cost-cutting procedures, "in light of all the other changes, have a material effect on the numbers you've reconstructed here," he answered no. He testified that he did not know whether the company paid fewer bonuses in the 1986-87 period. There is no evidence of the amount of the bonuses in the 1986-87 period, but in 1984 WR paid bonuses totaling $302,262.80 to eight managers ($200,000 of which was paid to Meyerson). There were also substantial contributions to profit sharing. In this connection, the interest is not in whether bonuses or profit-sharing contributions were or were not justified, but whether they were the same percentage of the gross margin for each of the other years. The record does not show they were the same.

Meyerson hired Malcolm Ballinger in 1984 as a step in merchandising and marketing television and video products along with extended warranties, that is, a warranty sold separately from the product that extended the warranty beyond the manufacturer's warranty. Northwall agreed the same management was not in effect in 1981 through 1984. The mix

of products also changed over time. Meyerson testified that the industry was still "skyrocketing" in the 1986–87 period as it had been doing in 1985, but there is no evidence that quantifies that rate of growth over these years. There was a different number of stores in 1984 as compared to 1986–87, and different markets. A controller and accounting personnel were added, and one person in accounting was let go. WR also rented less desirable buildings to conduct business.

Productwise, consumer electronics versus appliances changed over this period. The key city funds, rebates from suppliers, were negotiated, and Northwall did not know the terms of the agreements for the years 1981 through 1985. He had no way to compare the key city funds for the two periods.

[26] Northwall's opinion in this case suffers from a weakness similar to that of the State's expert in *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975). In *Y Motel, Inc.*, the State's expert was prepared to testify on the value of a motel by capitalizing the "typical income" and "typical expenses" of similar operations, and the trial court's refusal to accept such evidence was affirmed. In so doing, the Supreme Court said: "To permit a person, even a qualified one, to appraise a tract of land on the basis of capitalization of income by an estimate of the operation of a typical business would be guesswork at every stage." *Id.* at 533, 227 N.W.2d at 874. In this case, Shahon is merely capitalizing Northwall's guesswork, and such evidence is not adequate proof of damages.

We conclude that the facts set forth in the preceding discussion make Shahon's opinion insufficient as a matter of law to support an award of damages.

Other Possible Damages.

The parties stipulated that WR paid fees to C & L for auditing in the sums of $13,000, $14,000, and $15,000 for 1982, 1983, and 1984, respectively. In addition, for the same years, WR paid nonauditing fees of $4,232, $10,207, and $10,920, respectively. The trial court did not instruct the jury that WR could recover all or any part of these fees. At final argument, WR's counsel argued the full amount of the fees should be awarded as damages because none of the audits were

any good "when the financial statements aren't any good." If there is any evidence establishing the correctness of counsel's statement, we have missed it.

[27] The rule appears to be:

> While minor inaccuracies in an audit or report may be overlooked, where by reason of the accountant's negligence, inaccuracies and failure to report facts of serious character appear, he or she is not entitled to compensation. And when compensation is paid to an accountant in reliance upon his or her report, it may be recovered, upon proof that through the accountant's negligence, the audit was in substance, false.

1 Am. Jur. 2d *Accountants* § 13 at 537 (1994). See, also, 1 C.J.S. *Accountants* § 15 (1985); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969) (Iowa court recognized the plaintiff accountants could not collect their fee if their negligent performance made their audit valueless, but refused to hold the audit was valueless when the trial court found for the plaintiffs); *Allen County Comm'rs v. Baker*, 152 Kan. 164, 102 P.2d 1006 (1940) (Kansas court held the gross inaccuracies in the audit of three offices rendered the audit worthless as a matter of law and allowed recovery of the entire fee paid for the audit even though the audit covered other offices); *City of East Grand Forks v. Steele*, 121 Minn. 296, 141 N.W. 181 (1913) (Minnesota court held a city could recover the amount it paid for an audit if the evidence proved that through incompetence or negligence the audit report was in substance misleading and false).

In this case, the evidence would certainly support a finding that the audit reports for 1982, 1983, and 1984 were inaccurate and worthless due to C & L's negligence, but the evidence shows that C & L was also paid fees for nonauditing work. We have not located any evidence supporting a finding that the nonauditing work was worthless.

There is also evidence that WR paid AY for its auditing and accounting services, and the record would support a finding that all or part of these fees were fair and reasonable and were caused by C & L's malpractice. Again had the jury been properly instructed on this issue, an award of all or part of these fees would have been proper.

The record contains evidence sufficient to support a verdict for WR for damages on both of these issues. Therefore, there is sufficient evidence of some damages, and the trial court properly denied C & L's motion for a directed verdict.

CONCLUSION

In summary, we have concluded that the evidence and the law support the jury verdict in favor of WR against C & L on the issue of liability. We have also concluded that there was sufficient evidence of damages for expenses as outlined and thus to support a verdict, but insufficient evidence to support an award based on lost profits or for an award measured by a decrease in the value of WR. The verdicts $10,300 for 1982, $12,000 for 1983, and $17,018,000 for 1984 appear, at first blush, to be divisible with the $10,300, the $12,000, and the $18,000 being attributed to fees paid to C & L, and the $17 million to the valuation damages testified to by Shahon. However, the $17 million is more than Shahon's testimony would support, even if Shahon's opinion were otherwise acceptable and the jury had been properly instructed. The jury was not properly instructed upon the correct measure of damages under any theory, even on the fees and expenses WR incurred. Accordingly, we affirm the jury verdict on the issue of liability only and otherwise reverse the judgment and remand the cause for a new trial on the issue of damages in accordance with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. DENNIS C. SMITH, APPELLANT.

537 N.W.2d 539

Filed September 19, 1995. No. A-95-189.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
2. ____: ____. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. **Appeal and Error.** Questions presented on appeal, but not necessary to a decision, need not be determined.
4. **Drunk Driving: Proof.** The violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) is one offense, but it can be proved in more than one way, i.e., by excessive blood alcohol content shown through a chemical test or by evidence of physical impairment plus other well-known indicia of intoxication.

Appeal from the District Court for Seward County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Seward County, ALAN G. GLESS, Judge. Judgment of District Court affirmed.

David L. Kimble for appellant.

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

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

SIEVERS, Chief Judge.

Dennis C. Smith was charged with violating Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)), by driving while under the influence of alcoholic liquor or while having an excessive concentration of alcohol in his blood, breath, or urine. Smith was also charged with resisting arrest, in violation of Neb. Rev. Stat. § 28-904 (Reissue 1989). After a bench trial to the county court for Seward County, Nebraska, Smith was found guilty on both counts. Smith's convictions were affirmed by the district court for Seward County on appeal. On appeal to this court, Smith asserts that the district court erred by failing to find that

the county court should have sustained his motion to suppress the results of a chemical breath test on the basis that he was not sufficiently advised of the consequences of submitting to such a test before the test was administered as required by Neb. Rev. Stat. § 39-669.08(10) (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993)). For the reasons cited below, we affirm.

FACTS

On May 17, 1993, at approximately 12:51 a.m., Seward police officer Sherry Matol Lave, driving a marked police cruiser, observed a black pickup eastbound on Seward Street cross the centerline. After she observed the pickup go left of the centerline a second time, Lave stopped the vehicle and determined that the driver was appellant, Dennis C. Smith. Lave testified that Smith appeared to be hesitant and confused, had bloodshot eyes, and had an odor of alcohol about him. Smith told Lave that he had been at Luebbe's bar in Seward, where he had consumed approximately five or six drinks. Lave asked Smith to step out of the vehicle to perform field sobriety tests. As Smith stepped out of his car to move back to the area between his vehicle and the patrol car, he "was having difficulty maintaining his balance" and "staggered," and Lave "grabbed him so he [would not] fall."

Lave requested that Smith perform field sobriety tests including the alphabet test and a 30-second leg-lift test, both of which Smith refused to attempt. Lave also requested that Smith perform a finger-count test and a nine-step heel-to-toe test, both of which he failed. At that time, Lave determined that Smith had been driving while under the influence of alcohol and advised Smith that he was under arrest. Smith refused to comply with Lave's request to turn around and place his hands on the hood of the police cruiser. Lave testified that Smith became loud and belligerent and refused to let Lave restrain his hands. Smith hung on to the rail of his truck and refused to release his hands.

Scott Gaston, a police officer for the city of Seward, testified that he arrived on the scene as Lave was telling Smith that he was under arrest and to place his hands behind his back. Gaston

observed Smith walk away from Lave and proceed to grab the rail of the pickup to avoid having his hands cuffed. Smith also yelled profanities at the officers. Smith was finally cuffed and placed in the police cruiser after Gaston and Seward County Deputy Sheriff Karl Hoehler were able to physically restrain him. Gaston also testified that based on the odor of alcohol on Smith's breath, Smith's disposition, and his lack of cooperation, Gaston was of the opinion that Smith was intoxicated.

Smith was transported to the Seward County jail. After Smith was read an implied consent form, Smith was directed to submit to a breath test, which he did.

Prior to trial, Smith filed a motion to suppress the results of the chemical test of his breath for the reason that Smith was not advised of the consequences of submitting to the test prior to the test being administered as required by § 39-669.08(10). The county court overruled the motion, and at trial Smith renewed his objection to the results of the chemical test of his breath. Although the trial court reserved ruling on the matter, the court stated in its "Verdict and Order" that Smith was guilty of violating § 39-669.07, since "the evidence is sufficient to support a finding beyond a reasonable doubt on both possible bases for a finding of guilt, i.e., under the influence and an excessive [blood alcohol content]." Therefore, although it is not specifically stated in the record, we proceed on the basis that the trial court overruled the objection and received the results of the breath test in evidence.

On appeal, the district court affirmed Smith's convictions.

STANDARD OF REVIEW

[1,2] In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

ANALYSIS

[3] Smith argues on appeal that the county court erred by failing to sustain his motion to suppress the results of his chemical breath test on the grounds that he was not advised of the consequences of submitting to such a test as required by § 39-669.08(10) (now codified at § 60-6,197(10)). We are aware of the recent Nebraska Supreme Court case *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995) (which involved the defendant in the present case), wherein the administrative revocation of Smith's operator's license was reversed on appeal. The Supreme Court held that the advisory form read to Smith prior to the administration of the chemical breath test was inadequate to give Smith notice of the consequences of failing a breath test as required by § 60-6,197(10). However, in the present case we need not determine whether the trial court erred by overruling Smith's motion to suppress and receiving the results of the chemical breath test in evidence, since the record shows there was other admissible evidence to sustain Smith's conviction of the crime charged without the breath test results. See *State v. Wenzel*, 215 Neb. 395, 338 N.W.2d 772 (1983) (holding it unnecessary and inappropriate for appellate court to decide issue of propriety of receiving breath test results into evidence where record contained ample evidence that defendant operated motor vehicle while under influence of alcohol). See, also, *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (holding that appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

Section 39-669.07, the relevant statute at the time of Smith's arrest, provided in relevant part:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per

two hundred ten liters of his or her breath.

[4] The violation of § 39-669.07 is one offense, but it can be proved in more than one way, i.e., by excessive blood alcohol content shown through a chemical test or by evidence of physical impairment plus other well-known indicia of intoxication. See *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995). Given the testimony of Lave and Gaston about Smith's driving violations, the odor of alcohol about him, his confused demeanor, his lack of balance, his belligerence, and his failure of the field sobriety tests, along with Smith's admission that he had recently had five or six drinks in Luebbe's bar, the evidence was sufficient to support the trial court's finding that Smith was driving while under the influence of alcoholic liquor, in violation of the provisions of § 39-669.07(1)(a).

CONCLUSION

It is to be remembered that under our standard of review, we view this evidence in a light favorable to the State. Since this evidence is sufficient to prove the offense, we need not consider the admissibility of the chemical breath test. Smith did not present any argument on appeal with regard to his conviction of resisting arrest. Accordingly, Smith's convictions and sentence are affirmed in all respects.

AFFIRMED.

GRACE B. AINSLIE, APPELLEE, V. NEILON J. AINSLIE, APPELLANT.

538 N.W.2d 175

Filed September 26, 1995. No. A-94-216.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects

to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

3. **Alimony.** In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1993), the income and earning capacity of each party as well as the general equities of each situation.
4. **Alimony: Words and Phrases.** Earning capacity for the purpose of alimony encompasses more than one's ability to earn a wage and includes income from all sources.
5. **Property Division: Alimony.** How property inherited by a party during the marriage will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.
6. ____: ____. The general rule is that property inherited by one spouse is not subject to division unless the other spouse has contributed to improving or caring for that property. This general rule in no way suggests that ownership of inherited property and income derived therefrom may not be considered when determining whether alimony is awarded and in what amount. The fact that property is inherited and therefore excluded from division does not prevent the income it generates from being considered when determining alimony.
7. **Alimony.** The ultimate test for determining correctness in the amount of alimony is reasonableness.

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

Donald R. Witt and John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Virginia G. Johnson for appellee.

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

MUES, Judge.

Neilon J. Ainslie appeals from a decree entered by the district court for Lancaster County on February 11, 1994. The decree specifically dissolved the marriage between Neilon and his wife, Grace B. Ainslie. The order further divided the parties' property and debts and awarded alimony to Neilon in the sum of $500 for a period of 12 months, $300 for a period of 12 months, and $200 for a period of 12 months. On appeal to this court, Neilon challenges the award of alimony as insufficient in both amount and duration. Although Grace's brief argues that no alimony should have been awarded and, in fact, seeks a reversal of that portion of the decree, she has failed

to present a cross-appeal to this court pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 1992). Therefore, we view her position as that of merely resisting the increase sought by Neilon.

FACTS

Neilon and Grace were married for nearly 40 years. Four children were born of the marriage, all of whom had reached the age of majority at the time of trial. The couple moved to Lincoln in approximately 1985. Prior to this time, the couple had moved frequently throughout the course of the marriage.

The dissolution hearing was held December 14, 1993. At that time, Neilon was 65 years old. Neilon receives Social Security payments in the amount of $745 a month and a pension totaling $51 a month. These represent his sole source of income. Prior to moving to Lincoln, Neilon had worked full time in the restaurant management business during the entire course of the marriage except for a short period of time when he underwent a 30-day treatment program for alcoholism. Upon moving to Lincoln, Neilon worked at McDonald's, but quit because it was too strenuous. He subsequently worked part time delivering meals for a retirement center for an undisclosed amount of time. After the parties separated, Neilon worked for 4 months at a fast-food establishment at a Wyoming resort managed by his son. Neilon testified that he found the work difficult, but he continued until the resort closed due to cold weather. The tax documents submitted by the parties indicate the total wage income of the parties in 1991 totaled $732. It is impossible from the record to ascertain which party this wage income is attributable to. Tax records further indicate that neither party earned wages in 1992. Neilon likewise was not employed at the time of trial. Neilon suffers from high blood pressure, for which he takes medication. He also has a high cholesterol level, for which he does not take medication due to its expense. Neilon has undergone two surgeries for arterial sclerosis.

At the time of trial, Grace was approximately 58 years old. Throughout the marriage, she worked at various jobs ranging from store clerk and babysitter to medical records technician. Since moving to Lincoln, she worked as a store clerk during one Christmas season and participated in one Harris Laboratories

study. Grace's health problems include bladder incontinence, high blood pressure, and high cholesterol.

During the marriage, Grace became a beneficiary of two trusts. The first of these, referred to as the Grace B. Ainslie Trust, was created by Grace in 1985 using money inherited from her mother. At its inception, the trust corpus was $200,000. Grace has complete control over this trust with free access to its corpus and the ability to determine the amount of income she will receive. Grace's chosen yearly net income from this trust is approximately $12,588. The remainder of income from this trust has been allowed to accumulate. As of June 30, 1993, the corpus of the Grace B. Ainslie Trust had increased to $280,539.63.

Grace is also the beneficiary of a second trust created by a great-great-uncle, referred to as the Annie W. Dunlap Trust. As of June 30, 1993, this trust had an accumulated value of $4,662,938.07. Grace has an undivided two-fifteenths interest in this trust enabling her to receive a yearly net income of approximately $20,000. Further, Grace will receive an undivided two-fifteenths interest in the principal of this trust upon the death of her aunt. Grace has no control over the distribution regarding this trust. The income from both trusts has been used to purchase miscellaneous items of property and for support of the parties since they moved to Lincoln until the time of separation.

In the decree entered by the trial court, Grace received the marital residence, a vehicle currently in her possession, property in Arkansas, and the personal property in her possession. She was ordered to assume the debt for the real property in the amount of $62,000. Neilon received the vehicle in his possession, a television set, and a money judgment in the amount of $7,000 for his portion of the equity in the marital residence. Neilon was also awarded alimony, which is the subject of this appeal.

ASSIGNMENT OF ERROR

Neilon's sole assignment of error is that the trial court erred in awarding alimony of insufficient amount and duration.

STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

ANALYSIS

Neilon claims the district court erred by awarding an insufficient amount of alimony. Grace's counterargument is that any award of alimony in this case is contrary to the criteria set forth in Neb. Rev. Stat. § 42-365 (Reissue 1993). She further asserts that future uncertain income from a nonmarital trust cannot properly be considered for the purpose of awarding alimony.

The court will first consider § 42-365, which sets forth the criteria to consider in awarding alimony and provides, in relevant part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the

other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

[3] In awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Kelly, supra*; *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

The first factor to consider is "the circumstances of the parties." Both Neilon and Grace are at or close to retirement age. For the past 8 years, neither has been employed other than for a short duration on a part-time basis. Since the parties' separation, Neilon has stayed with three of his four children and, at times, was forced to sleep in his vehicle. Beginning December 1, 1993, Neilon was able to rent an apartment with the help of a son who provided the security deposit. Neilon's monthly income is less than $800. Nearly half of this is spent on rent alone. Grace, on the other hand, has a home with the ability to pay its mortgage. She has full access to the Grace B. Ainslie trust, which currently has a principal totaling over $280,000. In addition, she has a net monthly income of over $2,500.

Next, we consider the fact that the parties were married for nearly 40 years. We also consider the "contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities." Grace argues at length in her brief that Neilon contributed nothing to the marriage. However, Grace's assertions of alcoholism, gambling, and self-indulgence by Neilon are wholly unsupported by the record. The only evidence regarding alcoholism by Neilon is that he stopped drinking in approximately 1973 and entered a treatment program in 1976. Further, the only gambling by Neilon substantiated by testimony consists of occasional trips to Las Vegas in which both Neilon and Grace took part and Neilon's participation in poker games with a "30-cent limit, half a dollar on the last card." Aside from two references by Grace in her testimony that her husband gambled, no further evidence regarding Neilon's gambling was adduced at trial. Furthermore,

Grace's assertions that the family was forced to move frequently because Neilon continually lost his job due to his alcoholism is also unsupported by the record. Rather, the record indicates that Neilon was almost continuously employed for over 30 years of the marriage. At his last full-time position, Neilon received a yearly income of over $30,000. Grace admitted that during the marriage Neilon's income, along with hers, was used to pay the family's expenses. Consequently, there is also no evidence from the record to support the conclusion set forth in Grace's brief that the lack of marital assets is the sole result of Neilon's conduct.

The fourth factor to consider is "the ability of the supported party to engage in gainful employment." As previously stated, neither party has worked since coming to Lincoln other than in temporary, part-time positions. Neilon testified that he found work in the fast-food business too strenuous. He was employed, if at all, in 1991 only to the extent of $732. He was not employed in 1992. Neilon is past the age of typical retirement. His ability to acquire gainful employment appears limited to say the least.

[4] In addition to the criteria set forth in § 42-365, the court also considers the income and earning capacity of each party as well as the general equities of each situation. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986). Grace argues that she has no "earning capacity" from which to order alimony. However, the court considers not only "earning capacity" but also income. Grace's receipt of money from trusts is certainly income to be considered by this court when determining alimony. Moreover, "earning capacity" has been interpreted with regard to child support to mean the overall capability of one to make support payments from all sources. *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). Likewise, earning capacity for the purpose of alimony encompasses more than one's ability to earn a wage and includes income from all sources.

[5,6] Grace also argues that income from a trust whose corpus consists solely of inherited property should not be considered by the court in determining the appropriateness of alimony to be paid by the beneficiary of such trust. However,

she points us to no legal authority that such absolute limitation exists, and we have found none. Rather, how property inherited by a party during the marriage will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982); *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982). The general rule in Nebraska is that property inherited by one spouse is not subject to division unless the other spouse has contributed to improving or caring for that property. *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985); *Van Newkirk, supra*. In this case, Neilon does not claim an interest in the trust property inherited by Grace. However, this general rule in no way suggests that ownership of inherited property and income derived therefrom may not be considered when determining whether alimony is awarded and in what amount. The fact that property is inherited and therefore excluded from division does not prevent the income it generates from being considered when determining alimony. See, e.g., *In re Marriage of Thomas*, 319 N.W.2d 209 (Iowa 1982) (husband's interest in family farm, although inherited and therefore excluded from division, remains a factor with regard to alimony). See, also, *Geddes v. Geddes*, 530 So. 2d 1011 (Fla. App. 1988) (court entitled to consider income from nonmarital trust for purpose of determining alimony when such income was anticipated to be permanent and parties had relied upon said income during marriage).

Although we have found no case where the Nebraska Supreme Court has directly addressed this issue, that court has recognized that property, although otherwise excluded from property division as a marital asset, may still be a consideration when awarding alimony. For example, despite their exclusion from property divisions at one time, pension and retirement incomes were still considered when determining the appropriateness of an alimony award. See, e.g., *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976); *Albrecht v. Albrecht*, 190 Neb. 392, 208 N.W.2d 669 (1973) (of course, pension and retirement plans are now legislatively included as part of the marital estate to be considered in dissolution

proceedings under Neb. Rev. Stat. § 42-366(8) (Reissue 1993)). If Grace had purchased a business with her inherited money and were now drawing $30,000 net annual wages from that business, we believe few would seriously question the appropriateness of considering that money in the alimony equation. Its form as a trust distribution does not logically compel us to ignore it in this case.

[7] Furthermore, the ultimate test for determining correctness in the amount of alimony is reasonableness. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). Neilon testified that his "bare bones" monthly expenses total approximately $1,235. His income is now $796 per month. Grace does not challenge Neilon's stated amount of expenses or whether said amount is reasonable. Given the disparity in the parties' current income, the length of the marriage, the fact that Neilon steadfastly contributed to the family income for over 30 years, and his present limited ability to acquire gainful employment, we believe the district court's decision to award alimony was eminently correct.

However, the amount and duration of the alimony are not reasonable. There is nothing in the record to suggest that after the first year, when the $500 per month in alimony drops to $300 per month, or at the end of the second year, when it plummets to $200 per month, Neilon's needs will be less or his other income higher in order to compensate for this decrease in and eventual dissipation of alimony. As the matter now stands, Neilon will no longer receive alimony after December 1996. At that time, he will be 68 years old with a likely monthly income of $796 and monthly expenses of $1,235. Perhaps there is some wisdom in gradually "weaning" an alimony recipient from the security of an annual stipend in some circumstances, but we fail to see its wisdom in this case. If the desired effect is to allow and encourage Neilon to develop skills and financial independence, it hardly seems likely to succeed at this point in his life and health. We conclude that the order to reduce the alimony from $500 after 1 year and to totally eliminate it after 3 years constitutes an abuse of discretion. We believe an award to Neilon of $500 per month alimony payable until the death of

either Grace or Neilon or the remarriage of Neilon is reasonable in this case, subject, of course, to modification pursuant to § 42-365.

CONCLUSION

The fact that property is inherited does not preclude it from consideration when determining whether and in what amount to award alimony. Accordingly, the district judge correctly awarded alimony in this case. However, the district judge abused his discretion when ordering that the amount be decreased yearly and eventually terminated at the end of 3 years. We therefore affirm the award of alimony, but for the reasons set forth above order alimony to be paid in the amount of $500, to terminate upon the death of either party or upon the remarriage of Neilon.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF JOHN T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLEE, V. PATRICK T. CARRAHER, GUARDIAN AD LITEM, APPELLANT, AND G.B. AND J.B., APPELLEES.

538 N.W.2d 761

Filed October 3, 1995. No. A-95-215.

1. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of any final order of the juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but when the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than the other.
2. **Appeal and Error.** With respect to legal questions, an appellate court reaches independent conclusions of law.
3. **Juvenile Courts: Proof.** Under Neb. Rev. Stat. § 43-285(2) (Reissue 1993), if any party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the Department of Social Services plan for the care, placement, and services to be provided for a child adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue

1993) is not in the juvenile's best interests, the court shall disapprove the department's plan.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded with directions.

Patrick T. Carraher, guardian ad litem.

Don Stenberg, Attorney General, Cecile A. Brady, and, on brief, Royce N. Harper for appellee State.

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

SIEVERS, Chief Judge.

In this case, we examine the Department of Social Services (DSS) plan to remove a 3½-year-old child from his foster parents, with whom he has lived since he was 3 months of age, and place him in the home of other foster parents. The proposed change is a result of the fact that the child's present foster mother is afflicted with acquired immunodeficiency syndrome (AIDS). The separate juvenile court of Lancaster County approved the DSS plan to move the child, and the child's guardian ad litem now appeals to this court.

PROCEDURAL BACKGROUND

The separate juvenile court of Lancaster County adjudicated John T. as a child without proper support through no fault of his parents under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on April 9, 1992. The natural mother and father of John voluntarily relinquished to DSS their parental rights pursuant to Neb. Rev. Stat. § 43-106.01 (Reissue 1993), and as a result the juvenile court found that John was a child as defined in § 43-247(8), to wit: "Any juvenile who has been voluntarily relinquished, pursuant to section 43-106.01, to the Department of Social Services . . . ." On March 27, 1992, at the age of 3 months, John was placed in the custody of the foster parents involved in this litigation, J.B. and G.B., who are husband and wife. On May 27, 1994, DSS filed a "Notice of Placement Change," stating that it intended to change foster placement of John from the foster home of J.B. and G.B. to the foster home of another couple. The guardian ad litem and the current foster

parents opposed the placement change.

After extensive evidentiary hearings, the court issued its order approving the DSS plan. The guardian ad litem filed a motion for new trial, which was overruled, and a timely appeal to this court was filed on February 14, 1995. On June 8, the guardian ad litem filed a request that this court order a stay of the juvenile court's order. Although that request was denied, we ordered the appeal expedited, advised counsel that no extension of brief dates would be granted, and set the case for oral argument during the court's September 1995 session.

JUVENILE COURT DECISION

The juvenile court found that it was in John's best interests that he remain in the custody of DSS and that its "permanency plan" that he be adopted was also in his best interests. The court recited that DSS has located people who can provide "long term permanent placement" via adoption, which DSS can approve, and that the evidence "does not establish, by clear and convincing evidence, that the best interests of the child require that an alternative disposition to the Department's plan be made." Thus, the court approved the plan to "transition" John to the new foster/adoptive home.

In its order overruling the motion for new trial, the court made somewhat different findings, but with the same result. The court found that the proposed plan involved a change of placement so fundamental to the care, custody, and placement of the child that it could only be described as dispositional in nature and that the objection of the guardian ad litem to the plan constitutes an alternative disposition for the child. Therefore, proof by a standard of "clear and convincing evidence" was required to approve such alternative disposition. The court then found that the evidence did not establish by clear and convincing evidence that the DSS plan was not in the best interests of the child. Moreover, the court found that even if the guardian ad litem's objection were not considered an alternative disposition, there was a failure to prove by a preponderance of the evidence that the DSS plan was not in the best interests of the child. The court reasoned that approval of the plan would hold, irrespective of whether the evidentiary standard was that

found in Neb. Rev. Stat. § 43-284.01 (Reissue 1993) (clear and convincing evidence) or the lesser standard of Neb. Rev. Stat. § 43-285 (Reissue 1993) (preponderance of the evidence). A specific finding was made that the plan of DSS was in the best interests of John, and the motion for new trial was overruled.

ASSIGNMENTS OF ERROR

The guardian ad litem assigns the following six errors of the trial court: (1) in presuming that the plan of DSS was in the best interests of John, (2) in imposing a burden of proof of clear and convincing evidence upon the guardian ad litem rather than by a preponderance of the evidence, (3) in finding that "it was restricted by the authority of the Nebraska Department of Social Services," (4) in approving the plan of DSS "when the majority of the evidence favored the position of the guardian ad litem," (5) in changing John's placement because of the health status of one of his caregivers, and (6) in failing to find that the " 'health' regulation of the Department of Social Services was in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution."

STANDARD OF REVIEW

[1,2] As this is the appeal of a final order from a juvenile court, our standard of review is that we try factual questions de novo on the record. We are required to reach a conclusion independent of the findings of the trial court, but when the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). With respect to legal questions, the appellate court reaches independent conclusions of law. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995).

As part of articulating our standard of review, we must address the matter of the burden of proof in the trial court, about which there is much disagreement and argument in the briefs. The juvenile court's order perhaps reflects some confusion about the burden of proof. The guardian ad litem asserts that his burden of proof is to show by a "preponderance of the evidence" under § 43-285(2) that the DSS plan to

"transition" John from his present foster parents and place him with other foster parents is not in the best interests of the child. On the other hand, DSS claims that the guardian ad litem's burden of proof is to show that the plan is not in the best interests of John by "clear and convincing evidence" under § 43-284.01. The juvenile court, in its final order, appears to have adopted the "clear and convincing" standard for the burden of proof, but approved the plan irrespective of whether the guardian's burden of proof was by a "preponderance of the evidence" or by "clear and convincing evidence." The juvenile court found that the guardian ad litem would not prevail under either standard.

The Nebraska Supreme Court faced a somewhat similar situation in *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979). In *Souza-Spittler*, the appellant claimed that the trial court had erred in failing to specifically find that the State's burden of proof when terminating parental rights was by clear and convincing evidence rather than a preponderance of the evidence. The Supreme Court held that termination of parental rights should in fact be based on clear and convincing evidence, but no reversal of the juvenile court was required, since the evidence before the juvenile court satisfied even the stricter "clear and convincing" standard. In support of its decision, the Supreme Court noted that in any event, the matter was triable de novo in the Supreme Court and that since a correct judgment or order was made by the lower court, the fact that it contained erroneous declarations of law did not require reversal, citing *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979).

Here, too, we try this matter de novo on the record. Which burden of proof the juvenile court used is not a decisive matter on appeal. For our part, we rely upon the Supreme Court's recent pronouncements in *In re Interest of Constance G.*, 247 Neb. 629, 636-37, 529 N.W.2d 534, 540 (1995):

> We have held that a juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of L.O. and B.O.*, 229 Neb.

> 889, 429 N.W.2d 388 (1988); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). While § 43-285 grants the juvenile court discretionary power over a plan proposed by the department, it also grants a preference in favor of such a plan. In order for the court to disapprove the department's plan, a party must prove by a *preponderance of the evidence* that the department's plan is not in the child's best interests.

(Emphasis supplied.)

[3] The statute referenced in *In re Interest of Constance G.*, § 43-285, provides at subsection (2) for DSS plans to be filed with the juvenile court for the "care, placement, and services" to be provided for a child adjudicated under § 43-247(3), as is true of John. Section 43-285(2) then provides: "If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan."

Accordingly, the standard which we use in the trial de novo on the record conducted by this court is that the guardian ad litem must prove by a preponderance of the evidence that the DSS plan to "transition" John from his present foster parents to a new set of foster parents is not in the best interests of John. Our conclusion in this regard dispenses with the need for further discussion of the guardian ad litem's first three assignments of error concerning the burden of proof in the juvenile court. Thus, we turn to the guardian ad litem's fundamental proposition that the preponderance of the evidence establishes that it is in John's best interests to remain with J.B. and G.B.

FACTUAL BACKGROUND

John was born December 28, 1991. He was placed with J.B. and G.B. at the age of 3 months, and he has resided with them from that time forward. John's biological mother has suffered from schizophrenia over half of her life, and his biological father was incarcerated on a sexual assault charge. Additionally, there is some evidence of mental illness of the biological father,

but the record does not contain a clear diagnosis, although there are several references to his also being afflicted with schizophrenia. Both biological parents surrendered custody of the child and ultimately relinquished their parental rights to DSS. The placement of John with J.B. and G.B. was considered a "fos-adopt" placement, a term of art meaning that placement was assumed to be permanent with an adoption to occur when the child became available for adoption. J.B. and G.B. have had more than 10 foster children placed with them by DSS since their application to be foster parents in December 1990. G.B. stays at home caring for John and operates an in-home day-care center with several other small children. J.B. is steadily employed earning a middle-class income. The foster parents own their own home, and all DSS home studies have been satisfactory. The evidence establishes that the foster parents have been good and appropriate parents, that John is developing and progressing normally, and that the DSS plan for a change in placement flows directly from the mother's state of health.

The foster parents were married in 1989. G.B. tested positive for the human immunodeficiency virus (HIV) in 1989 and began taking the drug AZT, the generally accepted method of treatment. At the time the foster parents applied to be "fos-adopt" parents, they knew that G.B. was HIV positive and was on AZT. Neither G.B. nor her husband disclosed these facts to DSS.

The evidence shows that the Centers for Disease Control and Prevention have a number of diagnostic hallmarks for when an HIV infection becomes AIDS. When the patient's CD4+ T-lymphocyte count (an indication of immune system status) is below 200, which was true of G.B. on June 1, 1994, the diagnosis becomes AIDS rather than merely HIV positive. The foster father has tested negative for HIV as recently as August 1994. There are four generally acknowledged modes of transmission of HIV: (1) blood or blood products, (2) sexual activity involving the exchange of bodily fluids, (3) shared needles, and (4) transmission from mother to child during pregnancy or childbirth. Dr. Richard Morin, a specialist in infectious diseases who treats HIV and AIDS patients, testified that transmission to household members who are not sexual

partners is a risk which is "miniscule, at best." Dr. Morin further testified that HIV survives poorly outside the body and that transmission in the household through dishes, dirty Kleenex, toothbrushes, et cetera, does not occur. The greatest risk of transmission is through sexual activities, and thus, the majority of his recommendations to avoid transmission of HIV concern that subject. The foster parents testified that they are sexually active with each other, but practice "safe sex."

Dr. Morin testified that the life expectancy of a person with AIDS is difficult to predict, as some people get the infection and die relatively quickly and others survive longer periods of time. Statistically, Dr. Morin recounted that the overall fatality rate for AIDS cases diagnosed in the State of Nebraska since 1983 is 56 percent. Dr. Morin characterized the claim that everyone with AIDS will ultimately die of it as speculation, and when asked if G.B. has a 100-percent probability of dying of AIDS, he described that as "speculative, at best." However, Dr. John Donaldson, a psychiatrist, testified that there is now an almost certain probability that G.B. will die from AIDS and that it is a 100-percent fatal condition, and it was his opinion that G.B. "will become ill and eventually die while [John] is still a relatively young child."

Once G.B.'s diagnosis became known to DSS, the department approached the foster parents about changing from a "fos-adopt" program for John to a long-term foster care agreement, without adoption, to be reviewed by the court and DSS every 6 months. This plan is evidenced by a "court report" authored by the case supervisor, Patricia Squires, and dated March 2, 1994. Included in that report is a report of information from G.B.'s personal physician dated August 20, 1993, opining that she will develop AIDS within the next 7 years by a probability of 100 percent and that her probability of survival is " 'presently zero.' "

As recited in the procedural background, by late May 1994, DSS requested that the court approve a change in placement of John. Squires testified that the foster parents were uncooperative with regard to implementation of a long-term foster care plan. This failure to "cooperate" was evidenced solely by their insistence upon adopting John. When asked whether the foster

parents could not adopt John only because G.B. is HIV positive, Squires responded: "No, because we're not just considering her HIV positive. We're — At the foremost of our mind is how John, without medical advancement, losing his adoptive mother at a very young age, how that will impact his schizophrenia that is in his biological makeup." Although Squires described the decision concerning John's placement as a collaborative decision among herself, the director of DSS, medical and legal advisors, and others, only one witness, Dr. Donaldson, testified in support of the DSS position.

Dr. Donaldson is a board-certified psychiatrist, and children make up a substantial portion of his practice. He has done a "paper review" of this situation, but has never met the foster parents or John, nor has he seen them interact. Dr. Donaldson has rendered two opinions in this case. His initial recommendation to DSS was that John stay with the foster parents until the mother became increasingly ill and at that time, that John be moved to alternative care. Dr. Donaldson's second opinion, which was rendered at trial, is that John should be transferred to the care of others when he is age 3 or 4, while he is still a preschooler and before he is a concrete thinker and learns names. Dr. Donaldson opines that such a transition can be done in a positive fashion without great difficulty. The basis for the shift in Dr. Donaldson's opinion apparently stems from the opportunity to more fully review complete medical records of G.B. As a result, he concludes that she is becoming increasingly ill and is not asymptomatic, as she contends. In support of that position, he recites over 100 physician calls or visits from G.B.'s medical records, most of which related to problems typically seen in people with advancing HIV infections. From her medical records, Dr. Donaldson details a series of physical symptoms which he characterizes as symptomatic of advancing HIV infection, including, but not limited to, peripheral neuropathy pain, nosebleeds, low platelet count, thrombocytopenic purpura, splenectomy, sores on her head and hair loss, postoperative wound infections, multiple candidal infections, multiple fungal vaginal infections, fevers of unknown origin, allergic responses to antibiotics, and anxiety and depression.

The basis for Dr. Donaldson's opinion is that the seriousness of the foster mother's illness means a high risk that the child's "permanency" will be disrupted at a time when it is increasingly important, i.e., when the child begins school. He describes the situation as that of an increasingly ill person who becomes emotionally needy as a result of illness and thereby affects the support available for the child from the ill mother and the healthy father. Donaldson contends that the loss of a mother and father by a custodial shift is less traumatic at age 2 or 3 than it would be at a later time such as at age 6 or 8.

Dr. Donaldson also spoke to the matter of the child's biological family history. Since John's biological mother has been diagnosed with schizophrenia, there is a 14-percent chance that John will develop that illness. Should John's biological father have schizophrenia (which cannot be considered as established by the record), the probability increases to 50 percent that the child will develop schizophrenia.

Dr. Donaldson admits that the child has bonded with the foster parents, but asserts he is capable of bonding with others and that with a good transition to the care of another person or persons, such change would be to his long-term advantage. Dr. Donaldson does not assert that the foster mother's death would cause John to become schizophrenic, although he notes that it could cause him to become that way earlier rather than later. Nonetheless, Dr. Donaldson's testimony is that the foster mother's death would not affect the "ultimate outcome" as to whether John has schizophrenia. Dr. Donaldson characterizes the child's best interests as being in an adoptive situation where both parents can reasonably be expected to be alive during childhood, be well, and be emotionally available to him. Dr. Donaldson emphasizes the importance of emotional availability of the parents for the child, particularly one who is at risk for mental illness, as is John, so that the parents can identify problems the child might have and intervene on their own or seek outside help.

At the request of the guardian ad litem, a psychiatric evaluation of the child was sought and obtained from Dr. Ann Evelyn. This evaluation involved multiple clinical interviews,

including the child and both foster parents, the father alone, the mother alone, the father and mother as a couple, the mother and child, and the father and child, as well as a play session with the child. Dr. Evelyn gave an abbreviated mental status examination to each parent. Dr. Evelyn also reviewed extensive records concerning the foster parents, the biological parents, and the DSS file. Dr. Evelyn's recommendation was that John remain with the foster parents in permanent foster care or as an adoptive child. The basis of her recommendation is that John does not have the emotional development to hold an image of his mother as a protective, nurturing, and available person in his mind for a long time when she is absent. Because of his young age, the distress which he experiences when his mother is gone creates tension and anxiety which he cannot master. If he is removed from his foster mother at this age, his personality is likely to be damaged, even if his new caregivers are attentive and adequate. The consequences of such damage include running away in adolescence, behavioral fixation at the level of aggression, tantrums, restlessness, and a tendency to manipulate others or to become involved in power struggles with authorities.

Addressing the foster mother's health situation, Dr. Evelyn states that the foster mother's possible death is in the nature of an "ordinary" loss or grief process rather than one destructive to personality development. Dr. Evelyn concludes her opinion by stating that John has lived with the foster parents for over 85 percent of his life and that "[e]verything which helps him attain a sense of security, relationships to others, and motivation to grow and develop is connected to his place in their home."

Dr. George Williams, a clinical child psychologist, testified on the basis of his training and experience, as well as from his review of the reports of Drs. Evelyn and Donaldson. Dr. Williams agrees with Dr. Evelyn's conclusion that John needs to continue his relationship with the foster parents. Although not necessarily opposed to long-term foster care, Dr. Williams states that long-term foster care, as opposed to adoption, avoids the finalization of the family's commitment to each other. This opinion is consistent with DSS policy that a child of John's age who is free for adoption should be adopted rather than placed

in long-term foster care. When asked about moving John to a new family and having them adopt, Dr. Williams described that as being "a crime" because

> I just can't find one shred of clinical experience that I've had in sixteen years and [from] what I've read in the literature that would suggest that that's going to be a positive thing for this child or for any child, given the adaptive relationship that exists in this family system right now.

In Dr. Williams' opinion, it would be in the best interests of the child to stay with his present family. Dr. Williams criticized Dr. Donaldson's original recommendation to leave John with the foster parents and "transition" him when the mother becomes ill on the basis that the termination of a productive parent-child relationship at any time is not healthy at any developmental age. Dr. Williams opines that it would be harder to endure a change of placement than it would be to endure the death of a family member after many years of a functional nurturing relationship because being removed from a mother and father cannot be explained to or understood by the child.

Dr. Robert Ewart, the foster mother's personal physician, offered the opinion that both foster parents are capable of caring for children in their home. Dr. Ewart acknowledged that the foster mother was diagnosed as HIV positive in February 1989, but stated that the medical progression of her condition has been gradual and that as of August 1993 she had no symptoms. However, Dr. Ewart said that her prognosis was poor and that there is zero probability that she will survive if she develops AIDS. Dr. Ewart stated that G.B.'s expected length of survival once AIDS develops is unknown, but that this conclusion assumes current medical care and does not include expected advances in medical care.

The record contains a report from April 1994 from the Nebraska Foster Care Review Board (Board), which recites the history of this matter and takes note of the opinions of Drs. Evelyn and Donaldson. Although the Board was critical of the fact that DSS appeared to have more than one plan in place for John, its recommendation was as follows:

> The Board recommends that John [T.] NOT be removed

> from his current placement, and that the adoption process should proceed as originally planned. The Board is of the opinion that although the foster/adoptive mother does have a serious health problem, that no child ever has a guarantee that any parent will live till said child attains adulthood.
>
> The Board strongly recommends that John be given permanency as soon as is practicable due to his young age. The Board supports adoption of John by the [foster parents] because even if [G.B.] should eventually die from her illness, John would still have his father, and a **real extended family** which would be available to provide the necessary emotional support which he would need. If John is left to languish in long term foster care, then John would have no "real" family which he could call his own, in the possible event of the death of his adoptive mother.

(Emphasis in original.)

The foster mother testified that she considers her condition stable and that she takes the medication AZT. She did not disclose her HIV positive status to DSS because she felt DSS would not have placed a child with them. She runs a day care that has two children on a full-time basis and one child on a part-time basis. G.B. testified that it is in John's best interests to be adopted by her and her husband because

> we're his mom and dad. . . . [W]e would never give up on him. I mean, if he gets schizophrenia, that's okay. I mean, we're the parents. We will be there as long as — you know, one of us will be. I may not be. I know [J.B.] will be, I know our families will be. They're aware of it, you know. I'm going to try to be there for him as long as I can . . . .

G.B. described a close relationship with her parents, whom she sees two or three times per week, and that relationship includes John. G.B. testified that her husband works an evening shift and therefore is present in the morning and early afternoons to help with John and play with him. She testified that she feels her husband has been ignored throughout this process and that he plays with John and teaches him. She describes John and her husband as inseparable.

Selected regulations from the Nebraska Administrative Code concerning DSS were received into evidence, including 474 Neb. Admin. Code, ch. 4, § 020.04 (1988), which provides that adoption must be "the plan for any child free for adoption." The evidence is undisputed that John is a child "free for adoption." 474 Neb. Admin. Code, ch. 4, § 020.17B (1990), provides that "[w]hen the child has been living with a foster family who wishes to adopt, their request must be considered."

BEST INTERESTS ANALYSIS

When G.B.'s HIV positive status was discovered by DSS, a change in plan took place. In March 1994, the case supervisor, Squires, reported to the juvenile court and put forth a new plan for John which was long-term foster care placement with the current foster parents, but without adoption. However, by late May of that year, it appears that the director of DSS, as well as others involved with this situation, realized that such a plan was inconsistent with DSS' own rules and regulations. Section 020.04 requires that a child free for adoption, as John is, have adoption as the plan, not foster placement. This is the apparent genesis of the present plan of DSS to remove John from the care of J.B. and G.B. and "transition" him to the care of new foster parents for adoption, as DSS will not consent to an adoption of John by his current foster parents, according to the testimony of Squires.

A complete and thorough review of the evidence in this case establishes that John has bonded with and is attached to his foster parents; that there are no deficiencies in the care John receives; that the three of them view each other as mother, father, and family; that John has extended family via J.B. and G.B. with whom he has also bonded; and that there is virtually no risk that HIV will be transmitted to John through ordinary household contact. Although there is considerable discussion in the evidence of the deception practiced by the foster parents in not disclosing the mother's HIV positive status, that deception is not the basis for the plan being proposed by DSS. The basis of that plan is the belief that the foster mother will die before John reaches the age of majority, and thus, it is in John's best interests to be removed from that obviously difficult and painful

situation and placed in a home where he can be adopted by parents who are not faced with the apparently inevitable death of the wife and mother within the near future. Also entering into the consideration of the DSS caseworkers and Dr. Donaldson, who supports the DSS plan, is the fact that John has a biological family history of schizophrenia. Although no witness asserted that the trauma of the death of a parent causes schizophrenia, Dr. Donaldson expressed the concern that such a trauma could accelerate the onset of schizophrenia, if he is going to be so afflicted.

This case requires the legal system to answer a most difficult question. The question, at its most basic level, is whether it is better for John to stay with his foster parents and see what some witnesses assert is the virtually certain suffering and death of his foster mother from AIDS or whether it is best for John that he be removed from the care and love of his foster mother and father so that he can be placed with a "healthy set" of foster parents where he does not face the near certainty of having to endure at a tender age the death of his mother.

The end result of this litigation is that John will have one of two very difficult life experiences. We cannot precisely know today the ultimate impact of what we decide upon John's future well-being. Moreover, from an analytical standpoint, this case is not like the "adoption" cases. There, the clearly established constitutional rights of a biological parent mandate a legal preference over a proposed adoptive parent without consideration of the best interests of the child, absent a finding of unfitness on the part of the biological parent. See *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992) (holding fit biological or adoptive parent has superior right to custody of child over a nonbiological or nonadoptive parent because of constitutionally protected parent-child relationship). See, also, *Petition of Doe*, 159 Ill. 2d 347, 638 N.E.2d 181 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 499, 130 L. Ed. 2d 408, and *cert. denied* ____ U.S. ____, 115 S. Ct. 499, 130 L. Ed. 2d 408 (restoring custody to natural father of child who had been with proposed adoptive parents for over 3 years). See, also, *In re Adoption of Kassandra B. & Nicholas B.*, 3 Neb. App. 180, 524 N.W.2d 821 (1994) (upholding natural father's

right to custody without best interests analysis where father had not been adjudged unfit); *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948) (stating the same, unless the parent has forfeited or relinquished his or her parental rights).

Accordingly, a "hard and fast" rule of law does not govern this case. Instead, we must determine John's best interests, a standard which by its very nature is somewhat subjective and which eludes precise definition. Consequently, of necessity we must rely heavily upon the expert witnesses who testified about the impact upon John of the DSS plan to remove John from his foster parents. In other words, our decision flows from the evidence and our assessment of the weight thereof, rather than from well-established legal principles which dictate a clear result.

We have already extensively summarized in the factual background portion of this opinion the testimony and opinions of the experts who have testified in this case, as well as the other evidence. In summary fashion, the record contains the opinion of a clinical child psychologist, Dr. Williams, that John should not be removed from his foster parents. Dr. Evelyn, a psychiatrist, stated that John should remain with his foster parents. Both Drs. Williams and Evelyn felt that removal constituted a likelihood of damage to John's personality which was greater than the risk involved in a so-called ordinary life event such as the natural death of a parent. Dr. Donaldson, also a psychiatrist, initially recommended that John stay with his foster parents on a long-term basis until G.B. becomes ill with AIDS and that at that point, the child should be "transitioned." A later opinion from Dr. Donaldson was that the transition from the present foster parents to another set of foster parents where adoption could result should occur at the present time. Dr. Donaldson believes it is possible to make such a transition without harming the child. Into this evidentiary mix we must factor the initial decision of DSS, upon the discovery of G.B.'s HIV positive status, that John remain with his foster parents in a long-term foster care placement, but without adoption, as well as the emphatic opinion of the Board that John stay with them. We also consider that Dr. Donaldson has never spoken to the foster parents or the child, nor has he seen them interact.

Finally, the absence of risk to John from the HIV virus by household contact must be considered.

The Foster Care Review Act, Neb. Rev. Stat. §§ 43-1301 to 43-1318 (Reissue 1993), provides for a number of things which cause us to accord the Board's opinion substantial weight. Section 43-1314 requires the juvenile court to give notice to the Board of all reviews pertaining to a child in foster care placement and gives the Board the right to participate in such reviews. Section 43-1308(2) gives the Board the right to request the court to hold a review hearing. Pursuant to § 43-1308(1)(b), the Board *shall* submit its findings and recommendations to the court having jurisdiction over a child in foster care. Importantly, § 43-285(6) provides that the only prerequisite for the admission in evidence of the Board's written findings and recommendations is that they have been provided to all other parties of record. The Foster Care Review Act and the Board would be empty vessels indeed if the Board's recommendations were not considered by the court. Thus, we do not take the Board's emphatic stand against the DSS plan to be a meaningless gesture.

In our trial of this case de novo upon the record, we do not see the matter as one involving a conflict of fact requiring deference to the trial court's determination because of its having observed the witnesses. The case is, rather, a matter of disputed expert opinion about the consequences of a proposed course of action given a set of essentially well-established and undisputed facts concerning the child and his foster parents. As we have earlier held herein, the burden of proof is whether the guardian ad litem has established by a preponderance of the evidence that the DSS plan is not in John's best interests. Our conclusion is that the guardian ad litem has carried the burden of proof to establish that the proposed plan to remove John from his foster parents is not in the best interests of the child. There is more credible evidence against the plan to remove John than there is in support of the plan.

This is not to say that we are unconcerned about the deception practiced by the foster parents in failing to reveal the foster mother's HIV positive status. Clearly, the written application process is such that disclosure of this information

would have occurred, had the foster parents been truthful. The department's regulation on health, 474 Neb. Admin. Code., ch. 4, § 010.04C (1988), would clearly cause G.B.'s condition to be closely examined, and perhaps rejection of the application to be "fos-adopt" parents would have occurred. We let the language of the regulation speak for itself:

> 4-010.04C Health: An applicant must be in such physical/mental condition that it is reasonable to expect him/her to be able to fulfill parenting responsibilities. In case of adoption, health should be maintained to the child's majority. The worker may request a physician's and/or therapist's report on the health of an applicant if there appears to be a health condition that might affect parenting ability. A negative report may be the basis for denial of an application at any point in the home study process.

However, the evidence is that DSS does not have a specific policy on AIDS, and other than may be inferred from the foregoing regulation, there is no evidence about what would have been done with the application if G.B.'s health status had been fully disclosed. The foster parents' rationale for the deception is that they would not have been approved as foster parents, and we suspect that is so. However, if the deception of the parents were now used to decide the outcome of this case, we would be putting aside the matter of John's best interests, which is our focus. Consideration of that deception clearly played a role in Dr. Donaldson's opinion, as he so testified. As far as John is concerned, there is no deception. The matter is rather simplistic when viewed from John's eyes: G.B. and J.B. are his parents, they love and care for him, and he is attached and bonded to them. We cannot say it is per se against the child's best interests that his parents have hidden a health condition which generates from some quarters a degree of discrimination, hysteria, and paranoia. See *Doe v. Borough of Barrington*, 729 F. Supp. 376 (D.N.J. 1990), for a collection of examples of such reactions in an opinion finding that a police officer violated the plaintiffs' 14th Amendment rights by disclosing that a member of their family had AIDS.

There is no evidence that the deception itself adversely

affects John, except to the obvious extent that absent the dishonesty, he likely would not be in a position where we must discern which alternative is "less bad" for John. Keeping John's best interests at the forefront of the analysis requires that we put aside what is essentially a punitive notion that John cannot stay with his foster parents because they were dishonest about G.B.'s health. If we do not do this, we run the risk that John is also punished for the foster parents' deception.

Although the "best interests of the child" test is most often addressed in the context of custody disputes between natural parents, the considerations used in those cases are not inappropriate here.

> "In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; . . . and the general health, welfare, and social behavior of the child."

Ritter v. Ritter, 234 Neb. 203, 211-12, 450 N.W.2d 204, 211 (1990).

Of these considerations, the record shows only that the capacity of the foster mother to care for the child is compromised by virtue of her illness, which is only true at an uncertain point in the future. She is presently fully capable of parenting John, as well as operating her business. Moreover, DSS regulation § 020.17B requires that when a child has been living with a foster family who wishes to adopt, their request must be considered, and the assessment shall include the "[e]xtent of firmly established psychological bonding." A bond of that nature is indisputably present in this situation.

We have searched the legal literature for guidance, but we have been unable to find a case in which an attempt was made to remove a foster child from his foster parents due to the HIV

or AIDS infection of one of such parents. However, there are decided cases involving parents, children, and this illness. For example, in *Newton v. Riley*, 899 S.W.2d 509 (Ky. App. 1995), the child's father sought modification of a joint custody arrangement to give him sole custody upon learning that the mother's new husband had AIDS. The appellate court found that the trial court did not err in refusing a change in custodial arrangements, holding that the dispositive factor in "public school case law" and "custody/visitation case law" has been the courts' reliance on the medical community's increased understanding of HIV and the modes of transmission. *Id.* at 510. The court stated that "[t]he widely accepted conclusion among medical researchers is that there exists '[n]o risk of HIV infection through close personal contact or sharing of household functions.' " *Id.*, citing *Steven L. v. Dawn J.*, 148 Misc. 2d 779, 561 N.Y.S.2d 322 (1990), quoting *Doe v. Roe*, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (1988). See, also, *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. App. 1988) (holding that trial court could not restrict noncustodial father's visitation with his 2-year-old daughter on the sole basis that the father had AIDS, relying upon evidence that communication of virus by household contact was not a recognized method of transmission). In *Jane W. v. John W.*, 137 Misc. 2d 24, 519 N.Y.S.2d 603 (1987), the court held that a father was not precluded from visiting with his 18-month-old daughter because he had been diagnosed with AIDS, as expert testimony showed that there was little possibility of transmission to the child.

In *Doe v. Roe, supra*, the maternal grandparents sought custody of two minor children from their custodial father and moved for an order compelling involuntary testing of the father for HIV. The New York court analyzed the matter of compelling an involuntary HIV test, expressing particular concern over the discrimination and stigmatization directed toward those who have been diagnosed as HIV positive. The court found it would not compel an involuntary HIV test, as in any event, the law was well settled that a handicapping condition cannot deny custody to an otherwise qualified parent. The court cited the testimony of the psychiatrist that even if the father were suffering from AIDS and had a shortened lifespan, this fact

would not justify removing the children from their long-term custodial parent with whom they have strong bonds of love and affection. In a footnote, the New York court observed that "[t]he issue of potentially shortened life span is also insufficient grounds for removing custody." *Id.* at 221 n.12, 526 N.Y.S.2d at 726 n.12. Cf. *Collins v. Collins*, 115 A.D.2d 979, 497 N.Y.S.2d 544 (1985) (age of father at 65 was irrelevant on child custody issue where he was in excellent health).

In *Steven L. v. Dawn J., supra*, the mere fact that the mother had tested positive for HIV was not, without more, a material change of circumstances warranting change of custody from the mother to the father. In contrast, see *H.J.B. v. P.W.*, 628 So. 2d 753 (Ala. Civ. App. 1993), where a change-of-custody order from the father to the mother was affirmed on appeal in view of the custodial father's admitted homosexuality, HIV positive status, and lack of credibility as a witness which included attempting to hide his health status from the court, as well as the mother's improvement as a parent since the divorce.

Admittedly, the foregoing cases deal with the custodial or visitation rights of natural parents, whereas the instant case involves whether it is in the best interests of a child to stay with his foster parents, one of whom has AIDS. The State's brief asserts that J.B. and G.B. are persons without the standing of custodial parents "because they are 'legal strangers' to John [T.] who through deceit gained custody of a 'stranger child.' " Brief for appellee at 15. However, the fact of the matter is that the foster parents are not strangers to John, but, rather, when DSS proposed the plan, in John's eyes, they were *his parents*. The test for custody determinations for natural, biological parents is the best interests of the child. See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). Similarly, the best interests of John govern this case. Thus, because the determinative standard is the same, we are unable to give the lack of a biological connection between the foster parents and John any meaningful force when assessing the child's best interests. To the extent that the foregoing authority is helpful, it supports the conclusion that the foster mother's AIDS infection, as well as its probable consequences, does not compel a change of foster parents.

Life is indeed uncertain, and no child is guaranteed that he

or she will proceed through childhood or adolescence with his or her parents healthy or even alive. There is no doubt that parental illness and death are very hard on children. It is our task to put aside the fact that the foster mother has AIDS, an illness laden with emotion. Instead, we view the matter as we would a case involving any potentially terminal illness of a parent. At oral argument, counsel for DSS agreed that the nature of the illness is not determinative. We know that parents suffer and die from illness, and their children observe this and suffer with their parents. However, the children hopefully learn that although painful, death is a natural part of the cycle of life. When parents are ill, and even terminally so, children are not removed from their ill parent, and certainly not from a healthy parent who will survive the spouse's illness. Given the bond that exists between John and his foster parents, we do not believe it is the function of DSS or the courts to save John from one tragedy, the probable death of G.B., the only mother he has known, by visiting another tragedy on him, a DSS plan which includes not only the loss of his mother, but his father as well.

CONCLUSION

Upon our de novo review, we conclude that the preponderance of the evidence establishes that it is in John's best interests to stay with his present foster parents. In fact, the evidence strongly points to this conclusion. However, our decision should not be read as approval of the deceit of the foster parents—to so read the decision would be to *misread* it. We have decided this case on the basis of John's best interests as the law requires. Should John suffer the loss of his foster mother at a young age, his foster father and his extended family will be there to help him endure that misfortune. In the meantime, the evidence shows that he will be loved and well cared for. We reverse the decision of the separate juvenile court of Lancaster County and remand the cause to that court with directions to disapprove the DSS plan to "transition" John to another set of foster parents.

REVERSED AND REMANDED WITH DIRECTIONS.

BRENT L. FINE, APPELLEE, V. NAOMI L. FINE, APPELLANT.
537 N.W.2d 642

Filed October 3, 1995. No. A-95-702.

1. **Affidavits: Appeal and Error.** A trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit will not be disturbed on appeal unless the decision amounts to an abuse of discretion.
2. ____: ____. If the trial court makes the requisite specific findings, its decision that a litigant has no right to in forma pauperis status must be affirmed in the absence of an abuse of discretion.
3. ____: ____. A trial court may deny in forma pauperis status to an appellant on either of two grounds, (1) when the appellant is in fact able to pay the costs or give security therefor or (2) when the appeal is frivolous or not taken in good faith.
4. ____: ____. Before a court may deny an appellant in forma pauperis status for an appeal under Neb. Rev. Stat. § 25-2301 (Reissue 1989) on the basis that that person is not indigent, the court must make specific findings of fact that establish the expected fees and costs that the appellant must pay and the ability of the appellant to pay those costs within the time required.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. On motion to dismiss appeal. Motion overruled.

Anthony L. Young, of Western Nebraska Legal Services, for appellant.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for appellee.

HANNON, MILLER-LERMAN, and INBODY, Judges.

HANNON, Judge.

Naomi L. Fine has appealed from the decree dissolving her marriage with Brent L. Fine. In lieu of paying the costs of the appeal, Naomi filed an affidavit of poverty under Neb. Rev. Stat. § 25-2301 (Reissue 1989). After that affidavit was filed, the district court found that Naomi was not indigent and that the appeal was frivolous and not taken in good faith and therefore denied her application to proceed in forma pauperis. This case now comes before this court on Brent's motion to dismiss the appeal in view of the trial court's findings and Naomi's failure to pay the necessary appeal costs or give security following the court's finding. We conclude that the district court abused its

discretion in finding that Naomi was able to pay the costs of the appeal and that its conclusion that the appeal was not taken in good faith and was frivolous was not supported by specific findings. Therefore, we deny the motion.

Brent does not attempt to raise a jurisdictional issue by this motion, but, rather, seeks to have this court dismiss the appeal because Naomi failed to file a cost bond as required by Neb. Rev. Stat. § 25-1914 (Cum. Supp. 1994), to deposit the docket fee as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994), to deposit the approximate cost of the bill of exceptions with the court reporter as required by Neb. Ct. R. of Prac. 5B(1)e (rev. 1995), to file a brief, and to notify the court reporter of the record preparation date as required.

The trial court filed a decree dissolving the parties' marriage on March 1, 1995. By an order filed March 30, the court slightly modified that decree and overruled the parties' separate motions for new trial. On April 3, Naomi filed a combined application and affidavit to proceed in forma pauperis, which document contains those statements required under § 25-2301, that is, that she believed she was entitled to redress and that she was unable to pay the court costs or give security therefor. On April 5, the trial court set a hearing date for April 10 to consider Naomi's application. By an order filed May 26, the trial court denied her application.

In its order of May 26, the trial court made specific findings which can be summarized as follows: That approximately 2 weeks after the decree was entered Naomi borrowed $1,000 and spent $500 of that money to make a payment and a partial advance payment on her vehicle and then used $500 to bail an acquaintance out of jail; that she made no inquiries concerning borrowing funds sufficient to pay the costs of her appeal; that in late March she quit a full-time job at which she earned $5.50 per hour; that she admitted to having received financial assistance from her mother since the decree; that at the time of trial she was living with a man whom she was engaged to marry, but that by the time of the hearing he had left town with all of the money from her checking account; and that she has made no attempt to pay any child support. The court found that Naomi's situation had deteriorated since the decree was entered,

that her testimony concerning indigence is not credible, that she is not indigent for purposes of prosecuting this appeal, and that "the Respondent's appeal is not taken in good faith and is frivolous."

In holding the hearing and in entering the order of May 26, the trial court was plainly attempting to follow the dictates of *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). In *Flora*, the Supreme Court stated it intended to clarify the procedure trial courts must follow when denying leave to proceed in forma pauperis, and in so doing the court said:

> As required by § 25-2301, the trial court must certify in writing if, in its judgment, an appeal lacks good faith. However, a written statement of the trial court's reasons, findings, and conclusions for denial of the appellant's leave to proceed in forma pauperis must accompany its certification that an appeal is frivolous.

247 Neb. at 265-66, 526 N.W.2d at 647.

[1,2] In *Flora*, the court stated that ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit will not be disturbed on appeal unless the decision amounts to an abuse of discretion. We conclude that if the trial court makes the requisite specific findings, its decision that a litigant has no right to in forma pauperis status must be affirmed in the absence of an abuse of discretion. No bill of exceptions has been filed, and obviously, none can be expected if Naomi is unable to deposit the estimated cost of the bill of exceptions with the court reporter and she is denied in forma pauperis status. The lack of availability of a bill of exceptions in this situation is undoubtedly why in *Flora* the Supreme Court required trial courts to make specific findings of fact when an application under § 25-2301 is denied as frivolous.

Section 25-2301 provides in part that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." Neb. Rev. Stat. § 25-2306 (Reissue 1989) provides that upon the filing of an affidavit, the court shall order a transcript "if the suit or appeal is not frivolous, but presents a substantial question." These statutes clearly deal with the situation where the trial court denies in forma pauperis status to an appellant on the ground that the

appeal is frivolous or not taken in good faith. However, in *Flora*, the Supreme Court stated: "Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith." 247 Neb. at 265, 526 N.W.2d at 647.

[3] In *In re Interest of Noelle F. & Sarah F.*, 3 Neb. App. 901, 534 N.W.2d 581 (1995), this court considered a case where the trial court held the appellant's financial status did not warrant granting him in forma pauperis status, and we found that the record showed the trial court did not abuse its discretion in doing so and dismissed the appeal for failure to pay docket fees. We therefore conclude that a trial court may deny in forma pauperis status to an appellant on either of two grounds, (1) when the appellant is in fact able to pay the costs or give security therefor or (2) when the appeal is frivolous or not taken in good faith. In the case at hand, the trial court denied Naomi that status on both grounds. In *Flora*, the trial court found only that the appeal was not taken in good faith or was frivolous. *Flora* therefore gives no guidance on the subject matter of the required specific findings when in forma pauperis status is denied upon the basis that the appellant is not unable to pay the costs or give security therefor. However, the above-quoted statutes and cases allow the trial court to act if it determines that the allegations of poverty are untrue.

What specific findings are necessary to deny an appeal in forma pauperis on the basis that the appellant is not unable to pay the costs? With respect to an appeal, § 25-2301 provides in significant part: "Any court . . . shall authorize the . . . appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay such costs or give security." The statute gives neither the trial court nor this court any guidance in its administration. We conclude the effect of the statute must be examined in the light of other statutes and rules providing for the payment of fees, costs, or security in the appellate situation.

With respect to an appeal from the district court to this court or the Supreme Court, the fees and costs can only be the docket fee, the appeal cost bond, and the cost of the bill of exceptions.

Under § 25-1912 and Neb. Rev. Stat. §§ 33-103 and 33-106.04 (Reissue 1993), an appellant must deposit $53 with the clerk of the district court within 30 days of the order being appealed. The clerk is also entitled to a fee for the transcript, but the amount and the time within which it must be paid are not clear. Neb. Rev. Stat. § 33-106 (Reissue 1993). Under § 25-1914, the appellant must post a $75 cost bond or deposit $75 in cash within the same period. Rule 5B(1)e requires an appellant to deposit the estimated cost of the bill of exceptions within 14 days after the court reporter notifies the appellant of the estimated cost, and the reporter is supposed to make this estimate immediately upon receipt of the praecipe for the bill of exceptions. In effect, the appellant must deposit the cost of the bill of exceptions within not less than 44 days after the final order being appealed.

[4] In most appeals, the appellant will be required to come up with more money to pay for the bill of exceptions than any other item, but all of the costs must be paid before an appellant can hope to have an effective appeal. Section 25-2301 does not provide for the appellant to pay that part of the costs that the appellant is capable of paying. The statutes and rules controlling appeals do not allow for extending the time in which to pay the costs. The Legislature has not authorized the denial of in forma pauperis status for any reasons other than the ability to pay the costs or to give security therefor and that the appeal was not taken in good faith or was frivolous. Section 25-2301 does not require the affiant to claim indigence, but only that the affiant is unable to pay the fees and costs or give security therefor. Therefore, we conclude that before a court may deny an appellant in forma pauperis status for an appeal under § 25-2301 on the basis that that person is not indigent, the court must make specific findings of fact that establish the expected fees and costs that the appellant must pay and the ability of the appellant to pay those costs within the time required.

We must determine the costs Naomi must pay to appeal in this case. The record shows that on April 11 the court reporter notified Naomi that the estimated cost of the bill of exceptions was $1,450 and demanded that sum be deposited within 14 days. In addition, she would be required to deposit the $53 for

docket and automation fees and to file a $75 cost bond or to deposit the cash within 30 days of March 30, 1995, as required by the statutes cited above. Therefore, it is apparent that in order to pursue the appeal, Naomi would need to raise $1,578 in cash within 30 days after the motion for new trial was overruled.

Next, we must determine Naomi's ability to pay the $1,578 as required. We do not have a bill of exceptions to examine. To determine whether the trial court abused its discretion, we must examine the court's findings, the few facts stated in Naomi's affidavit, and the record. In her affidavit, she states her net income is $736 per month and that she is required to pay $220 per month child support. In its May 26 order, the trial court found that she quit a full-time job paying $5.50 per hour. (At 40 hours per week, working 52 weeks a year, she would make $953 per month gross.) However, in the decree of dissolution the court concluded her earnings were $736 per month and on that basis ordered her to pay $220 per month child support. In its May 26 order, the court found she had not paid the ordered child support.

Naomi's affidavit shows that she claims to have only $10 in her bank accounts, household goods valued at $1,500, and a 1987 Chevrolet valued at $4,500 with a $3,600 lien upon it. The property she claims to own and the values and liens she claims for that property appear to be reasonable in view of the property listed in the decree, and the court did not find them to be incorrect. In the dissolution decree, Naomi was directed to pay the balance owing on two credit cards and to Ford Motor Credit Company, the balance of a J.C. Penney bill, and a medical bill. The amounts of these obligations are not shown, except that in overruling the motions for new trial, the trial court required Naomi to pay only $1,250 of the balance of one of these credit cards. In summary, the record shows she has more liabilities than assets, and more obligations than any income she could reasonably expect in the immediate future. These findings would be necessary even if she had kept the better paying job. There is no evidence that Naomi had any money or property with which to pay the required costs.

The trial court also found that Naomi had borrowed $1,000

and spent $500 of this money on car payments and $500 to bail an acquaintance out of jail, that she had received financial assistance from her mother since the decree was entered, and that she had made no inquiries of financial institutions about borrowing money to pay the appeal costs. The court's findings imply that Naomi should have attempted to borrow the money from either a lending institution, friends, or family. The record clearly establishes that Naomi is insolvent and that she had no assets to sell. It is self-evident that she could not obtain a commercial loan of any sum, let alone one for $1,578. We do not believe a person must unsuccessfully resort to begging for a loan from friends and family in order to qualify for in forma pauperis status.

The findings of the trial court and the evidence would support a finding that Naomi's financial condition would have been better if she had maintained the job she once held, if she had selected her friends more carefully, and if she had not trusted someone who was not worthy of trust. These matters might support a conclusion that she has been improvident, perhaps foolish, but the existence of these attributes does not establish the ability to pay the costs. These matters may help to explain why she cannot pay the costs of the appeal, but they do not tend to establish that she had the ability to pay them. The trial court did not find and the record would not support a finding that Naomi voluntarily impoverished herself.

For the above reasons, we conclude that the record shows that Naomi could not pay the required costs of appeal within the required time and that therefore the trial court abused its discretion in determining that Naomi was not indigent for purposes of prosecuting her appeal in forma pauperis.

The trial court also found that Naomi's appeal was not taken in good faith and that it was frivolous. The effect of these findings is controlled by the holding of *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). In *Flora*, the trial court did not certify in writing the reasons and findings supporting its conclusion, and thus, its conclusion was found to be inadequate. In the case at hand, the trial court gave no reasons and made no specific findings to support its conclusion that Naomi's appeal was not taken in good faith and was frivolous. Therefore,

we conclude that the finding of the trial court in this case is essentially the finding that the Supreme Court rejected as inadequate in *Flora*, and that finding is likewise inadequate in this case.

The trial court abused its discretion in denying Naomi in forma pauperis status, and we reverse the district court's decision on that determination. We also direct the district court to make such orders to the clerk, court reporter, or other court officials as shall be necessary for them to prepare as expeditiously as possible the bill of exceptions and any other documents for this appeal. Naomi's brief date will be set when the bill of exceptions is filed.

MOTION OVERRULED.

CHARLES L. MAHLENDORF, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT AND CROSS-APPELLEE.

538 N.W.2d 773

Filed October 24, 1995. No. A-94-054.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Judgments: Appeal and Error.** When reviewing for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** Under the statutory scheme for driver's license revocations, the Department of Motor Vehicles has made a prima facie case once the department establishes that the arresting officer provided his sworn report containing the required recitations to the director of the department.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellant.

L. William Kelly, of Kelly & Schroeder, for appellee.

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

HOWARD, District Judge, Retired.

The Nebraska Department of Motor Vehicles appeals from a district court order which reversed the department's revocation of Charles L. Mahlendorf's driver's license. Mahlendorf had his license revoked pursuant to the automatic license revocation provisions of Neb. Rev. Stat. § 39-669.15 et seq. (Reissue 1988 & Cum. Supp. 1992). Mahlendorf cross-appeals, alleging that the district court erred when it did not award him attorney fees. For the reasons stated below, we reverse the district court's order and dismiss the cross-appeal.

STATEMENT OF FACTS

Mahlendorf was arrested on April 4, 1993, and had his license impounded pursuant to §§ 39-669.15 through 39-669.18. These sections have since been transferred to Neb. Rev. Stat. §§ 60-6,205 through 60-6,208 (Reissue 1993), but the transfer of the sections and renumbering of the sections has no substantive bearing on the case at hand. Mahlendorf filed a petition for an administrative hearing on April 14, resisting the automatic license revocation. Mahlendorf requested that the rules of evidence be used during the hearing, and his request was granted. The department requested a continuance of the hearing, and an administrative hearing was held on May 13.

The department offered the testimony of Aurora police officer Benjamin Penick, who testified that as a result of his contact with Mahlendorf, Penick had filed a sworn report with the department. The attorney representing the department then offered the sworn report into evidence, but Mahlendorf objected to the offer on the basis of foundation, and the objection was sustained by the hearing officer. The department's attorney then

stated that the document was not offered

> to prove the truth of the matter assertive [sic] therein but to show that Officer Penick did file it with the Department of Motor Vehicles, and that it stated the things contained on the face of it when it was submitted, but that the document is not being offered as proof of anything. It's not being offered to prove the truth of the matter assertive [sic] on the document, rather simply to show that it was filed with the Department of Motor Vehicles on this day. And that the Director has jurisdiction over this matter.

Mahlendorf's attorney stated he had no objection if the offer of the report was only for that purpose, and the hearing officer then accepted the report into evidence "to establish jurisdictional grounds and to show that the sworn report was filed by Officer Penick but will not be considered for the truth of the matters asserted therein." The department did not offer further evidence, and Mahlendorf offered no evidence at the hearing. The director of the department ordered that Mahlendorf's license be revoked for 90 days, effective May 19, 1993.

Mahlendorf appealed the director's decision to the district court, alleging that the director erred when he revoked Mahlendorf's license because the department had failed to establish a prima facie case. The district court found that because the department had offered and received the sworn report of Penick solely for the purpose of establishing jurisdiction and to show the sworn report was filed,

> [t]here was no other competent evidence received at the contest hearing that would support a finding that the law enforcement officer had probable cause; that the appellant was lawfully arrested; that the appellant was advised of the consequences or that the appellant was operating or in the actual physical control of a motor vehicle.
>
> . . . .
>
> The consideration by the Director of [the sworn report] to establish the prima facie case for revocation was error because it was not offered or received for that purpose
>
> . . . .

The district court held that the department had failed to

establish a prima facie case for revocation and therefore vacated the director's order. The department appeals.

ASSIGNMENTS OF ERROR

The department alleges that the district court erred when it found that the department had failed to establish a prima facie case and when it reversed the order revoking Mahlendorf's driver's license.

STANDARD OF REVIEW

[1-3] In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994). In an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). When reviewing 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. *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994).

ANALYSIS

We are guided in our analysis of this case by the recent Nebraska Supreme Court opinion in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). In *McPherrin*, the court noted that before adoption of the automatic license revocation provisions of § 39-669.15 (Cum. Supp. 1992), the administrative revocation of driver's licenses in association with driving while intoxicated occurred when a driver, arrested for driving while intoxicated, refused to submit to a chemical test of his or her blood, breath, or urine. See § 39-669.15 (Reissue 1974). Under the old statute, when an arrested driver refused to submit to the test, the arresting officer was required to make a sworn report to the director of the Department of Motor

Vehicles. The statute provided that the report must state (1) that the driver was validly arrested pursuant to the implied consent statute and the reasons for such an arrest, (2) that the driver was requested to submit to the required chemical test, and (3) that the driver refused to submit to the test.

Section 39-669.16 (Reissue 1974) required the director to notify the driver of the date of a hearing regarding the reasonableness of the driver's refusal to submit to the test. The statute further provided that after the hearing, "if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license."

The Nebraska Supreme Court in *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), held that § 39-669.15, by prescribing what must be stated in the arresting officer's affidavit filed with the director after a person refuses to submit to the chemical test, places the burden upon the State to make a prima facie case for revocation before the director. The *Mackey* court held that upon appeal from an order revoking a driver's license, the licensee bears the burden of proof to establish by a preponderance of the evidence the ground for reversal.

In 1992, the Nebraska Legislature adopted the automatic license revocation statutes. Section 39-669.15 (Cum. Supp. 1992) provides that upon a driver's arrest, if the driver refuses to submit, or submits to a test and is found to be intoxicated, the arresting officer must immediately impound the driver's license, issue a temporary, 30-day permit, and notify the driver that the revocation of his or her license shall be automatic 30 days after the driver's arrest unless the driver files a petition for a hearing. The statute further states that the arresting officer shall forward to the director a sworn report stating (1) that the person was validly arrested pursuant to the implied consent statute, (2) that the person was requested to submit to the test, (3) that the person was advised of the consequences of refusing to submit or submitting to a test which results in a showing of intoxication, and (4) that the person either refused to submit or submitted and was found intoxicated. While the statutory provision regarding the arresting officer's sworn report now

provides that the officer must attest that he or she advised the driver of the consequences of refusing or submitting to the test and provides that a sworn report must be filed when a person submits to a test and is found intoxicated, the court in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), noted that the 1992 amendments to § 39-669.15, now found at § 60-6,205, did not change the statutory requirement that a sworn report must be provided in order for the State to meet its burden of making a prima facie case.

[4] In *McPherrin*, the hearing officer received the sworn report of the arresting officer into evidence for the limited purpose of establishing jurisdiction and not as " 'proof of any of the statements made.' " *Id.* at 563, 537 N.W.2d at 500. The arresting officer then testified that as a result of his contact with McPherrin, he had filed a sworn report. The report was then received again into evidence for the purpose of proving the sworn report had been provided and as evidence that " 'statements have been made to the [d]irector as required by 39-699.15(3).' " *Id.* The *McPherrin* court held that

> reading the statutory scheme at issue in light of our holdings under the pre-1993 scheme, we must conclude that defendants made a prima facie case once they established the officer provided his sworn report containing the required recitations. The director was not required to prove the recitations were true. Rather, it became McPherrin's burden to prove that one or more of the recitations were false.

Id. at 565, 537 N.W.2d at 501.

In the case at hand, the department offered the sworn report of the arresting officer for the purpose of establishing jurisdiction and as proof that "it stated the things contained on the face of it when it was submitted." Mahlendorf's attorney stated that there would be no objection if the offer was for that limited purpose. We see little distinction between *McPherrin*, in which there was an offer of a report for jurisdictional purposes and for purposes of showing that " 'statements have been made to the [d]irector as required by 39-669.15(3),' " and the case at hand, in which there was an offer for jurisdictional purposes and for the purpose of showing that the report "stated the things

contained on the face of it when it was submitted." The report, among other things, states that Mahlendorf was validly arrested after crossing the centerline four times while driving and after performing field sobriety tests poorly; that Mahlendorf was advised of the consequences of refusing or submitting to a chemical test of his blood, breath, or urine; and that Mahlendorf, having submitted to a test, was found to have .137 grams of alcohol per 100 milliliters of blood or 210 liters of breath. Such recitations meet the statutory requirements of § 39-669.15 (Cum. Supp. 1992), and therefore, the department made a prima facie case, thus shifting the burden of proof to Mahlendorf to present evidence to prove that one or more of the recitations in the report were false. See *McPherrin, supra.*

Mahlendorf alleges in his cross-appeal that the district court erred when it did not grant his motion for attorney fees. Because we have reversed the district court's order, Mahlendorf's cross-appeal is dismissed.

CONCLUSION

We find that under *McPherrin*, the department met the burden of presenting a prima facie case when the sworn report was offered as proof that the report had been provided and that it contained the recitations found on its face, which met the requirements of § 39-669.15. Therefore, we reverse the district court's order and remand the cause for the purpose of reinstating the director's order. Because we reverse the district court's order, Mahlendorf is not entitled to attorney fees.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, Judge, concurring.

I would have thought in a case in which the rules of evidence have been invoked that a greater foundation by the testifying officer would be required before the sworn report could be admitted. Further, I would have thought in a case in which the rules of evidence have been invoked that a document admitted for jurisdictional purposes, but not offered "to prove the truth of the matter assertive [sic] therein" and not admitted for such purposes, would be incapable of establishing a prima facie case, even under Neb. Rev. Stat. § 39-669.15(2) or (3) (Cum. Supp. 1992) and 247 Neb. Admin. Code, ch. 1, § 006.05B (1993).

However, based on *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), I concur.

IN RE INTEREST OF BRANDY M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. BRANDY M. ET AL., APPELLEES.

539 N.W.2d 280

Filed October 31, 1995. Nos. A-94-1212, A-94-1214 through A-94-1222.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
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. **Juvenile Courts: Time.** Neb. Rev. Stat. § 43-271 (Reissue 1993) applies, on its face, only to juveniles taken into custody pursuant to Neb. Rev. Stat. §§ 43-248, 43-250, and 43-253 (Reissue 1993).
4. **Statutes: Ordinances: Legislature: Intent.** Where a statute or ordinance enumerates the things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.
5. **Parental Rights: Time.** Absent a showing of prejudice, failure to comply with the 6-month time period found in Neb. Rev. Stat. § 43-271 (Reissue 1993) does not require dismissal of a juvenile case involving the termination of parental rights.
6. **Statutes: Legislature: Intent: Presumptions.** Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent.
7. **Juvenile Courts: Time.** Neb. Rev. Stat. § 43-278 (Reissue 1993), as amended, provides that all cases filed under subdivision (3) of Neb. Rev. Stat. § 43-247 (Reissue 1993) shall have an adjudication hearing not more than 90 days after a petition is filed.
8. **Juvenile Courts.** A juvenile court judge is not authorized to dismiss a petition filed pursuant to Neb. Rev. Stat. § 43-247(3) (Reissue 1993) absent a showing of prejudice.

9. **Juvenile Courts: Criminal Law: Speedy Trial.** A juvenile court judge has no authority to dismiss cases pursuant to Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1989), as these criminal speedy trial provisions do not apply to juvenile proceedings.
10. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. To determine whether one's constitutional right to a speedy trial has been violated, courts employ a balancing test.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed.

James S. Jansen, Douglas County Attorney, and Vernon Daniels for appellant.

Thomas M. Kenney, Douglas County Public Defender, Sarah G. Hemming, and Krista L. Tushar for appellees.

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

MUES, Judge.

I. INTRODUCTION

The State appeals from 10 separate orders of the Douglas County Separate Juvenile Court dismissing 10 juvenile cases on the basis that said cases were not brought to trial within 6 months of the filing of the individual petitions. Having issues of fact and law in common, the cases were consolidated by stipulation of the parties.

II. STATEMENT OF CASE

The petitions at issue were filed in the separate juvenile court of Douglas County between April 11 and June 1, 1994. Nine of the 10 petitions alleged jurisdiction over the juveniles pursuant to Neb. Rev. Stat. § 43-247(1), (2), or both (Reissue 1993). One petition alleged jurisdiction under § 43-247(3)(b). Motions for absolute discharge pursuant to Neb. Rev. Stat. §§ 43-271 (Reissue 1993) and 29-1207 and 29-1208 (Reissue 1989) were filed in each of the cases on December 5 or 6. In these motions, it was claimed that the children in interest had not been brought to trial within 6 months as required by statute. A hearing was held on December 7 in which the only evidence adduced was with regard to docket congestion in the Douglas County Separate Juvenile Court. In separate orders dated December 7,

the juvenile judge, without a statement of the factual or legal basis, sustained the motions for absolute discharge and ordered that each of the 10 cases be dismissed.

III. ASSIGNMENTS OF ERROR

Appellant claims the juvenile court erred in (1) sustaining the motions for absolute discharge on the sole evidentiary ground of a congested docket and (2) failing to apply a balancing test to determine whether an impermissible violation of the right to a speedy trial occurred.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

[2] 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. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

V. ANALYSIS

Appellant's first assignment of error presumes that § 43-271 applies to juvenile proceedings such as those involved here. This assignment goes on to contend that the trial judge erroneously based dismissal on the fact that a congested docket precluded more prompt hearings. We are uncertain on what legal or factual grounds the trial judge based these dismissals. We initially presume that the discharges were based on the grounds set forth in appellees' motions. At the outset, the applicability of § 43-271 to these juvenile proceedings appears, to us, questionable. We begin our discussion by explaining this point. However, we note that even if § 43-271 were construed to apply to these proceedings, it would not change the result reached herein.

1. STATUTORY RIGHT TO SPEEDY TRIAL

(a) Juvenile Code

(i) Application of § 43-271

Appellees' motions for absolute discharge base their claim on §§ 43-271, 29-1207, and 29-1208. Section 43-271 states:

> A juvenile taken into custody pursuant to sections 43-248, 43-250, and 43-253 shall be brought before the court for adjudication as soon as possible after the petition is filed. On the return of the summons . . . or as soon thereafter as legally may be, the court shall proceed to hear and dispose of the case as provided in section 43-279.
>
> The hearing as to a juvenile in custody of the probation officer or the court shall be held as soon as possible but, in all cases, within a six-month period after the petition is filed, and as to a juvenile not in such custody as soon as practicable but, in all cases, within a six-month period after the petition is filed. The computation of the six-month period provided for in this section shall be made as provided in section 29-1207, as applicable.

When interpreting a statute, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

[3] Section 43-271 applies, on its face, only to juveniles "taken into custody pursuant to sections 43-248, 43-250, and 43-253." First, Neb. Rev. Stat. § 43-248 (Reissue 1993) provides that in certain situations, a juvenile may be taken into temporary custody by an officer without a warrant or order of the court. Neb. Rev. Stat. § 43-250 (Reissue 1993) gives the officer taking the juvenile into temporary custody four options: The officer may (1) release the juvenile; (2) provide a written notice requiring the juvenile to appear before the juvenile court or probation officer; (3) take and deliver the juvenile to the custody of the juvenile court or probation officer; or (4) deliver

custody of the juvenile to the Department of Social Services, which then provides for placement of the child. Neb. Rev. Stat. § 43-253 (Reissue 1993) further provides instruction when a juvenile is taken into temporary custody pursuant to § 43-248 and option No. 3, pursuant to § 43-250, is chosen, i.e., the juvenile is delivered to the juvenile court or probation officer. Section 43-253 provides that the court or probation officer may immediately release the juvenile, admit the juvenile to bail by bond, or provide for placement or detention of the juvenile.

The second paragraph of § 43-271 divides those juveniles taken into temporary custody into two groups, those remaining in the custody of the court or probation officer and those not remaining in said custody. Section 43-271 further provides that for both groups, a hearing must be held as soon as possible or practicable, but in all cases, within 6 months after the petition is filed.

[4] The language of § 43-271 is plain and unambiguous. It applies only to those juveniles entering the juvenile court system through the temporary custody process set forth in § 43-248. Even if § 43-271 could be construed as ambiguous, the maxim "expressio unius est exclusio alterius" is applicable here. " '[W]here a statute or ordinance enumerates the things upon which it is to operate . . . it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.' " *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 306, 267 N.W.2d 530, 532 (1978).

Our interpretation is further supported by examining the previous version of the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-245 et seq. (Reissue 1988). Section 43-271 in its current version is identical to the version of that section contained in the previous code. However, in the previous code, § 43-278 restated the second paragraph of § 43-271 without limiting its application to juveniles entering the system through the temporary custody process set forth in § 43-248. Through amendment, this language was omitted from § 43-278, the current version expressly speaking only to cases filed under § 43-247(3) and providing for a hearing to take place within 90

days. (The one petition filed pursuant to § 43-247(3)(b) is addressed later in this discussion.)

Not every juvenile entering the juvenile system begins by being taken into temporary custody pursuant to § 43-248. In these cases, it does not appear from the records that any of the juveniles at issue were taken into temporary custody pursuant to § 43-248. Without such a showing, § 43-271 is not applicable. We find no other provision in the code providing for the right to a trial in 6 months. In fact, we find no statutory time limit applicable to those juveniles not entering the system pursuant to § 43-248 and not subject to the court's jurisdiction under § 43-247(3).

We can conceive of no logical reason to impose a 6-month time limit on one type of juvenile proceeding (those initiated by the taking of temporary custody pursuant to § 43-248), a 90-day limit on another (those initiated under § 43-247(3)), and no time limit on others (those not filed under § 43-247(3) and not initiated by the temporary custody procedure set forth in § 43-248). Yet, we have no authority to interpret a statute that is plain and unambiguous, and it is not our province to change the language. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

We are aware of Neb. Rev. Stat. § 43-279(1)(f) (Reissue 1993), requiring the court to inform certain juveniles of the right to a speedy adjudication. However, as will be discussed below, without further legislative direction as to a proper time period or remedy for failure to provide a speedy trial, this provision does not authorize a juvenile judge to dismiss cases not brought to trial within 6 months.

[5] Even if we were to find § 43-271 applicable to these juveniles, the effect of the language found in § 43-279(1)(f) and the second paragraph of § 43-271 has already been determined. In *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990), the Supreme Court, interpreting language identical to that found in §§ 43-271 and 43-279(1)(f), decided that because the Legislature failed to specify a consequence for the failure to provide a trial within 6 months, said 6-month limit was merely directory rather than mandatory. The court in *In re Interest of C.P.* relied upon the rule that a provision of a statute not relating

to the essence of the thing to be done but governing the time or manner of performance is generally considered to be directory as opposed to mandatory. The court went on to indicate that absent a showing of prejudice, failure to comply with the 6-month time period found in § 43-271 does not require dismissal of a juvenile case involving the termination of parental rights. This, the court reasoned, was necessary given the Legislature's failure to provide a remedy and the purpose to be served by a parental rights termination proceeding, that is, to provide for the best interests of the juvenile. See, also, *In re Interest of T.E., S.E., and R.E.*, 235 Neb. 420, 455 N.W.2d 562 (1990).

[6] Although the juvenile cases currently at issue do not involve the termination of parental rights, the reasoning in *In re Interest of C.P.* is applicable. First, the language interpreted in *In re Interest of C.P.* is identical to that in the second paragraph of § 43-271, upon which appellees base their right to discharge, and § 43-279(1)(f). Additionally, since the court's decision in *In re Interest of C.P.*, the Legislature has amended the juvenile code. See Neb. Rev. Stat. § 43-278 (Reissue 1993). The current version of the code still contains no remedy for the court's failure to try specified juvenile cases within a prescribed period. Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). When the Legislature amended the juvenile code, it was presumably aware of the court's decision in *In re Interest of C.P.*; however, it did not respond by making the time limit mandatory rather than directory. Therefore, even if § 43-271 could be construed to apply to these cases, absent a showing of prejudice, failure to comply with its 6-month provision does not require dismissal. No prejudice was shown in the present cases.

(ii) § 43-247(3)(b) Petition

[7,8] One of the juvenile petitions at issue was filed pursuant to § 43-247(3)(b). Section 43-278, as amended, provides in relevant part: "All cases filed under subdivision (3) of section 43-247 shall have an adjudication hearing not more than ninety

days after a petition is filed." Therefore, although not subject to a 6-month provision, this (3)(b) petition is subject to a 90-day limit. Applying the same rationale as above, however, absent a legislative remedy, this 90-day provision is also directory rather than mandatory. Again, we assume the amended version of § 43-278 was drafted with the knowledge of *In re Interest of C.P., supra*. Accordingly, the fact that one petition was filed pursuant to § 43-247(3), therefore subjecting it to a statutorily imposed time limit, does not authorize its dismissal by the juvenile court judge, absent a showing of prejudice. See, also, *In re Armour*, 59 Ill. 2d 102, 319 N.E.2d 496 (1974) (use of word "shall" in providing for setting of juvenile hearing within 30 days is directory rather than mandatory, as court noted that society's interest in juvenile's welfare could not always be served by mechanical adherence to formula).

Accordingly, the juvenile code provides no authority upon which a judge may rely to dismiss cases like any of those at issue.

(b) Criminal Code

Appellees arguably recognized the absence of a remedy in the juvenile code, as their motions for absolute discharge attempt to incorporate the dismissal remedy provided in the criminal speedy trial provisions.

Section 29-1207 provides the method for computing the 6-month period and excludes various time periods, including any period of delay that a court determines to be for "good cause." § 29-1207(4)(f). Further, § 29-1208 states: "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."

Despite the reference in § 43-271 to § 29-1207, it has already been determined in Nebraska that Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1989) apply only to criminal proceedings. See *In re Interest of C.P., supra* (§§ 29-1205 to 29-1209 not applicable to proceeding to terminate parental rights, as such proceeding is not criminal in nature).

The Nebraska Supreme Court has recognized that in fact, all

juvenile proceedings are civil rather than criminal in nature. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

> "The purpose of our statutes relating to the handling of youthful offenders is, as in other states having juvenile court systems, the education, treatment and rehabilitation of the child, rather than retributive punishment. The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature. Instead of a complaint or indictment we have a 'petition.' The hearing never results in a conviction, but may lead to an 'adjudication of delinquency.' Where confinement of the delinquent child is indicated as the proper treatment, the child is not sentenced to prison but, instead, is 'committed' to a 'training school.' The adjudication of delinquency does not carry with it any of the civil disabilities ordinarily resulting from conviction of crime, nor is the child considered to be a criminal because of such adjudication."

Id. at 614, 447 N.W.2d at 43 (quoting *Smith v. State*, 444 S.W.2d 941 (Tex. Civ. App. 1969)). See, also, *State v. Jones*, 521 N.W.2d 662 (S.D. 1994) (criminal procedure rules including right to speedy trial do not apply to juvenile proceedings because of different purpose served by juvenile system); *Robinson v. State*, 707 S.W.2d 47 (Tex. Crim. App. 1986) (provisions of criminal code including speedy trial act do not apply until juvenile is transferred to criminal court); *In re M.A.*, 132 Ill. App. 3d 444, 477 N.E.2d 27 (1985) (criminal speedy trial act not applicable to juvenile court proceedings; only juvenile law applies to juvenile offenders until court authorizes criminal prosecution); *In Interest of C. T. F.*, 316 N.W.2d 865 (Iowa 1982) (criminal statutory right to speedy trial not applicable in juvenile proceedings); *State v. Myers*, 116 Ariz. 453, 569 P.2d 1351 (1977); *R.D.S.M. v. Intake Officer*, 565 P.2d 855 (Alaska 1977).

[9] Neb. Rev. Stat. § 43-276 (Reissue 1993) further points out the distinction between criminal and juvenile proceedings by requiring the county attorney, when there is concurrent jurisdiction, to choose between filing a criminal charge or a

juvenile court petition. Application of § 29-1208 to criminal proceedings only is further reinforced by that section's application only to "defendants," a term not used in juvenile court proceedings. Therefore, the juvenile court judge had no authority to dismiss these cases pursuant to §§ 29-1205 to 29-1209, as these criminal speedy trial provisions do not apply to juvenile proceedings.

Based on the aforementioned reasons, it is unnecessary to determine whether docket congestion constitutes good cause within the meaning of § 29-1207. Having determined the dismissal of these juvenile proceedings, if based on statutory grounds, is improper, we must reverse the juvenile court judge's orders unless we can find other grounds to uphold them. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993).

2. CONSTITUTIONAL GROUNDS

[10] " 'The constitutional right to a speedy trial and the statutory implementation of that right . . . exist independently of each other. . . .' " *State v. Trammel*, 240 Neb. 724, 728, 484 N.W.2d 263, 267 (1992) (quoting *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989)). To determine whether one's constitutional right to a speedy trial has been violated, courts employ a balancing test. See, e.g., *Andersen, supra* (citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

Although we fail to understand appellant's second assignment of error because neither the court nor appellees make any reference to the constitutional right to a speedy trial, appellant insists that the court erred by failing to conduct a balancing test.

First, we note that this argument presumes that juveniles possess a constitutional right to a speedy trial, an issue not specifically ruled upon by the Nebraska Supreme Court or the U.S. Supreme Court. Assuming, without deciding, that

juveniles have a constitutional right to a speedy trial, the circumstances of these cases do not warrant a determination that appellees' rights were violated here.

The Nebraska Supreme Court has indicated that when determining if an individual's constitutional right to a speedy trial has been violated, it is necessary to apply a balancing test. See, e.g., *Andersen, supra* (criminal proceeding). "This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *Id.* at 196, 440 N.W.2d at 211 (citing *Barker, supra*). Those same factors would naturally be considered in determining whether a juvenile's constitutional right to a speedy trial has been violated. See *In Interest of C. T. F.*, 316 N.W.2d 865 (Iowa 1982) (court applies *Barker* four-part balancing test to determine whether juvenile's constitutional right to speedy trial violated).

Even if we were to assume that juveniles possess a constitutional right to a speedy trial, application of this balancing test favors appellant rather than the juveniles now before the court. The petitions at issue were filed between April 11 and June 1, 1994. All were dismissed by orders dated December 7. The period of delay beyond 6 months and up to the date of dismissal of these petitions is minimal, ranging from 6 days to just under 2 months. Evidence was adduced attributing this delay to docket congestion. No evidence was presented regarding prejudice to the juveniles by virtue of the delay. Deprivation of the constitutional right to a speedy trial is not per se prejudicial. *Andersen, supra*. Thus, even if we were to determine that juveniles have a constitutional right to a speedy trial, the facts of these cases indicate a short delay caused by docket congestion and no prejudice resulting to these juveniles.

VI. CONCLUSION

The juvenile court erred by dismissing 10 separate juvenile court petitions on the basis that they had not been tried within 6 months. No 6-month speedy trial provision exists in the juvenile code applicable to these juveniles, as § 43-271 applies on its face only to youths taken into temporary custody without a warrant or court order. Even if § 43-271 could be construed

to apply, because of the purpose served by the juvenile court system and because the Legislature has failed to provide a remedy for missing the 6-month deadline, the language of § 43-271 is directory rather than mandatory. Likewise, the 90-day time limit imposed upon the § 43-247(3)(b) petition filed herein, absent a legislative remedy, is directory rather than mandatory. Therefore, absent a showing of prejudice, dismissal is improper. Further, given the civil nature of juvenile proceedings, it is also improper to apply the criminal speedy trial statutory provisions. Finally, even if we were to determine that juveniles have a constitutional right to a speedy trial, the facts of these cases indicate short delays caused by docket congestion and no prejudice resulting to these juveniles.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. ALVIN G. LONG, APPELLEE.

539 N.W.2d 443

Filed November 7, 1995. No. A-95-207.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law. Thus, an appellate court has an obligation to ascertain the meaning of a statute independently and without regard for a lower court's decision.
2. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **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.
4. **Criminal Law: Statutes.** A penal statute is given strict construction which is sensible and prevents injustice or an absurd consequence.
5. **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.
6. **Statutes: Prior Convictions.** A greater offense cannot be used to enhance a lesser offense, unless the statute so authorizes.

Appeal from the District Court for Lancaster County: BERNARD G. MCGINN, Judge. Exception overruled.

Gary E. Lacey, Lancaster County Attorney, and Patrick F. Condon for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

The defendant, Alvin G. Long, pled guilty to one count of Class II misdemeanor theft under Neb. Rev. Stat. § 28-518(4) (Cum. Supp. 1994). The State unsuccessfully attempted to enhance this crime to a Class IV felony under § 28-518(6) by three prior theft convictions, one a Class IV felony and two Class I misdemeanors. The district court refused to enhance the crime, and the State appealed pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994). We conclude that the statute should be applied as written, that a conviction under § 28-518(2) or (3) does not include a conviction of a lesser offense under subsection (4), and that therefore, the district court did not err, and the exception is overruled.

FACTUAL BACKGROUND

The State filed an information charging Alvin G. Long with two counts of Class II misdemeanor theft under Neb. Rev. Stat. § 28-511 (Reissue 1989) and § 28-518(4). Long pled guilty to one of the underlying charges, and the other was dismissed. The court accepted Long's plea and found Long guilty. An enhancement hearing was then held. The State attempted to enhance the conviction to a Class IV felony pursuant to § 28-518(6) by offering three prior theft convictions. One prior conviction was a Class IV felony pursuant to § 28-518(2), and the other two convictions were Class I misdemeanors pursuant to § 28-518(3).

The trial court received the evidence of the previous convictions, but held that Long had not been previously convicted under § 28-518(4), and thus the prior convictions could not be used for enhancement purposes. Long was then

sentenced for the Class II misdemeanor. The State appealed pursuant to § 29-2315.01, and as a result, pursuant to Neb. Rev. Stat. § 29-2316 (Cum. Supp. 1994), this court's holding will not affect Long, as jeopardy has attached to him.

ASSIGNMENTS OF ERROR

The State alleges that the trial court erred in ruling that § 28-518(6) does not permit three prior convictions pursuant to § 28-518(2) and (3) to be used for purposes of enhancement of a conviction pursuant to § 28-518(4).

STANDARD OF REVIEW

[1,2] Statutory interpretation is a matter of law. Thus, an appellate court has an obligation to ascertain the meaning of a statute independently and without regard for a lower court's decision. *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994); *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. Joseph*, 1 Neb. App. 525, 499 N.W.2d 858 (1993). When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its, plain, ordinary, and popular sense. *In re Application of City of Grand Island, supra*; *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995).

LANGUAGE OF § 28-518(6)

The State argues that § 28-518(6) should be interpreted to effectuate the legislative intent for the enactment of the statute and that the statute is designed to deter individuals convicted under any subsection of § 28-518 by imposing upon them penalties greater than those for a Class II misdemeanor. Long argues that § 28-518(6) is plain and unambiguous and that the statute as written would deter individuals from repeating the same misdemeanor. Section 28-518 grades theft offenses and provides:

> (1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand five hundred dollars.

(2) Theft constitutes a Class IV felony when the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars.

(3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than two hundred dollars, but less than five hundred dollars.

(4) Theft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less.

(5) For any second or subsequent conviction under subsection (3) of this section, any person so offending shall be guilty of a Class IV felony.

(6) For any second conviction under subsection (4) of this section, any person so offending shall be guilty of a Class I misdemeanor, and for any third or subsequent conviction under subsection (4) of this section, the person so offending shall be guilty of a Class IV felony.

(7) . . . .

(8) In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt.

[3,4] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Application of City of Grand Island, supra*; *State v. Wragge, supra*; *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Jansen*, 241 Neb. 196, 486 N.W.2d 913 (1992); *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992).

[5] The meaning of § 28-518(6) is plain and unambiguous. Subsection (6) specifically provides that if an individual has two or more prior Class II misdemeanor convictions under subsection (4), then a third or subsequent conviction pursuant to subsection (4) will be enhanced to a Class IV felony. 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. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

It is also important to note that the Legislature provided for the enhancement of theft convictions constituting Class I misdemeanors in one subsection of § 28-518 and for the enhancement of theft convictions constituting Class II misdemeanors in a different subsection. In summary, the statute enhances the second or subsequent conviction of a Class I misdemeanor to a Class IV felony, it enhances a second conviction of a Class II misdemeanor to a Class I misdemeanor, and it enhances a third or subsequent conviction of a Class II misdemeanor to a Class IV felony. The Legislature clearly elected to distinguish between enhancement of subsequent Class I misdemeanor theft convictions and of subsequent Class II misdemeanor theft convictions by enacting separate subsections, § 28-518(5) and (6). The statutory provisions which provide for enhancement of the penalty when specific criteria are met cannot be a basis for any presumption of a general legislative intent for enhancement when the specific provisions are not complied with.

LESSER-INCLUDED OFFENSES

The State also contends that for purposes of enhancement under subsection (6) of § 28-518, even if the statute shall be read as we have concluded above, the State may use prior convictions pursuant to subsections (2) and (3) of § 28-518 because a Class II misdemeanor theft is a lesser-included charge of both a Class I misdemeanor and a Class IV felony, because it is impossible to commit the greater theft without committing the lesser theft. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). The State asserts that because each of Long's theft convictions was pursuant to § 28-511, they all have the same elements. The State argues that the only difference between Long's convictions is the value of the property stolen

and that § 28-518(8) affects only the grading of the offense and is not an essential element of the offense.

Long argues that § 28-518(8) makes value an essential element of the offense which must be proved beyond a reasonable doubt, and therefore it is possible to commit the greater offense without committing the lesser. He contends that because value is a separate element, once the value of an item is proved beyond a reasonable doubt, that value is dispositive of which subsection of § 28-518 applies, and that no other subsection can apply, and therefore, no subsection can be an included offense of another.

Under the current statutory scheme, value is an essential element of the crime of theft by unlawful taking. See *In re Interest of Shea B.*, 3 Neb. App. 750, 532 N.W.2d 52 (1995). Section 28-518(8) provides that "[i]n any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." Thus, once value is established by conviction, the type and class of the offense are determined under the plain language of § 28-518, and it is possible to commit the greater offense without committing the lesser offense. The State is equating a lesser-included offense to a lesser-included conviction.

[6] Additionally, even if under our statutory scheme value were not considered an essential element, and therefore, a conviction of either Class I misdemeanor or Class IV felony theft could include the lesser Class II misdemeanor, the unambiguous statutory language of subsection (6) of § 28-518 still would not permit enhancement of a Class II misdemeanor conviction pursuant to subsection (4) based upon prior greater convictions pursuant to subsection (2) or (3). In *State v. Sardeson*, 231 Neb. 586, 594, 437 N.W.2d 473, 480 (1989), the Supreme Court reaffirmed the rule that

> [w]hen a defendant is convicted of both a greater and lesser-included offense, the conviction and sentence on the lesser charge must be vacated [citation omitted], for the constitutional prohibition against double jeopardy protects not only against a second prosecution for the same offense after acquittal or conviction, but also against multiple punishments for the same offense.

(Citing *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).) Clearly, the language of the statute as written and the above-cited rule lead to the conclusion that prior greater theft convictions cannot be used to enhance the lesser subsequent conviction.

CONCLUSION

Having found that § 28-518(6) plainly permits enhancement of a Class II misdemeanor conviction pursuant to § 28-518(4) to a Class IV felony conviction only when an individual has been convicted of two prior Class II misdemeanors pursuant § 28-518(4), and having found that a Class II misdemeanor pursuant to § 28-518(4) is not a lesser-included offense of either a Class IV felony conviction pursuant to § 28-518(2) or a Class I misdemeanor conviction pursuant to § 28-518(3), we conclude that the trial court did not err in not enhancing Long's conviction.

EXCEPTION OVERRULED.

STATE OF NEBRASKA, APPELLANT, V. CLINT WALKER WILEN, APPELLEE.

539 N.W.2d 650

Filed November 7, 1995. No. A-95-236.

1. **Criminal Law: Appeal and Error.** According to the cases, the purpose of a Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994) review is to provide an authoritative exposition of the law for use as a precedent in similar cases which may now be pending or which may subsequently arise.
2. **Statutes: Appeal and Error.** Statutory interpretation involves the resolution of a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Statutes.** A statute is open to construction when its language requires interpretation or may reasonably be considered ambiguous.
4. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.

5. **Statutes: Legislature: Intent: Appeal and Error.** In construing statutes, an appellate court must seek to effect the legislative intent of the statute which may be discerned from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Police Officers and Sheriffs.** An examination of the nature of the acts the officer is performing at the time of the incident as well as the circumstances surrounding those acts and the secondary employment is a well-reasoned analytical approach to the question of whether an off-duty officer working in a secondary employment capacity is performing official duties within the meaning of Neb. Rev. Stat. § 28-930 (Reissue 1989).
7. ____. Under the common law, a police officer has certain powers, rights, and duties both on and off duty.
8. **Police Officers and Sheriffs: Public Health and Welfare.** A police officer on off-duty status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.
9. **Police Officers and Sheriffs.** Under the cases, based both on common law and statute, it has been widely held that a police officer is not relieved of his or her obligation to preserve the peace while off duty.
10. ____. A police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.
11. ____. A police officer's conduct while off duty can implicate his or her official position, and a police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform.
12. ____. Despite personnel manuals that impose certain affirmative duties on a police officer while off duty, certain off-duty activities are unrelated to police officer status or do not resemble the police officer's obligation to keep the peace, and such off-duty conduct is not viewed as engaging in the performance of official duties.
13. **Constitutional Law: Police Officers and Sheriffs.** In the context of the Fourth Amendment, the Nebraska Supreme Court has stated that it has rejected the notion that solely because one is a police officer, the officer acts in that capacity at all times.
14. **Police Officers and Sheriffs.** Nebraska case law does not preclude the scenario where an off-duty law enforcement officer witnesses misconduct and the officer engaged in peacekeeping is, therefore, under the circumstances, deemed to be engaged in the performance of his or her official duties.
15. ____. One can infer from the statutory language of Neb. Rev. Stat. § 16-323 (Reissue 1991) that police officers may, under proper circumstances, exercise their authority and peacekeeping duties at any time.
16. ____. Neb. Rev. Stat. § 16-323 (Reissue 1991) is compatible with the notion that police officers are expected to exercise their obligations, regardless of whether they are officially on duty.
17. ____. Nebraska law does not conflict with the common-law view that under proper circumstances, police officers have a duty to preserve the peace and to respond as police officers at all times.

18. ____. A police officer retains his or her police officer status, even while off duty in a secondary employment capacity, unless it is clear from the nature of the officer's activities that he or she is acting exclusively in a private capacity or is engaging in his or her own private business.
19. **Police Officers and Sheriffs: Public Health and Welfare.** The practice of municipalities which allows law enforcement officers, while off duty and in uniform, to serve as peacekeepers in private establishments open to the general public is in the public interest. The presence of uniformed officers in places susceptible to breaches of the peace deters unlawful acts and conduct by patrons in those places. The public knows the uniform and the badge stand for the authority of the government. The public generally knows that law enforcement officers have the duty to serve and protect them at all times.
20. ____: ____. The U.S. Supreme Court has described police officers as trustees of the public interest.
21. **Police Officers and Sheriffs.** An official uniform implies an official status, and a defendant will be charged with knowledge of the uniformed officer's official status where circumstances warrant.
22. ____. The public expects that a uniformed law enforcement officer has the power to enforce the law and to arrest where necessary, powers which a private security guard generally does not possess.
23. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
24. **Constitutional Law: Double Jeopardy: Juries.** Although jeopardy attaches when a jury is impaneled and sworn, the Double Jeopardy Clause bars retrial in criminal prosecutions only where jeopardy has attached and terminated.
25. **Double Jeopardy.** Events which terminate jeopardy include (1) an acquittal by a judge or jury, (2) a directed verdict of acquittal for insufficient evidence, and (3) a conviction reversed as a matter of law for insufficient evidence.
26. ____. A dismissal at the end of the State's case constitutes an acquittal for double jeopardy purposes.
27. **Constitutional Law: Double Jeopardy: Demurrer: Appeal and Error.** A demurrer sustained on the basis that the State's evidence was insufficient to establish factual guilt constitutes an acquittal under the Double Jeopardy Clause, barring the State's postacquittal appeal when reversal could result in a second trial or further proceedings for the purpose of resolving factual issues relating to the elements of the charged crime.

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

Charles J. Stolz, Deputy Sarpy County Attorney, for appellant.

Michael B. Kratville, of Terry & Kratville Law Offices, for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Appellee, Clint Walker Wilen, was charged in the district court for Sarpy County with attempted second degree assault on a police officer. See Neb. Rev. Stat. § 28-930 (Reissue 1989). After the State presented its case against Wilen to the jury, the trial court sustained Wilen's motion for directed verdict and dismissed the charges against Wilen for lack of evidence. This court granted the application of the county attorney to docket the proceedings for review by this court as authorized by Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994). The State assigns one error in this appeal, which we address in part III of this opinion entitled "Analysis of Challenged Ruling." For the reasons recited below, we sustain the State's exception. Because jeopardy had attached and terminated at trial, our ruling sustaining the State's exception does not permit a reversal.

I. FACTUAL BACKGROUND

On the evening of November 25, 1994, Officer Melanie Whitney, a duly sworn law enforcement officer with the Bellevue Police Department, was working in a secondary employment capacity at the Hardee's restaurant located at 1701 Galvin Road South in Bellevue. This particular Hardee's restaurant had been experiencing problems with fights and with individuals carrying guns and knives on its property. Consequently, Hardee's hired Officer Whitney and other Bellevue police officers to work at the restaurant on the weekends for purposes of maintaining the peace and providing security and protection for its patrons. Officer Whitney received compensation from Hardee's for her services in addition to her regular salary as a Bellevue police officer. Officer Whitney engaged in this secondary employment during hours that she was not regularly scheduled as an "on-duty" officer for the Bellevue Police Department. In accord with her peacekeeping purpose at Hardee's, Officer Whitney dressed in her official police uniform and carried a sidearm, her police badge, and a police radio.

At approximately 9:30 p.m. on November 25, Officer Whitney was inside the Hardee's restaurant when she heard

someone cursing loudly over the intercom of the drive-through window. With the assistance of the individual working at the drive-through window, Officer Whitney identified the car in which the individual who was swearing was riding, went outside, and approached the passenger side of the vehicle. The vehicle, described by Officer Whitney as a "newer model Cavalier," held a female driver and two male passengers, one in the backseat and the other in the front passenger seat. When Officer Whitney reached the passenger side of the vehicle, she asked the individuals which one of them had been "cussing" into the drive-through intercom. The individual in the front passenger seat indicated that he was that individual and stepped out of the car at Officer Whitney's request.

Officer Whitney testified that the individual, who identified himself as Clint Wilen, "got very smart with me" and that he smelled of alcohol. Officer Whitney stated that Wilen gave her his name and date of birth, but told her he did not have any identification with him. At Officer Whitney's direction to leave the premises, Wilen got back in the car, and the car exited the Hardee's parking lot.

Later that night, Officer Whitney had another confrontation with Wilen which directly gives rise to the instant case. The individual working at the drive-through window at about 12:40 a.m. on November 26 summoned Officer Whitney, who was working on the other side of the restaurant, and informed her that a collision had occurred between two cars in the drive-through lane. Officer Whitney went outside to investigate the accident and discovered that the Jeep Cherokee positioned at the drive-through window had been hit from behind by a silver Volvo.

First, Officer Whitney made contact with the driver of the Jeep, Jamie Loefler. Officer Whitney determined that Loefler was not injured, inspected Loefler's Jeep for damage, and then asked Loefler for her driver's license, registration, and proof of insurance. While Loefler was retrieving the requested items, Officer Whitney approached the driver of the Volvo, later identified as Wilen. Officer Whitney testified that she did not immediately realize the driver of the Volvo was Wilen because his appearance seemed different than she remembered from

their confrontation earlier that night. According to Officer Whitney's testimony, when she asked Wilen for his driver's license, registration, and proof of insurance, "[a]ll he did was stare at [her]." Officer Whitney testified that she explained to Wilen that there was damage to the Volvo and that she needed to complete a report on the accident. See Neb. Rev. Stat. § 60-695 (Reissue 1993) (providing generally that a peace officer who investigates a traffic accident has a duty to file a report of any accident resulting in personal injury, death, or property damage in excess of a statutory amount). Wilen remained unresponsive. Officer Whitney also noted that Wilen smelled strongly of alcohol and that his eyes were watery and bloodshot.

At that point, Officer Whitney proceeded to the front of the Volvo, with her police radio in hand, intending to "run the plate" of the Volvo. After squeezing between the Jeep and the Volvo, she attempted to get the identification of the passenger in the Volvo. Officer Whitney testified that she hesitated for a second and, out of the corner of her eye, saw "the car doing something. . . . [M]oving." Officer Whitney stated that she turned toward the Volvo, saw it reverse a few feet, and "then I [saw] headlights coming at me, and Wilen is looking right at me and then starts to look down and just floors it . . . ." The Volvo sped out of the Hardee's lot. In describing what she meant by "[he] floors it," Officer Whitney testified that the Volvo took off very fast, sending the gravel on the pavement "flying every which way." Officer Whitney testified specifically that if she had not stepped back out of the Volvo's path it would have hit her.

Kristi Wright, a Hardee's employee who witnessed the incident, testified at trial and corroborated Officer Whitney's description of the facts surrounding the attempted assault. Wright testified that it appeared that Officer Whitney had to "scoot back" to avoid being hit by the Volvo. When asked on cross-examination if it appeared Wilen tried to hit Officer Whitney, Wright speculated that "I wouldn't think he tried to on purpose, no."

After the incident, Officer Whitney was unable to follow the Volvo when it turned out of the Hardee's parking lot, as she was

on foot. Later that night, however, the Volvo was stopped by another officer for reasons not specified in the record. Officer Whitney positively identified Wilen as the driver of the Volvo with whom she had had the incident earlier that night.

Wilen was subsequently charged with attempted second degree assault on a police officer. See § 28-930. The information charged that the crime was "intentionally or knowingly or recklessly" committed. Wilen pled not guilty to the attempted assault charge, and the case proceeded to trial. A jury trial of this matter was conducted on February 15, 1995. The State offered the testimony of Officer Whitney and Wright and then rested its case. After the State rested, Wilen moved for a directed verdict, arguing that the State had not proved the intentional element of the charged offense. We note that this case was tried before the decision of this court in *State v. Hemmer*, 3 Neb. App. 769, 531 N.W.2d 559 (1995), was filed on May 23, 1995, in which we held that attempted reckless assault on a peace officer in the second degree is not a crime in Nebraska. After hearing argument from the parties, the district court granted Wilen's motion on other grounds and dismissed the case. Specifically, the district court found that the State presented "no evidence to support" the fact that Officer Whitney, who is a peace officer, was engaged in her official duties at the time of the incident.

On February 27, 1995, the State moved for leave to docket an appeal to this court pursuant to § 29-2315.01. We granted the State's motion for purposes of clarifying when an officer is "engaged in the performance of his or her official duties" for purposes of § 28-930.

II. SCOPE AND PURPOSE OF REVIEW IN AN ERROR PROCEEDING

[1] This appeal is before this court as an error proceeding filed by a county attorney pursuant to § 29-2315.01, which states in part: "The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made." Neb. Rev. Stat. § 29-2316 (Cum.

Supp. 1994) defines the scope and purpose of our review in error proceedings. According to the cases, the purpose of such review "is to provide an authoritative exposition of the law for use as a precedent in similar cases which may now be pending or which may subsequently arise." *State v. Jennings*, 195 Neb. 434, 436, 238 N.W.2d 477, 479 (1976). Accord *State v. Vaida*, 1 Neb. App. 768, 510 N.W.2d 389 (1993).

III. ANALYSIS OF CHALLENGED RULING

1. Identification of Issue on Appeal

In this appeal, the State asks us to determine the propriety of the district court's order granting Wilen's motion for directed verdict for the reason that the State failed to present evidence that peace officer Whitney was engaged in the performance of her official duties at the time of the alleged attempted assault. Wilen was charged with attempted assault on an officer in the second degree, a Class IV felony. See § 28-930. Section 28-930 provides in part:

> A person commits the offense of assault on an officer in the second degree if he or she:
>
> (a) Intentionally or knowingly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties; or
>
> (b) Recklessly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

Neb. Rev. Stat. § 28-201 (Reissue 1989) makes it a crime to attempt to commit such a felony. The element of § 28-930 at issue in this proceeding is the requirement that the peace officer-victim be "engaged in the performance of his or her official duties" at the time of the incident. Specifically, the question before this court is whether, under the facts of this case, Officer Whitney, whom the record clearly shows was a peace officer at the time in question, was performing her official duties at the time Wilen allegedly attempted to commit the

assault as charged.

2. Standard of Review

[2] Statutory interpretation involves the resolution of a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995).

[3-5] In interpreting the meaning of § 28-930, we note that a statute is open to construction when its language requires interpretation or may reasonably be considered ambiguous. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *Id.* We note that in construing statutes, an appellate court must seek to effect the legislative intent of the statute which may be discerned from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

3. Applicable Analysis

The trial court found that the State presented no evidence that Officer Whitney was engaged in the performance of her official duties at the time of the alleged attempted assault. Specifically, it appears the trial court was persuaded that because Officer Whitney was working in the capacity of her secondary employment with Hardee's that she could not be engaged in the performance of "official duties" for purposes of § 28-930 at the time of the incident. We disagree.

[6] Although the question of performance of official duties under § 28-930 while engaged in secondary employment under the facts of this case appears not to have been addressed in Nebraska, many other jurisdictions have concluded in factually similar cases that police officers moonlighting for private employers as security guards or similar peacekeepers are engaged in official duties for purposes of officer assault statutes or statutes defining aggravating circumstances when, during the course of such secondary employment, they react to incidents of

what may be criminal or disorderly conduct. *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992); *State v. Hartzog*, 575 So. 2d 1328 (Fla. App. 1991); *Duncan v. State*, 163 Ga. App. 148, 294 S.E.2d 365 (1982); *Tapp v. State*, 406 N.E.2d 296 (Ind. App. 1980); *People v. Barrett*, 54 Ill. App. 3d 994, 370 N.E.2d 247 (1977). In each of the foregoing cases, the court analyzed the issue of the performance of "official duties" under a test which examined the nature of the secondary employment and the nature of the acts being performed at the time of the incident. We are persuaded from our review of relevant case law that an examination of the nature of the acts the officer is performing at the time of the incident as well as the circumstances surrounding those acts and the secondary employment is a well-reasoned analytical approach to the issues in this case. Therefore, in the instant case, we examine (1) the specific nature, extent, and circumstances of the secondary employment; (2) the manner in which such secondary employment is regarded by the employer and employee; and (3) the nature of the acts the peace officer-victim is performing at the time in question.

4. Application and Discussion

(a) Specific Nature, Extent, and Circumstances of Secondary Employment

(i) Primary Employment and Off-Duty Conduct Generally

To assess the nature of Officer Whitney's secondary employment with Hardee's, it is necessary to put such employment in context by examining the general nature of Officer Whitney's employment as a police officer. Thus, we identify generally duties of police officers under the relevant common law, case law, and statutes.

[7-9] Under the common law as reflected in the treatises and cases, a police officer has certain powers, rights, and duties both on and off duty. In connection with off-duty obligations, it has been stated:

> A police officer on "off-duty" status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the

> citizens of the public in general. Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.

16A Eugene McQuillin et al., The Law of Municipal Corporations § 45.15 at 123 (3d ed. 1992). Under the cases, based both on common law and statute, it has been widely held that a police officer is not relieved of his or her obligation to preserve the peace while off duty. See, e.g., *Gibson v. State*, 316 Ark. 705, 875 S.W.2d 58 (1994); *Harris v. City of Colorado Springs*, 867 P.2d 217 (Colo. App. 1993); *Packard v. Rockford Prof. Baseball Club*, 244 Ill. App. 3d 643, 613 N.E.2d 321 (1993); *Animashaun v. State*, 207 Ga. App. 156, 427 S.E.2d 532 (1993); *Tate v. State*, 198 Ga. App. 276, 401 S.E.2d 549 (1991); *Firemen's and Policemen's Civ. Serv. v. Burnham*, 715 S.W.2d 809 (Tex. App. 1986); *Alvarado v. City of Dodge City*, 10 Kan. App. 2d 363, 702 P.2d 935 (1985), *rev'd in part on other grounds* 238 Kan. 48, 708 P.2d 174.

[10] In Nebraska, it has long been the case that a police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith. See, e.g., *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985) (acknowledging official police officer status of off-duty officer serving as security guard who arrested defendant for disorderly conduct); *State v. Munn*, 203 Neb. 810, 280 N.W.2d 649 (1979) (approving arrest of defendant for robbery made by off-duty police officer serving as security guard at bus depot); *State v. Williams*, 203 Neb. 649, 279 N.W.2d 847 (1979) (approving authoritative action by off-duty police officer working at bus depot).

[11] Under the Nebraska cases, a police officer's conduct while off duty can implicate his or her official position, and a police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform. See, e.g., *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984) (approving official personnel action by Blair Police Department taken against officer who accidentally fired his police weapon while off duty and failed to report incident); *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983) (approving dismissal of police officer based on violations of rules of

conduct due to allegations of criminal business practices occurring while off duty).

[12] We recognize that despite personnel manuals that impose certain affirmative duties on a police officer while off duty, certain off-duty activities are unrelated to police officer status or do not resemble the police officer's obligation to keep the peace, and such off-duty conduct is not viewed as engaging in the performance of official duties. See, e.g., *Baughman v. City of Omaha*, 142 Neb. 663, 7 N.W.2d 365 (1943) (holding that police officer accidentally killed by passing car while crossing street on his way home after work was not killed in the course of his employment for purposes of workers' compensation). We also note that under *Salyers v. State*, 159 Neb. 235, 66 N.W.2d 576 (1954), where the victim of a beating after a night of drinking happened to be a police officer, the charge against the defendant according to the opinion was limited to assault and battery, not assault on an officer.

[13,14] We are aware that in the context of the Fourth Amendment, the Nebraska Supreme Court has stated that it has "reject[ed] the notion that solely because one is a police officer, the officer acts in that capacity at all times." *State v. Walker*, 236 Neb. 155, 161, 459 N.W.2d 527, 532 (1990) (upholding admission of evidence based on search of leased residence by off-duty law enforcement officer where officer observed contraband in residence in his capacity as private citizen-landlord, not as agent of State). This statement indicates that the Nebraska Supreme Court has rejected the idea that solely because one is a police officer he or she always acts in his or her official capacity. Neither *Walker* nor the Nebraska cases discussed above preclude the scenario where an off-duty law enforcement officer witnesses misconduct and the officer engaged in peacekeeping is, therefore, under the circumstances, deemed to be engaged in the performance of his or her official duties.

We note that Nebraska statutes describe generally the duties of a police officer such as Officer Whitney. The city of Bellevue is a city of the first class under Neb. Rev. Stat. § 16-101 (Cum. Supp. 1994). Under Neb. Rev. Stat. § 16-323 (Reissue 1991),

> police officers [of cities of the first class] shall have the

> power and the duty to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as a sheriff . . . . [P]olice officers shall have the same power as the sheriff in relation to all criminal matters arising out of a violation of a city ordinance . . . .

[15-17] Section 16-323 does not distinguish between the authority and obligations of police officers on or off duty or in or out of uniform. However, by its language, § 16-323 provides that the powers and duties it confers shall be exercised upon "all offenders . . . by day or by night." One can infer from the statutory language that police officers in Bellevue may, under proper circumstances, exercise their authority and peacekeeping duties at any time. This statute is compatible with the notion that police officers are expected to exercise their obligations, regardless of whether they are officially on duty. Based on the foregoing, we conclude that Nebraska law does not conflict with the common-law view to which we subscribe that under proper circumstances, police officers have a duty to preserve the peace and to respond as police officers at all times.

(ii) Secondary Employment

[18-20] Our analysis of the foregoing statutory and common law indicates that a police officer retains his or her police officer status, even while off duty in a secondary employment capacity, unless it is clear from the nature of the officer's activities that he or she is acting exclusively in a private capacity or is engaging in his or her own private business. Based on public policy reasons, other jurisdictions have adopted this view. It has been stated:

> The practice of municipalities which allows law enforcement officers, while off duty and in uniform, to serve as peace-keepers in private establishments open to the general public is in the public interest. The presence of uniformed officers in places susceptible to breaches of the peace deters unlawful acts and conduct by patrons in those places. The public knows the uniform and the badge stand for the authority of the government. The public generally knows that law enforcement officers have the duty to serve and protect them at all times. A holding that

> law enforcement officers have no official duty to maintain the peace under these circumstances would be in contravention of the policy we seek to further.

Duncan v. State, 163 Ga. App. 148, 149, 294 S.E.2d 365, 366–67 (1982). In this regard, the U.S. Supreme Court has described police officers as "trustee[s] of the public interest." *Gardner v. Broderick*, 392 U.S. 273, 277, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968).

We find the quoted language from *Duncan v. State, supra*, particularly relevant in this case. Hardee's, a restaurant open to the general public, hired Officer Whitney and other Bellevue police officers to curtail disorderly and unlawful conduct and to provide security to the restaurant and its patrons. The functions Officer Whitney performed for Hardee's, in general and on the evening in question, are consistent with the powers and duties of her primary employment as a law enforcement officer for the city of Bellevue.

[21,22] When Officer Whitney worked at Hardee's, she was armed and dressed in her full police uniform and badge. Her uniformed status indicated that her secondary employment was consistent with the tenets of the Bellevue Police Department. A uniformed individual at the restaurant conveyed to the patrons the presence of law enforcement. Under the cases, an official uniform implies an official status, and a defendant will be charged with knowledge of the uniformed officer's official status where circumstances warrant. See, *Chandler v. State*, 204 Ga. App. 816, 421 S.E.2d 288 (1992) (inferring knowledge of police officer's official status when defendant observed police officer in official uniform); *State v. Brown*, 36 Wash. App. 166, 672 P.2d 1268 (1983) (holding that disclosure of police officer status may be nonverbal by use of uniform or badge). The public expects that a uniformed law enforcement officer has the power to enforce the law and to arrest where necessary, powers which a private security guard generally does not possess.

Pursuant to the foregoing analysis, we conclude that in performing her duties at Hardee's, Officer Whitney (1) acted on behalf of both Hardee's and the general public and (2) was responding to the events in question in her official capacity as a law enforcement officer.

(b) Manner In Which Employer and Employee Regard Secondary Employment

It is clear that Officer Whitney performed duties for Hardee's that were supplemental to her primary duties of law enforcement on behalf of the general public. The fact that Officer Whitney received compensation from Hardee's, along with her salary from public employment, is of no consequence. Pursuant to her primary employment with the city of Bellevue, her ultimate duty was to enforce the law and ensure the safety of the public at large. The record suggests that Hardee's hired Officer Whitney and other police officers on the basis of their official status and the advantages this status would provide in their peacekeeping function. While Officer Whitney's primary official status and secondary services benefited Hardee's, her goal always was to keep the peace, universally regarded as an official law enforcement duty.

(c) Nature of Acts Performed at Time in Question

On the night in question, Officer Whitney had two confrontations with Wilen. In the first instance, Officer Whitney heard Wilen swearing into the intercom of the drive-through window. Officer Whitney responded to Wilen's disorderly conduct by identifying him, confronting him, and directing him to leave the property. Against Officer Whitney's directions, Wilen returned to Hardee's a few hours later driving a silver Volvo and caused it to collide with another vehicle in the drive-through lane, causing property damage. Officer Whitney responded by investigating the circumstances of the accident, and she attempted to complete an official accident report.

The record reflects that Officer Whitney responded to and investigated the accident in an official and professional manner. Officer Whitney testified in detail regarding her observations of Wilen and his possible state of intoxication. This testimony was comparable to that of police officers in criminal drunk driving cases generally. Before Officer Whitney could resolve the issue of Wilen's state of intoxication or complete a report of the accident, Wilen backed up the Volvo and sped out of the parking lot onto a public road, the Volvo missing Officer Whitney only because she stepped out of the way.

(d) Summary of Analysis

Statutes recognizing that law enforcement officials are exposed to greater risks of assault and battery are widespread. See *Tapp v. State*, 406 N.E.2d 296 (Ind. App. 1980) (statutes and cases collected). Section 28-930 recognizes that law enforcement officers in Nebraska are exposed to harm due to the nature of their official duties. As indicated above, the performance of official duties may arise at any time. Under the facts of this case, at the time of the alleged attempted assault, Officer Whitney was engaged in the performance of her official duties within the meaning of § 28-930. This conclusion is consistent with the dictates of statutory interpretation, which direct us to effect the obvious legislative intent and purpose of the statute prohibiting an assault on an officer. See *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995). To fail to hold that Officer Whitney was performing her official duties at the time of the alleged attempted assault would be inconsistent with public policy, the cases, and the intent of the statute under which Wilen was charged. Based on the foregoing, we conclude that the trial court erred in sustaining Wilen's motion for directed verdict on the basis that the State presented no evidence that Officer Whitney was performing her official duties at the time of the alleged attempted assault.

IV. EFFECT OF THIS RULING

As explained above, this is an appeal by a county attorney pursuant to § 29-2315.01. Section 29-2316 describes the effect of the appellate court's ruling pursuant to § 29-2315.01:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the

> trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

Having concluded that the trial court erred in directing a verdict against the State and dismissing the case, pursuant to § 29-2316 we must determine whether jeopardy had attached before the trial court dismissed the case.

[23-25] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects " 'an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " *State v. Bostwick*, 222 Neb. 631, 642, 385 N.W.2d 906, 914 (1986) (quoting *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). Although jeopardy attaches when a jury is impaneled and sworn, the Double Jeopardy Clause bars retrial in criminal prosecutions only where jeopardy has attached and terminated. *State v. Bostwick, supra*. Events which terminate jeopardy include (1) an acquittal by a judge or jury, (2) a directed verdict of acquittal for insufficient evidence, and (3) a conviction reversed as a matter of law for insufficient evidence. *Id.*

[26,27] In *Smalis v. Pennsylvania*, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986), a case procedurally similar to the instant case, the U.S. Supreme Court determined that a dismissal at the end of the State's case constituted an acquittal for double jeopardy purposes. Specifically, the Court held in *Smalis* that a demurrer sustained on the basis that the State's evidence was insufficient to establish factual guilt constituted an acquittal under the Double Jeopardy Clause, barring the State's postacquittal appeal when reversal could result in a second trial or further proceedings for the purpose of resolving factual issues relating to the elements of the charged crime. Accordingly, under *Smalis v. Pennsylvania, supra*, we find in the instant case that the directed verdict constituted an acquittal and that jeopardy had attached and terminated. Therefore, under § 29-2316, our decision herein does not reverse or affect the district court's judgment.

V. CONCLUSION

We conclude that the trial court erred in sustaining Wilen's motion for directed verdict and, therefore, sustain the State's exception. Because jeopardy had attached and terminated at the time the trial court dismissed the case, our decision does not reverse or affect the judgment of the trial court, but provides "an authoritative exposition of the law for use as a precedent in similar cases which may now be pending or which may subsequently arise," *State v. Jennings*, 195 Neb. 434, 436, 238 N.W.2d 477, 479 (1976), with reference to the meaning of the phrase "engaged in the performance of his or her official duties" as used in § 28-930.

EXCEPTION SUSTAINED.

SABRINA W., APPELLANT, V. KURTIS WILLMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF RON WILLMAN, DECEASED, DOING BUSINESS AS HAIR AFFAIR III, APPELLEE.

540 N.W.2d 364

Filed November 21, 1995. No. A-94-118.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. **Directed Verdict: Appeal and Error.** If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law.
3. **Mental Distress.** Severe emotional damage is an element of intentional infliction of mental distress and negligent infliction of mental distress.
4. **Invasion of Privacy: Liability.** Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.
5. **Invasion of Privacy: Mental Distress: Damages.** A plaintiff can collect general damages for any symptom or side effect caused by an intrusion or resultant emotional distress or suffering or mental anguish or nervousness affecting one's personal or professional life, fright or shock, any physical discomfort or injury resulting from the emotional distress, headaches, embarrassment, anxiety, sleeplessness, depression, adverse impact on marital or family relationships

(including loss of consortium), increased use of alcohol, shame, humiliation, and feelings of powerlessness.

6. **Invasion of Privacy.** A plaintiff may make a claim for reputational injury precipitated by or proximately resulting from an intrusion.
7. **Damages.** Nominal damages are awarded, not as compensation for pecuniary loss, but in recognition of a legal wrong where there is no proof of actual damages.
8. **Invasion of Privacy: Mental Distress: Damages: Juries.** In an action for invasion of privacy pursuant to Neb. Rev. Stat. § 20-203 (Reissue 1991), the damages that a plaintiff may recover are (1) general damages for harm to the plaintiff's interest in privacy which resulted from the invasion; (2) damages for mental suffering; (3) special damages; and (4) if none of these are proven, nominal damages. The amount of damages should almost always be in the hands of the jury.
9. **Rules of Evidence.** Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.
10. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
11. **Mental Health: Expert Witnesses.** The rule that only a medical doctor may testify concerning mental conditions has deteriorated, and qualified psychologists are allowed to testify concerning mental conditions.
12. **Venue.** Neb. Rev. Stat. § 25-410 (Reissue 1989) provides for a change of venue for the convenience of the parties and the witnesses or in the interest of justice.
13. **Affidavits: Evidence: Appeal and Error.** Even though the law permits the use of affidavits in consideration of motions, the affidavit must be offered and received into evidence for an appellate court to consider such evidence.
14. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
15. **Venue: Appeal and Error.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded for a new trial.

Siegfried H. Brauer III, of Ross, Schroeder, Brauer & Romatzke, for appellant.

O. William VonSeggern, of Grimminger & VonSeggern, for appellee.

Susan C. Williams, of Murphy, Pederson, Waite & Williams, for amicus curiae Nebraska Federation of Business & Professional Women.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

This is an invasion of privacy action under Neb. Rev. Stat. § 20-203 (Reissue 1991) brought by the plaintiff, Sabrina W., against Ron Willman, doing business as Hair Affair III. Notwithstanding Willman's admission of liability, the trial court directed a verdict for Willman because the judge concluded plaintiff was required to prove she suffered severe emotional distress as a result of the invasion of privacy in order to recover and found that she failed to do so. Plaintiff appeals. We conclude that a plaintiff need not prove severe emotional distress in order to recover for an invasion of privacy and that the evidence was sufficient for the jury to determine damages, and therefore, we reverse the trial court's judgment and remand the cause for a new trial.

FACTUAL BACKGROUND

On May 3, 1989, plaintiff brought this action, but it was delayed due to Willman's bankruptcy. The trial was had on January 5 and 6, 1994, and Willman has since died. The case has been revived against his estate. At trial, the parties stipulated that Willman was liable and that the only issue to be tried would be damages. The following facts have been summarized from the record and the stipulation:

During March or early April 1989, plaintiff, who at the time was a 23-year-old single mother, purchased a membership to a tanning facility from Willman, the owner of the Hair Affair III hair salon located in Grand Island, Nebraska. The tanning room in the hair salon had a door which locked from the inside. Willman allowed plaintiff to use the facility before normal business hours, when Willman was the only person operating the facility.

Prior to April 14, 1989, plaintiff used the facility several times. Willman had constructed the tanning room so as to permit him to view any occupant, including plaintiff, without his or her knowledge. Willman secretly watched and photographed her while she was in various stages of undress and nude in the tanning room. Plaintiff never consented to any of Willman's actions, nor was she aware of his voyeuristic desires.

Willman then took the film to a commercial developing facility in Hastings, Nebraska. Upon developing the film, an employee of the facility notified the Hastings Police Department of the nature of these photographs. The Hastings Police Department confiscated the photographs when Willman attempted to take delivery of them. The Hastings Police Department then notified and delivered the pictures to the Grand Island Police Department. Lt. Bradley Brush of the Grand Island Police Department notified plaintiff that she had been photographed by Willman while she was using the tanning facility.

The evidence on damages consists mostly of plaintiff's own testimony. She learned of Willman's actions when she went to the police station at the request of the police to identify herself as the subject of some of the photographs. She testified to the details of her shock upon learning of Willman's conduct and of the photographs. She testified that she was shocked, humiliated, and embarrassed and that she felt degraded by the matter. When Brush showed her the photographs, she cried. She also testified to the details of how some of her family members, friends, fellow workers, and acquaintances treated her after it became known that she was one of the subjects of Willman's conduct. Some of the comments were poor attempts at humor; others were uncharitable or even vicious. Directly or indirectly, the actions of many such people charged or implied that plaintiff had consented or had cooperated with Willman, or at the very least that she was stupid for not having learned what Willman was doing. Men made indecent proposals to her, apparently upon the assumption that the matter indicated her morals were low.

The harassment from other employees at work was sufficiently severe that she asked her employer to call a meeting of the employees to tell them to stop harassing her, but this was ineffective, and eventually she left that employment. She had to have her telephone number changed to avoid obscene telephone calls. Her former husband charged she was unfit to have the custody of her child because of the incident. On several occasions, she overheard people talking about her with reference to the Willman matter. As a result, she felt humiliated and embarrassed and suffered mentally. She started drinking

more to escape her problems. She was afraid to use a public dressing room or stay in a motel room. The incident affected her attitude toward men, her interest in them, and their interest in her. She gained weight.

She found that after the incident she recalled that she was sexually abused as a young child. She became angry at her family members, and she had trouble dealing with her feelings. In 1992, she sought counseling from Robert Bednar, a certified counselor.

Other witnesses also testified about their observations of plaintiff's demeanor after the incident, but since this evidence is in the nature of corroboration it is unnecessary to summarize it in this opinion.

At the conclusion of plaintiff's evidence, the trial court granted the directed verdict, citing the following reasons: (1) Plaintiff failed to show that she suffered severe emotional distress, and (2) the evidence in this case is such that the jury could not determine damages, if any, except by speculation and conjecture.

ASSIGNMENTS OF ERROR

Plaintiff alleges five errors which can be summarized as the trial court erred in (1) directing a verdict against her and dismissing her cause of action, (2) requiring plaintiff to prove severe emotional distress, (3) refusing to allow certain evidence offered, and (4) granting Willman a change in venue.

STANDARD OF REVIEW

[1,2] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of all inferences which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Clausen v. Columbia Nat. Ins. Co.*, 1 Neb. App. 808, 510 N.W.2d 399 (1993).

ANALYSIS

Damages for Invasion of Privacy Under § 20-203.

[3] Willman contends that expert testimony is required and cites the proposition that to be actionable, emotional distress must be so severe that no reasonable person could have been expected to endure it. See *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987). Furthermore, the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant. *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993). See, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993); *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992). Severe emotional damage is an element of intentional infliction of mental distress, *Pick, supra*, and negligent infliction of mental distress, *Sell, supra*, but severe damage is not specified as an element of the cause of action under § 20-203. Conduct which would invade the privacy of an individual will generally be mental and emotional in nature, and if the person whose privacy was invaded could only recover for severe mental distress, the invasion of privacy statutes would provide very little relief.

Furthermore, an examination of the invasion of privacy statutes shows the close relationship of this tort to defamation and not to actions for intentional or negligent infliction of emotional distress. The relationship and nature of the causes of action for invasion of privacy and defamation are particularly spelled out in Neb. Rev. Stat. § 20-209 (Reissue 1991), which provides in significant part: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication, exhibition, or utterance . . . ." As shown below, we have found that both the Nebraska Supreme Court and other jurisdictions have recognized the relationship of defamation to the action for invasion of privacy.

[4] Under our statutory scheme, the tort of invasion of privacy has been divided into three separate causes of action. They are found in Neb. Rev. Stat. §§ 20-202 through 20-205 (Reissue 1991) and generally are (1) exploitation of the plaintiff

for advertising or commercial advantage, (2) trespass or intrusion upon the plaintiff's solitude, and (3) publicity which places the plaintiff in a false light. The present case involves the intrusion claim pursuant to § 20-203. Section 20-203 provides: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." The statute is silent as to the damages that a plaintiff must prove in order to recover.

In *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991), the plaintiffs brought an invasion of privacy action pursuant to § 20-203 against the defendants for flying model airplanes over the plaintiffs' property. The Nebraska Supreme Court looked to the Restatement (Second) of Torts § 652 B (1977), Intrusion upon Seclusion, for guidance, and found § 20-203 similar to the Restatement. The court, relying upon the comments to the Restatement, held that the plaintiffs' action was not the type covered by the statute and stated:

> The illustrations of invasions of privacy accompanying § 652 B encompass such situations as a reporter's entering a hospital room and taking the photograph of a person suffering from a rare disease; "window peeking" or wiretapping by a private detective; obtaining access to a person's bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations.

239 Neb. at 631, 477 N.W.2d at 562. Certainly, the photographing of a woman in the privacy of a tanning booth without her consent falls within this category as well.

In addition to *Kaiser*, both this court and the Supreme Court have referred to the Restatement for guidance in other cases involving other statutory claims for invasion of privacy. See, *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Wadman v. State*, 1 Neb. App. 839, 510 N.W.2d 426 (1993). Therefore, an examination of the Restatement, *supra*, and specifically the section regarding damages for invasion of privacy, § 652 H, is the proper place to begin our analysis. The Restatement, *supra*, § 652 H at 401, states:

> One who has established a cause of action for invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.

Surely, a jury would be entitled to find mental distress would normally result to a woman who was photographed in the privacy of a tanning booth.

Comment *a.* to § 652 H at 401-02 states that "[a] cause of action for invasion of privacy . . . entitles the plaintiff to recover damages for the harm to the particular element of his privacy that is invaded. Thus one who suffers an intrusion upon his solitude or seclusion, under § 652B, may recover damages for the deprivation of his seclusion." Comment *b.* states that a plaintiff may recover for emotional distress or humiliation that he proves to have been actually suffered by him. Comments *b.* and *d.* also state that an action for invasion of privacy closely resembles that for defamation. See, also, *Schoneweis, supra.*

A review of other jurisdictions regarding the intrusion of privacy claim reveals that the gravamen of this tort is "the injury to the feelings of the plaintiff, and the mental anguish and distress caused thereby." *Fernandez v. United Acceptance Corp.*, 125 Ariz. 459, 462, 610 P.2d 461, 464 (Ariz. App. 1980). See, *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977); 62A Am. Jur. 2d *Privacy* § 252 (1990) and cases cited therein; 5A Personal Injury, Right of Privacy § 1.03[1][d] (Louis R. Frumer & Melvin I. Friedman, eds., 1994). Generally, other jurisdictions have held that in order for a plaintiff to recover, the plaintiff must prove "an intentional substantial intrusion, physically or otherwise, upon the solitude or seclusion of the complaining party that would be highly offensive to the reasonable person." *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62, 67 (Utah App. 1992). See, *Snakenberg v. The Hartford*, 299 S.C. 164, 383 S.E.2d 2 (S.C. App. 1989); *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973); *Monroe,*

supra; *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 560 N.E.2d 900 (1990); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269 (1995); 62A Am. Jur. 2d, *supra*, § 38 et seq.; David A. Elder, The Law of Privacy § 2:10 (1991). Certainly, Willman's conduct would be highly offensive to almost anyone that was subject to it.

Once a party has established that the defendant has intruded, the defendant is liable for damages. At least one court has held that if the plaintiff proves liability of the defendant for an intrusion then "the fact of damage is established as a matter of law." *Snakenberg*, 299 S.C. at 172, 383 S.E.2d at 6. Other jurisdictions have either relied upon or expressly adopted the Restatement (Second) of Torts § 652 H (1977) as the proper measure of damages. See, e.g., *Socialist Workers Party v. Attorney General of U.S.*, 642 F. Supp. 1357 (S.D.N.Y. 1986); *Monroe, supra*; *Turner, supra*. Courts have also recognized that damages in this area can be difficult to ascertain or measure by a pecuniary standard, but that this is not a ground for denying recovery. *Turner, supra*; *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955); 62A Am. Jur. 2d, *supra*, § 257, and cases cited therein.

[5,6] Realizing the difficulty in determining damages, courts have found that a trier of fact is uniquely qualified to assess damages. See, *Snakenberg, supra*; *Turner, supra*; *Fernandez, supra*; *Monroe, supra*. Plaintiffs have collected substantial damages without asserting or proving special damages or physical or other debilitating injury. See *id.*

> Consequently, plaintiff can collect general damages for any symptom or side effect caused by the intrusion or resultant emotional distress or suffering or mental anguish—nervousness affecting one's personal and/or professional life; fright and/or shock; any physical discomfort or injury resulted from the emotional distress; headaches; embarrassment; anxiety; sleeplessness; depression; adverse impact on marital or family relationships (including loss of consortium); increased use of alcohol; shame; humiliation; feelings of powerlessness. Furthermore, the courts have applied the general rules of intentional tort liability to intrusion cases. . . .

> Plaintiff may also make a claim for reputational injury precipitated by or proximately resulting from the intrusion. For example, where defendant unjustifiably, physically intruded into plaintiff's trailer, a court upheld a damage award based in part on the fact that the "incident became rather public knowledge" throughout a widespread area and became enlarged by rumor and innuendo. . . .
>
> Although special or out-of-pocket damages are not a prerequisite to actionability, the plaintiff may collect for any special damages . . . .

(Citations omitted.) Elder, *supra* at 58-61. See, also, *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219 (Tex. Civ. App. 1977); *Monroe, supra*; *Phillips v. Smalley Maintenance Services*, 435 So. 2d 705 (Ala. 1983); *Miller, supra*; *Love v. Southern Bell Telephone and Telegraph Co.*, 263 So. 2d 460 (La. App. 1972); *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419 (S.D. 1994); *Socialist Workers Party, supra*; *Fernandez, supra*.

The Nebraska Supreme Court in *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), has recognized similar difficulties in assessing damage awards in the area of defamation. In *McCune*, the plaintiff appealed a trial court's order that denied the plaintiff the benefit of a jury award of $25,350 after having found that the defendant made slanderous statements that the plaintiff was infected with AIDS. The Supreme Court found that the plaintiff's testimony was evidence of injury to his reputation and of mental suffering and thus reversed the trial court's order for a new trial on the issue of damages and reinstated the verdict. In regard to what damages a plaintiff is entitled to recover, the court stated:

> In recognition of the interests involved in a defamation action and the difficulty of proof in this area, this court has declared that in an action for libel or slander, the amount of damages is almost entirely in the jury's discretion. *Hall v. Vakiner*, 124 Neb. 741, 248 N.W. 70 (1933).
>
> In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation [citations omitted]; (2) special damages [citations omitted];

(3) damages for mental suffering [citation omitted]; and (4) if none of these are proven, nominal damages [citations omitted].

McCune, 235 Neb. at 765, 457 N.W.2d at 811.

We note that these damages are very similar to the damages prescribed by the Restatement for an invasion of privacy. See the Restatement, *supra*, § 652 H. We recognize that in Nebraska, plaintiffs are entitled to recover for mental anguish, embarrassment, and humiliation for other causes of action. See, *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Menhusen v. Dake*, 214 Neb. 450, 334 N.W.2d 435 (1983); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964); *Kurpgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910).

[7] Nebraska also recognizes that nominal damages are awarded, not as compensation for pecuniary loss, but in recognition of a legal wrong where there is no proof of actual damages. *Mathis v. State*, 178 Neb. 701, 135 N.W.2d 17 (1965); *Stewart v. Spade Township*, 157 Neb. 93, 58 N.W.2d 841 (1953); *Larson v. Marsh*, 144 Neb. 644, 14 N.W.2d 189 (1944).

[8] Therefore, we conclude that in an action for invasion of privacy pursuant to § 20-203, the damages that a plaintiff may recover are (1) general damages for harm to the plaintiff's interest in privacy which resulted from the invasion; (2) damages for mental suffering; (3) special damages; and (4) if none of these are proven, nominal damages. We also conclude that the amount of damages should almost always be in the hands of the jury.

Sufficient Evidence of Damages.

Because the trial was had solely on the issue of damages, the evidence that was adduced related only to the effect that the photographing incident had on plaintiff. Plaintiff was allowed to offer certain evidence regarding her damages, but not allowed to produce other evidence. We have already summarized plaintiff's evidence, and we conclude that it is sufficient to go to the jury.

Excluded Evidence.

Plaintiff argues that the trial court erred in not admitting into evidence a sexually explicit magazine which she received anonymously; several newspaper articles which reported the incident, at least one of which specifically mentioned her by name; and plaintiff's testimony regarding an incident that occurred at the Grand Island Post Office. Willman objected on the basis that the newspaper articles and the post office incident were highly prejudicial. The trial court sustained the objections. Willman also objected to the sexually explicit magazine on the basis that "[i]t's highly prejudicial and overweighs the probative value." Plaintiff contends that all of this evidence provides support for her claims of damage to her reputation and of her mental suffering.

[9] Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); Neb. Rev. Stat. § 27-403 (Reissue 1989). A trial court's ruling concerning § 27-403 will not be disturbed on appeal unless there has been an abuse of discretion. *Paro, supra.*

We conclude that the exclusion of the newspaper articles and the sexually explicit magazine was within the discretion of the trial court. The newspaper articles included references to Willman's bankruptcy, the fact that he had been criminally charged and that the charges had been dismissed, other victims' stories, and the fact that there were other victims. Plaintiff testified about receiving the magazine and the nature of it. Considering the magazine's contents, it would have confused the issues of the case, and we think the court was within its discretion to exclude it.

Plaintiff offered to prove that while in the post office on business she overheard three men talking about the Willman matter. The gist of their conversation, sanitized for decency, was that Willman was having relations with all of the women involved and that some of them became mad and reported him because he was giving more sexual attention to one woman than

the others. This incident is merely one of the many incidents of unkind actions of the public which would tend to increase the suffering of someone who was already humiliated. We think it was prejudicial to exclude this evidence.

Expert Testimony.

During trial, Willman filed a motion in limine asking the court to prohibit plaintiff from using the deposition of Bednar, a full-time school guidance counselor and part-time marriage and family counselor. The basis of the motion was that Bednar was not a medical doctor, and in counsel's opinion a medical doctor's testimony was the only relevant evidence on the issue of emotional distress. After examining Bednar's deposition and hearing arguments by the attorneys, the court granted the motion. Later, out of the presence of the jury and by agreement, Bednar's deposition was offered into evidence by plaintiff's attorney and objected to by Willman's attorney for the reasons stated in the motion in limine. In this case, the procedure used was unsatisfactory for the situation.

Bednar's deposition shows him to be a school counselor with the Pleasanton Public Schools since 1980, and before that he had been a teacher and school counselor in the Millard Public Schools. He has a master's degree plus 27 additional graduate hours in counseling. He has engaged in private practice in the field of marriage and family counseling. In 1980, he started counseling as a private business, and he has taken courses related to both his private practice and school counseling. He counsels adults as well as children. Bednar is a board-certified professional counselor in Nebraska. For our purposes, he appears to be a well-qualified professional counselor as that term was defined in Neb. Rev. Stat. § 71-1,266 (Reissue 1990) (since replaced by Neb. Rev. Stat. § 71-1,310 (Cum. Supp. 1994)). He is not certified to practice psychology, and in his deposition he did not claim to do so.

Bednar testified he first interviewed plaintiff in November 1992. He had two more sessions with her in November or December and one more session in April 1993. The information he obtained from plaintiff was essentially the same information that she testified to as summarized above. He testified about the

counseling he had with plaintiff.

The goals of his treatment plan were to reconcile plaintiff with her mother and grandmother and improve her relationship with her current husband and her parenting skills with her child. The treatment plan included dealing with her own anger, feelings of victimization, and paranoia and developing an understanding of why she was suffering since the photographing incident. He felt that treating her was within his capabilities.

In the deposition, plaintiff's counsel also elicited Bednar's opinions on a number of questions in the usual format that attorneys use to present expert testimony. We will merely summarize enough of this testimony to let the reader understand its overall import. Bednar testified that the photographing incident was a significant event of her life, that it triggered emotional traumas and memories and a great deal of anxiety and distress between her parents and herself, and that it triggered her resentment against her mother for not reporting the sexual abuse plaintiff suffered as a child. He also opined that plaintiff suffered adverse effects as a result of the photographing, including paranoia, fear of being alone in a closed room, fear of staying in a motel, nightmares, and difficulty sleeping; that she became withdrawn and cried a lot, but she could still function at work; and that she had repressed the sexual abuse incidents until the photographing incident. Plaintiff's counsel elicited additional opinions from Bednar along the same general approach, but the above should be sufficient to demonstrate the problem.

[10,11] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994); *Zarp v. Duff*, 238 Neb. 324, 470 N.W.2d 577 (1991); *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985). It appears to us that much of Bednar's testimony would be admissible, but many of his opinions are inadmissible, and perhaps some would be admissible in the discretion of the judge. However, the sole objection to his testimony, that Bednar was not a medical doctor, does not raise the question of its admissibility. The rule that only a medical doctor may testify concerning mental

conditions has deteriorated since the early 1960's, and for many years qualified psychologists have been allowed to testify concerning mental conditions. See Annot., Qualification of Nonmedical Psychologist to Testify as to Mental Condition or Competency, 78 A.L.R.2d 919 et seq. (1961), and supplement thereto in 78 A.L.R.2d Later Case Service 919-27 at 407-11 (1986).

We realize that Willman's objection and the court's ruling might have been premised upon the rule contained in cases considering the torts of negligent and intentional infliction of emotional distress, such as the statement "[T]he emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant." *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 481, 488 N.W.2d 567, 576 (1992). See, also, *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993). In other sections of this opinion we have concluded that rule does not apply to invasion of privacy cases. However, even if that rule did apply to this case and Bednar's evidence were therefore insufficient to support a verdict, it would still not be inadmissible because it was insufficient.

To go through Bednar's deposition to determine the admissibility of his various opinions without a specific objection would amount to an advisory opinion. This we decline to do. Except to conclude that the objection was improper and should therefore have been overruled, there is nothing for this court to consider. Since this case must be retried, we simply make clear that we have not ruled upon the admissibility of any particular portion of Bednar's deposition.

Change of Venue.

[12,13] The transcript shows that on July 29, 1992, Willman filed a motion for change of venue, and the motion was granted by the court and the trial was changed to another judicial district. Neb. Rev. Stat. § 25-410 (Reissue 1989) provides for a change of venue "[f]or the convenience of the parties and witnesses or in the interest of justice." Plaintiff assigned this action as error, but failed to include the hearing at which the

motion was considered into the bill of exceptions. The motion for change of venue with an affidavit of service is included within the transcript, but when the record of the hearing on the motion is not included within the bill of exceptions we do not know what if any evidence might have been offered on that motion. Even though the law permits the use of affidavits in consideration of motions, the affidavit must be offered and received into evidence for this court to consider such evidence. *Anderson v. Autocrat Corp.*, 194 Neb. 278, 231 N.W.2d 560 (1975). The filing of such affidavits is not sufficient, and the inclusion of the affidavit within the transcript is not sufficient. *Id.*

[14,15] However, in this case no record was presented for the hearing on the motion for change of venue. "It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed." *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 339, 513 N.W.2d 281, 283 (1994). See, also, *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). Obviously, without a record, this court cannot conclude that the trial court abused its discretion. We therefore find the trial court did not err in granting the change of venue.

CONCLUSION

Therefore, we conclude that the trial court erred in directing a verdict for Willman, and we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. LEWCHUK, APPELLANT.

539 N.W.2d 847

Filed November 21, 1995. No. A-94-1234.

1. **Evidence: Appeal and Error.** An appellate court's analysis of the admissibility of evidence is not limited to the bases argued at trial, and the appellate court must determine if the evidence should have been admitted for any purpose.
2. **Self-Defense: Evidence: Proof.** Evidence of a victim's violent character is probative of the victim's violent propensities and is relevant to the proof of a self-defense claim.
3. **Rules of Evidence.** The plain language of Neb. Evid. R. 404 provides that a defendant may present evidence of a pertinent trait of a victim's character to show that the victim acted in conformity therewith on a particular occasion.
4. **Rules of Evidence: Testimony.** Neb. Evid. R. 405(1) provides that in situations where testimony is allowed about a person's character trait, that trait may be shown by reputation and opinion testimony.
5. **Rules of Evidence: Proof.** Neb. Evid. R. 405(2) provides for proof of specific instances of conduct regarding a person's character or trait of character when the character or trait of character is an essential element of a charge, claim, or defense.
6. **Self-Defense.** A determination of who was the first aggressor is an essential element of a self-defense claim.
7. **Self-Defense: Evidence.** When character evidence is being offered to establish which party was the first aggressor, it is being used objectively to determine if the victim was more probably than not the first aggressor in the incident in question, and the defendant's prior knowledge of the incidents or reputation which makes up the character testimony is irrelevant.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for a new trial.

David A. Domina and Denise E. Frost, of Domina & Copple, P.C., for appellant.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Appellant in this case was charged with assault in the first degree. Appellant was tried twice, the first trial resulting in a

hung jury and the second in a conviction. Appellant failed to appear at sentencing and was arrested 14 years after the conclusion of the second trial and sentenced to a term of imprisonment. Appellant seeks to have his conviction set aside because the district court in his second trial refused to admit testimony relating to specific instances of the victim's violent conduct. Because we find the district court committed reversible error, we reverse, and remand for a new trial.

II. FACTUAL BACKGROUND

The events which gave rise to this case occurred during the nighttime hours of December 21, 1979, and early morning of December 22. Viewed in the light most favorable to the State, the record reveals the following facts:

On the evening of December 21, 1979, appellant, Dennis L. Lewchuk, accompanied a friend to various bars and lounges in the Norfolk, Nebraska, area. Lewchuk eventually arrived at the Brass Rail bar in Norfolk at approximately midnight. While at the Brass Rail, Lewchuk encountered a man named James Warner, the victim in this case.

Although there is some conflict as to the specific details of Lewchuk's encounter with Warner, it appears that Warner was aware Lewchuk had some affiliation with the Joker's Wild, a motorcycle gang, and Warner had been making obnoxious and insulting remarks about Joker's Wild members and questioning how "tough" they really were. At some point, Lewchuk and Warner proceeded to get into an automobile which Lewchuk drove away from the Brass Rail. According to Lewchuk, the two were going to Lewchuk's home to see his bar. Warner claimed to have gotten into the car with Lewchuk to go somewhere and smoke marijuana. The accounts of the events after Lewchuk and Warner left the Brass Rail in the automobile differ substantially.

Lewchuk alleged that Warner again began to make disparaging remarks about the Joker's Wild members and questioned how tough they were. Lewchuk claimed that Warner touted his skills in karate and at some point threatened to "do [Lewchuk] in right where [he] sat." Lewchuk alleged that Warner suddenly hit him with a karate chop to the throat, pulled him to the floor of the car, and began choking him until he

nearly blacked out. Lewchuk claimed to then have obtained a knife from a sheath on Lewchuk's belt and stabbed Warner in self-defense until Warner released him and fled from the car.

Warner alleged that he was merely sitting in the car listening to Lewchuk talk about how people were afraid of the Joker's Wild members for various things they had done to other people. Warner claimed that Lewchuk, without warning, struck him in his left arm. Warner alleged that he attempted to grab Lewchuk's arm, missed, and was struck in the head by Lewchuk and began bleeding. When he began bleeding, Warner claimed, he realized that Lewchuk was using more than his fists and that he had actually been stabbed. Warner claimed to have attempted to get out of the car, continually feeling blows coming from over his right shoulder. Warner testified that he remembered Lewchuk shouting, " 'Why don't you die, you son-of-a-bitch.' " Eventually the car ran off the road, and Warner alleged that he was able to make his escape, seek refuge, and contact the police.

As a result of the incident, Warner suffered numerous lacerations, some of which were very large and very deep. Among the wounds were at least two chest wounds. The doctor who examined Warner testified at trial that there may have been as many as 25 knife wounds, which required approximately 500 stitches.

After the incident, Lewchuk proceeded to go home. A couple of days later, after learning that a warrant had been issued for his arrest, Lewchuk turned himself in to the Norfolk Police Department.

The case proceeded to trial the first time in June 1980. The first trial ended with a hung jury on June 21. During the course of the first trial, the court allowed Lewchuk to call several witnesses to testify about alleged specific instances of Warner's violent conduct on the night of December 21, 1979.

Mark Volquardson testified that he was a bartender at the Brass Rail on December 21, 1979, and that Warner had forcefully shoved a female patron into him. Volquardson testified that on that night Warner was being very loud and belligerent and was "raising hell" in the bar. Volquardson also testified that he observed Warner hit another patron in the chest.

Gary Biggerstaff testified that he was in the Brass Rail on the night of December 21, 1979, and that Warner repeatedly made obscene comments to him, bragged about his proficiency in karate, and attempted to gouge Biggerstaff's eyes out. Biggerstaff further testified that he went outside of the bar with Warner, and Warner beat him. Biggerstaff also testified to Warner's reputation for using force, knives, and guns on other people.

B.J. Hoile testified that he was in the Brass Rail on the night of December 21, 1979, and had an altercation with Warner. Hoile testified that Warner directed obscene comments at him and then asked him to step out behind the bar. Hoile testified that he went out behind the bar with Warner, Warner swung at him and missed, and as Hoile attempted to return to the bar, Warner grabbed him from behind and tried to gouge his eyes out. Hoile testified that Warner was generally very vulgar and obnoxious on that night, and Hoile observed Warner shove the female patron.

Janell Hackler testified that she was in the Brass Rail on the night of December 21, 1979. Hackler testified that she was the female patron Warner shoved in the bar that night. Hackler testified that the shove was forceful enough to move her a couple of steps, but not enough to push her to the ground.

Leonard Haines testified that he was in the Brass Rail on the night of December 21, 1979, and observed Warner shove Hackler. Haines testified that Warner was acting in a very vulgar, drunken, disrespectful manner throughout the evening.

Richard Bear testified that he was in the Brass Rail on the night of December 21, 1979, and that Warner made disparaging remarks about the Joker's Wild to Lewchuk and tried to start a fight with Bear while they were in the bar.

Lewchuk was tried a second time on September 23 through 30, 1980. On September 11, the State filed a motion in limine seeking to prevent the defense from presenting any evidence of specific instances of violent, aggressive, or assaultive conduct by Warner toward third persons, unless Lewchuk was aware of Warner's conduct prior to the charged assault. After a hearing on September 12, the court sustained the motion. On September 26, Lewchuk's counsel made an offer of proof concerning the

substance of the excluded testimony by offering a transcript of the witnesses' testimony about specific acts of violence by Warner from the first trial. The parties stipulated to the form, foundation, and accuracy of content of the offer of proof. The State noted on the record its objection to the jury hearing the testimony in the offer of proof, and the court sustained the objection. On September 30, the jury returned a verdict of guilty against Lewchuk.

On November 6, 1980, Lewchuk failed to appear for sentencing, and his bond was forfeited. During the time period from November 1980 to December 1994, Lewchuk lived primarily in Alabama under an assumed name. After he was identified and arrested by the FBI in Alabama, Lewchuk was returned to Nebraska in 1994. Lewchuk was sentenced on December 16, 1994. Lewchuk then filed his appeal to this court, challenging his conviction.

III. ASSIGNMENTS OF ERROR

In this appeal, Lewchuk assigns numerous errors from the proceedings in the district court. One of the assigned errors is that the district court erred in excluding testimony about specific instances of violent and aggressive conduct by the victim in the hours preceding the assault with which Lewchuk was charged. Because our decision regarding this error is dispositive, we will not address the remaining assigned errors. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994). We also note that Lewchuk has not assigned as error that there was insufficient evidence to support his conviction. See *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

IV. STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, the admissibility or exclusion of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

Error may not be predicated upon a trial court's ruling

excluding testimony of a witness unless the substance of the evidence to be offered by the witness' testimony was made known to the court by offer or was apparent from the context in which the questions were asked. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Bennett*, 2 Neb. App. 188, 508 N.W.2d 294 (1993).

Since under the Nebraska rules of evidence all relevant evidence is admissible except as otherwise provided in the Nebraska rules of evidence, a proponent of evidence which was excluded at trial is not limited on appellate review to reliance upon the bases argued for admission of the evidence at trial. *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993).

In a jury trial of a criminal case, whether an error in excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993).

V. ANALYSIS

1. Admissibility of Evidence of Victim's Character

At trial, Lewchuk sought to introduce testimony of Mark Volquardson, Gary Biggerstaff, B.J. Hoile, Janell Hackler, Leonard Haines, and Richard Bear about the specific instances of Warner's violent and assaultive conduct these witnesses observed on the night in question. The district court granted the State's motion in limine, preventing any testimony as to specific instances of conduct, and limited the testimony to reputation and opinion testimony about the victim's violent character. The court ruled that specific acts could be introduced only if Lewchuk was shown to have had knowledge of them prior to the charged assault. In this appeal, Lewchuk contends that testimony about the specific acts supports his defense claim that Warner was the first aggressor, and therefore Lewchuk was justified in using the force he did to defend himself. See Neb. Rev. Stat. § 28-1409 (Reissue 1989). The same statutory provision for the use of force in self-defense was in effect at the time of Lewchuk's trial.

[1] We note that it is not entirely clear from the record that Lewchuk offered the evidence at trial in the precise manner in which we are analyzing its admissibility. Our analysis cannot be limited to the bases argued at trial, and we must determine if the evidence should have been admitted for any purpose. See *Cockrell, supra*. We also note that Lewchuk properly made the substance of the evidence to be offered by the witnesses' testimony known to the court by an offer of proof. See *Cortis, supra*.

[2] Evidence of a victim's violent character is probative of the victim's violent propensities, and many courts have recognized that evidence of a victim's violent character is relevant to the proof of a self-defense claim. See, e.g., *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983) (where court found that specific examples of victim's violent conduct were relevant to who was first aggressor in homicide case); *State v. Dunson*, 433 N.W.2d 676 (Iowa 1988) (holding that evidence of specific acts of violence by victim, even if subsequent to assault charged, is admissible and relevant to victim's aggressive character and propensity for violence). See, also, *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972) (holding that in homicide case, evidence of deceased's violent character, including evidence of specific violent acts, is relevant on issue of who was first aggressor); *Gonzales v. State*, 838 S.W.2d 848 (Tex. Crim. App. 1992) (holding that evidence of victim's aggressive character is essential element of self-defense); *Chapman v. State*, 469 N.E.2d 50 (Ind. App. 1984) (noting that evidence of person's character, however adduced, is admissible in homicide and battery cases where defendant raises issue of self-defense); *People v. Buchanan*, 91 Ill. App. 3d 13, 414 N.E.2d 262 (1980) (noting that a common issue in self-defense cases is use of evidence regarding reputation or character of deceased); Annot., 1 A.L.R.3d 571 (1965). Evidence of a victim's violent character—his propensity to engage in violent and aggressive conduct—can be offered by a defendant under Neb. Evid. R. 404(1)(b), Neb. Rev. Stat. § 27-404(1)(b) (Cum. Supp. 1994).

Rule 404 discusses the use of evidence of a person's character or trait of character. Rule 404(1) discusses the limited

circumstances in which evidence of a trait of a person's character may be used as evidence that he or she acted in conformity with such trait on another occasion. Rule 404(2) discusses the circumstances in which evidence of a trait of a person's character may be used as evidence of some other issue aside from demonstrating that he or she acted in conformity with such trait on another occasion, namely, to demonstrate motive, opportunity, intent, preparation, plan, et cetera. Although rule 404(1) and (2) both deal with character evidence, we are here concerned with rule 404(1).

[3] Rule 404 provides:

> (1) Evidence of a person's character or a trait of his . . . character is not admissible for the purpose of proving that he . . . acted in conformity therewith on a particular occasion, *except*:
>
> . . . .
>
> (b) *Evidence of a pertinent trait of character of the victim of the crime offered by an accused* or by the prosecution to rebut the same . . . .

(Emphasis supplied.) This language was also in effect at the time of Lewchuk's trial. The plain language of rule 404 provides that Lewchuk may present evidence of a pertinent trait of Warner's character, such as his propensity for violence, to show that Warner acted in conformity therewith on the night in question.

Our analysis of the character evidence in this case is confined to rule 404(1). Our review of other jurisdictions which have found character evidence relevant to a self-defense claim, as well as the Nebraska Supreme Court's analysis in *Sims, supra*, has revealed that rule 404(1) and Neb. Evid. R. 405(2), Neb. Rev. Stat. § 27-405 (Reissue 1989), provide appropriate bases for admitting the character evidence in this case. Our analysis under rule 404(1) is not meant to foreclose or in any way imply a limitation on the possibility of this type of evidence in another case being offered pursuant to rule 404(2) to demonstrate something *other* than conformity. See, e.g., Annot., 121 A.L.R. 380 (1939) (noting that in homicide cases where self-defense was relied upon, courts have held admissible specific prior acts of deceased as being part of res gestae or, where sufficiently

close in time and circumstances, to characterize deceased's conduct or state of mind at time and to establish deceased as initial aggressor, even where prior actions were not within defendant's knowledge).

2. Determining What Type of Character Evidence May Be Used

When it is determined that evidence of a trait of the victim's character is admissible, rule 405 governs what type of evidence can be used. There are three distinct types of character evidence provided for in rule 405: reputation testimony, opinion testimony, and testimony of specific instances of conduct. Rule 405 provides:

> (1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The same language was in effect at the time of Lewchuk's trial.

(a) Reputation and Opinion Testimony

[4] Rule 405(1) provides that in situations where testimony is allowed about a person's character trait, such as Warner's propensity for violence, that trait may be shown by reputation and opinion testimony. At trial, the district court allowed witnesses to testify about Warner's reputation or their opinion about Warner's violent character. This was appropriate.

(b) Specific Instances of Conduct

[5] Rule 405(2) provides for proof of specific instances of conduct regarding a person's character or trait of character when the character or trait of character is an essential element of a charge, claim, or defense. Lewchuk asserted self-defense as his defense at trial, alleging that Warner was the first aggressor in the incident.

[6] A determination of whether Warner was the first

aggressor is an essential element of Lewchuk's self-defense claim. See *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983). In *Sims*, the Nebraska Supreme Court noted that testimony about specific incidents of the victim's violent behavior was relevant to, and probative of, the question of who was the first aggressor. The court in *Sims* held that the district court committed error by refusing to admit testimony of specific prior acts of violence by the victim under rule 405(2). However, the court in *Sims* found the excluded evidence to be merely cumulative and held the error harmless. Although we recognize that *Sims* was decided after Lewchuk's trial, the evidence rules upon which the *Sims* decision was premised were the same as those in effect at the time of Lewchuk's trial.

3. Relevance of Defendant's Knowledge of Prior Acts

The trial court herein stated that evidence of specific prior incidents of Warner's violent conduct would have been admissible only if it was first demonstrated that Lewchuk was aware of the incidents. It appears that the district court was operating under a common misconception about the use of character evidence in support of a self-defense claim. Many courts, when discussing the admissibility of testimony concerning the victim's violent and aggressive character, fail to distinguish two different and independent purposes for which the testimony may be offered. See Annot., 1 A.L.R.3d 571 (1965), and cases cited therein. One purpose for the testimony may be to demonstrate that the defendant was in a reasonable state of mind in acting in self-defense and had a reasonable fear based upon the victim's violent and aggressive character, which was known by the defendant. The other purpose for the testimony may be to support the defendant's allegation that the victim was the first aggressor. A demonstration of the victim's violent character makes it more probable that the victim initiated the violence in this instance and was in fact the first aggressor. See, e.g., *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972); *Gonzales v. State*, 838 S.W.2d 848 (Tex. Crim. App. 1992); *Chapman v. State*, 469 N.E.2d 50 (Ind. App. 1984); *People v. Buchanan*, 91 Ill. App. 3d 13, 414 N.E.2d 262 (1980); Annot., 1 A.L.R.3d, *supra*.

These two distinct purposes serve different functions and carry different requirements as to the defendant's knowledge of the victim's character. See *Buchanan, supra*, citing 1 John H. Wigmore, Evidence in Trials at Common Law § 63 (3d ed. 1940). When the character evidence is being offered for the first purpose, to determine if the defendant's fear was reasonable, it is being used subjectively to determine the defendant's state of mind and his beliefs regarding the danger he was in. See *Buchanan, supra*. When the character evidence is being used for the first purpose, the defendant necessarily must have known of the incidents or reputation which makes up the character testimony at the time of the assault. See *id.* (noting that when character evidence is used to show defendant's state of mind, defendant must have known of information concerning victim when act of self-defense occurred).

[7] When the character evidence is being offered for the second purpose, to establish which party was the first aggressor, it is being used objectively to determine if the victim was more probably than not the first aggressor in the incident in question. See *Buchanan, supra*. When the character evidence is being used for the second purpose, the defendant's knowledge of the incidents or reputation which makes up the character testimony is irrelevant. See, e.g., *Burks, supra* (noting that defendant's knowledge of victim's violent character, including evidence of specific acts of violence, is irrelevant when the evidence is used to show who first aggressor was); *Gonzales, supra* (stating defendant need not show awareness of specific acts of violence by victim when such evidence is used to show who in fact was first aggressor); *Chapman, supra* (holding defendant's knowledge of victim's reputation for violence is irrelevant where victim's character offered to show who was first aggressor); *Buchanan, supra* (holding specific acts of violence by victim are admissible to support self-defense claim even if defendant did not know of acts at time of charged assault); Annot., 1 A.L.R.3d, *supra*. Evidence that Warner was a violent person or committed violent acts helps to corroborate Lewchuk's allegation that Warner was the first aggressor, even if Lewchuk was unaware of the previous violent acts at the time of the assault in question.

We conclude pursuant to rules 404(1)(b) and 405(2) that Lewchuk was entitled to present evidence of Warner's violent and aggressive character to support his claim of self-defense. See *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983). Pursuant to rule 405(2), Lewchuk was entitled to present evidence of specific instances of conduct demonstrating Warner's violent, aggressive character to corroborate Lewchuk's claim that Warner was the first aggressor. See *Sims, supra*. It is irrelevant whether Lewchuk was aware of the prior incidents at the time of the assault, and the trial court committed error by refusing to admit the evidence because Lewchuk had not established his knowledge of the prior incidents.

4. Prejudicial Nature of Error

Determining that the district court erred by excluding evidence of specific instances of Warner's violent conduct does not end our inquiry. When error has occurred, we must always determine if the error was prejudicial. See Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1989), stating that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected, and Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1994), providing that no judgment in a criminal case shall be set aside or new trial granted because of the rejection of evidence, unless a substantial miscarriage of justice has actually occurred. See, also, *Sims, supra*. Although rule 405(2) allows the proffered testimony in this case to be admissible, the admissibility of such evidence is always subject to the constraints of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989).

Rule 403 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by dangers of unfair prejudice, confusion of issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The concept of probative value involves an assessment of the tendency of evidence to establish that the proposition for which it is offered is more probably than not as a party claims it to be. *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). Probative value is measured by the degree to which the evidence persuades the

fact finder that a particular fact exists and the distance of the particular fact from the ultimate issues of the case. *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995); *Lowe, supra.*

We cannot say that the testimony excluded in this case is substantially more prejudicial than it is probative. The proffered testimony concerned accounts of Warner acting violently and aggressively assaulting numerous individuals in the few hours preceding his encounter with Lewchuk. The testimony concerned eyewitness accounts of Warner physically attacking numerous other individuals and acting in a manner consistent with Lewchuk's claim that Warner was the first aggressor. The similarity in circumstances and the proximity in time of the prior incidents would be highly probative of the issue of whether Warner was the first aggressor and physically attacked Lewchuk on the night in question.

We also cannot say that the testimony excluded in this case is merely cumulative. The district court did allow testimony as to Warner's reputation for violence and witnesses' opinions as to his violent character. The excluded testimony of specific acts by which Lewchuk would have demonstrated Warner's violent and aggressive propensities would have substantiated Lewchuk's claim that Warner was the first aggressor. The similarity in circumstances and the proximity in time of the prior incidents would have made the excluded testimony much more probative than the opinion and reputation testimony was, and the excluded testimony would not have been merely cumulative.

Because the rule 403 analysis does not establish that the probative value of the particular evidence in this case would have been substantially outweighed by dangers of unfair prejudice, confusion of issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence, we cannot say that the error in this case was harmless beyond a reasonable doubt. See *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994) (holding that only error which is not harmless beyond a reasonable doubt requires a conviction to be set aside). It was prejudicial error to exclude this evidence.

VI. CONCLUSION

Finding that the district court committed prejudicial error by excluding admissible testimony regarding specific instances of prior violent conduct by the victim, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HAROLD J. SMITH, JR., APPELLANT, V. PAUL M. KELLERMAN, APPELLEE.

541 N.W.2d 59

Filed November 28, 1995. No. A-93-1081.

1. **Directed Verdict.** A directed verdict is proper 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.
2. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
3. **Motor Vehicles: Highways: Right-of-Way.** A driver of a motor vehicle about to enter a highway protected by stop signs is required to come to a complete stop as near the right-of-way line as possible before driving onto the highway. After stopping, the driver must yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.
4. **Motor Vehicles: Negligence: Trial.** Whether one fails to look or looks and sees an approaching vehicle, but misjudges its speed and distance, the question of negligence is usually for the jury, except in those cases where the evidence that the approaching vehicle was within the limit of danger is so conclusive that reasonable minds could not differ thereupon.
5. **Motor Vehicles: Highways: Words and Phrases.** A vehicle is located in a favored position when it is within the radius which denotes the limit of danger—a definition which focuses on the vehicle's geographic proximity to the collision point and the vehicle's favored status under the applicable rules of the road.
6. **Liability: Contribution.** A common liability to the same person must exist in order for there to be contribution.
7. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
8. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from

the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

9. **Motor Vehicles: Right-of-Way.** One does not forfeit his right-of-way by driving at an unlawful speed.
10. **Motor Vehicles: Highways: Right-of-Way.** An instruction that drivers required to stop must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for them to proceed into the intersection includes within it the concept that unlawful speed does not forfeit right-of-way to a motorist who must stop for traffic on a favored roadway.
11. **Trial: Jury Instructions.** When it is necessary to draft a special definitional instruction, it should, whenever possible, be placed in an affirmative rather than a negative posture.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded for a new trial.

Gary L. Dolan, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

J. Arthur Curtiss and Stephanie Frazier Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

SIEVERS, Chief Judge.

This is an action for contribution stemming from a two-car collision occurring in Beatrice, Nebraska. The jury rejected Harold J. Smith, Jr.'s claim for contribution from Paul M. Kellerman. Smith now appeals to this court.

FACTUAL BACKGROUND

The collision occurred at night at the intersection of 19th and Dorsey Streets on December 8, 1989. Smith was northbound on 19th Street in his 1984 Grand Prix. Kellerman was eastbound on Dorsey Street in his 1975 Dodge Dart. There was a stop sign for the eastbound Kellerman vehicle at that intersection. Kellerman stopped at the stop sign and looked to his right, but his view was obscured by a bush. He pulled forward and looked again to the right and saw the headlights of the Smith vehicle approximately 1 1/2 to 2 blocks away. Kellerman looked to the left and then accelerated in a "normal" fashion across the intersection while looking straight ahead and without looking back to the right for the Smith vehicle. For his part, Smith saw the Kellerman vehicle at the intersection and saw it pull across into

his path. Smith applied his brakes, locking them up and leaving 142 feet of preimpact skid marks, according to the testimony of Dr. Ted Sokol, an accident reconstructionist. Sokol also indicated that there were 70 feet of postimpact skid marks from the Smith vehicle. Sokol put the speed of the Smith vehicle between 66 to 77 m.p.h. immediately before Smith applied his brakes. Sokol put the speed of the Smith vehicle between 41 and 53 m.p.h. at impact and the speed of the Kellerman vehicle at 13 m.p.h. at impact. Sokol testified that the normal time for a driver to perceive danger is three-quarters of a second and that a like amount of time is typically needed to react to the danger. Consequently, Sokol's testimony placed the Smith vehicle approximately 310 feet from the intersection when Smith "began to perceive the Kellerman vehicle as a danger." Sokol further testified that when Kellerman pulled out from the stop sign it would not have been possible for Smith to stop before the collision, given the speed and distance involved. Although 19th Street is on the very edge of Beatrice and has houses on one side and farm fields on the other, the speed limit is 35 m.p.h. Both vehicles had passengers, and as a result of this accident, Smith's insurer, Amco Insurance Company, paid $163,800 in settlement of the personal injury claims of the various passengers in the two vehicles.

PROCEDURAL BACKGROUND

After receiving an assignment of Amco's interest, Smith filed suit against Kellerman for contribution, seeking 50 percent of the amount paid in settlement of the claims, or $81,900. Smith alleged that Kellerman was negligent in failing to yield the right-of-way, in failing to maintain reasonable control, and in failing to maintain a proper lookout. Kellerman admitted the occurrence of the accident and admitted Amco's assignment to Smith of its claim for contribution, but denied that he was negligent. At trial, Smith did not introduce evidence to dispute that he was speeding and admitted that he had consumed at least two beers prior to the accident. Richard Clinard, a litigation supervisor for Amco, testified about the settlements made by Amco. Clinard testified that based upon his experience and training, the settlements paid to the passengers were reasonable,

and that they were made because of Amco's conclusion that its insured Smith was negligent. Kellerman introduced no evidence to dispute the reasonableness of the settlements made by Amco with the injured passengers in the two vehicles. Kellerman made motions for directed verdicts, and Smith moved for a finding that Kellerman was negligent as a matter of law. The motions were overruled, and the matter was submitted to the jury.

STANDARD OF REVIEW

[1] A directed verdict is proper 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. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

[2] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

With respect to questions of law, the appellate court has an obligation to reach independent conclusions, irrespective of determinations thereof made by any inferior court. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994).

ASSIGNMENTS OF ERROR

Smith asserts two assignments of error: (1) The trial court erred in failing to grant his motion for a directed verdict made at the close of all of the evidence, and (2) the trial court erred in refusing to give his proposed instruction that "a driver does not lose his right-of-way by driving at an unlawful speed."

ANALYSIS

Yielding Right-of-Way at an Intersection.

[3] We begin with Smith's claim that the trial court should have directed a verdict in his favor. Smith moved for both a finding that Kellerman was negligent as a matter of law and a verdict for half of the amounts paid by Amco. In support of this assignment, Smith cites *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989), asserting that the facts there are nearly

identical to the instant case. Smith relies heavily upon the following quote from *Kasper*:

> In *Chlopek*, we also reiterated the rules applicable to cases involving violation of the right-of-way of the driver on the favored highway. A driver of a motor vehicle about to enter a highway protected by stop signs is required to come to a complete stop as near the right-of-way line as possible before driving onto the highway. After stopping, the driver must yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. The driver has a duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others. A person traveling on the favored street protected by stop signs of which he has knowledge may properly assume that motorists about to enter from a nonfavored street will observe the foregoing rules. *Chlopek, supra*, citing *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978).

232 Neb. at 174, 440 N.W.2d at 198.

In *Kasper*, the southbound vehicle driven by plaintiff's decedent approached a T-intersection which was protected by a stop sign and upon which the eastbound defendants' truck was proceeding. One version of the evidence was that the truckdriver stopped at the stop sign, but never looked again to his left as he turned across the southbound lane of River Road while looking to his right. The southbound vehicle on River Road "submarined" under the left side of the truck, and its driver, plaintiff's decedent, was fatally injured. The Supreme Court found that the trial court did not err in failing to direct a verdict in favor of plaintiff, but did err in failing to instruct the jury that defendant truckdriver was negligent as a matter of law. The fundamental precept of *Kasper* is the statement by the court that it is well established that a motorist is required to yield the right-of-way to a vehicle traveling on a highway protected by stop signs if the vehicle is "close enough to the intersection to pose an *immediate hazard*." (Emphasis supplied.) 232 Neb. at 173, 440 N.W.2d at 197, citing *Chlopek v. Schmall*, 224 Neb.

78, 396 N.W.2d 103 (1986).

After detailing the above applicable law, the Supreme Court in *Kasper* returned to the facts, reciting that the truckdriver started out from the stop sign (located 55 feet west of the southbound highway) without ever looking left to the direction from which plaintiff's decedent was coming, until the truck was halfway through the intersection. Additionally, the court cited the testimony from the investigating state trooper that the truckdriver told him immediately after the accident that his foot had slipped off the brake and he " 'went through the intersection.' " *Id.* at 175, 440 N.W.2d at 198. After reciting these facts, the court then stated, "Because the evidence as discussed above was established at trial, the plaintiff is entitled to an instruction that the defendant Carlson [the truckdriver] was negligent as a matter of law." *Id.*

We cannot agree with Smith that the facts in *Kasper* are almost identical to the case before us and compel a finding that the trial judge here erred by not directing a verdict. In *Kasper*, there was evidence that the truckdriver did not look or see the vehicle on the protected road until the truck was halfway through the intersection. Additionally, by his own admission to the trooper, the truckdriver may not have stopped at all. Thus, whether the truckdriver stopped and failed to look or whether he simply went through the stop sign, those circumstances from *Kasper* are different from those in the instant case and support the finding that the truckdriver was negligent as a matter of law.

[4,5] Whether one fails to look or looks and sees an approaching vehicle, but misjudges its speed and distance, the question of negligence is usually for the jury, except in those cases where the evidence that the approaching vehicle was within the limit of danger is so conclusive that reasonable minds could not differ thereupon. See *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988). However, a driver who fails to see another motorist who is favored over him is guilty of negligence as a matter of law when the motorist's vehicle is indisputably located in a favored position. Before a verdict can be properly directed in such a case, the position of the oncoming vehicle must be definitively located in the favored position, that is, within the radius which denotes the limit of

danger. *Id.* A vehicle is located in a favored position when it is within the radius which denotes the limit of danger—a definition which focuses on the vehicle's geographic proximity to the collision point and the vehicle's favored status under the applicable rules of the road. See *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). In the instant case, the question of whether Smith's vehicle was so indisputedly located in a favored position that Kellerman was negligent as a matter of law turns on Smith's geographic proximity to the intersection because, as the vehicle on the protected roadway, he is otherwise favored under the rules of the road.

In addressing the matter of geographic proximity, we view the evidence most favorable to Kellerman, as we must under the standard for determining whether a verdict should be granted. We recall that there is evidence in the record that Smith was proceeding at 77 m.p.h. when he applied the brakes, meaning he was covering 115 feet per second immediately prior thereto. He left 142 feet of preimpact skid marks. There was also evidence of perception time and reaction time totaling 1½ seconds, meaning that at 77 m.p.h. Smith would have been 173 feet south of where his skid marks began at the instant he was first motivated by what he observed to apply his brakes. This puts Smith a total of 315 feet south of the intersection when he perceived that Kellerman was entering the intersection. This evidence allows for the conclusion that when Kellerman looked to his right and first saw the headlights of the approaching Smith vehicle, the car was at least 300 feet away. Such calculations are based on what Smith did, as Smith did not start to brake until he saw Kellerman entering the intersection and recognized this as a danger.

However, before starting across the intersection, Kellerman had looked to his left after seeing the headlights of the oncoming Smith vehicle. Of necessity, additional time passed between the time when Kellerman first saw the headlights of Smith's vehicle and when Kellerman first started across the intersection—the act and danger which triggered Smith's response of braking. As a result, Smith was even farther south of the intersection than the 315 feet calculated above when Kellerman first observed him. That is to say, we must include,

in addition to Smith's perception time, reaction time, and skid marks, the time which elapsed while Kellerman's gaze shifted from the oncoming headlights on his right to his left, because he did not start out until he had shifted his gaze from right to left and then to straight forward. If this elapsed time was just 1 second, it would have the consequence of placing Smith another 115 feet (77 m.p.h. equals 115 feet per second) farther south of the intersection. Therefore, Smith could have been as far as 430 feet south of the intersection when Kellerman first saw Smith.

The foregoing deductive inferences come from viewing the evidence most favorably to Kellerman, as must be done when determining whether he was negligent as a matter of law. We must give Kellerman the benefit of every reasonable inference that may be deduced from the evidence. See *Moats v. Lienemann*, 188 Neb. 452, 197 N.W.2d 377 (1972). We judge the matter using the version of the evidence which most favors Kellerman, and thus we use Sokol's testimony that Smith was traveling 77 m.p.h. immediately prior to braking. See *Floyd v. Worobec, supra* (using for analytical purposes version of events provided by party resisting motion to find such party negligent as matter of law).

Under this standard, we cannot say as a matter of law that Smith, who could be as much as 430 feet south of the intersection when first observed by Kellerman, was indisputedly located in a favored position. If Smith is not indisputedly in the favored position, and we think that reasonable minds could differ on this point, the question of Kellerman's negligence is for the jury. Accordingly, Kellerman was not negligent as a matter of law as Smith contends, and the trial court properly denied the motion for a directed verdict. Smith's first assignment of error is without merit.

Plain Error in Jury Instructions.

[6] Our review of this case convinces us that this jury was not correctly instructed with reference to the fundamental precepts of an action for contribution. Therefore, we turn to the issues presented by the jury instructions. The prerequisites to a claim for contribution are that the party seeking contribution and the party from whom it is sought share a common liability

and that the party seeking contribution has discharged more than his fair share of the common liability. 18 C.J.S. *Contribution* § 5 (1990). Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification. *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992). In other words, a common liability to the same person must exist in order for there to be contribution. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982).

The jury was instructed that Amco had assigned its claim to Smith, who sued Kellerman for "contribution." In instruction No. 2, the court told the jury that the burden of proof was upon Smith to prove that Kellerman was negligent and that such negligence was *a proximate cause* of the accident and also to prove the "fair and reasonable amount of damages paid by AMCO Insurance Company on behalf of plaintiff in settlement of passengers's [sic] damages resulting from the accident." The court then instructed as follows:

> If plaintiff Smith has failed to establish by the greater weight of the evidence any one or more of the foregoing numbered propositions, your verdict will be for defendant Kellerman.
>
> On the other hand, if plaintiff Smith has established by a greater weight of the evidence all of the above numbered propositions [that Kellerman was negligent which was a proximate cause], then you must consider the defenses of defendant Kellerman.

The court further instructed the jury that Kellerman's defenses were that the accident was "solely and proximately caused by the negligence of plaintiff Smith" in one or more of the following particulars: (1) speeding, (2) not having his vehicle under reasonable control, (3) failing to yield the right-of-way, and (4) failing to maintain a proper lookout. The jury was instructed that the burden of proof was on Kellerman to show that Smith was negligent and that such negligence was the *sole* proximate cause of the accident, and if the jury so found, its verdict would be for Kellerman.

In summary, the jury was told that if Smith proved that Kellerman was *a* cause of the accident, then it must determine

whether Smith was the *sole* proximate cause. This instruction presented the jury with an obviously illogical and impossible premise in an action for contribution. Admittedly, Kellerman could be *a* cause, or Smith could be the *sole* cause; but the jury cannot find that Smith is the *sole* cause of the accident when the jury has already found Kellerman to be *a* cause. Thus, to this extent, instruction No. 2 was incorrect.

The parties also agreed in the pretrial order that the matter of Kellerman's negligence, if it was a jury issue, "would be submitted under the instruction on concurrent negligence as contained in the Nebraska Jury Instructions, 2nd." This agreement was the apparent basis for giving instruction No. 6 which provided:

> Where the independent negligent acts or failures to act of more than one person combine to proximately cause the same injury and damage, each such act or failure to act is a proximate cause, *and each such person may be held responsible for the entire injury or damage*. This is true though some may have been more negligent than others.

(Emphasis supplied.)

This instruction corresponds with NJI2d Civ. 3.42 entitled "Concurring Cause." Even though the parties agreed generally to this instruction, the emphasized portion thereof should not have been given. The instruction would be appropriate for an action by a passenger from one of the vehicles against either Smith or Kellerman. In such an action, NJI2d Civ. 3.42 informs the jury that even though two people each committed negligent acts which in combination proximately caused the same injury, one of those two negligent parties can be held liable for all of the injury to the passenger. This is an appropriate instruction when only one joint tort-feasor is sued so that a jury does not lay the responsibility at the doorstep of the absent tort-feasor. However, instructing that one person may be responsible for the entire injury when the negligence of two people proximately combines to cause the injury, is the antithesis of contribution—an action to have the two negligent parties share the cost of the injury they have jointly and proximately caused. Instruction No. 6 was flawed.

[7] It is the trial court's duty to instruct on the issues

presented by the pleadings and supported by the evidence, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no error. *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988). It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). An instruction that misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Wilson v. Misko, supra.*

This action was tried as a contribution case, and the jury was instructed that Kellerman must contribute to the settlements made by Smith if Kellerman's negligence, if any, was "a proximate cause." The emphasized portion quoted above from instruction No. 6 misled the jury by telling it that each negligent person may be held responsible for the entire damage. This is inherently inconsistent with the nature of the lawsuit on trial and with other instructions which would have imposed responsibility upon Kellerman, if he were guilty of negligence which was *a* proximate cause of the accident. The emphasized portion of instruction No. 6 informed the jury that one tort-feasor can legally carry the burden for the entire injury, i.e., the $163,800 in settlements from this accident, when the very nature of the action on trial—contribution—is a sharing of financial responsibility among those whose negligence combined to cause the injury.

[8] Although Smith does not assign the giving of instructions Nos. 2 and 6 as error and in fact submitted a proposed instruction very similar to instruction No. 6 given to the jury, we address the instructions under the plain error doctrine. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995).

The combination of the error in instructions Nos. 2 and 6 rises to the level of plain error because the jury was misinformed

at the most fundamental level about this case and misled to the prejudice of Smith. All that is needed to establish Kellerman's liability for contribution is that his negligence be *a* proximate cause. That Smith was negligent is not a defense for Kellerman unless Smith's negligence was the *sole* proximate cause. But, determining whether Smith was the *sole* proximate cause is subsumed within the jury's determination of whether Kellerman's negligence was *a* proximate cause. If Kellerman was *a* proximate cause, Smith was entitled to recover—the instructions did not tell the jury this.

Moreover, the phrase from instruction No. 6 "and each such person may be held responsible for the entire injury or damage" incorrectly (in a contribution case) tells the jury that one negligent party can bear full responsibility even though the negligence of two people combines to produce the injury—a proposition wholly inconsistent with the doctrine of contribution.

These erroneous instructions go to the heart of the lawsuit, and a verdict premised thereupon damages the fairness of the judicial system. We reiterate the uncontested nature of the proof of damages, and therefore we conclude that failure of proof of damages is unlikely to account for the verdict in Kellerman's favor. We find that the instructional errors were prejudicial, and we reverse under the plain error doctrine, and remand for a new trial.

Speeding as Forfeiture of Right-of-Way.

[9] Finally, Smith contends that the trial court erred when it failed to instruct the jury that he did not forfeit his right-of-way by driving at an unlawful speed. We address this assignment because the issue is likely to be involved in a retrial of this case. See *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990). It is a well-established tenet of Nebraska automobile law that "[o]ne does not forfeit his right-of-way by driving at an unlawful speed." *Burrows v. Jacobsen*, 209 Neb. 778, 781, 311 N.W.2d 880, 883 (1981). See, also, *Epperson v. Utley*, 191 Neb. 413, 215 N.W.2d 864 (1974). *Epperson* explains that there were separate statutory sections regulating right-of-way at intersections from 1931 to 1971 and that the 1931 provision

provided that when two vehicles approach an intersection at approximately the same time, the vehicle on the left shall yield the right-of-way to the vehicle on the right and that "[t]he driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder . . . ." 191 Neb. at 419, 215 N.W.2d at 868, quoting 1931 Neb. Laws, ch. 110, § 17, p. 311. According to the *Epperson* court, this provision remained in effect until 1969, when this section was repealed. However, the statutory forfeiture section related only to directional right-of-way cases.

The court in *Epperson* also rejected the suggestion that forfeiture of right-of-way by speed can be said to still exist by virtue of other aspects of the right-of-way concept:

> The plaintiff argues that the "rule of reason" announced by the cases under the prior forfeiture provision should be retained and even extended to nondirectional right-of-way forfeitures. But, as we have shown, the forfeiture rule is completely derivative from statute and not from decisional law. Even under the statute it was limited to directional right-of-way cases. It is beyond doubt that the Legislature in 1969 expressly excluded the forfeiture provision from the applicable statutes. The intent was clear. The trial court properly refused to instruct on forfeiture of right-of-way by unlawful speed. The inference to the contrary, found in dicta, in Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166 (1971), that forfeiture of right-of-way by unlawful speed is "inherent" in other regulations covering right-of-way is expressly disapproved.

191 Neb. at 420, 215 N.W.2d at 869.

The foregoing decisional law is also cited in the comment to NJI2d Civ. 7.14 on "Speed," but 7.14 does not contain what Smith argues for here—an instruction to the jury that unlawful speed does not forfeit right-of-way. We are unable to find a Nebraska case which holds that such an instruction should be given.

[10] We turn to the instructions given in the present trial which include the following portions of NJI2d Civ. 7.04, given to the jury in instruction No. 9: "1. Drivers required to stop must yield the right-of-way to cross traffic that is *so close to*

the intersection and traveling at such a speed that it is not safe for them to proceed into the intersection[.]" (Emphasis supplied.)

[11] Kellerman argues that an instruction that right-of-way is not forfeited by unlawful speeding is a negative instruction which should not be given. The Nebraska Supreme Court has said that the Nebraska Jury Instructions should be used when applicable and practical, but when it is necessary to draft a special definitional instruction, it "should, whenever possible, be placed in an affirmative rather than a negative posture." *Jones v. Foutch*, 203 Neb. 246, 261, 278 N.W.2d 572, 580 (1979). For example, in *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979), the court said that there was no duty to instruct the jury as to what would not be an accord and satisfaction, but, rather, it was the duty of the court to instruct the jury as to the elements of an accord and satisfaction. The court held that when the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form. From this doctrine, it can be analogized as a general proposition that the trial court need not and should not instruct on conduct which does not forfeit right-of-way.

Nonetheless, as the law is that a speeding vehicle does not forfeit its right-of-way, the question becomes whether NJI2d Civ. 7.04 given by the trial judge as instruction No. 9 contains this concept. The jury was told that a driver such as Kellerman must yield if the vehicle in cross traffic is so close *and* traveling at such a speed that it was not safe for him to proceed into the intersection. The instruction does not condition Kellerman's duty to yield on the lawfulness of Smith's speed. The instruction simply and plainly states that the determinative facts are cross traffic speed and distance—and whether those two conditions make it unsafe for the driver at the stop sign to enter the intersection. Interestingly, Smith asserts that the no forfeiture rule "has been embodied in instruction 7.04 . . . ." Brief for appellant at 9. We agree. The nonforfeiture of right-of-way doctrine is contained within NJI2d Civ. 7.04 which was given to the jury. A separate negative instruction telling the jury that certain conduct does not constitute a forfeiture is not required.

Accordingly, there was no error in failing to give the requested instruction that unlawful speed does not forfeit right-of-way. The second assignment of error is also without merit.

CONCLUSION

Having found plain error in the instructions to the jury, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. LEONARDO MARTINEZ, APPELLANT.

541 N.W.2d 406

Filed December 5, 1995. No. A-95-019.

1. **Appeal and Error.** An appellate court is obligated to reach conclusions independent of the trial court on questions of law.
2. **Indictments and Informations.** An information which alleges the commission of a crime using the language of the statute which defines that crime is generally sufficient.
3. ____. An information must apprise a defendant with reasonable certainty of the charge against him so that he may prepare a defense to the prosecution and be able to plead the judgment of conviction as a bar to a later prosecution for the same offense.
4. **Indictments and Informations: Complaints: Appeal and Error.** When an information or complaint is questioned for the first time on appeal, it must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
5. **Indictments and Informations: Complaints: Pretrial Procedure: Waiver.** A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law.
6. **Constitutional Law: Indictments and Informations: Pretrial Procedure: Double Jeopardy.** The constitutional requirements of the rule in *Bartell v. United States*, 227 U.S. 427, 33 S. Ct. 383, 57 L. Ed. 583 (1913), are not waived when a defendant proceeds to trial, because the sufficiency of the information for double jeopardy purposes may require reference to the record, which does not exist at the time of arraignment, as well as reference to facts outside the record, and any second prosecution is obviously a future event.

7. **Constitutional Law: Sexual Assault: Double Jeopardy.** Consistent with constitutional limitations, the extreme youth of a victim who has been victimized more than once should not become the basis of preventing on double jeopardy grounds a conviction for sexual assault on a child.
8. **Indictments and Informations: Sexual Assault: Limitations of Actions.** Reasonable certainty is required in criminal pleading, but the lack of a precise date is not a fatal defect if it is not a substantive element of the crime, and a precise date generally is not an element of sexual assault. Charging the commission of first degree sexual assault within the statute of limitations is sufficient.
9. **Indictments and Informations: Sexual Assault: Time: Double Jeopardy.** When only one sexual assault within the charging period is determinable as having occurred during that period by linkage to another event, which then furnishes a reasonably definite time for an offense, the requirement of the Double Jeopardy Clause that the defendant be able to plead the conviction as a bar to further prosecution is satisfied when used in conjunction with a "blanket bar" for the time period in the charging information.
10. **Indictments and Informations: Time: Double Jeopardy.** Upon a subsequent prosecution, courts may tailor double jeopardy protection to reflect the time period involved in the charge in the earlier prosecution.
11. **Trial: Evidence: Waiver: Appeal and Error.** It is fundamental that a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
12. **Pretrial Procedure: Appeal and Error.** Unless discovery is granted as a matter of statute, court rule, or the Constitution, discovery is within the discretion of the trial court, whose ruling will be upheld on appeal absent an abuse of discretion.
13. **Rules of Evidence.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1989), may not be proved by extrinsic evidence.

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

Jon Placke, of Box Butte County Public Defender's Office, for appellant.

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

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

SIEVERS, Chief Judge.

Leonardo Martinez was charged by information with two counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319 (Cum. Supp. 1994), and one count of sexual

assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1994). After a jury trial, Martinez was convicted of one count of first degree sexual assault. The two other counts mentioned above were not submitted to the jury. Martinez was sentenced to a term of imprisonment of not less than 15 nor more than 25 years, with credit given for 167 days already served. Martinez appeals his conviction and sentence to this court. For the reasons cited below, we affirm.

FACTS

The victim's mother, Tracy P., testified that her son Matthew P. was 8 years old and in the second grade at the time of trial. Tracy had known the defendant, Leonardo "Leo" Martinez, for the last 10 years. Martinez, age 58 at the time of trial, lived with Juanita Garcia, Matthew's babysitter. Garcia babysat for Matthew from July 1991 to August 1993 while Tracy worked and when Tracy went bowling. Matthew lived with Garcia from July 14 to August 12, 1991, when Tracy was in Hastings for inpatient treatment. Matthew was 5 years old at that time.

In June 1994, Tracy was informed by her babysitter at that time, Leslie War Bonnett, that Matthew had been kissing War Bonnett's son. Leslie and her husband, Jim War Bonnett, told Tracy that Matthew had "told them about other events that had happened, sexual events." Since Tracy suspected that her son had been sexually molested, she contacted the Hemingford Police Department on June 18. After she spoke with Hemingford police officers, it was suggested that Tracy take her son to be interviewed by Sgt. Rae Ann Christensen of the Alliance Police Department. Christensen was suggested because of her experience and specialized training in child abuse cases.

Christensen testified that she interviewed Matthew on June 24, 1994, at the request of the Hemingford Police Department. As an investigative technique, Christensen had Matthew identify different parts of the body on a picture of a male child "because a lot of times children will use different terminology than what adults do so that when I get to asking the questions about what happened I know what he's talking about." Matthew identified a penis as being a "pee-pee." Matthew was then asked to mark the parts of the body where Martinez had touched him. The

picture introduced into evidence indicates that Matthew marked the mouth, hand, buttocks, and groin area of the picture. Matthew also told Christensen that Martinez had made Matthew touch and suck Martinez' "pee-pee."

On cross-examination, Christensen was asked whether Matthew had talked about sexual actions he had taken with three other children. Christensen indicated that Matthew described sexual acts he had with these children. However, Christensen also testified that in her experience, it was not uncommon for children who have had sexual experience with adults to act out those experiences with other children. An audiotape of Christensen's interview with Matthew was received as evidence at trial. In that interview, Matthew indicated that the first time that Martinez hurt him was while Matthew was staying with Martinez and Garcia the month his mother was gone to Hastings "to stop drinking."

Matthew was allowed to testify by videotaped deposition pursuant to Neb. Rev. Stat. § 29-1926 (Reissue 1989). Matthew stated that he was 8 years old and in the second grade. After demonstrating that he knew the difference between telling the truth and telling a lie, Matthew testified that Martinez lived with Garcia. Matthew stated that Martinez had "stuck [his] private part up my butt" and that Martinez had hurt him more than once. The assaults took place behind the car in the garage at Garcia's house. Matthew stated that he told Martinez to stop it but he would not and that Martinez had told him not to tell anyone. At the time of the assaults, Martinez told Matthew to pull his pants down, but when he would not, Martinez pulled them down himself. When asked how many times Martinez did this to him, Matthew responded, "I can't remember." However, Matthew later stated that he was in kindergarten the first time that Martinez did this to him.

Dr. John Ruffing, Jr., a physician and surgeon practicing in Hemingford, Nebraska, testified that he examined Matthew on June 23, 1994, and gave him a complete physical examination, including a rectal examination. Ruffing stated that the purpose of the examination was to determine whether there was evidence of possible abuse. After performing the rectal examination, Ruffing found that the muscle tone of Matthew's buttocks was

greater than the muscle tone of the rectal sphincter. Ruffing found this to be somewhat unusual. Ruffing also found that Matthew had some incontinence of the rectal sphincter, which is unusual in a child of Matthew's age. Ruffing explained that it was unusual for a child to develop incontinence after the child had been continent for a period of time. No bleeding or abnormalities were noted within the rectum.

In the late summer of 1991, after she returned from inpatient treatment at Hastings, Tracy noticed for the first time that her son was having problems with fecal incontinence. Tracy did not take Matthew to the doctor at that time because she felt that it was her fault and that she had not taught Matthew proper hygiene.

Martinez testified through an interpreter in his own defense at trial and denied ever sexually assaulting Matthew. Martinez' motion for a directed verdict was sustained as to the second and third counts of the information. Martinez was found guilty by the jury of one count of first degree sexual assault.

ASSIGNMENTS OF ERROR

In his appeal to this court, Martinez assigns the following errors: (1) "The district court erred in giving a jury instruction that allowed the State to prove the first element of First Degree Sexual Assault happened in a time period from July 1, 1991 to September 1, 1993," (2) the district court erred in denying Martinez his constitutional right to confront witnesses, (3) the district court erred in denying Martinez his constitutional right to compulsory process, and (4) the district court erred by imposing an excessive sentence.

STANDARD OF REVIEW

[1] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). An appellate court is obligated to

reach conclusions independent of the trial court on questions of law. See *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

ANALYSIS

Sufficiency of Information.

Martinez' first assignment of error is that "[t]he district court erred in giving a jury instruction that allowed the State to prove the first element of First Degree Sexual Assault happened in a time period from July 1, 1991 to September 1, 1993." The jury was instructed that the elements of the offense included that "[o]n or about July 1, 1991, to September 1, 1993, in Box Butte County, Nebraska, Martinez did subject Matthew [P.] to sexual penetration by placing any part of his body into Matthew [P.'s] anal opening." Martinez argues that from the record "it is indistinguishable on which occasion of alleged criminal conduct Martinez was convicted." Brief for appellant at 5.

Martinez' assignment of error attacks the sufficiency of the jury instruction which defined the timeframe of the crime, but the argument in Martinez' brief under this assignment is that the information was insufficient to bar a future prosecution for the same criminal conduct. The information had charged that the first degree sexual assault had occurred "between July 1, 1991 and June 18, 1994." However, the trial court limited the timeframe in the instructions to the period when the victim was being babysat at the house where Martinez also resided: July 1, 1991, to September 1, 1993. We address the argument advanced by Martinez, and consequently our focus is on the information.

[2,3] An information which alleges the commission of a crime using the language of the statute which defines that crime is generally sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). Moreover, an information must apprise a defendant with reasonable certainty of the charge against him so that he may prepare a defense to the prosecution and be able to plead the judgment of conviction as a bar to a later prosecution for the same offense. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). These requirements are imposed by the U.S. Constitution. See, *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974); *Bartell v. United States*, 227 U.S. 427,

431, 33 S. Ct. 383, 57 L. Ed. 583 (1913) (holding that it is elementary that an indictment, under the U.S. Constitution, "shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense"). This has long been the law in Nebraska, and we shall hereinafter refer to this as the "*Bartell* rule." See *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942).

[4-6] Initially, we note that Martinez pled not guilty to the information. He did not move to quash the information as provided for in Neb. Rev. Stat. § 29-1808 (Reissue 1989), nor did he otherwise attack the sufficiency of the information until this appeal. The Nebraska Supreme Court has held that when an information or complaint is questioned for the first time on appeal, it must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991). A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. *Id.* However, the constitutional requirements of the *Bartell* rule were not waived by Martinez when he proceeded to trial, because the sufficiency of the information for double jeopardy purposes may require reference to the record, which obviously does not exist at the time of arraignment, as well as reference to facts outside the record, which is permissible, see *State v. Piskorski, supra*, and any second prosecution is obviously a future event. The information here does not have any jurisdictional defects and charges the offense in the language of the statute, and Martinez does not argue that he was unable to prepare his defense. Therefore, under Martinez' first assignment of error, our consideration is limited to that portion of the *Bartell* rule which focuses on whether Martinez is able to plead the conviction rendered on this information as a bar to a later prosecution for the same offense.

Martinez argues that *State v. Quick*, 1 Neb. App. 756, 511 N.W.2d 168 (1993), requires that this conviction must be reversed because it fails to protect him from future prosecution in violation of the Double Jeopardy Clause. Therefore, we summarize *Quick*. The charging information in *Quick* alleged sexual assault by a father upon his 15-year-old mentally retarded daughter within a 2-week timeframe, but at trial the State sought to amend the information to expand the time period in the information to nearly a year. The amendment was allowed, and upon the State's evidence that the daughter was sexually assaulted four times during that year, Quick was convicted of one sexual assault. In *Quick*, the victim's testimony was that prior to each instance of sexual assault, her father would fake a heart attack and instruct his wife to leave the house to summon the rescue unit. But, during the timeframe alleged in the amended information, the rescue unit had only made two calls to the victim's residence. On appeal, the court found that the conviction could not stand because even by reference to the record, one could not determine which of the four assaults had resulted in the conviction. The court cast the question in the context that if Quick were charged again, "how can [the court] determine which occasion of alleged criminal conduct was the one for which Quick was convicted? More important, how can Quick make that same determination if he is prosecuted again for sexual assault of the victim?" *Id.* at 766, 511 N.W.2d at 173. The court found that there were no facts, either within or outside the record, which Quick could use to prove which of the four assaults he had been convicted of, if he were ever charged again. The court wrapped the matter up by observing: "[T]here are not enough ambulance trips to go around." *Id.* The court in *Quick* held:

> Therefore, relying on *Piskorski*, we apply to the facts before us the following proposition of law: When a conviction could be based on any of two or more occasions of indistinguishable criminal conduct alleged at trial, the record must clearly indicate which occasion of criminal conduct supports the conviction in order for the judgment to serve as a bar to future prosecution.

1 Neb. App. at 765, 511 N.W.2d at 172.

We do not believe that *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), supports the above proposition which our respected colleagues set forth in *State v. Quick, supra*. The trial court in *Piskorski* by express instruction limited the jury's consideration to one incident of sexual assault, testified to by both the victim and her mother, which had occurred in the presence of the mother. Thus, Piskorski was going to be convicted for one specific identifiable act, or not at all, and there was only one such act identified in the evidence. *Quick* presented a dramatically different case—four sexual assaults testified to, but only one criminal count charged. The decided cases typically analyze such situations to see whether the information is impermissibly duplicitous.

In *State v. Saraceno*, 15 Conn. App. 222, 228–29, 545 A.2d 1116, 1120–21 (1988), the court considered duplicitous informations:

> It is now generally recognized that "[a] single count is not duplicitous merely because it contains several allegations that could have been stated as separate offenses. See *Cohen* v. *United States,* 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897, 88 S. Ct. 217, 19 L. Ed. 2d 215 (1967). Rather, such a count is only duplicitous where the policy considerations underlying the doctrine are implicated. See *United States* v. *Margiotta,* 646 F.2d 729, 733 (2d Cir. 1981), cert. denied, 461 U.S. 913, 103 S. Ct. 1891, 77 L. Ed. 2d 282 (1983)." *United States* v. *Sugar,* 606 F. Supp. 1134, 1146 (S.D.N.Y. 1985); see also *United States* v. *O'Neill,* 463 F. Sup. 1200, 1202–1204 (E.D. Pa. 1979), and cases cited therein. "These [considerations] include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution. [*United States* v. *Murray,* 618 F.2d 892, 896 (2d Cir. 1980)]." *United States* v. *Margiotta,* supra.

In *Piskorski*, the defendant was charged by an amended information with one count of first degree sexual assault on a child. The information, amended at the close of the State's case to conform to the evidence, alleged that the crime had occurred on or after September 1 and before December 25, 1982. Piskorski argued that the State offered proof of several potentially criminal acts, and as a result, the amended information was insufficient because Piskorski had "no way of knowing which specific act was involved in this conviction and which one is now barred." *State v. Piskorski*, 218 Neb. at 548, 357 N.W.2d at 210. On appeal, the Nebraska Supreme Court rejected Piskorski's argument, observing that the jury's consideration of the charge was limited by the court's instructions to one specific event testified to by both the child victim and her mother and that the jury was also told that it could not consider other acts testified to solely by the child. The court said:

> When one reviews the information, the instructions to the jury, and the record in this case, one can be left with no doubt that the act charged, and upon which Piskorski was convicted, was a specific act involving assault on the young child while the mother was present. The record makes it clear that only one such event occurred while the mother was present, although other violations, not charged in this information, may have occurred. Therefore, it would not be difficult to establish which act was involved that resulted in the conviction and is a bar to a subsequent prosecution for the same offense.

Id. at 549, 357 N.W.2d at 211.

Therefore, *Piskorski* is a "one count—one act" case, and thus it is not a "duplicitous information" case as was discussed in *State v. Saraceno*, 15 Conn. App. 222, 545 A.2d 1116 (1988). Accordingly, we do not believe that *Piskorski* could properly be used as a "springboard" for the broad proposition of law laid down by the court in *State v. Quick*, 1 Neb. App. 756, 511 N.W.2d 168 (1993).

The case at hand is factually closer to *Piskorski* than to *Quick*. Here, Matthew testified that Martinez assaulted him more than once, but never specified how many times. He did,

however, testify that it first happened in the babysitter's garage while he was in kindergarten, and his statement to the investigating officer (received in evidence) was that the first time was while his mother was receiving treatment "to stop drinking." Thus, although the record contains evidence of more than one assault, there is only one count charged, and there is evidence which defines with reasonable certainty the time and place of at least one assault—the first one—while the mother was away in treatment. Accordingly, the instant case is not an allegedly duplicitous information case such as *Saraceno*, which involved a 5-year history of sexual assault and abuse of a girl who was 10 years old when she reported the crimes. *Saraceno* involved 11 separate counts against the defendant which encompassed various parts of a 3-year timespan. Even then, the Connecticut court turned back the challenge to the information on grounds that it was duplicitous, on notice grounds, and finally on the ground that the trial court should have granted a further bill of particulars:

> We also recognize, however, that in a case involving the sexual abuse of a very young child, that child's capacity to recall specifics, and the state's concomitant ability to provide exactitude in an information, are very limited. The state can only provide what it has. This court will not impose a degree of certitude as to date, time and place that will render prosecutions of those who sexually abuse children impossible. To do so would have us establish, by judicial fiat, a class of crimes committable with impunity.
>
> We conclude, as have other jurisdictions considering the issue, that as long as the information provides a time frame which has a distinct beginning and an equally clear end, within which the crimes are alleged to have been committed, it is sufficiently definite to satisfy the requirements of the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. See, e.g., *United States* v. *Roman*, 728 F.2d 846, 851 (7th Cir.), cert. denied, 466 U.S. 977, 104 S. Ct. 2360, 80 L. Ed. 2d 832 (1984) (crimes committed over eleven year period); *United States* v. *McCown*, 711 F.2d 1441, 1450 (9th Cir. 1983) (crimes committed over five

month period); *People v. Baugh,* 145 Ill. App. 3d 133, 495 N.E.2d 688 (1986) (crimes committed over nine month period).

State v. Saraceno, 15 Conn. App. at 237, 545 A.2d at 1124.

[7] The Iowa Supreme Court stated in *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970), that some liberality must be permitted concerning the date of a sexual assault when the person victimized is too young to testify clearly "as to the time and details of such shocking activity." Consistent with constitutional limitations, the extreme youth of a victim who has been victimized more than once should not become the basis of preventing a conviction for sexual assault on a child.

We are aware that the court in *State v. Quick, supra*, rejected the solution of a "blanket bar to future prosecution" of Quick for any of the four alleged incidents of sexual assault which may have occurred between April 25, 1987, and April 9, 1988, the timeframe of the amended information. 1 Neb. App. at 766, 511 N.W.2d at 173. The trial judge, in ruling on the State's proposal to amend the information, had ruled that if the amendment were allowed, " 'then *any act* that occurred during that period would be barred by the verdict of this jury.' " (Emphasis in *Quick*.) *Id.* at 765, 511 N.W.2d at 173. The court in *Quick* said that the trial judge cited no authority for its assertion of the "blanket bar" of further prosecution for the timeframe of the amended information against Quick. We conclude that a "blanket bar" to future prosecution cannot always be rejected and that the concept has ample support in decided cases, and therefore we respectfully disagree with our colleagues who decided *Quick*. We reach this conclusion recognizing that the issue under consideration typically arises only in cases of sexual assault of young children who cannot particularize dates. However, without some sort of "blanket bar," convictions in cases of multiple offenses against young children would be most difficult to sustain in the face of a double jeopardy challenge when there are multiple assaults over a lengthy timeframe upon a young and frightened child.

[8] In *State v. Fawcett*, 145 Wis. 2d 244, 247, 426 N.W.2d 91, 93 (Wis. App. 1988), the Wisconsin Court of Appeals dealt with whether a conviction on two counts barred further

prosecution in a sexual assault case involving a 10-year-old child, which offenses were alleged to have occurred " 'during the six months preceding December A.D. 1985.' " The Wisconsin Court of Appeals noted that the Wisconsin Supreme Court had adopted what we have called the *Bartell* rule, but the rule was characterized as merely extremely broad language which arguably does nothing more than state the constitutional right to notice and protection against double jeopardy. When considering the two prongs of the *Bartell* rule: (1) notice of the charges and (2) whether the charging document violated the defendant's double jeopardy protections, the Wisconsin Court of Appeals found the "reasonableness test" of *People v Morris*, 61 N.Y.2d 290, 461 N.E.2d 1256, 473 N.Y.S.2d 769 (1984), to be helpful. In *Morris*, the high court of New York said that reasonable certainty is required in criminal pleading but that the lack of a precise date is not a fatal defect if it is not a substantive element of the crime. In Nebraska, a precise date generally is not an element of sexual assault, and charging the commission of first degree sexual assault within the statute of limitations is sufficient. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). See, also, *State v. Rankin*, 181 N.W.2d 169 (Iowa 1970). *Morris* sets forth a number of factors used in the analysis of a charging information, including "the ability of the victim or complaining witness to particularize the date and time of the alleged transaction." 61 N.Y.2d at 296, 461 N.E.2d at 1260, 473 N.Y.S.2d at 773.

In *State v. Fawcett, supra*, the court listed the factors used by courts in applying the "reasonableness test": (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to be discovered immediately; (4) the length of the time period at issue compared to the number of criminal acts alleged; (5) the passage of time between the alleged period of time and the defendant's arrest; (6) the length of time between the offense and when charges are brought; and (7) the ability of the victim to particularize the date and time of the offense.

These factors, together with the unique nature of sexual crimes against children, are important in judging whether the

constitutional protection against double jeopardy is offended when the best that can be done is to charge the crime within a period of time, rather than to a specific date. In cases of sexual crimes against children, a young child lacks the ability to particularize dates as adults do, there usually are neither eyewitnesses nor reliable trace evidence, and delayed reporting is often the norm. This court touched on some of these matters in its discussion of child sexual abuse accommodation syndrome in *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

[9] When only one sexual assault within the charging period is determinable as having occurred during that period by linkage to another event, which then furnishes a reasonably definite time for an offense, the requirement of the Double Jeopardy Clause that the defendant be able to plead the conviction as a bar to further prosecution is satisfied when used in conjunction with a "blanket bar" for the time period in the charging information. In *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), the assault that happened when the mother was present was the only one for which a conviction could have occurred, and thus it was sufficient to provide the defendant with the certainty needed for double jeopardy purposes. Here, the first assault occurred during the month while the victim's mother was gone "to stop drinking" and while the victim was in kindergarten. Thus, similarly to Piskorski, Martinez could establish, if need be in the event of future prosecution, that the first assault was the occasion for which Martinez was convicted. He would do so by reference to the record that the first assault occurred while the child's mother was undergoing inpatient treatment. Nonetheless, the bar to future prosecutions must of necessity extend to the entire time period in the information—July 1, 1991, through June 18, 1994.

[10] In reaching this conclusion, we reject the prohibition against a "blanket bar" from *State v. Quick*, 1 Neb. App. 756, 511 N.W.2d 168 (1993), and find the reasoning of other courts more on point. The Wisconsin court in *State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Wis. App. 1988), held that courts may tailor double jeopardy protection to reflect the time period involved in the charge in the earlier prosecution. The *Fawcett* court said:

> Therefore, Fawcett's double jeopardy protection can also be addressed in any future prosecution growing out of this incident. If the state is to enjoy a more flexible due process analysis in a child victim/witness case [in pleading the charge in the information], it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged. *See State v. St. Clair*, 418 A.2d 184, 189 (Me. 1980).

145 Wis. 2d at 255, 426 N.W.2d at 96.

Our analysis here is not aimed at whether Martinez sexually assaulted Matthew. The jury has determined that he did, and the sufficiency of the evidence to uphold that conviction is not challenged. Instead, our analysis goes to whether this conviction must be reversed because the charging information was not definite and certain enough to enable Martinez to use this conviction as a bar in the event of future prosecution. We cannot help but observe that this is a speculative exercise, since there is no further prosecution disclosed by this record. Nonetheless, if future prosecution of Martinez for sexual crimes against Matthew is undertaken by the State, Martinez will be able to plead that further prosecution based on a sexual assault of Matthew between July 1, 1991, and June 18, 1994, the timeframe of the information, is barred by the Double Jeopardy Clause of the U.S. Constitution.

As said in *State v. Chambers*, 173 Wis. 2d 237, 253, 496 N.W.2d 191, 197 (Wis. App. 1992), a court "may tailor double jeopardy protection by tracking the time period of an earlier prosecution." See, also, *State v. Altgilbers*, 109 N.M. 453, 468, 786 P.2d 680, 695 (N.M. App. 1989) (extending "blanket bar" to future prosecution of defendant for "any sexual offenses involving his two children during the time encompassed by the counts in the indictment"), citing *State v. Rudd*, 759 S.W.2d 625 (Mo. App. 1988). *Altgilbers* contains a comprehensive discussion of the problems presented when framing charges involving child victims who cannot particularize dates with the result that considerable discretionary latitude is extended to prosecutors. The corollary thereof must be the extension to the defendant of a "blanket bar" to future prosecution for the time period specified in the first charge.

Recognition of the concept of a "blanket bar" accords Martinez broad protection under constitutional double jeopardy requirements in the event of future prosecutions. In doing so, the State is held to the expansive time period which it specified in the information. In so concluding, we recognize the difficulties inherent in child sexual abuse prosecutions with young victims who cannot particularize dates. When there are multiple assaults, the inability to define a date often becomes even more pronounced. We balance such difficulties against the defendant's constitutional right to be free from double jeopardy as a result of future prosecutions. See *State v. Rankin*, 181 N.W.2d 169 (Iowa 1970), and *State v. Healy*, 136 Minn. 264, 161 N.W. 590 (1917) (holding that conviction or acquittal of offense occurring within designated time period will bar subsequent prosecutions on same charge for acts occurring within designated time period). To the extent that *State v. Quick, supra*, can be considered factually similar to the case at hand, we reject, with due respect to our colleagues, its reasoning and hold it inapplicable. Accordingly, we reject Martinez' first assignment of error, that his conviction should be reversed because this conviction is based upon an information which fails to accord him protection for future prosecutions under the Double Jeopardy Clause.

Martinez' Right to Confrontation of Victim.

[11] Martinez also argues that the court denied him his right to confrontation by limiting his cross-examination of the victim. Specifically, Martinez asserts he was denied the right to confront the victim during the victim's deposition which was used in court in place of the victim's live testimony. The victim, 8 years old at the time of trial, was allowed to testify by videotaped deposition pursuant to Neb. Rev. Stat. § 29-1926 (Reissue 1989). Our review of the record reveals that Martinez has waived any error with regard to confrontation of this witness, since he did not object to the introduction of the videotaped deposition at trial. It is fundamental that a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Williams*, 247 Neb. 878,

530 N.W.2d 904 (1995); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). Since Martinez has waived appellate review on this issue, we consider this assignment no further.

Denial of Right to Compulsory Process.

Martinez next argues that he was denied his right to compulsory process when the trial court refused to allow him to depose and call as witnesses at trial the three children the victim claimed to have had sexual relations with. Martinez argues that these witnesses would have denied sexual contact with the victim. Martinez then asserts that this testimony would serve to impeach the victim's statements made to Christensen and would put the victim's credibility into question. The trial court denied Martinez' motion to depose these witnesses and also sustained the State's motion in limine preventing the testimony of these three children at trial. The trial court reasoned that the evidence was not relevant to the issues in the case and was an improper collateral attack upon the victim's testimony. The issue presented is the extent to which a defendant can introduce evidence of collateral matters in order to attack the victim's credibility. We note that Martinez does not assign as error the sustaining of the motion in limine which prevented him from making inquiry of Matthew about such matters on cross-examination during the videotaped deposition.

[12] A trial court has the discretion to order depositions in criminal cases if the information may affect the outcome of the trial. Neb. Rev. Stat. § 29-1917 (Cum. Supp. 1994). See, also, *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992), where the appellant contended he should have been allowed to depose the sexual assault victim's grade school principal about an incident involving a missing watch and the victim's untruthfulness regarding the disappearance of the watch. The Nebraska Supreme Court upheld the trial court's rejection of the discovery plan, stating: "This line of discovery not only is clearly collateral to the criminal behavior at hand, but does nothing to exculpate the appellant." *Id.* at 38, 486 N.W.2d at 203. See, also, *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991) (holding that unless discovery is granted as a matter of statute, court rule, or the Constitution, discovery is within the

discretion of the trial court, whose ruling will be upheld on appeal absent an abuse of discretion). In order to conclude that the district court abused its discretion in denying discovery, we would have to be able to say that the evidence from the three children would have been admissible.

In the present case, the discovery sought by the defense with regard to Matthew's purported sexual relations with other children is collateral to the allegations against Martinez. We understand the argument Martinez wanted to make at trial to be that if Matthew lied about his sexual activity with the three children, then he also lied about Martinez' having sexually assaulted him.

[13] Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1989), provides that

> [s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . .

Obviously, Martinez' use of the three children as witnesses was solely for the purpose of attacking Matthew's credibility and would be prohibited extrinsic evidence under rule 608(2).

This section was applied in *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), a case factually analogous to the situation in the case at bar. Trackwell was on trial for first degree sexual assault and wanted to use the testimony of the county attorney to impeach the alleged victim and her companion because " '[i]f [the alleged victim] sexually heckles men she does not know and lies about it, the jury should have known this. If she could lie about her flirtatious conduct while waiting for Appellant and [her male companion], she could have also lied about her conduct later that evening.' " *Id.* at 934, 509 N.W.2d at 645 (quoting from Trackwell's reply brief). The Nebraska Supreme Court, citing rule 608(2), held that it was impermissible for Trackwell to attack the credibility of the alleged victim and her companion by presenting extrinsic evidence of their behavior through the testimony of the county

attorney. Trackwell's opportunity to attack the credibility of each of these witnesses was said to be through cross-examination. The court held that the trial court had correctly denied Trackwell's request to call the county attorney as a witness to testify about the victim's untruthfulness. In the present case, although Martinez may have been able, within the discretion of the court under rule 608(2), to inquire into such incidents with the three children on cross-examination of Matthew during the videotaped deposition, it is clear that it would have been impermissible to bring the three child witnesses into the courtroom to testify.

In *State v. Williams*, 219 Neb. 587, 365 N.W.2d 414 (1985), the court set forth a test to determine whether a fact inquired into on cross-examination in criminal proceedings is collateral, i.e., Would the cross-examining party be entitled to prove it as part of the case tending to establish his plea? Whether Matthew engaged in conduct of a sexual nature with three other children is not in any way exculpatory with respect to the allegation that Matthew was forcibly sexually assaulted by Martinez. In fact, there was evidence in the record that sexual "acting out" by child sexual abuse victims is common. Thus, if anything, the evidence could be seen as inculpatory. The trial court did not err in denying Martinez the opportunity to call these three children as witnesses as alleged in the assignment of error.

Excessive Sentence.

Finally, Martinez argues that the sentence imposed against him was excessive when compared to the sentences received by two other individuals. The problem with this argument is that the record here does not reveal that these two individuals were convicted and sentenced for assaulting Matthew. Martinez was sentenced to 15 to 25 years' imprisonment for his conviction of first degree sexual assault. A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion, meaning that the trial court's ruling is clearly untenable and unfairly deprives the defendant of a substantial right and a just result. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993). Martinez' sentence is harsh, but the crime is particularly

reprehensible. The sentence is well within the statutory limits defined by the Legislature for this crime. We find no abuse of discretion in the sentence imposed.

CONCLUSION

The conviction and sentence are affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY C. CHARLES, ALSO KNOWN AS JEFFREY CRAIG CHARLES, ALSO KNOWN AS JEFFREY CHARLES, APPELLANT.

541 N.W.2d 69

Filed December 12, 1995. No. A-94-902.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. ____: ____: ____. In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Jury Instructions: Appeal and Error.** If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
4. ____: ____. In evaluating a claim of an improper jury instruction, the jury instructions must be read together as a whole.
5. ____: ____. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.
6. **Criminal Law: Weapons: Jury Instructions: Verdicts.** A separate count of use of a firearm to commit a felony requires a separate instruction from the underlying felony and preferably is accompanied by a separate verdict form.
7. **Criminal Law: Jury Instructions: Proof.** Repetition of instructions is not required to ensure that the standard of proof beyond a reasonable doubt is applied to each count.
8. **Jury Instructions.** Repetition of jury instructions may cause confusion.

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

Michael F. Maloney for appellant.

Don Stenberg, Attorney General, Jay C. Hinsley, and, on brief, Delores Coe-Barbee for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Jeffrey C. Charles appeals his judgment of conviction stemming from an incident on December 10, 1993, in Omaha. Because we find that there was no error in the jury charge as claimed on appeal by Charles, we affirm.

FACTS

Donald Boggess, whose convictions were affirmed in an opinion of this court dated May 16, 1995, and Charles were tried together to a jury in the district court for Douglas County on June 7 through 10, 1994, for crimes charged in connection with an incident occurring on December 10, 1993, in Omaha. See *State v. Boggess*, 95 NCA No. 20, case No. A-94-884 (not designated for permanent publication). The eight-count amended information dated May 31, 1994, charged Charles with the following: count I, robbery; count II, use of a firearm to commit a felony, i.e., robbery; count III, operating a motor vehicle to avoid arrest; count IV, use of a firearm to commit a felony, i.e., operating a motor vehicle to avoid arrest; count V, attempted first degree assault on a police officer; count VI, use of a firearm to commit a felony, i.e., attempted first degree assault on a police officer; count VII, possession of a firearm by a felon; and count VIII, being a habitual criminal.

Following conviction by a jury, the trial judge summarized the underlying episode at the sentencing as follows:

> THE COURT: . . . You robbed a restaurant by firing a firearm through the roof of the restaurant to get everybody's attention and then crawled out the drive through window.
>
> When you were approached by police officers on a traffic stop later on, you fired at the officer investigating

> the matter and led the police officers on a lengthy chase, out the interstate to McKinley Road firing enough times that you would have had to reload your weapon two or three times. Spent shells . . . were found about the interior of the vehicle, and actually in the cylinder.
>
> Once you had been stopped, you continued to resist arrest and were only arrested after you'd been subdued by several officers. No one was killed, but you gave it your best efforts.

Charles was thereafter sentenced. This appeal timely followed.

During the trial, the trial court held a jury instruction conference at which the parties generally made their record in connection with the proposed instructions. Specifically, Charles objected to the court's proposed jury instruction No. 7 on use of a firearm to commit a felony, stating that "in it's [sic] present form, it's confusing and Defendant Charles would request that three separate instructions be given as to each [use of a firearm count]." The trial judge overruled the objection, stating that "I think when the instructions and the verdict forms are read, number seven is an accurate and clear statement of the elements that the state must establish for conviction on the use in Counts II, IV and VI."

Instruction No. 7 as given reads as follows:

> The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict either of the defendants of the crime charged in Counts 2, 4 or 6 of the Amended Informations, Use of a Firearm in the Commission of a Felony, are:
>
> (1) That on or about the 10th day of December, 1993, in Douglas County, Nebraska, the defendants did commit:
>
> a) the crime of Robbery as to Count 2; or
>
> b) the crime of operating a motor vehicle to avoid arrest as to Count 4; or
>
> c) attempted first degree assault upon an officer as to Count 6.
>
> (2) That in the commission of said crime, defendants used a firearm; and
>
> (3) That the use of a firearm during the commission of the particular crime was done:

a) with the intent to steal money as to Count 2; or

b) with the intent to avoid arrest in Count 4; or

c) with intent to do serious bodily injury to an officer in Count 6.

The state has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of Count 2, 4 or 6 of the Amended Informations necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, on any of these Counts, it is your duty to find the particular defendant guilty of the crime of Use of a Firearm to Commit a Felony as charged in Count 2, 4, or 6 of the Amended Informations, but as to Jeffrey C. Charles you shall then also consider his plea of not responsible by reason of insanity. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements as to each of these Counts, it is your duty to find that defendant not guilty of Use of a Firearm to Commit a Felony as charged in that Count of the Amended Informations.

The burden of proof is always on the state to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

We note that other relevant instructions given by the court include the identification by the court of the seven separate counts in the instructions pertaining to the charges brought against Charles other than the habitual criminal charge, directions to the jury to "come to a separate decision regarding each charge," and general instructions pertaining to reasonable doubt, intent, direct and circumstantial evidence, and credibility. The jury was also instructed on Charles' insanity defense. The record shows that the jury was supplied with seven separate verdict forms, one as to each count other than the habitual criminal charge, and that the foreperson of the jury endorsed each verdict form separately.

ASSIGNMENT OF ERROR

As his sole assignment of error, Charles asserts that the district court "erred in overruling Defendant's objection to jury instruction seven because said instruction had the effect of removing from the jury essential elements necessary for the proof of the crimes charged."

STANDARD OF REVIEW

[1] It is well settled that to establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

[2] In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Derry, supra*; *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

ANALYSIS

As we understand his appellate argument, Charles claims generally that the vocabulary of instruction No. 7 was confusing and that the trial court erred in not repeating the elements of a charge of use of a firearm to commit a felony (use) three times because Charles was charged with three counts of use. See Neb. Rev. Stat. § 28-1205 (Reissue 1989). We do not find error in the language of instruction No. 7 in the context in which it was given, nor do we find that the trial court erred in its refusal to repeat instruction No. 7 three times or that Charles was prejudiced thereby.

[3] It is well settled that if the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). There is no dispute in this

case that instruction No. 7 correctly states the law with respect to the elements of use. Charles nevertheless claims that the challenged instruction is misleading for grammatical reasons, variously because of its use of the word "or" and its use of the word "any." Charles argues that instruction No. 7 misled the jury because the manner in which the foregoing vocabulary was used allowed the jury to find Charles guilty of three counts of use upon proof of one count. Charles, thus, claims prejudice.

[4,5] In evaluating a claim of an improper jury instruction, the jury instructions must be read together as a whole. *State v. Brunzo, supra.* Rather than dissecting the challenged instruction as urged by Charles, we must examine the effect of the instructions taken together in evaluating a claim that one such jury instruction is badly written. With respect to Charles' claimed grammatical errors, we note that it has been held that "[a]n inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error." *Macholan v. Wynegar*, 245 Neb. 374, 381, 513 N.W.2d 309, 314 (1994). Charles claims that the grammar of instruction No. 7 invited the jury to convict Charles of three counts of use if it found him guilty of one. Following our review of the challenged instruction, we conclude that the uses of "or" and "any" do not render the instruction improper. Even if Charles' claim of grammatical error were valid, which we do not conclude, the other instructions directing individual consideration of each count and the provision of a separate verdict form for each count of use would persuade us that the jury was not confused or misled by instruction No. 7.

[6] Charles also argues that the instruction pertaining to use should have been read to the jury three times. It is obvious that a separate count of use of a firearm to commit a felony requires a separate instruction from the underlying felony and preferably is accompanied by a separate verdict form. *State v. Tyson*, 19 Ohio App. 3d 90, 482 N.E.2d 1327 (1984). Although a separate instruction on use of a firearm to commit a felony is required, it does not follow that the use instruction must be repeated to ensure that the separate use counts are considered individually. In the instant case, a use instruction separate and

apart from the instructions relating to the underlying felonies was given, and three separate jury verdict forms were provided, one as to each count of use of a firearm to commit a felony. The jury was instructed to consider each count in the information individually. Clearly, the jury had before it three separate use counts for separate consideration.

[7] We understand Charles to suggest, in arguing that the use instruction should have been read three times to support three use convictions, that the State's burden of proof was unconstitutionally lessened by the failure of the trial court to repeat instruction No. 7. See *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). See, also, *State v. Blake*, 326 N.C. 31, 387 S.E.2d 160 (1990). A review of the cases shows that repetition of instructions is not required to ensure that the standard of proof beyond a reasonable doubt is applied to each count. See, e.g., *State v. Blankenship*, No. CA94-05-118, 1995 WL 547834 (Ohio App. Apr. 17, 1995).

The argument that certain jury instructions should have been repeated has been made and rejected in a variety of contexts. The cases tend to cluster into those involving claims that general instructions should have been repeated and those involving claims that the instructions regarding specific crimes should have been repeated. For example, in connection with general instructions, on a claim that a separate intent instruction should have been given as to each intentional crime charged in a multiple-count information, the New Mexico Court of Appeals held that such repetition was not required, that a contention that the intent charge should be repeated bordered on the frivolous, and that the application of the general intent instruction to several counts did not constitute a prohibited modification of uniform instructions. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (N.M. App. 1977), *rev'd in part on other grounds*, 90 N.M. 191, 561 P.2d 464. As noted above, in *State v. Blankenship, supra*, it was held in a multiple-charge indictment case subject to review for plain error that the general reasonable doubt instruction need not be repeated in connection with each possession of a firearm count. See, also, *State v. Penson*, No. 9193, 1990 WL 19395 (Ohio App. Feb. 26, 1990) (unpublished opinion).

In cases involving claims that the elements of specific crimes should be repeated, such as asserted by Charles in the instant case, such repetition has been rejected as not necessary to a fair and complete jury charge. In *People v Payne*, 90 Mich. App. 713, 282 N.W.2d 456 (1979), a case involving, inter alia, six counts of criminal sexual conduct and assault with intent to commit criminal sexual conduct, the appellate court rejected a claim that the elements of criminal sexual conduct should have been repeated where the trial court properly instructed on the elements and made it clear the elements applied to each count. In rejecting appellant's argument, the Michigan appellate court stated, "Defendant is, in effect, asking for six charges to the jury. This would be unnecessarily cumbersome and a poor administration of justice." *Id.* at 722, 282 N.W.2d at 460. See, *United States v. MacQueen*, 596 F.2d 76, 82 (2d Cir. 1979) (stating that "[a] trial judge is not obligated to repeat adequate instructions"); *People v. Giles*, 60 A.D.2d 635, 400 N.Y.S.2d 181 (1977) (finding defendant's argument that trial court erred in refusing to reiterate charge to jury to be without merit). In *People v. Estela*, 177 A.D.2d 646, 577 N.Y.S.2d 70 (1991), the New York appellate court held in a homicide prosecution that the trial court was not required to repeat after each count and each lesser-included offense that the defense of justification applied. The court in *Estela* reasoned that repetition would have confused the jury and prevented it from properly exercising its function. See *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965). See, also, *State v. McDougald*, 336 N.C. 451, 444 S.E.2d 211 (1994); *People v Bonham*, 182 Mich. App. 130, 451 N.W.2d 530 (1989); *State v. Golden*, No. CA 12912, 1987 WL 14439 (Ohio App. July 15, 1987) (unpublished opinion).

[8] In the instant case, the record shows that the jury was clearly instructed that it was to deliberate and return a separate verdict on each count and was supplied seven separate verdict forms for such purpose. Instruction No. 7 stated the elements of the crime of use of a firearm to commit a felony and indicated that these were the elements to be proven by the State beyond a reasonable doubt as to each of counts II, IV, and VI to support a conviction. Instruction No. 7 was properly worded and did not need to be repeated. Repetition would have caused

confusion. We find no merit to Charles' assertions that instruction No. 7 was prejudicially worded or that instruction No. 7 should have been repeated three times.

AFFIRMED.

HANNON, Judge, dissenting in part.

I believe instruction No. 7 misstates the law and is misleading. I would therefore reverse the convictions on counts II, IV, and VI and remand the cause for a new trial, but I would affirm the other convictions.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. SMITH, APPELLANT.
540 N.W.2d 375

Filed December 12, 1995. No. A-95-149.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless it is clearly erroneous.
2. ____: ____. In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.
3. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
4. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Evidence.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure. If police unconstitutionally stop a person, evidence obtained by a search of the person stopped is constitutionally inadmissible as the "fruit of the poisonous tree."
5. **Constitutional Law: Motor Vehicles.** A motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle.
6. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.

7. **Investigative Stops: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
8. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether a police officer has a constitutionally permissible reason to stop a person on a public street, a court must assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.
9. **Police Officers and Sheriffs: Motor Vehicles.** Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police–citizen contact involving automobiles will be substantially greater than police–citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.
10. **Criminal Law: Police Officers and Sheriffs: Probable Cause.** A caretaking encounter does not foreclose an officer from making observations that lead to a reasonable suspicion of criminal activity.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

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

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

INBODY, Judge.

INTRODUCTION

This appeal arises from the conviction of David L. Smith for driving while intoxicated, second offense. Smith appealed this judgment and conviction, and the Lancaster County District Court affirmed the county court's judgment. Smith's sole

assignment of error on appeal is that the trial court erred in overruling his pretrial motion to suppress evidence. Smith contends that the evidence should have been suppressed as "fruit" of an unlawful stop and seizure of Smith. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On February 26, 1994, Smith was given a citation for driving while intoxicated. At the arraignment on March 30, Smith pled not guilty, and the matter was set for trial. A motion to suppress was filed on April 27, alleging that the stop and seizure of Smith was in violation of his constitutional rights under the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 1, 3, and 7, of the Nebraska Constitution.

On May 26, 1994, an evidentiary hearing was held on Smith's motion to suppress evidence. Smith's motion specifically went to whether or not the stop and seizure of Smith and his vehicle were based on reasonable and articulable suspicion that a crime had been, was, or was about to be committed. The only witness called during the motion to suppress was Deputy Stewart Danburg, the officer who effected the arrest.

Deputy Danburg testified that as of February 26, 1994, he had been working at the Lancaster County sheriff's office for approximately 1½ years, assigned to road patrol. On that night, he was working a 9 p.m. to 7 a.m. shift. While on patrol, Deputy Danburg came to the intersection of S.W. 98th and West Van Dorn Streets, in Lancaster County, from the south and observed a brown GMC pickup on the north and opposing side of the intersection. Deputy Danburg described both S.W. 98th Street and West Van Dorn Street, the intersecting street, as gravel roads. At that intersection there are stop signs for both northbound and southbound traffic. Therefore, S.W. 98th Street yields to West Van Dorn Street.

Deputy Danburg was traveling north at approximately 10:15 p.m., when he first observed the brown pickup, facing south, on the north side of the intersection. The pickup was observed to be stopped at the stop sign. When Deputy Danburg approached the intersection, the pickup was already stopped,

and after he had stopped at the stop sign, he waited for the pickup to proceed because the pickup had arrived at the intersection first, and Deputy Danburg was going to yield to it. He waited approximately 15 to 20 seconds, and when the pickup did not move, he proceeded through the intersection, continuing north on S.W. 98th Street. As Deputy Danburg drove by the pickup, he glanced out his side window and observed a person sitting in the driver's seat. On cross-examination, Deputy Danburg stated that he did not see anything unusual or notice anything suspicious as he passed the pickup.

Deputy Danburg thought it was "rather strange" that the vehicle had not moved the entire time that he was at the intersection, so he continued to watch the pickup in his rearview mirror, as he proceeded north, to see if it was going to move or not. He drove approximately one-half mile north of the intersection, and during that time he did not see the pickup move. He thought traveling that distance took approximately 1 1/2 minutes. Deputy Danburg testified that again he "thought this was rather strange," so he turned around in the roadway and went back to check on the vehicle. As he pulled up behind the pickup, he noticed that the brake lights were on and the engine was running. After Deputy Danburg pulled up behind the pickup, he activated his vehicle's overhead flashing lights and proceeded to the pickup to make contact with the driver.

As Deputy Danburg approached the pickup, he observed a man sitting behind the steering wheel with his head leaning forward as if he were either asleep or unconscious. Deputy Danburg opened the door of the pickup and noticed that the vehicle was still in gear, so he placed the vehicle in park, and then proceeded to wake the man, later identified as David L. Smith.

Deputy Danburg said that he activated his vehicle's overhead lights because the pickup was not free to go until he was satisfied that everything was all right. If the pickup had started to move after he had activated the overhead lights, Deputy Danburg would have initiated another stop. At the end of the hearing, the motion to suppress was overruled.

The matter was reset for trial after Smith waived his right to a jury trial, and on August 10, 1994, the matter came on for trial by stipulation.

Prior to the trial by stipulation, Smith objected to any evidence that would be offered by the stipulation because that evidence had been obtained in violation of Smith's constitutional rights. Smith's objection was to preserve the trial court's ruling on the motion to suppress that had previously been heard. Because the only error on appeal is whether or not the trial court erred by failing to sustain the motion to suppress, the rest of the facts are not relevant to this particular appeal.

On August 25, 1994, Smith was found guilty of driving while intoxicated, and after the enhancement hearing, the offense was found to be Smith's second offense. Smith was then sentenced to 90 days' imprisonment and fined $500, and his driver's license was suspended for 1 year.

On August 25, 1994, Smith appealed the trial court's judgment and sentence and assigned as error that "[t]he trial court abused its discretion and committed an error of law by not sustaining the defendant's motion to suppress." On November 16, a hearing was held in district court, and at the conclusion of that hearing the matter was taken under advisement. On January 25, 1995, the district court entered an order affirming the county court's ruling. On February 9, Smith gave his notice of appeal to this court.

ASSIGNMENT OF ERROR

Smith's sole assignment of error on appeal is that the trial court erred by not sustaining his motion to suppress.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless it is clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

[2] In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual

determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Harris*, 244 Neb. 289, 505 N.W.2d 724 (1993).

[3] In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Grimes, supra*; *Dyer, supra*; *Ranson, supra*.

ANALYSIS

The only issue on appeal is whether or not the county court erred by not granting Smith's suppression motion concerning evidence obtained as a result of Smith's seizure, evidence that was ultimately used by the State to convict Smith.

[4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure. If police unconstitutionally stop a person, evidence obtained by a search of the person stopped is constitutionally inadmissible as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Therefore, to determine whether evidence obtained in this case is constitutionally inadmissible, it is first necessary to determine whether the initial contact by Deputy Danburg violated the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

[5] The U.S. Supreme Court and the Nebraska Supreme Court have consistently held that a motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle. See, *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993).

[6,7] The law is equally clear regarding investigatory stops: "[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth

amendment." *State v. Staten*, 238 Neb. 13, 18, 469 N.W.2d 112, 116 (1991). Accord, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Staten*, 238 Neb. at 18, 469 N.W.2d at 116–17.

[8] In this case, the police acted without a search warrant, therefore, the State had the burden to prove that the seizure of Smith was conducted under circumstances substantiating the reasonableness of such seizure. See *Childs, supra*. In determining whether a police officer has a constitutionally permissible reason to stop a person on a public street, a court must assess the totality of the circumstances surrounding the stop, including "all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior." *State v. Ebberson*, 209 Neb. 41, 45, 305 N.W.2d 904, 907 (1981).

[9] Although it may be questionable whether the State demonstrated that Deputy Danburg had a reasonable and articulate suspicion that Smith had been, was, or was about to be involved in criminal activity, under appropriate circumstances a law enforcement officer may be fully justified in stopping or contacting a vehicle to provide assistance, without needing any reasonable basis to suspect criminal activity. As the U.S. Supreme Court noted in *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973):

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the

> operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

See, also, *People v. Murray*, 137 Ill. 2d 382, 560 N.E.2d 309 (1990); *Crauthers v. State*, 727 P.2d 9 (Alaska App. 1986); *State v. Chisholm*, 39 Wash. App. 864, 696 P.2d 41 (1985); *State v. Goetaski*, 209 N.J. Super. 362, 507 A.2d 751 (1986).

Therefore, we need to determine if the facts of this case amounted to a constitutionally permissible reason for Deputy Danburg to return to the stop sign to see if Smith was all right under the community caretaking functions.

In this case, it is apparent that Deputy Danburg had justifiable reason to believe that something was wrong. As he was returning to the intersection, he observed that the pickup had not moved for several minutes. When Deputy Danburg pulled up behind the pickup, he observed that the brake lights were on and that there was no activity in the pickup. Danburg was therefore justified in believing that an exigent circumstance might exist, and he had good reason to make contact with Smith and to provide him aid, if necessary. When Deputy Danburg approached the vehicle to contact the driver, he noticed that Smith was sitting behind the steering wheel with his head leaning forward, as if he were either asleep or unconscious. Deputy Danburg then opened the door of the pickup, noticed that the vehicle was still in gear, and placed the vehicle in park. It was after this action that Deputy Danburg obtained information that led him to believe Smith was engaged in criminal activity.

[10] These factors taken into account make it clear that Deputy Danburg did not have an intent to arrest or to search when he opened the door of the vehicle, placed the vehicle in park, and woke Smith to determine Smith's condition. Deputy Danburg came back to the intersection to determine what, if anything, was wrong and the condition of the driver and to

provide aid, if necessary. These actions fall completely within the community caretaking exception to the Fourth Amendment prohibition against warrantless, nonconsensual searches. We find that a caretaking encounter does not foreclose an officer from making observations that lead to a reasonable suspicion of criminal activity. *State v. Langseth*, 492 N.W.2d 298 (N.D. 1992). We believe that Deputy Danburg's actions were reasonable—engaging his vehicle's emergency lights and contacting Smith, following what Deputy Danburg reasonably interpreted to be an exigent circumstance, which allowed him to enter Smith's vehicle without a warrant and without consent. Therefore, the trial court was correct in refusing to suppress the evidence seized as a result of Deputy Danburg's entering Smith's vehicle, and there is no error.

CONCLUSION

Having found that Smith's assignment of error is without merit, we therefore affirm the judgment and sentence of the trial court in all respects.

AFFIRMED.

JAMES H. MONAHAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS E. ROBERTSON, DECEASED, APPELLANT, V. UNITED STATES CHECK BOOK COMPANY, APPELLEE.

540 N.W.2d 380

Filed December 12, 1995. No. A-95-209.

1. **Workers' Compensation: Proof.** For benefits to be recovered under the Nebraska Workers' Compensation Act, the claimant must prove that the employee suffered injuries because of an accident arising out of and in the course of his or her employment.
2. **Workers' Compensation: Words and Phrases.** The phrase "arising out of the employment" is used to describe the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job.

3. **Workers' Compensation.** Where an assault is committed by a person intending to injure the employee because of reasons personal to him, and not for reasons directed against him as an employee or because of his employment, the injury does not arise out of the employment.
4. **Workers' Compensation: Words and Phrases.** In order for an assault for personal reasons to be brought within the sphere of "arising out of the employment," the employment must somehow exacerbate the animosity or dispute or facilitate an assault which would not otherwise be made.
5. **Workers' Compensation.** The determination of whether the employment creates a situation wherein an assailant will commit a crime that she would not otherwise commit is a difficult question of fact.
6. **Workers' Compensation: Appeal and Error.** Findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed on appeal to a review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. An appellate court also does not substitute its view of the facts for that of the trial judge.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James H. Monahan, of Monahan & Monahan, pro se.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Appellant, James H. Monahan, seeks benefits for the death of Thomas E. Robertson, which occurred as the result of a purely personal assault by his estranged wife at Robertson's workplace. The Workers' Compensation Court review panel affirmed the Workers' Compensation Court's decision denying benefits for the death of Robertson. Because we find there is evidence to support the findings of the court and the court's factual determinations are not clearly erroneous, we affirm.

II. FACTUAL BACKGROUND

This case concerns the right of Thomas E. Robertson's estate to receive workers' compensation benefits for his death. Robertson's death was caused by his wife, Janette Rae Radtke-Robertson (Radtke), while he was working at his

employer's place of business. The action is brought to secure benefits for Robertson's minor child. Robertson's minor child, Wendy Whited, was born to Robertson and a previous wife, Janet L. Robertson. Robertson was divorced from Janet Robertson by decree dated March 20, 1991.

Robertson was later married to Radtke. Robertson and Radtke were both employees of United States Check Book Company, in Omaha, Nebraska, although they worked separate jobs at separate times of day. The couple's relationship was stormy, and Radtke moved her belongings out of the couple's home to her parents' home in Murray, Nebraska, in July 1992 after Robertson had beaten her.

The record indicates that Robertson was attempting a one-sided reconciliation with Radtke, and he had made arrangements to move her belongings back to the couple's home on the morning of February 20, 1993. Robertson's usual hours of employment were from 10 p.m. to 6 a.m. He was responsible for nighttime maintenance and janitorial services, and he kept watch over the premises. Robertson was fatally shot between 2 and 6 a.m. on February 20. Robertson's body was found approximately 50 feet inside an entrance door that was equipped with a bell and window for nighttime admission to the premises. There was no sign of forced entry, and the door was locked and secure the next morning when his body was discovered. Radtke was eventually convicted of second degree murder in the case after entering a guilty plea.

Testimony admitted at the trial of this case indicates that Radtke had a professed fear of Robertson and did not want to move back in with him for fear that he would beat her again or kill her. Robertson had apparently threatened on more than one occasion to kill Radtke.

The record indicates that sometime in the past, Radtke had tried to hire someone to kill Robertson for her. Approximately 1 week before she killed Robertson, Radtke had obtained a gun from a friend, Teri Parks. Parks testified by deposition that she had provided Radtke with a gun and that in the early morning hours of February 20, 1993, Radtke had visited Parks and obtained another gun because the first one did not work properly. During this early morning visit, Radtke related to

Parks that she was afraid of Robertson and that he had threatened to kill her if she did not move back in with him. Radtke further told Parks she did not want to move back in with Robertson for fear that he would beat her again. The record also reflects that Robertson had a company life insurance policy and pension fund, both of which apparently named Radtke as beneficiary.

The Workers' Compensation Court entered an order of dismissal on August 11, 1994, finding that Robertson was shot to death by Radtke "because of personal differences between them and a professed fear on the part of Janette Radtke that she would suffer injury or death at the hands of Thomas Robertson if she did not kill him first." The court further found that the killing "arose out of a personal dispute and not any dispute . . . having its roots or origins in their employment." Because the court found that the death did not arise out of the employment, the petition for benefits was dismissed. A review panel affirmed the decision of the court on February 9, 1995. This appeal followed.

III. ASSIGNMENTS OF ERROR

Appellant alleges four errors in this appeal, which we have consolidated to one for discussion. Appellant alleges that the lower court erred in holding that Robertson's death did not arise out of his employment because his night job facilitated the murder.

IV. ANALYSIS

[1] For benefits to be recovered under the Nebraska Workers' Compensation Act, the claimant must prove that the employee suffered injuries because of an accident arising out of and in the course of his or her employment. Neb. Rev. Stat. § 48-101 (Reissue 1993); *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994). There is no dispute in this case that Robertson's death satisfies the requirements of "accident," as that term is construed in workers' compensation law, and that the incident occurred in the course of his employment. The only issue on this appeal is if Robertson's murder arose out of his employment.

[2] The phrase "arising out of the employment" is used to describe " ' "the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job." ' " *Nunn*, 3 Neb. App. at 107, 523 N.W.2d at 709 (quoting *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d 820 (1986)). Appellate courts in this state have not been called upon to determine whether injury or death resulting from an assault motivated by purely personal reasons can be said to have arisen out of the employment.

1. Personal Assaults at Workplace

[3] The Nebraska Supreme Court has never specifically decided a case where the issue on appeal concerned an employee who was assaulted at the workplace for purely personal reasons. The court has noted, however, in cases resolved on the basis that an assault on an employee involved risks that were distinctly associated with the employment, that the general rule is that where an assault is committed by a person intending to injure the employee because of reasons personal to him, and not for reasons directed against him as an employee or because of his employment, the injury does not arise out of the employment. See, *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Myszkowski v. Wilson and Company, Inc.*, 155 Neb. 714, 53 N.W.2d 203 (1952). In *P.A.M.*, the court noted that where an assault is committed by a person " 'intending to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment, the injury does not arise out of the employment . . . .' " 221 Neb. at 649, 380 N.W.2d at 248 (quoting 99 C.J.S. *Workmen's Compensation* § 227 (1958)). See 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 11.11(b) (1995). Similarly, in *Myszkowski*, the court observed that " '[p]ractically all authority holds that an assault by one employee upon another for personal reasons, not growing out of the relation as fellow employees, or out of acts in the performance of their work, cannot be held to arise out of the employment.' " 155 Neb. at 719–20, 53 N.W.2d at 207. In both *P.A.M.* and *Myszkowski*, however, the court ultimately

decided that the assault in question was not the result of purely personal animosity, but, rather, was a dispute over some element of the employment. In the present case, there is no dispute that the assault by Radtke which resulted in Robertson's death was motivated by purely personal and domestic animosities, not anything concerned with their employment at United States Check Book Company.

As the Nebraska Supreme Court mentioned in *P.A.M.* and *Myszkowski*, the general rule is that assaults motivated by personal reasons, although occurring at work, are not compensable under workers' compensation law. See 1 Larson & Larson, *supra*, § 11.00 at 3-178 ("[a]ssaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor"). See, also, *id.*, § 11.21(a) at 3-274 ("[w]hen the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test"); 82 Am. Jur. 2d *Workers' Compensation* § 358 at 393 (1992) ("where an employee is assaulted and injury is inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he is assaulted when he is in the discharge of his duties").

2. Assaults Facilitated by Employment

All risks causing injury to an employee can be placed within three categories: (1) risks distinctly associated with the employment, (2) risks personal to the claimant, and (3) "neutral" risks—i.e., risks having no particular employment or personal character. 1 Larson & Larson, *supra*, § 7.00. Harms from the first category are universally compensable. *Id.* In Nebraska, harms from the third category can also be compensable. See, *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d 820 (1986); *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994). However, harms which arise in the second category, from risks personal

to the employee, are universally noncompensable. 1 Larson & Larson, *supra*.

[4] The assault in the present case was the result of a risk personal to Robertson, i.e., a purely personal dispute, but appellant claims that the employment contributed to the assault. Professor Larson has noted that in order for an assault for personal reasons to be brought within the sphere of "arising out of the employment," the employment must somehow exacerbate the animosity or dispute or facilitate an assault which would not otherwise be made. See 1 Larson & Larson, *supra*, §§ 11.00 and 11.21(a).

In this appeal, appellant is essentially arguing that Robertson's night job facilitated the assault by affording Radtke a better opportunity to commit the crime without being detected. The record indicates that Robertson was the only employee in the building during the nighttime hours. The building was apparently locked at approximately 4:30 every evening, and Robertson had a key to allow himself access when he came to work. There was an employees' entrance equipped with some variety of bell so that any employee needing access to the building after hours could ring the bell and have Robertson let him or her in. The entrance also had a window so that Robertson could see who was seeking admittance prior to opening the door. The record indicates that Radtke did not have a key and that the door was locked and secure when Robertson's body was found the next morning. Appellant argues that the door was frequently left unlocked, which exposed Robertson to a risk that anyone could enter the building and assault him in the solitude of the empty building during the night hours. Appellant contends that Robertson's employment as the only night employee in the building facilitated Radtke's assault on him because it afforded her an opportunity to commit the crime with less likelihood of being detected.

[5] In discussing the factual situation where a night watch employee is murdered for personal reasons, Professor Larson acknowledges that the determination of whether the employment creates a situation wherein an assailant will commit a crime that she would not otherwise commit is a difficult question of fact. 1 Larson & Larson, *supra*, § 11.23(a). It is precisely because it

is a difficult question of fact that we cannot reverse, set aside, or modify the trial court's ruling in this case.

Neb. Rev. Stat. § 48-185 (Reissue 1993) provides that an appellate court may modify, reverse, or set aside a Workers' Compensation Court award only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award of the compensation court 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. *Watson v. Alpo Pet Foods*, 3 Neb. App. 612, 529 N.W.2d 139 (1995); *Haney v. Aaron Ferer & Sons*, 3 Neb. App. 14, 521 N.W.2d 77 (1994).

In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, an appellate court reviews the findings of the trial court, whose decision is afforded the same force and effect as a jury verdict. *Id.*; § 48-185. When testing the sufficiency of the evidence to support the factual findings of the trial court, the evidence is considered in the light most favorable to the successful party, and the successful party is given the benefit of every inference reasonably deducible from the evidence. *Watson, supra*; *Haney, supra*. See, also, *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

[6] Findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed on appeal to a review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. *Watson, supra*. An appellate court also does not substitute its view of the facts for that of the trial judge. *Id.*

Although it is indeed plausible that Radtke would not have assaulted and murdered Robertson but for the fact that he worked alone at night, it is equally plausible that she would in fact have assaulted and murdered him anywhere on the night in question to prevent him from forcing her to move back in with him the next day. There is nothing in the record to indicate that Radtke had as a motive for murdering Robertson at work the

decreased likelihood that she would be caught. On the other hand, there is ample evidence to support the conclusion that she was desperate and fearful of Robertson to the point of killing him before he killed her.

The record indicates that Robertson had threatened to kill Radtke. Radtke had confided her fear of Robertson to friends on more than one occasion. Radtke first left Robertson after she was hospitalized because he beat her. Robertson's repeated efforts at reconciliation somehow resulted in a plan for him to use a company truck on February 20, 1993, to move her belongings back to the couple's home. There is evidence in the record that she did not want to move back in and had only agreed to do so after Robertson threatened to kill her if she refused. The record further reflects that Radtke was so afraid of Robertson that she tried to hire someone to kill him and having failed in that effort, procured a gun from a friend. On the night Robertson was killed, Radtke again expressed her fear that Robertson would do her violence if she moved back in with him or kill her if she refused. It is entirely plausible that Radtke was in such a mental state that she would have killed Robertson wherever he was on the night in question, so as to avoid being forced to move back in with him the next day.

The trial court's determination that this assault did not arise out of Robertson's employment is supported by the court's factual findings that Radtke killed Robertson purely out of personal reasons and fear entirely unrelated to the employment. Further, there is ample evidence to support the conclusion of the trial court that Radtke was motivated to kill because of her fear, not because of the likelihood of being undetected.

In reaching this conclusion, we are aware that other jurisdictions have affirmed trial-level decisions that personal assaults were compensable because the work facilitated the assault. See, e.g., *California Comp. & Fire Co. v. Workmens' Comp. App. Bd.*, 68 Cal. 2d 157, 436 P.2d 67, 65 Cal. Rptr. 155 (1968) (trial-level tribunal determined that work facilitated personally motivated assault, and appellate court held findings were not clearly erroneous). We do not believe that our decision today is contrary to such holdings to the extent that the determination that work did or did not facilitate the assault is a

question of fact for the trial-level tribunal to decide. On the record presented to us, we cannot say that the decision of the trial court was not supported by sufficient evidence in the record or was clearly erroneous.

V. CONCLUSION

Because we do not find that the trial court was clearly erroneous in its factual determinations and because there is sufficient evidence in the record to support the court's order, we affirm.

AFFIRMED.

KATHLEEN ALICE GIBSON-VOSS, APPELLEE, V. THOMAS MICHAEL VOSS, APPELLANT.

541 N.W.2d 74

Filed December 19, 1995. No. A-94-369.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Property Division.** The division of property in marriage dissolution cases is a matter initially entrusted to the discretion of the trial judge.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system.
4. **Property Division.** The ultimate test for determining an appropriate division of marital property is one of fairness and reasonableness as determined by the facts of each case.
5. **Property Division: Appeal and Error.** A division of property will not be disturbed on appeal unless it is patently unfair.

6. **Workers' Compensation: Property Division.** A workers' compensation award is marital property only to the extent it recompenses for the couple's loss of income during the marriage. To the extent that it compensates for loss of premarriage or postdivorce earnings of the injured party, it is that person's separate property.
7. ____: ____. To determine what portions of a workers' compensation award are marital property or separate property, a court must consider (1) the purpose of the award, e.g., whether it was made for lost earnings, loss of future earning capacity, or some other purpose; (2) the time period of any diminished earning potential or disability; (3) the nature and date of the underlying injury; and (4) the terms of the award.
8. **Divorce: Attorney Fees: Appeal and Error.** An award of attorney fees in dissolution proceedings is discretionary with the trial court and depends on a variety of factors, including the property involved, the earning capacity of the parties, and the general equities of the situation. An award of attorney fees will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

Marsha E. Fangmeyer and John H. Marsh, of Knapp, Fangmeyer, Aschwege & Besse, for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Thomas Michael Voss appeals those portions of the decree of dissolution entered by the district court for Buffalo County on March 4, 1994, pertaining to the division of property and the award of $500 to Kathleen Alice Gibson-Voss for attorney fees. For the reasons recited below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

The parties were married on April 14, 1987; they separated on May 29, 1993; and the dissolution decree was entered on March 4, 1994. No children have been born of the marriage.

The district court conducted a hearing on February 9, 1994. Kathleen and Thomas testified. The record shows the following: Prior to the marriage, Kathleen owned 80 acres of pasture ground with a barn near Ravenna, for which property she paid

$12,000. Prior to the marriage, Kathleen paid for a barn owned by Thomas to be moved onto the property. Both parties valued this building at $10,000.

After the marriage, three additional outbuildings and a residence were built on the property. The parties financed the residence with a mortgage from the State Bank of Cairo in the amount of $57,000 and at least $30,000 of a $37,000 workers' compensation settlement that Thomas received in 1989 for an August 1986 work-related injury. At the time of trial, approximately $55,900 was still owed on the mortgage. The parties agreed that the value of the house and property together was approximately $110,000. The record does not show in whose name the property is held.

During the marriage, Kathleen and Thomas raised approximately 26 head of cattle on the property. Prior to the hearing, the herd was sold, and Kathleen deposited the profits into a checking account. During the marriage, Kathleen was employed with Burlington Northern Railroad and earned approximately $34,000 per year. Although there was conflicting testimony, the trial court found, and the record supports, that for some period of time prior to the marriage and some portion of the marriage, Kathleen supported both herself and Thomas. There is conflicting testimony that during the marriage Kathleen paid child support owed by Thomas for children of Thomas' previous marriage. Apparently, Thomas did receive some weekly benefits for some period of time prior to receiving the lump-sum settlement, and at some point in 1988, Thomas returned to work for Burlington Northern Railroad. He earns approximately $30,000 per year. In 1993, he worked approximately 7 months and spent the remainder of the year at an alcohol treatment center.

Kathleen indicated that she was responsible for the bills associated with the property; "dealt with the contractors, the subcontractors in building"; and provided the daily care for the cattle. Thomas indicated that they both contributed to the daily care for the cattle.

The district court divided the assets as follows: Kathleen was awarded certain marital property and its related debt having a net value of $46,260. In particular, Kathleen was awarded the

residence and realty. She was also given credit for the $12,000 she had paid for the realty prior to the marriage. Thomas was awarded certain marital property and its related debt having a net value of $32,116. In addition, the court found that Thomas was entitled to an award of $7,022 in order to equalize the property division.

The court did not separately award the various outbuildings located on the realty, but found them to be "a part of the real estate and incorporated with the award of the real estate." The court further stated:

> [E]ach party has made substantial contributions to the value of the real estate involved herein. For example, [Thomas] has contributed a building which was moved on to the property and a substantial portion of a personal injury settlement award. [Kathleen], however, has also made similar contributions to the development of the real estate through payments for other properties installed, costs of moving the buildings, and being the sole supporter of the marital entity during the time much of the property development occurred. It appears to this court that the contributions of the parties are essentially equal and that further adjustments are not necessary.

At trial, Kathleen sought attorney fees, primarily due to legal expenses she incurred as a result of Thomas' alleged violation of protection orders. The court awarded Kathleen $500 for attorney fees. According to the court, this amount represents the cost and value of additional fees incurred because of "the inappropriate and unnecessary behaviors of [Thomas]."

ASSIGNMENTS OF ERROR

Thomas assigns as error the division of the marital property because it failed to credit him for the workers' compensation settlement received for an injury that occurred prior to the marriage and the building that he owned prior to the marriage. Thomas also assigns as error the $500 award of attorney fees to Kathleen.

STANDARD OF REVIEW

[1] In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment

is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Policky v. Policky*, 239 Neb. 1032, 479 N.W.2d 795 (1992).

[2] The division of property in marriage dissolution cases is a matter initially entrusted to the discretion of the trial judge. *Id.*

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

ANALYSIS

Division of Property.

[4,5] The Nebraska Supreme Court has repeatedly stated that the ultimate test for determining an appropriate division of marital property is one of fairness and reasonableness as determined by the facts of each case. *Thiltges, supra*; *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). See Neb. Rev. Stat. § 42-365 (Reissue 1993). There is no mathematical formula by which property awards can be precisely determined. *Thiltges, supra*. A division of property will not be disturbed on appeal unless it is patently unfair. *Heser v. Heser*, 231 Neb. 928, 438 N.W.2d 795 (1989).

We first address whether Thomas' workers' compensation award should have been included in the marital estate. Although the question of whether workers' compensation awards are marital property is one of first impression in Nebraska, several other state courts have considered the issue. There appear to be

three general approaches in classifying such awards. Some jurisdictions hold that workers' compensation awards acquired during the marriage are marital property. See, e.g., *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987); *Goode v. Goode*, 286 Ark. 463, 692 S.W.2d 757 (1985); *In re Marriage of Dettore*, 86 Ill. App. 3d 540, 408 N.E.2d 429 (1980). Others have concluded that a workers' compensation award is the separate property of the injured spouse regardless of when the injury occurred or when the award is acquired. See, e.g., *Gloria B.S. v. Richard G.S.*, 458 A.2d 707 (Del. Fam. 1983). See, also, *Izatt v. Izatt*, 627 P.2d 49 (Utah 1981). Finally, equitable distribution jurisdictions have generally concluded that the portion of the workers' compensation award that represents lost wages or lost earning capacity sustained during the marriage is marital property. See, *Jessee v. Jessee*, 883 S.W.2d 507 (Ky. App. 1994); *Crocker v. Crocker*, 824 P.2d 1117 (Okla. 1991); *Bandow v. Bandow*, 794 P.2d 1346 (Alaska 1990); *Ward v. Ward*, 453 N.W.2d 729 (Minn. App. 1990); *Kirk v. Kirk*, 577 A.2d 976 (R.I. 1990); *Weisfeld v. Weisfeld*, 545 So. 2d 1341 (Fla. 1989); *Wilk v. Wilk*, 781 S.W.2d 217 (Mo. App. 1989); *Queen v. Queen*, 308 Md. 574, 521 A.2d 320 (1987); *In re Marriage of Blankenship*, 210 Mont. 31, 682 P.2d 1354 (1984).

[6] Because Nebraska is an equitable distribution jurisdiction, *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985), and we consider it to be a well-reasoned approach, we adopt the final approach, pursuant to which the portion of the workers' compensation award that represents lost wages or lost earning capacity sustained during the marriage is marital property. In addition, this approach is consistent with the purpose of the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), which is to compensate an employee for a loss in earning power because of an accidental injury arising out of and in the course of employment. *Warner v. State*, 190 Neb. 643, 211 N.W.2d 408 (1973). Accordingly, a workers' compensation award is marital property only to the extent it recompenses for the couple's loss of income during the marriage. *Jessee, supra*; *Crocker, supra*. To the extent that it compensates an employee for loss of

premarriage or postdivorce earnings of the injured party, it is that person's separate property. *Id.*

[7] To determine what portions of the award are marital property or separate property, a court must consider (1) the purpose of the award, e.g., whether it was made for lost earnings, loss of future earning capacity, or some other purpose; (2) the time period of any diminished earning potential or disability; (3) the nature and date of the underlying injury; and (4) the terms of the award. *Crocker, supra*; *Wilk, supra*; *In re Marriage of Blankenship, supra.*

The trial court did not consider any of the above and treated Thomas' entire workers' compensation award as marital property. The testimony showed that Thomas' injury occurred in 1986, prior to the marriage in 1987, and Thomas received the $37,000 award during the marriage. The testimony does not reveal any of the specifics surrounding the injury or the award and is such that in our de novo review we are unable to determine which portion of the workers' compensation settlement is marital property under the four-part test noted above. We conclude that on this record the trial court abused its discretion in treating the entire workers' compensation award as marital property. Based upon the above case law, any portion of the award which recompenses Thomas for premarriage or postdivorce wages or loss of earning capacity is Thomas' separate property, and any portion that represents loss of earning capacity for the years of the marriage is marital property.

As noted above, although we review the case before us de novo on the record, we are unable to make a decision consistent with the above case law because of the sparse record regarding the workers' compensation award. Because the workers' compensation award appears to be a significant contribution to the marital estate, we are also unable to opine on the propriety of the property division overall. It also appears that the building originally owned by Thomas was a significant contribution to the marital estate, and upon remand the trial court should give reasonable credit to Thomas for this property. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985). For these reasons, we remand the matter for further proceedings.

Attorney Fees.

[8] Thomas also claims that the trial court's award of $500 to Kathleen for attorney fees was error. We do not agree. Neb. Rev. Stat. § 42-367 (Reissue 1993) permits an award of attorney fees in dissolution cases. An award of attorney fees is discretionary with the trial court and depends on a variety of factors, including the property involved, the earning capacity of the parties, and the general equities of the situation. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). An award of attorney fees will be affirmed in the absence of an abuse of discretion. *Id.* Following our review of the record, we find no such abuse.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. GARY McMANN, APPELLANT.

541 N.W.2d 418

Filed December 19, 1995. No. A-95-188.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Sentences: Restitution: Appeal and Error.** The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence, and the standard of review for restitution is the same as it is for other parts of the sentence.
3. **Restitution.** Restitution is purely statutory, and a court has no power to issue such an order in the absence of enabling legislation.
4. **Sentences: Restitution.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1994) is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court.
5. **Criminal Law: Statutes.** Penal statutes are to be given a strict construction which is sensible.
6. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.

7. **Restitution: Damages.** Nebraska's restitution statutes provide for monetary payment of the victim's actual damages or return of the property taken.
8. **Restitution.** Neb. Rev. Stat. § 29-2281 (Reissue 1989) provides that the court may order that restitution be made immediately, in specified installments, or within a specified period of time.
9. **Restitution: Words and Phrases.** Restitution is generally considered to mean monetary payments to the victim.
10. ____: ____. Monetary amounts ordered by a court to be paid by the defendant to a victim are properly termed restitution.
11. **Statutes: Legislature: Restitution.** Unlike some other state legislatures, the Nebraska Legislature has not chosen to provide a defendant the statutory option of working for the victim in lieu of monetary restitution.
12. **Restitution.** Nebraska law does not authorize restitution in the form of a defendant's in-kind labor.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Sentence of restitution vacated, and cause remanded for resentencing.

Charles D. Hahn for appellant.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Pursuant to a plea of no contest, Gary McMann was convicted of criminal attempt, a violation of Neb. Rev. Stat. § 28-201(1)(b) (Reissue 1989), a Class I misdemeanor. In a memorandum opinion of this court dated November 21, 1994, McMann's sentence was vacated and the cause remanded for resentencing. Upon resentencing, McMann was sentenced to 2 years' probation and ordered to pay restitution to the victim with an option to work off some of the restitution amount as conditions of probation. On appeal, McMann's assignments of error relate to certain portions of the sentence pertaining to restitution.

FACTS

McMann was originally charged under several informations with 26 counts of issuing bad checks, each count being a felony. See Neb. Rev. Stat. § 28-611 (Reissue 1989). The original information in the case before us alleged two counts of issuing

bad checks, one in the amount of $1,406.55 and another in the amount of $771.28. All the checks were issued by June 1992. Pursuant to a plea agreement, an amended information was filed on October 18, 1993, alleging one count of criminal attempt, and on October 25, McMann entered a plea of no contest. The amended information in the case before us alleged that on or about May 23, 1992, McMann had attempted to issue a bad check having a value of more than $500 but less than $1,500. The plea agreement did not include a sentencing recommendation.

McMann was originally sentenced to 5 years' probation and was ordered to pay restitution in monthly installments of $200 for 60 months with an additional $10,000 payable in the last 6 months of McMann's term of probation. This sentence was appealed to the Nebraska Court of Appeals. In a memorandum opinion, the sentence was vacated and the cause was remanded for resentencing because there is a 2-year maximum term of probation for first-offense misdemeanors. See Neb. Rev. Stat. § 29-2263 (Reissue 1989).

On February 6, 1995, a resentencing hearing was held. The bill of exceptions from the original sentencing hearing of December 1993 was received, and McMann testified. Douglas Lueders, the victim and recipient of the checks, was present and made unsworn statements in response to the trial judge's questioning. The parties agreed that Lueders' actual loss was approximately $22,920.

The record shows the following regarding McMann's financial situation upon resentencing. McMann is approximately 50 years old, has no significant health problems, and has considerable work experience in the construction field. McMann lives with his ex-wife in her house that has no debt owed on it, and the two of them "have been back together for about the past six years and he feels they get along better now than when they were married." McMann declared bankruptcy in 1992, and his debts were discharged.

At the time of the resentencing hearing, McMann was employed at Cooper Nuclear Station, but his job was scheduled to end in March 1995. However, we note that his job had been scheduled to end at earlier dates but had been extended.

McMann was earning $8 per hour and working at least 40 hours per week. McMann testified that he had not "lined up" other employment.

McMann also testified that his monthly expenses had increased due to inflation since the original sentencing hearing in December 1993. At the December 1993 hearing, McMann testified that his monthly expenses included $200 for rent, $60 to $65 for the telephone, $100 for electricity, $15 for other utilities, $400 to $600 for other expenses such as food and gasoline, and $25 for payments on a hospital bill. At the resentencing hearing, McMann testified that his expenses have equaled what he earned, he had not saved any money, his only asset was a 1981 pickup truck worth approximately $1,500, and he had given his son some money to remodel the son's house in recent months. It appears that McMann's monthly expenses were at least $800, and his monthly gross income was approximately $1,280.

After much discussion between the court, the county attorney, Lueders, McMann, and McMann's counsel regarding the amount of restitution and the manner of restitution, the court pronounced sentence. The court sentenced McMann to 2 years' probation. As a condition of probation, the court ordered restitution of $500 per month for the probationary period, of which amount at least $300 was to be a cash payment, for total restitution of $12,000. The court provided McMann the option of working for Lueders for $5 per hour for the remaining $200 per month. McMann did not consent to this order of restitution. This appeal timely followed.

ASSIGNMENTS OF ERROR

We read McMann's assigned errors to be that the terms of the order of restitution were contrary to law and the evidence and that the amount of restitution ordered exceeded his ability to pay.

STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Ice*, 244 Neb. 875,

509 N.W.2d 407 (1994). The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence, and the standard of review for restitution is the same as it is for other parts of the sentence. *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990); *State v. Collins*, 1 Neb. App. 596, 510 N.W.2d 330 (1993).

ANALYSIS

Manner of Sentence.

On appeal, McMann challenges both the terms and the monthly amount of the restitution order. In response, the State generally concedes that the sentencing court abused its discretion in providing that McMann could work for Lueders for the equivalent of $200 per month.

[3-6] Restitution is purely statutory, and a court has no power to issue such an order in the absence of enabling legislation. See, Arthur W. Campbell, Law of Sentencing § 3:3 (2d ed. 1991); 24 C.J.S. *Criminal Law* § 1770 (1989). Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1994) and its predecessor statutes is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court. *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987); *Collins, supra*. Penal statutes are to be given a strict construction which is sensible. *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995); *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *Sorenson, supra*; *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

[7,8] It is clear from a reading of Nebraska's restitution statutes that they provide for monetary payment of the victim's actual damages or return of the property taken. Neb. Rev. Stat. § 29-2281 (Reissue 1989) provides that the court may order that restitution "be made immediately, in specified installments, or within a specified period of time." Pursuant to Neb. Rev. Stat. § 29-2282 (Reissue 1989):

> In determining restitution, if the offense results in damage, destruction, or loss of property, the court may require: (1) Return of the property to the victim, if possible; (2) payment of the reasonable value of repairing the property . . . ; or (3) payment of the reasonable replacement value of the property . . . . If the offense results in bodily injury, the court may require payment of necessary medical care . . . .

[9,10] Our review of Nebraska case law does not reveal cases in which an appellate court affirmed an alternative form of restitution, such as providing services to the victim, rather than a monetary payment or return of the property to the victim. Indeed, restitution is generally considered to mean monetary payments to the victim. See, e.g., *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990) (stating that monetary amounts ordered by court to be paid by defendant to victims are properly termed restitution).

[11] Unlike some other state legislatures, the Nebraska Legislature has not chosen to provide a defendant the statutory option of working for the victim in lieu of monetary restitution. See, Ala. Code § 15-18-66 (1995) (defining restitution to include services performed or work or labor done for benefit of victim); Conn. Gen. Stat. Ann. § 18-101h (West 1992) (defining restitution to include provision of services to victim); Me. Rev. Stat. Ann. tit. 17-A, § 1322 (West 1983) (defining restitution to include work or service provided to victim for economic loss); N.H. Rev. Stat. Ann. § 651:62 (Cum. Supp. 1994) (defining restitution to include work or service to be reimbursed by offender to victim); Utah Code Ann. § 63-63-2 (1993) (defining restitution to include services offender is ordered to render to victim).

[12] Based upon our review of Nebraska jurisprudence, we conclude that Nebraska law does not authorize restitution in the form of a defendant's in-kind labor. Therefore, the sentencing court abused its discretion in its order of restitution composed of monetary payments and in-kind labor for the benefit of the victim.

Dollar Amount of Restitution.

McMann also argues on appeal that the dollar amount of the restitution order is an abuse of discretion because the order exceeds his ability to pay. The State responds that the amount is justified by the record. We need not address this assignment of error as posed by McMann because we note plain error committed by the court in the total amount of restitution ordered. See *State v. Mettenbrink*, 3 Neb. App. 7, 520 N.W.2d 780 (1994). Plain error may be found on appeal regarding sentencing when the error is plainly evident in the record and prejudicially affects a substantial right of the litigant, causes a miscarriage of justice, or damages the integrity of the judicial process. *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992); *Mettenbrink, supra*.

Pursuant to § 29-2280 (Reissue 1989), which was in effect when McMann wrote the check giving rise to his conviction and this appeal, the amount of restitution a sentencing court may order was limited to the loss sustained by the victim "as a direct result of the offense for which the defendant has been convicted." In an amendment to this statute effective July 15, 1992, the amount of restitution permitted was changed to include, with the consent of the parties, loss sustained by the victim "of an uncharged offense or an offense dismissed pursuant to plea negotiations." § 29-2280 (Cum. Supp. 1994).

A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the defendant to his or her disadvantage is void. *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987). The amended § 29-2280 increased the possible punishment if restitution is ordered. Therefore, it cannot be given retroactive effect to crimes committed prior to its effective date. See *Duran, supra*.

The parties agree that all checks involved in the numerous informations filed were issued by McMann to Lueders by June 1992, and therefore prior to the effective date of the amendments to § 29-2280 on July 15, 1992. Specifically, the check which is at issue in the amended information on which

he was convicted was dated May 23, 1992. McMann's sentence of restitution in the amount of $12,000 clearly included Lueders' losses due to bad checks for which McMann was not convicted. Such a restitution order was not permissible under § 29-2280 (Reissue 1989), which was in effect when McMann issued the bad check for which he was convicted.

It was plain error for the sentencing court in the case before us to order restitution in the amount of $12,000. Pursuant to § 29-2280 (Reissue 1989), which controls the sentencing in this case, the amount of restitution which may be ordered is limited to the amount of the check for which McMann was convicted of attempt.

Based upon the foregoing, we vacate the sentence of restitution and remand the cause for a sentence of restitution consistent with this opinion.

SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. LOUISE MORRIS, APPELLANT.

541 N.W.2d 423

Filed December 26, 1995. No. A-94-1197.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
2. **Rules of Evidence: Hearsay.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with his or her testimony and is offered to rebut an express or implied charge against him or her of recent fabrication or improper influence or motive.
3. **Witnesses: Prior Statements.** When a witness relates a prior statement of the victim which contains more details than the victim's in-court testimony, the prior statement is consistent when the additional details are not contradictory to or collateral to the victim's testimony.

4. **Rules of Evidence: Witnesses: Prior Statements.** Nebraska case law has consistently interpreted Neb. Evid. R. 801(4)(a)(ii), Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1989), as admitting prior consistent statements when the opponent implies the witness' testimony is false, even when the charge of recent fabrication is made during the cross-examination of the witness during trial.
5. **Testimony: Prior Statements.** A prior consistent statement need only predate the trial testimony with which it is consistent.
6. **Courts.** The decisions of the Nebraska Supreme Court are binding in matters of state law, and the decisions of the U.S. Supreme Court are binding in matters of the U.S. Constitution and other federal questions.
7. ____. In respect to questions of general law, the state courts are required to follow the decisions of the highest court of the state and are not bound by the authority of the Supreme Court of the United States, and particularly is this true where it would be necessary to overrule previous state decisions in order to conform to the views of the federal court.
8. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
9. **Sentences.** An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Peter K. Blakeslee for appellant.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

The defendant, Louise Morris, appeals her convictions resulting from a jury trial for one count of first degree sexual assault on a child and two counts of sexual assault of a child. On appeal, Morris claims that the district court erred (1) in admitting four State's witnesses' testimony relating what the victims had told each of them as prior consistent statements pursuant to Neb. Evid. R. 801(4)(a)(ii), Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1989), and (2) in imposing excessive sentences. Morris relies upon a recent U.S. Supreme Court decision interpreting a comparable federal rule of evidence to require a showing, before the prior consistent statement is admissible, that the statement had been made before the charged

undue influence or recent fabrication occurred. We conclude that the Nebraska Supreme Court has interpreted rule 801(4)(a)(ii) to not require such a showing and that the ruling of the U.S. Supreme Court is an interpretation of a federal rule of evidence and not a pronouncement of federal constitutional law. We find that the trial court did not err in admitting the prior consistent statements, nor did the court abuse its discretion in sentencing Morris. We therefore affirm.

BACKGROUND AND FACTS

In November 1993, Morris was charged with one count of first degree sexual assault on a child and one count of sexual assault of a child for assaults on her daughter, Nicole T., and one count of sexual assault of a child for assaults on her son, Jason T. These assaults allegedly occurred from January 1983 to December 1988, when Nicole was between 4 and 10 years of age and when Jason was between the ages of 1 and 7.

Morris and Gene T. married in June 1978. Their daughter, Nicole, was born on October 30, 1978, and their son, Jason, was born on October 7, 1981. They lived in a mobile home south of Seward, Nebraska, and later moved to a house in Seward. Morris left the family home in March 1989 and moved to Grand Island, Nebraska. Within a month and a half she started living with a man she had been seeing before her separation. They later married. The children remained in Gene's home, and he was awarded their custody in the final divorce decree, entered in January 1990. Prior to the decree, a guardian ad litem for the children was appointed in the divorce proceeding, and during Morris' criminal trial, the guardian testified that neither child gave any indication that they were sexually abused when he interviewed them back in 1989. Gene testified that until October 1992, he had no indication that his children were sexually abused.

Gene started living with Jenny B. in February 1990, and they married the following November. Morris had visitation with the children, but she testified that Gene and Jenny made it difficult and then impossible to visit the children. Morris and her husband later moved to Arizona, and she claims that after a few unsuccessful attempts to contact the children by letter or phone she stopped trying. Gene's testimony tended to support Morris'

assertion that he and Jenny made it difficult, if not impossible, for Morris to visit and correspond with the children. Jenny admitted she did not get along with Morris.

Gene testified that Jason did not have nightmares or frequently wet his bed prior to Morris' leaving the house. However, after Jenny moved in, Gene and Jenny started having problems with Jason. Jenny testified that Jason became violent, got upset, used profanity, had nightmares, and frequently wet the bed. On one occasion while Jenny was babysitting some other children, Jason produced a knife and talked as if he intended to hurt them. At about the same time, Gene and Jenny grew concerned with Nicole's loss of weight and found treatment for her at "Pioneer." Gene and Jenny took Jason to Pioneer for treatment. After a couple of sessions at Pioneer, Jason was taken to Lincoln General Hospital in July 1992, where he stayed for approximately 3 months. It was determined that he required long-term treatment, and Gene and Jenny admitted him to Epworth Village, a residential treatment center for children.

In October 1992, Gene and Jenny visited Jason at Epworth Village, and when he got into their car, he told them that he had started counseling with Sandra Kroeker and that she thought he was sexually abused by his mother. He told them that his sister, Nicole, knew about it. When they attempted to talk with Nicole regarding the matter, she ran upstairs and began beating her head on the floor. Jenny testified that both children admitted being sexually abused by Morris but neither was asked by Gene and Jenny to relate any details of the abuse to them.

Jason was 12 years old when he testified. His testimony was elicited by the prosecution through a series of leading questions to which, for the most part, Jason's answers were one or two words long. Jason testified that he considers his "private parts" to be his penis and that his mother touched his private parts. He could not remember the details of the first time this happened, other than to say his pants were off, and he was in his parents' bedroom in the mobile home. Jason was about 3 at the time. He testified that when he was about 5 or 6, the family moved to a different house and that his mother again touched his private parts. He stated that sometimes he would have his clothes on

and that sometimes he would be naked, and sometimes his sister would be present. He did not remember many details when he was questioned. He testified that his mother touched him on more than one occasion, that he touched her, and that he and his sister touched each other at their mother's direction. His mother told him never to tell anyone about these incidents. He testified that he was very angry at his mother for leaving and that he wanted her back.

Nicole was a sophomore in high school when she testified. She lived in the mobile home until she was 6 or 7 and then moved with her family into the house. She was in the fourth grade when her parents were divorced. She testified that her understanding of "private parts" is her breasts and vagina. When she lived in the mobile home, her mother touched her private parts a couple of times a week, sometimes while she was clothed, and other times while she was not. After they moved, her mother continued to touch her, but not as often, because Nicole was in school. She testified that most of the time, her mother would take her clothes off as well and that they would lie on the bed and touch each other's private parts. She testified that her mother used her fingers to vaginally penetrate her more than once. She also testified that she and Jason touched one another, because their mother told them to do so. She also witnessed her mother touching Jason. She also testified that her mother brought her to as many as five men's houses, that they touched her, and that her mother knew that this was occurring. She could not describe the events with these men in any detail, except to say that the men were older.

The timeframe for these events was from the time Nicole was 4 or 5 until her mother left, when Nicole was 10. She did not tell anyone before Jason had told because her mother told her not to tell. She denied the assertion that the investigating officer convinced her that her mother was touching them at such an early age and that the investigating officer suggested to her that the men abused her.

Gene admitted that he and Jenny supplied all the information contained in the Lincoln General Hospital records, and he denied that it was slanted and that they portrayed Morris in an unfavorable light.

The prosecution also called Dr. Kathryn Benes, a psychologist who evaluated Jason at Lincoln General Hospital prior to his counseling with Kroeker. Benes testified that Jason was suffering from depression and posttraumatic stress disorder. She had specifically asked Jason if anyone had touched him in a way that he felt was uncomfortable, and Jason had responded no.

Kroeker, a clinical social worker, testified that during her first visit with Jason, on October 29, 1992, he told her that his mother sexually abused him. Jason told her that his mother would pick him up from school, bring him home, remove his pants, and rub his penis while lying on his bed. He also told Kroeker that his mother would rub his penis with her breasts, and she would have him touch her breasts and vagina. She also had him dress in girls' clothes and masturbate his sister while his mother watched. Jason's verbatim statement, as penned by Kroeker, was also admitted into evidence without objection during her testimony.

On cross-examination, Kroeker stated that based in part on the family history report supplied by Lincoln General Hospital that she reviewed before interviewing Jason, she determined that Jason may have been sexually abused. She stated that indications on the report that the mother was sexually promiscuous and that there was a possibility that Nicole had been sexually abused led to her conclusion.

Sherry Lave, the police officer who was assigned to interview Nicole at the time the abuse was reported, testified to the details that Nicole told her about Morris' sexual abuse of both children. The defense did not object to the testimony of the above witnesses or assign the issue as error in this appeal.

The hearsay issue in this case arises on the basis of four witnesses who testified to what Nicole or Jason told them over the defense's continuing hearsay objection. These witnesses were Eunice Williams, the director of therapeutic services and a psychotherapist at Epworth Village; Gordon Hall, the director of life skills training at Epworth Village, who provided weekly individual therapy for Jason during his 6-month stay at Epworth Village; Christy Weber, a registered nurse employed at Epworth Village as the director of health care services and admissions coordinator; and Karl Hoehler, a deputy sheriff of Seward

County who was involved in the investigation of Jason's allegations. Williams, Hall, and Weber testified that during the course of their respective professional duties Jason told them that Morris had sexually abused him. Jason made statements to these witnesses shortly after he made the statements to Kroeker and to his father and stepmother. Williams also testified that Nicole told her Morris had sexually abused her and her brother, but she did not describe the details to Williams. Hoehler elicited the details from Jason that one would expect an investigating police officer to elicit, and he related these details to the jury.

Morris testified and denied any improper conduct with her children. The defense also called a counselor from Lincoln General Hospital who took the family history from Gene and Jenny in July 1992. This witness established that they reported the possibility that Morris had abused drugs and alcohol during her pregnancy with Jason; that Morris' parental rights were terminated through the court system; and that she was sexually promiscuous, occasionally in the presence of Jason and his sister.

A trial was held on September 6, 7, and 8, 1994. The jury found Morris guilty on all counts. Prior to sentencing, Morris moved for a new trial, and the motion was overruled. Morris was sentenced to not less than 15 nor more than 20 years' imprisonment on the first degree sexual assault conviction and not less than 1 nor more than 5 years' imprisonment on each sexual assault of a child conviction, and all sentences were to be served consecutively.

ASSIGNMENTS OF ERROR

Morris alleges that the trial court erred (1) in overruling her objections on hearsay grounds to statements made by four State's witnesses regarding their respective testimony of what each was told by the victims and (2) by imposing excessive sentences.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial

discretion is a factor involved in admissibility of evidence. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994); *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993).

ERRORS IN ADMISSION OF TESTIMONIAL EVIDENCE

[2] Morris argues that the trial court erred in allowing the testimony of Williams, Hall, Weber, and Hoehler relating what the children told them about the sexual abuse suffered at their mother's hands. Morris argues that these statements are hearsay and do not fall within any exception. Morris notes that the trial court believed the evidence was admissible as prior consistent statements under rule 801(4), which provides:

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him [of] recent fabrication or improper influence or motive.

In the latter part of this opinion we consider Morris' argument that statements of the four witnesses do not qualify as prior consistent statements under *Tome v. U.S.*, ____ U.S. ____, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), and we conclude that if *Tome* controlled this case, the statements would not be admissible. However, this case was tried before the *Tome* decision was released, and therefore Morris' counsel sought to exclude the testimony of the four witnesses under existing Nebraska authority, which is in conflict with *Tome*. The time sequence also explains why defense counsel did not object to testimony of other witnesses who related statements that appear to be prior consistent statements to the same degree as the statements to which Morris did object. We shall first consider whether the testimony is admissible under Nebraska authority.

Admissibility Under Nebraska's Interpretation of Rule 801(4)(a)(ii).

For a statement to be admissible under rule 801(4)(a)(ii), the declarant must testify at trial and be subject to cross-

examination concerning the statement. These requirements are met. In addition, the statement must be consistent with the declarant's testimony and be offered to rebut a charge of recent fabrication or improper influence or motive.

Morris asserts that Jason's trial testimony was not consistent with the four witnesses' testimony. She argues that Jason could not remember any details of what had happened to him and that only after answering leading questions could he describe what he had told Kroeker his mother did. We do not agree. Our review of the testimony shows Williams, Hall, and Weber all essentially testified that Jason told them that he had been sexually abused by his mother and that his mother had touched his private parts or he had touched his mother's or sister's private parts. Hoehler's testimony was more detailed; however, there is nothing in his testimony that was not consistent with Jason's testimony.

[3] A similar argument was put forth by the defendant in *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992). In that case, the Supreme Court held that when a witness relates a prior statement of the victim which contains more details than the victim's in-court testimony, the prior statement is consistent when the additional details are not contradictory to or collateral to the victim's testimony. Similarly, in the case at hand, when the children's in-court testimony is compared to the testimony of the four witnesses as to what the children told them, the facts related, although not identical, are consistent.

Morris claims that she showed that Gene and Jenny practiced fabrication and undue influence between the time the children talked to the guardian ad litem and to Benes, when they did not refer to any abuse, and the October 29, 1992, statements made by Jason to Kroeker. Morris argues that Gene and Jenny's recitation of the family history information suggested to Kroeker and her colleagues at Epworth Village that Jason was being subjected to abuse of some kind. With this in mind, Kroeker unduly influenced Jason into making incriminating statements regarding Morris. Perhaps the evidence would support a finding of improper influence; however, the evidence clearly is not sufficient to require such a finding on the part of either the trial court or the jury.

[4] Nebraska case law has consistently interpreted rule 801(4)(a)(ii) as admitting prior consistent statements when the opponent implies the witness' testimony is false, even when the other side makes the charge of recent fabrication during the cross-examination of the witness during trial. For example, in *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), a child victim's statement to a police officer, which was made 3 days after the child reported the abuse to her parents, was ruled admissible pursuant to rule 801(4)(a)(ii). The Supreme Court stated:

> Tlamka's counsel asked her who had taught her to say "private," "wee wee," and "rock hard," the implication being that someone had coached J.H. in articulating the assault. By this line of questioning, Tlamka's counsel implied that J.H.'s testimony was the product of improper influence. J.H.'s statement on the stand was consistent with what she told Officer Lantis. Therefore, J.H.'s statements to the officer could have been properly admitted under rule 801(4)(a)(ii).

244 Neb. at 680, 508 N.W.2d at 852.

In *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992), the Supreme Court held that the admission of a consistent note in a diary offered and received on direct examination of the victim was not admissible as a prior consistent statement, because at the time the diary was offered the defendant had yet to claim the testimony of the victim was a fabrication. In the case at hand, the victims testified before the statements were offered, and at least in cross-examination of them, Morris implied that the children's testimony was a fabrication. The following cases also contain holdings similar to that in *Tlamka*: *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994); *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985); *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985); *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969).

[5] In *State v. Austin*, 1 Neb. App. 716, 510 N.W.2d 375 (1993), the Court of Appeals addressed and discussed in detail whether rule 801(4)(a)(ii) allows only those statements made before the charged recent fabrication or improper influence or

motive. The *Austin* court examined the authorities on the issue and held that to be admissible, a prior consistent statement need only predate the trial testimony with which it is consistent.

During cross-examination of the children, Morris' attorney sought to imply that Kroeker improperly influenced Jason during their interview. Neither child admitted to any improper influence, and no improper motive on the part of the children is suggested. Nonetheless, Morris now urges that the "recent fabrication or improper influence or motive" occurred during Kroeker's interview on October 29, 1992. If a defendant could exclude prior consistent statements simply by implying that the first statement made on the subject was the recent fabrication or was due to improper influence or motive, then of course no prior statement would be admissible. Put another way, a charge that the initial consistent statement was a fabrication is also a charge that the statement testified to by the witness is a fabrication. In *Tlamka*, a cross-examination that implied the witness was not telling the truth was sufficient to allow the admission of the prior consistent statement. We think the rule applies to this case, even though Morris implies the first statement was the untruthful one.

U.S. Supreme Court Decision Tome v. U.S.

Morris relies upon the analysis and holding of the recent U.S. Supreme Court decision *Tome v. U.S.*, ____ U.S. ____, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). In *Tome*, the child victim testified that her father sexually abused her. The father asserted as his defense that the child was subjected to undue influence, causing the child to make the incriminating statements. The prosecution then called six witnesses who testified to statements the child made after the time when Tome alleged that the child was subjected to the undue influence. The trial court allowed the testimony, finding that the evidence was admissible pursuant to Fed. R. Evid. 801(d)(1)(B), which is the same as Neb. Evid. R. 801(4)(a)(ii). The Supreme Court reversed the trial court's ruling and stated: "The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made

before the charged recent fabrication or improper influence or motive." (Emphasis supplied.) 115 S. Ct. at 705.

The Court explained:

> [A]dmissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditiona[l]" common law of evidence, which was the background against which the Rules were drafted. See Advisory Committee Notes, *supra*, at 773. Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. In the present context, the question is whether A.T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A.T.'s in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

115 S. Ct. at 701.

Morris urges this court to revisit the holding in *Tlamka* and the other cases cited above in light of the decision in *Tome*. We agree that if *Tome* controls the admission of the testimony of the four witnesses, the statements the children made to them would be inadmissible as hearsay. However, we conclude that *Tlamka* and similar Nebraska Supreme Court decisions control.

[6] *Tome* interprets Fed. R. Evid. 801(d)(1)(B), not Neb. Evid. R. 801(4)(a)(ii). The two rules are the same. We are bound by the decisions of the Nebraska Supreme Court in matters of state law, and we are bound by the decisions of the U.S. Supreme Court in matters of the U.S. Constitution and other federal questions. See, *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993) (recognizing U.S. Supreme Court is bound by state's highest court's interpretation of state statute); *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985). We realize that the Nebraska Supreme Court frequently looks to federal cases in the interpretation of state law when state law is patterned after federal law, such as in discrimination cases. See *Ventura v.*

State, 246 Neb. 116, 517 N.W.2d 368 (1994). Indeed, in *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), the Supreme Court examined federal cases for aid in the construction of rule 801(4)(a)(i) because that rule was patterned after the federal rule.

[7] We understand the rule to be as stated in *Gourley v. Chicago & E. I. Ry. Co.*, 295 Ill. App. 160, 174, 14 N.E.2d 842, 847 (1938), by way of a quote from an earlier Illinois case:

> "The decisions of that court [U.S. Supreme Court] are always entitled to great consideration and this court has never grudgingly yielded to them the deference which is due to so distinguished a tribunal, still, when its decisions conflict with those of this court upon questions over which this court has complete and final jurisdiction, it is our plain duty, under the law, to adhere to our own decisions. . . . In respect to questions of general law the State courts are required to follow the decisions of the highest court of the State and are not bound by the authority of the Supreme Court of the United States, and particularly is this true where it would be necessary to overrule previous State decisions in order to conform to the views of the Federal court. . . ."

See, also, 21 C.J.S. *Courts* § 158 (1990).

We conclude that we are bound by the Nebraska Supreme Court's interpretation of rule 801(4)(a)(ii). Therefore, having found that the statements made to and repeated by Williams, Hall, Weber, and Hoehler were prior consistent statements under *Tlamka*, we conclude that they are admissible under rule 801(4)(a)(ii).

We also note that in addition to the four witnesses to whose testimony Morris objected, the children, the father, the stepmother, Kroeker, and another police officer testified to the same or similar instances when the children had made prior statements that were consistent with their in-court testimony. We recognize that the procedure was followed by Morris' counsel in an attempt to create error under the *Tlamka* holding, the only course open to him at the time. However, this tactic had the effect of letting into evidence many prior consistent statements that would have been excluded under *Tome*, and thus

the testimony of the four witnesses to which Morris did object was cumulative and could not have prejudiced Morris.

EXCESSIVE SENTENCES

[8,9] Morris alleges that the trial court erred by imposing consecutive sentences of 1 to 5 years' imprisonment for each of the two convictions of sexual assault of a child, Class IV felonies, and 15 to 20 years' imprisonment for the one conviction of first degree sexual assault on a child, a Class II felony. The possible sentence for the Class II felony is 1 to 50 years' imprisonment, and for each Class IV felony is 0 to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Nebraska law is well settled on the issue of sentences imposed that are within the statutory limits. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. See *State v. Hall, supra*.

Morris' sentences are clearly within the statutory limits, and the record does not reveal that in sentencing her, the trial court's reasons or rulings were clearly untenable or unfairly deprived Morris of a substantial right and just result. Therefore, we conclude that the trial court did not abuse its discretion in sentencing Morris, and the sentences imposed by the trial court are affirmed.

CONCLUSION

Having found that the State's witnesses' statements regarding what the victims had told them were prior consistent statements, we conclude that the trial court properly admitted these statements under rule 801(4)(a)(ii). Additionally, the sentences imposed by the trial court were well within the statutory limits, and we find that the trial court did not abuse its discretion in imposing such sentences. The rulings of the trial court are affirmed.

AFFIRMED.

WORLD RADIO LABORATORIES, INC., A NEBRASKA CORPORATION, APPELLEE, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLANT.
542 N.W.2d 78

Filed January 2, 1996. No. A-93-739.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Former opinion modified. Motion for rehearing overruled.

Jeff A. Anderson, of Kutak Rock; Maureen E. McGrath; Philip A. Lacovara and Lynne M. Raimondo, of Mayer, Brown & Platt; and William G. Campbell for appellant.

Joseph E. Jones, Lon A. Licata, and Michael L. Schleich, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MUES, Judge.

Coopers & Lybrand (C & L) filed a motion for rehearing following the issuance of our opinion in this case. See *World Radio Labs. v. Coopers & Lybrand, ante* p. 34, 538 N.W.2d 501 (1995). C & L asks that we reconsider "one narrow issue," that being the question of whether the statute of limitations barred the claim of World Radio Laboratories, Inc. (WR), for malpractice arising out of C & L's 1983 audit report. Upon reconsideration, we conclude that our opinion was incorrect with regard to this issue.

We initially recognized that Neb. Rev. Stat. § 25-222 (Reissue 1989) requires that claims for professional negligence shall be brought within 2 years after the alleged act, omission, or failure to render the professional service. We reasoned that the statute of limitations on an error committed in an audit begins to run when the audit report is delivered to the client, citing *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). In this instance, the 1983 audit report was mailed on August 5, 1983, and we determined that this action, being filed on May 20, 1986, was obviously barred as to that audit unless the limitations period was otherwise extended on some recognized basis. Section 25-222 provides that if a cause

of action is not discovered and could not be reasonably discovered within the original 2-year period, the action may be commenced within 1 year from the date of discovery or within 1 year from the date of discovery of facts which would reasonably lead to such discovery. WR did not discover the alleged failures of C & L before May 21, 1985. We concluded that this portion of § 25-222 applied and that since the suit was commenced within 1 year of the date of discovery of the alleged failures, it was timely.

In applying the 1-year discovery exception to the claims arising out of the 1983 audit, we overlooked the clear language of § 25-222, which provides that the 1-year discovery exception is available when "the cause of action is not discovered and could not be reasonably discovered *within* such two-year period." (Emphasis supplied.) In this case, the audit report was mailed on August 5, 1983, and the alleged errors were discovered on May 21, 1985, *within* the initial 2-year statute of limitations period. Thus, the 1-year discovery exception provided for under § 25-222 does not apply to extend the time for filing beyond the original 2-year period, i.e., August 1985. WR did not commence this action until May 20, 1986.

Although we overrule the motion for rehearing, we correct our original decision and opinion and find that WR's claims for malpractice arising out of the 1983 audit report were barred by the 2-year statute of limitations for professional malpractice. In all other respects, the opinion is reaffirmed.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. JOHN BYRON NEWMAN, APPELLANT.
541 N.W.2d 662

Filed January 2, 1996. No. A-94-833.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the

factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.

2. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Search and Seizure.** While the propriety of an inventory search is judged by a standard of reasonableness, an inventory search must also be conducted pursuant to standardized policies or established routine.
4. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
5. **Rules of Evidence: Other Acts: Appeal and Error.** A review of the admission of other acts evidence under Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1994) requires an appellate court to consider (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.
6. **Trial: Evidence: Other Acts.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion.
7. **Sexual Assault: Evidence: Other Acts.** In crimes involving sexual assault, evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third parties.
8. **Trial: Evidence.** Balancing the probative value of the evidence against the danger of unfair prejudice is within the discretion of the trial court.
9. **Trial: Evidence: Jury Instructions: Appeal and Error.** The question of whether the evidence was unfairly prejudicial, when the other elements for admissibility have been met, depends upon whether the court properly instructed the jury as to its limited use.
10. **Criminal Law: Constitutional Law: Evidence.** A criminal defendant has a constitutional right to give a voice exemplar without being subject to cross-examination, provided the voice exemplar is relevant to the issues of the case and satisfactory evidence is produced or offered to establish that the exemplar will be genuine.
11. **Trial: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Webb E. Bancroft for appellant.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

John Byron Newman appeals his conviction of first degree sexual assault, second or subsequent offense. A woman was sexually assaulted in her apartment while alone with her young child at night, and the issue at trial was the identification of Newman as her assailant. Newman alleges that the trial court erred in not suppressing evidence that the police obtained by a warrantless search of luggage they took from him when they arrested him, which search was not an inventory search; in admitting the testimony of two witnesses under Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1994); in not allowing him to read a voice exemplar to the jury without subjecting himself to general cross-examination; in allowing evidence of an identification from an allegedly suggestive photo lineup; and in finding the evidence sufficient to support the verdict. We conclude that Newman's luggage was unconstitutionally searched, but that the error in introducing the evidence obtained from the search was harmless, and that the trial court did not err in the other manners claimed. We therefore affirm.

STATEMENT OF FACTS

In the early morning hours of March 22, 1993, the victim was home with her 3-year-old son. The victim lived in an apartment building in the 4600 block of Baldwin Avenue in Lincoln. The victim and her son were asleep in the living room, with the television on. The only other light on in the apartment was in the kitchen, which was accessible from the living room. In addition, there is an open cutout in the wall of the living room, through which one can see the kitchen. The victim testified that when the kitchen light is on she can see well enough to read in the living room without other lights in the living room. Lincoln police officer Robert Hurley testified at trial that he re-created the lighting as it was in the victim's apartment at the time of the assault and that although the light coming into the living room was less bright than it was when

one stood in the kitchen, it was still bright enough in the living room to read and to easily make out facial features and identify clothing.

At some point in the evening, the victim woke up after she heard a knock on her front door. The victim looked through the peephole in the front door, but did not see anyone. The victim testified that it was not unusual for a woman friend of hers to stop by her apartment late at night. The victim opened up the door part way and saw the defendant, Newman, standing outside. She asked Newman if he had the wrong apartment. He told her he did not have the wrong apartment. Newman pushed the door open and walked in. The victim began to back up and started kicking and hitting Newman. Newman backed the victim up against the couch in the living room.

Newman then pushed the victim down on the couch and began to remove the victim's clothing. The victim testified that she was wearing a green shirt, bra, jean shorts, underwear, a white T-shirt, and shoes and socks. After he had removed all her clothing, Newman lowered his pants and attempted to penetrate her vagina with his penis. The victim testified that Newman was not successful.

Newman then grabbed the victim in a "bear hug" and carried her into her bedroom. Newman threw the victim on the bed and penetrated her vagina with his finger. Newman then put a pillow over the victim's face because he was trying to muffle her crying. Newman again attempted to have sexual intercourse with the victim. The victim testified that all of a sudden, Newman stood up, turned off the light and began to say repeatedly, " 'This didn't happen.' " Newman began putting on his clothes, making sure the whole time that the victim's face was covered up.

The victim then heard a door shut, and she began to get up. Newman came back into the room and said, " 'I told you not to move.' " Newman pushed the victim down, covered her face over with a pillow, and then left. The victim got up, walked out into the front room, and observed that her son had been moved from the recliner in which he was sleeping to the couch. The victim tried to phone the police from her phone in the living room, but discovered that the phone cord had been cut. She also

discovered that the clothes Newman had taken off her and left on the floor were missing. The victim phoned the police from her phone in the kitchen. While she was still on the phone with the police dispatcher, the police arrived at her apartment at about 4 a.m. The victim testified that her ordeal lasted roughly 30 minutes.

When the police arrived, the victim described her assailant as a Hispanic male, between 5 feet 6 inches and 5 feet 8 inches tall, with dark hair, an olive complexion, and a moustache. The victim stated that the assailant was wearing a white T-shirt, black pants, and a black leather jacket. She did not describe the assailant's shoes. The victim told the police that she thought that her assailant might have had a slight accent, "because he was short with the words and things. He just sounded different than I'm normally used to."

Police conducted a search, using a dog to track the trail of the suspect leading from the victim's apartment. Lincoln police officer Paul Aksamit, a dog handler for the police department, took his tracking dog to the door of the victim's apartment and commanded that the dog begin tracking. The track headed around the various sides of the victim's apartment building, then northeast, across 47th Street, to an alley in which a dumpster was located. The dog stopped at the dumpster, and Officer Aksamit opened it up and found some clothing. The dog then continued eastward to a parking lot between some buildings in the 4700 block of Baldwin Avenue. The dog then lost the scent. Officer Erin Sims, who accompanied Officer Aksamit on the dog track, inspected the clothes in the dumpster. Officer Sims found a green print shirt, bra, underwear, socks, and jean shorts. At trial, the victim identified the clothing recovered by Officer Sims as the clothing she was wearing the night of her attack.

The police then took the victim to a hospital, where a "rape kit" was administered. The police then took the victim to the police station, where she was asked to use a computer to create a composite drawing of her assailant. She was then asked to look at a photo lineup and asked if she could identify her assailant from among the six photographs shown to her. She could not. The victim did point out, using the photographs for

demonstration, some of the features depicted in the photos which were similar to her assailant's features. Newman's photograph was not among the photographs in the photo composite.

The victim testified that on March 23, 1993, she was shown a second set of photographs, which again consisted of six photographs. The victim was asked whether she recognized her assailant from among the photographs. The victim did not identify any person depicted in the photograph as her assailant. Newman's photograph was not among the photographs shown to the victim.

On March 25, 1993, the victim was shown a third set of photographs, again consisting of six photographs. The police officer who showed the victim the photographs told the victim to take her time. The victim testified, "I knew immediately who it was, what number it was." Newman's photograph was No. 4 in the photographic array, and the victim identified his photograph as a picture of the man who attacked her. In court, the victim also identified Newman as the man who sexually assaulted her.

At about 12:15 a.m. on March 22, 1993, Russell Grady was sitting in his car, waiting to pick up Allen Wanek at 49th and Greenwood Streets, approximately seven blocks from the victim's apartment. Grady observed a woman walking north across Adams Street, along 49th Street. Following the woman shortly thereafter was a man Grady identified as Newman, walking about a quarter of a block behind. Grady stated that Newman was wearing a black leather jacket and white tennis shoes. Grady observed the woman walk north on 49th Street and then turn right on Greenwood Street, where she entered an apartment building in the middle of the block. When the woman got to the corner of 49th and Greenwood Streets, Grady testified, Newman ran to the corner and stopped. When the woman entered the apartment complex, Newman ran to the complex doors. Newman ducked down, looked up in the glass doors of the apartment complex, and then walked back to the sidewalk and looked at the building. When a light came on from an apartment in the right top corner of the building, Newman

walked away. Newman then walked back to 49th Street and walked south.

Grady testified that he drove around the block and proceeded to follow Newman because he thought Newman's behavior was unusual. Grady continued to observe Newman by circling around the next block and waiting for Newman to almost catch up with him. Grady testified that Newman walked to the corner of 49th Street and St. Paul Avenue, where he stood by a building on the corner. The building is approximately two blocks from the victim's apartment building. Grady said he continued to keep an eye on Newman while he looked for a patrol car which he had seen in the area. When he saw a patrol car going down Leighton Avenue, Grady drove after the patrol car. From the time he first observed Newman until the time he drove off after the patrol car, Grady testified, approximately 45 minutes had elapsed. When Grady caught up to the patrol car, he reported to the police officer what he had seen and then left.

A couple of days later, Grady was contacted at work by a Lincoln police officer who asked him to examine a photo lineup. Grady was unable to identify the photograph of the person he observed following the woman on March 22, 1993. A few days after that, Grady was shown a second set of photographs and was able to identify Newman's photograph as a picture of the man whom he observed on March 22.

Julie Denny testified that at approximately 10:15 p.m. on March 22, 1993, Newman approached her as she inspected her car in back of her apartment building in the 5200 block of Cleveland Avenue, approximately eight blocks from the victim's home. Denny stated that Newman was wearing a black leather jacket and white tennis shoes. Newman asked her whether she knew a Chinese couple that lived in the building, then followed her to some stairs. Newman asked Denny whether she was married and whether she had a boyfriend. Denny continued to walk toward her apartment. Denny reported the encounter to the police the next evening. On cross-examination, Newman asked Denny whether Newman had a Hispanic accent. Denny testified that she was sure he did not have an accent. Denny was asked by police to go to the station house, where she was asked to

create a composite drawing of Newman, using the police department's computer.

Finally, the State offered the testimony of Rev. Stewart Firnhaber, who testified that Newman came over to his house for dinner in early March 1993 and that he was wearing a black leather jacket and white tennis shoes. Newman asked Reverend Firnhaber on cross-examination whether Newman had a Hispanic accent. Reverend Firnhaber testified that he did not.

After the victim identified Newman as her assailant, Lincoln police determined that Newman had taken an Amtrak train to Las Vegas. On March 26, 1993, Lincoln police notified the police in Las Vegas that there was a warrant for Newman's arrest and that the State was requesting extradition. Newman was arrested by Las Vegas police at an Amtrak train station and brought to the Clark County, Nevada, detention center.

Newman filed motions to suppress the jacket and tennis shoes on the basis that they were recovered in violation of his Fourth Amendment rights and to suppress the photographic lineup evidence. At the hearing on those motions, the prosecution and Newman stipulated to the following facts: Immediately upon being arrested, Newman was frisked and then handcuffed. He possessed no contraband or weapons upon his person. Next to the ground where Newman had been standing were three suitcases. The suitcases were not inspected by the police, but remained unopened when they were placed in the trunk in the police cruiser in which Newman was transported to the detention center. Upon Newman's arrival at the detention center at about 8:50 a.m., the processing officer asked him if he had any valuables to declare. Newman responded that he did and listed the following on an "Inmate's Property Inventory and Release" form: a black wallet, two watches, a necklace, a $20,000 cashier's check, and bulk property, listed as three black bags. Newman signed the form underneath this statement.

In connection with that hearing, the prosecution and Newman further stipulated to the following facts: To Newman's knowledge, the bags were not opened or searched for inventory purposes. No warrant was sought or obtained to search the contents of the luggage. Entered into evidence at the hearing was a report by Sgt. Julie Goldberg of the Las Vegas

Metropolitan Police Department. The report states that after Newman's arrest, Las Vegas police contacted Lincoln police detective Richard Kohles, who asked whether Newman was wearing a leather jacket and white tennis shoes. Sergeant Goldberg told Detective Kohles no and described what Newman had been wearing upon his arrest. Detective Kohles then told Sergeant Goldberg that the black leather jacket and a pair of white tennis shoes were needed for evidentiary purposes. The report states,

> He was then explained that if he mentioned it, the property would have been taken earlier. However, at 1115 this same date, Detective M. Neumann . . . along with the reporting detective, arrived at the [Clark County Detention Center] and went to the property room. Contact was made. In the inventory, a black leather jacket and the white tennis shoes were found.

Newman and the State stipulated that Sergeant Goldberg and Detective Neumann retrieved Newman's black leather jacket and white tennis shoes from one piece of Newman's luggage located in the property room. The bags bore tags placed on them by the Las Vegas police which stated "BULK PROPERTY TAG."

The policy of the detention center is that if the three bags had not been searched by law enforcement officers prior to arrival at the detention center, the center's personnel would have looked through the luggage for contraband or weapons or explosives, and that there would have been no further inventory done, prior to placing the luggage in the property room. The trial court overruled Newman's motions to suppress. At trial, the State did not offer the shoes into evidence. The jacket was offered and received into evidence over an objection which preserved the question raised by that motion.

Newman also filed a motion in limine to bar the prosecution from offering the testimony of Grady and Denny, on the basis that their testimony was more prejudicial than probative. The motion in limine as to that testimony was denied, and the objection was preserved at trial.

At trial, the victim and Grady each identified the leather jacket seized from Newman's luggage as similar to the jacket

Newman was wearing on March 22, 1993. Lancaster County Deputy Sheriff Andrew Stebbing testified that he traveled to Las Vegas to pick up Newman, who had a number of items with him, which Stebbing brought back with Newman to Lincoln. In the Las Vegas police evidence locker was a brown paper bag, which contained a black leather jacket and some tennis shoes. The jacket identified by the victim and Grady as similar to Newman's was identified by Stebbing as the same jacket found in the Las Vegas evidence locker. Stebbing testified that he talked to Newman on the way back to Lincoln and that it was his opinion that Newman spoke with a Hispanic accent.

At the close of the State's case, Newman made a motion for a directed verdict, which was overruled. Newman then attempted to introduce a voice exemplar to prove that he did not have a Hispanic accent. The State objected, and its objection was sustained. Newman did not present any evidence.

Newman was convicted of the first degree sexual assault of the victim. Because the State produced evidence that he had committed two prior first degree sexual assaults, Newman's sentence was enhanced. Newman was sentenced to 25 to 50 years' incarceration, with credit for 497 days served, and is ineligible for parole.

ASSIGNMENTS OF ERROR

Newman alleges the district court erred when it (1) overruled his motion to suppress evidence seized from his luggage, (2) overruled his motion in limine to bar the introduction of testimony from Denny and Grady, (3) held that Newman could not introduce a voice exemplar without subjecting himself to cross-examination, (4) barred him from introducing the voice exemplar and thus violated his due process rights, (5) overruled his motion to suppress the pretrial and courtroom identification of Newman because the photographic lineup was allegedly overly suggestive, and (6) found the evidence sufficient to support the verdict.

STANDARD OF REVIEW

[1,2] In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial

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

An appellate court reviews the admission of evidence of other acts under § 27-404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

Because exercise of judicial discretion is implicit in Neb. Rev. Stat. § 27-401 (Reissue 1989), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Carter, supra.*

ANALYSIS

Search of Newman's Luggage.

Newman contends that the district court should have granted his motion to suppress the leather jacket seized from his luggage by the Las Vegas police and entered into evidence at trial. Newman alleged that the warrantless search of his luggage was outside the scope of an inventory search or a search subsequent to arrest, and therefore the jacket should have been suppressed as the fruit of an illegal search.

The Fourth Amendment to the U.S. Constitution protects people against unreasonable searches and seizures by the government, including by police officers. A search conducted pursuant to a warrant which was supported by probable cause is generally considered reasonable and therefore not violative of

the Fourth Amendment. *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). The U.S. Supreme Court has recognized, however, that " 'exigencies of the situation' " may sometimes make exemptions from the warrant requirement a necessity. *New York v. Belton*, 453 U.S. 454, 457, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). In addition, the U.S. Supreme Court and our Nebraska Supreme Court have recognized that it is proper at the station house for the police to remove and list or inventory property found on the arrested person or in the possession of an arrested person about to be jailed. *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

[3] The Nebraska Supreme Court in *State v. Dixon*, 237 Neb. 630, 636, 467 N.W.2d 397, 403 (1991), held that a range of governmental interests supports an inventory process, which includes

> (1) protecting property of an arrestee in custody, (2) protecting police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining security of a detention facility by preventing introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity.

While the propriety of an inventory search is judged by a standard of reasonableness, an inventory search must also be conducted pursuant to standardized policies or established routine. *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993). The reason why the courts have required that standardized criteria or established routine must

> regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime[.]"

Florida v. Wells, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).

In *U.S. v. Johnson*, 820 F.2d 1065 (9th Cir. 1987), the defendant, convicted of bank robbery, had had currency in his jacket when he was arrested for driving while under the influence of alcohol. At the time of his detention, the currency was inventoried and placed in an envelope. Later, at the request of an FBI agent, the envelope was opened, and serial numbers on the currency were compared with those on currency stolen during a bank robbery. The *Johnson* court acknowledged that there are governmental interests in safety, protection of the owner's property, and protection for the police from claims of lost property which underlie the rationale for an inventory search. However, "[n]one of these motivations compelled the officer to open the package. Rather, he examined the currency in order to determine whether it was the currency stolen in a bank robbery. Searching for incriminating evidence of a crime does not fall within the purview of an inventory search." *Id.* at 1072.

Nonetheless, the *Johnson* court upheld the trial court's decision to deny the defendant's motion to suppress because the police had subjected the money to a cursory inventory search the first time it was seized, and therefore, the defendant had a significantly reduced expectation of privacy. "Even though the officer did not in fact at first record the serial numbers of the bills, he could have done so legitimately without a warrant." *Id.* Therefore, the court held, the evidence regarding the serial numbers was admissible.

In the same manner, in *State v. William*, 248 Kan. 389, 807 P.2d 1292 (1991), the state, in a cross-appeal, alleged the trial court had erred in suppressing a note written by the defendant in which he referred to tying up his victim and threatened to mutilate him unless he consented to engage in sexual relations. The note was among the defendant's personal possessions removed from him at the time the defendant was booked. The personal possessions were placed in an envelope and put in a property locker. At the time the defendant was booked, a corrections officer looked at the papers taken from the defendant and "just flipped through the papers to see if there was any money that needed to be separated and then listed them on the inventory sheet as miscellaneous papers. . . . He did not

individually read any of the sheets of paper." *Id.* at 421, 807 P.2d at 1315. The police opened up the envelope the next day to look for the note, because one officer had observed at the time of booking that the defendant seemed especially concerned about the note, which had been wadded up. The defendant appeared to be trying to hide the note among his other papers. The *William* court held that because the note had once been lawfully seized, through the inventory inspection and listing as miscellaneous paper, it was lawful for the police officers to go back and take a second look at the inventoried personal effects without a search warrant and remove evidence from the property room.

In the case at hand, while there is evidence that it is the policy of the Clark County Detention Center to conduct an inventory search of the luggage for contraband or weapons or explosives and that there would have been no further inventory done prior to placing the luggage in the property room, such policy was not, in fact, followed in this case. The luggage was inventoried as bulk items, was not opened, and was not searched for contraband, weapons, or explosives prior to being placed in the property room. The items inside the luggage were not inventoried prior to the luggage being placed in the property room. Las Vegas police sergeant Goldberg's report seems to make clear that the search she and Detective Neumann conducted on Newman's luggage was done only after she was told the Lincoln police wanted the jacket and shoes for evidence, and that the search was conducted solely for the purpose of looking for that evidence. It cannot be characterized as a routine inventory search. Nor can we say that it would be proper as a "second look" search of a previously inventoried item. No inventory was conducted upon any items in Newman's luggage. Because there was no "first look," there can hardly be a second look.

The State attempts to excuse the search by mischaracterizing the evidence. The State claims that Newman stated at the time he was taken into detention that he had certain items of value in the luggage which would need to be inventoried. The evidence shows no such thing. The State further argues, "Apparently, both as a result of Newman's statement, and as a result of their

own policy to search the baggage for contraband, the luggage confiscated along with Newman was inventoried." Brief for appellee at 27. Again, the evidence shows no such thing.

[4] That said, while the denial of Newman's motion to suppress the jacket and shoes was error, we find it to be harmless. Not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). The shoes were not offered into evidence. The jacket seized from Newman's luggage and introduced at trial was merely cumulative evidence. The victim, Denny, and Grady all identified Newman from a photograph in which Newman was not wearing a leather jacket. Moreover, all of these witnesses identified Newman at trial when he was not wearing the jacket. The identification of Newman was not based on his clothing, but on his physical characteristics. Thus, Newman's first assignment of error is without merit.

Motion in Limine to Bar Denny's and Grady's Testimony.

Newman argues that Denny's and Grady's testimony regarding a prior act and a subsequent act should have been excluded on the basis that it was offered for an improper purpose, and not for one of the purposes listed in § 27-404(2). Moreover, even if the evidence was admissible under § 27-404(2), Newman argues, it was more prejudicial than probative and therefore should have been excluded under Neb. Rev. Stat. § 27-403 (Reissue 1989).

Evidence of Other Acts.

Under § 27-404(2):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Nebraska Supreme Court has held that the statute's recited list of acceptable uses is illustrative and not intended to

be exclusive. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). Evidence, however, which is otherwise admissible under § 27-404(2) may be excluded under § 27-403 if its probative value is outweighed by its prejudicial effect.

[5,6] A review of the admission of other acts evidence under § 27-404(2) requires an appellate court to consider

> (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.

State v. Carter, 246 Neb. at 962, 524 N.W.2d at 771. Moreover, in all proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Carter, supra*. The court in *Carter* held that because the exercise of judicial discretion is implicit in a decision regarding whether the evidence is relevant, "it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion." *Id.* at 963, 524 N.W.2d at 772.

[7] In crimes involving sexual assault, evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third parties. *State v. Carter, supra*. We find the case of *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984), to be especially instructive, as it addressed similar other acts testimony. In *Baker*, the victim, a student of a beauty school in downtown Omaha, was waiting for her bus in the early morning at the corner of 45th and Wirt Streets on January 20, 1983. Shortly before the bus was due, the defendant stopped his car and asked the victim if she needed a ride. The victim accepted. The victim was sexually assaulted by the defendant while in the car.

The other acts testimony in *Baker* came from three minors. The first, a 14-year-old girl, was walking to school near 52d and Bedford Streets in the early morning of December 13, 1982, when the defendant drove up and asked her if she wanted to come over to his house for about 20 minutes. The girl refused. The second witness, also a 14-year-old girl, stated that as she was walking home from school near 48th and Maple Streets at about 3 p.m. on January 19, 1983, the defendant drove by and said to her, " 'Hey, Baby, get in my car.' " *Id.* at 210, 352 N.W.2d at 896. The girl kept on walking. The third witness, a 16-year-old girl, was walking home at 50th Avenue and Maple Street at 3:30 p.m. on January 10, 1983, when the defendant approached her in a car, stopped, and offered her a ride home. The girl refused, and the defendant said that he was lonely and would like to spend some time with her. She again declined.

The *Baker* court held that although the trial court instructed the jury that the witnesses' testimony was to be received only for the purpose of determining the motive and intent, the evidence was also clearly admissible to establish preparation, plan, and identity as well as motive and intent. The court found that the evidence was more probative than prejudicial and therefore upheld the defendant's conviction.

In the case at hand, the trial court instructed the jury that Denny's and Grady's testimony was to be received for the limited purpose of placing Newman in the area described on the date and time described, and for no other purpose. We find that not only could the evidence be admitted for that limited purpose, but it could also be introduced for purposes of establishing identity and planning. Newman's only defense was that the victim identified the wrong man as her assailant. Placing Newman within blocks of the crime, within hours of the crime, seemingly stalking one woman to her apartment building and approaching another woman near another apartment building, is relevant to the sexual assault of the victim, and therefore there was no abuse of discretion by the trial court in admitting the evidence.

Prejudicial Effect.

[8,9] Newman argues that even if the testimony of Denny and Grady was relevant, its probative value was outweighed by the prejudicial effect. Balancing the probative value of the evidence against the danger of unfair prejudice is within the discretion of the trial court. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). Although evidence may be prejudicial, that alone is not enough to require its exclusion, because most evidence, if not all evidence, that the State offers to prove a defendant's guilt is calculated to be prejudicial to the defendant. *Id.* Section 27-403 allows for the exclusion of evidence "which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial." *State v. Carter*, 246 Neb. at 965, 524 N.W.2d at 773. The question of whether the evidence was unfairly prejudicial, when the other elements for admissibility have been met, depends upon whether the court properly instructed the jury as to its limited use. *Id.* We find that the court gave a limiting instruction which prohibited the evidence from being used for any improper purpose and therefore find no abuse of discretion by the trial court in admitting the testimony of Denny and Grady.

Voice Exemplar.

Newman alleges the district court erred when it held that if he was allowed to introduce a voice exemplar, by means of making a statement to the jury, to show a lack of accent, Newman would waive his Fifth Amendment privilege against self-incrimination and subject himself to cross-examination. Newman argues that because the State can compel him to provide a voice exemplar or give an in-court voice demonstration without violating his privilege against self-incrimination, he should be allowed to give an in-court voice demonstration without subjecting himself to cross-examination. Newman argues that due process requires reciprocity.

The victim testified that Newman had a slight Hispanic accent. The deputy sheriff who transported Newman back from Las Vegas stated that he spoke with an accent. Denny testified that she was certain he did not speak with an accent, and Reverend Firnhaber testified that Newman did not speak with

an accent. The victim did not identify Newman as her attacker based on his accent in either the photographic lineup or in court. Nonetheless, Newman wanted to be able to speak in court to demonstrate that he did not have a Hispanic accent. The State objected to Newman's offer, and the court sustained the objection.

The U.S. Supreme Court has held that compelling a suspect to give a voice exemplar in a lineup was not compulsion to utter statements which were testimonial, but, rather, "he was required to use his voice as an identifying physical characteristic." *United States v. Wade*, 388 U.S. 218, 222-23, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The Court held that giving a voice exemplar was no different than submitting to fingerprinting, photography, measurements, or requests to stand in court, to walk, or to make a particular gesture. None of these demonstrations, the Court noted, give rise to a Fifth Amendment privilege against self-incrimination. "[T]he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's 'communications' in whatever form, vocal or physical, and 'compulsion which makes a suspect or accused the source of "real or physical evidence[.]" ' " 388 U.S. at 223. (Quoting *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

Other courts have held that due process reciprocity would allow an otherwise admissible voice exemplar to be introduced by the defendant without subjecting the defendant to cross-examination. See, *United States v. Esdaille*, 769 F.2d 104 (2d Cir. 1985), *cert. denied* 474 U.S. 923, 106 S. Ct. 258, 88 L. Ed. 2d 264; *People v Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728, 530 N.Y.S.2d 83 (1988). However, while a voice exemplar offered by the defendant is potentially admissible, the defendant still must show that such evidence is reliable.

In *United States v. Esdaille, supra*, the court held that while the defendant's request to give a voice exemplar to show he had a heavy accent would not result in a waiver of his privilege against self-incrimination, the trial court correctly denied the defendant's request to speak, because the voice exemplar would have little probative value, as it was inherently suspect. Its

probative value, the court found, was outweighed by the prejudice to the State because of the ease with which a person can alter his or her accent and the difficulty of challenging the reliability of the proffered accent. The *Esdaille* court noted that in other cases in which the defendant has demonstrated some physical characteristic, there has always been a showing that the evidence was reliable. The court gave an example of a case in which the defendant should have been allowed, without taking the stand, to exhibit a large scar to the jury which the witness had not mentioned when describing the defendant to the police. See *People v Shields*, 81 A.D.2d 870, 438 N.Y.S.2d 885 (1981). Prior to demonstrating the scar on the stand, the defendant in *Shields* proffered hospital records showing that the injury which resulted in the scar preceded the crime, and therefore there was no possibility that the scar was not authentic or reliable evidence. The *Esdaille* court held, however, that "[u]nlike a visible scar or a permanent tattoo . . . a regional accent is a manner of speaking that need be neither permanent nor genuine. One need only have heard an impersonator perform to know that accents can be feigned or deepened." 769 F.2d at 107. The court noted that the witness in *Esdaille* did not identify the defendant on the basis of his accent, nor did police arrest the defendant on the basis of his accent.

In *People v. Scarola, supra*, the court found that there was no abuse of discretion by the trial court when it disallowed a voice exemplar offered by a defendant to show he had a speech impediment. The court held that while the voice exemplar may have been broadly relevant, as the defense was based on mistaken identity, its probative value was outweighed by its potential for unfair prejudice. The court found that the victim did not rely on the defendant's voice to identify him, and "[m]oreover, the foundation for the admission of the evidence . . . did not rule out the possibility that [the defendant] could feign the existence of a speech defect." *Id.*, 71 N.Y.2d at 778, 525 N.E.2d at 733, 530 N.Y.S.2d at 87.

[10] We conclude that a criminal defendant has a constitutional right to give a voice exemplar without being subject to cross-examination, provided the voice exemplar is relevant to the issues of the case and satisfactory evidence is

produced or offered to establish that the exemplar will be genuine. We also conclude that the issues of relevancy of the voice exemplar and of its genuineness are questions for the trial court, and its decision on such issues will not be disturbed in the absence of an abuse of discretion. In this case, the evidence does not establish that Newman clearly and consistently spoke with an accent, and the manner in which Newman offered the voice exemplar included no guarantees that it would be genuine. Therefore, we find no abuse of discretion by the trial court in excluding the voice exemplar.

Photographic Lineup.

Newman complains that the photographic lineup shown to the victim was unconstitutionally suggestive and that the police made statements to the victim which led her to pick Newman's photograph and to maintain that Newman was her assailant. Specifically, Newman argues that the other pictures in the photo lineup were older, which suggested that Newman had recent contact with the law, and that the other photographs were of taller men, while the photo of Newman made him look shorter, which Newman's attorney argues was significant because the victim described her assailant as between 5 feet 6 inches and 5 feet 8 inches tall. Our examination of the photographs leaves us at a loss to see what Newman allegedly sees as suggestive in the photographs or in the manner in which they were presented. We are unable to tell the age of the photographs and are unable to determine the relative height of anyone depicted in the photographs.

[11] Newman also argues that remarks the police made to the victim when she was shown the photographs were unduly suggestive. In regard to photo arrays, the Nebraska Supreme Court has held that whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

The Nebraska Supreme Court has held that when considering the totality of the circumstances surrounding an out-of-court identification, the trial court should consider

> " 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.' "

State v. Houser, 241 Neb. 525, 538, 490 N.W.2d 168, 178 (1992) (quoting *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988)).

At the hearing on the motions to suppress, the victim was asked:

> Q Do you recall when asking a question that Officer — I had asked you a question that Officer Scott had asked you and you had said — You recalled stating that Officer Scott said, "Take your time. You don't have to pick one out real fast."
>
> A Yes.
>
> Q Is that what he said to you?
>
> A Yes.

Newman argues that telling the victim that she did not " 'have to pick one out real fast' " meant that "she did in fact have to pick one of the photos as her assailant." Brief for appellant at 45. We doubt if the victim or any reasonable person would think that on the lineup, that being told she did not have to pick one out " 'real fast' " meant that she had to pick a suspect, any suspect. We can find nothing in the record to suggest that the trial court was clearly erroneous when it denied Newman's motion to suppress the identification of Newman from the photographic lineup. Newman's assignment of error is without merit.

Sufficiency of Evidence.

Newman alleges that the evidence was insufficient to convict him of sexually assaulting the victim. The evidence is clearly sufficient to sustain the conviction. We find no prejudicial error and affirm the trial court's judgment.

AFFIRMED.

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

541 N.W.2d 677

Filed January 2, 1996. No. A-95-696.

1. **Juvenile Courts: Appeal and Error.** An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by an appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof.
2. **Juvenile Courts: Parental Rights: Proof.** At a detention hearing, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the Department of Social Services pending adjudication.
3. **Juvenile Courts: Parental Rights.** The circumstances required to be established for continuing to withhold a juvenile's custody from his or her parent or legal guardian pending adjudication are that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Reversed and remanded for further proceedings.

B. Gail Steen for appellant.

James S. Jansen, Douglas County Attorney, and Vernon Daniels for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

INTRODUCTION

This case involves a child named Cherita and her grandmother who is also named Cherita. For the ease of the reader, we will refer to Cherita W., the juvenile, as "the child." We will refer to Cherita R., the appellant, as "the grandmother." This appeal arises from a detention hearing at which the separate juvenile court of Douglas County found that continued detention of the child was necessary and continued custody of the child in the Department of Social Services (DSS). The grandmother, who is the child's legal guardian,

appeals the trial court's ruling. For the reasons recited below, we reverse, and remand for further proceedings.

FACTUAL BACKGROUND

The child, born August 16, 1988, was taken into custody on May 12, 1995, and DSS placed her in foster care. Patty Green, a Child Protective Services (CPS) worker, testified at the detention hearing that the child was "picked up" because a child cannot thrive in an environment, such as the one the child was in, where he or she receives negative attention and no nurturing or empathy. A petition was also filed on May 12 that alleged the child is a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) because she lacks proper parental care by reason of the faults or habits of the grandmother.

A detention hearing was held May 24, 1995. The record contains less than 50 pages of testimony. Green testified for the State. Denise T., who is the child's aunt, and the grandmother testified for the grandmother. The evidence shows as follows:

The grandmother has been the child's legal guardian since November 1994. The child apparently suffers from attention deficit disorder (ADD) and hyperactivity. Dr. Kimberly Frank, a psychiatrist that the grandmother retained for herself and the child, made the above diagnosis.

Since February 1995, the family has been voluntarily working with CPS. The family was originally referred to CPS because of the child's report that the grandmother had "spanked" her with a belt. After an investigation, the charge was determined to be unfounded. Debra Miller, a family support worker, visited the home daily for 2 weeks, and Green continued the home visits thereafter.

According to Green, the original issues which led to CPS' involvement with this family remain unresolved. One issue was the grandmother's negative view of the child. Green testified that the grandmother referred to the child as a "liar, a manipulator, [and] a stealer." However, Green admitted that these are accurate descriptions of the child and that she has never heard the grandmother call the child these names or describe her as such in front of the child.

Another issue Green identified was the grandmother's lack of understanding of the connection between ADD and hyperactivity and the child's behavior. According to Green, the grandmother viewed the child's requests for attention and her constant talking as "hassling her." Green admitted that this is a fairly typical complaint of parents of children with ADD, at least initially. Green did not know what specific services had been offered to the grandmother to counsel and educate her regarding ADD.

Another of Green's concerns was that the grandmother locked the child in the child's bedroom at night. Apparently, this caused the child to have nightmares. The record does not show the exact circumstances surrounding this situation. Green did not know when this had happened, when the most recent incident was, or if this issue had been resolved.

A fourth concern was the grandmother's health. The grandmother is 66 years old and has arthritis and hypertension. Green testified that the grandmother moves "very, very slowly." This was a concern because of the possible inability of the grandmother to "unlock the door" if there was an emergency.

Finally, Green expressed concern about the child's apparent hoarding of food, which could indicate that she was not getting enough food. Miller had told Green that when the child would ask for a snack, the grandmother would deny it. Although Green thought the child was thin, she had not taken her to, or recommended, a medical doctor to determine if she was malnourished.

Green testified that she spoke with Frank, the psychiatrist, and Frank had concerns about the locking of the child in her room, the grandmother's inability to see a connection between ADD and the child's behavior, and the grandmother's lack of empathy. Green did not know how many sessions Frank had had with the family or what occurred at the sessions.

Green had interviewed the child, and she indicated to Green that she would like to live with her mother. The child thought that this would make the grandmother happy as well. Green also spoke with the child's schoolteachers. They did not indicate that the child was behaving negatively in school.

Green testified that in her opinion the situation was "very, very possibly explosive." According to Green, the child had at some point pushed the grandmother down. Green indicated that this was a "long haul situation" that had been going on for a long time. Green admitted that "[the grandmother] is right, this child's difficult to handle."

The child's aunt Denise and the grandmother denied the allegations that the grandmother has only negative interactions with the child and testified that the grandmother has a loving relationship with the child. The grandmother admitted that she has told the child she is a liar when the child has lied to her. She further testified that when confronted, the child would admit that she lied and state that she did not know why she had lied. The grandmother testified that if the child remains with her they will continue counseling.

In a written order dated May 24, 1995, the juvenile court found that "reasonable efforts," pursuant to Neb. Rev. Stat. § 43-254 (Reissue 1993), were made prior to the child's removal from the home and that return to the home at this time would be contrary to the child's welfare. The juvenile court therefore ordered that temporary custody of the child remain with DSS. This appeal timely followed.

ASSIGNMENTS OF ERROR

The grandmother assigns that the juvenile court erred when it found by a preponderance of the evidence that the continued detention of the child was necessary and when "it implied through its order of continued detention" that the child could possibly come within the meaning of § 43-247(3)(a) under such allegations as found in the petition.

STANDARD OF REVIEW

[1] An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by an appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

ANALYSIS

[2,3] We address whether the juvenile court erred when it found that continued detention was necessary. At a detention hearing, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in DSS pending adjudication. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). The circumstances required to be established for continuing to withhold a juvenile's custody from his or her parent or legal guardian pending adjudication are found in § 43-254:

> If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

See *In re Interest of R.G., supra.*

There appear to be some chronic problems that this family needs to address. This family may well benefit from some type of State intervention, and if adjudication ultimately occurs, it may serve a legitimate purpose. The grandmother does appear to have some difficulty dealing with and understanding the child's behavior and perhaps even interacting positively with her. She may not have always nurtured and empathized with the child. However, we acknowledge that raising children can be difficult and challenging, and raising children with special needs even more so.

The evidence does not show whether any or all of Green's initial concerns have been resolved or are ongoing. Green's testimony regarding her concerns is often conflicting, and there are no references to specific instances at specific times of improper parental care. It is noteworthy that the evidence does not show that since CPS' original decision to provide in-home services, the situation in this home has so degenerated as to support the child's placement outside the home at this point.

There is no event or series of events which enable us to conclude that it would be contrary to the child's welfare to allow her to remain with her grandmother pending adjudication, as required for continued detention pursuant to § 43-254.

The evidence also does not show what specific efforts were made by the State to prevent the need to remove the child from the grandmother's home. Green did not know what services Miller had provided in the first 2 weeks of home visits. Green also did not know what issues Frank was addressing in the counseling that the grandmother had sought for herself and the child. It is also not clear what attempts Green made to resolve her concerns regarding the grandmother.

For these reasons, we find that the evidence does not preponderate in favor of a conclusion that it would be contrary to the child's welfare to remain in the grandmother's home pending adjudication. We also find that the evidence does not preponderate in favor of a conclusion that the State made reasonable efforts prior to the child's removal to prevent the need for her removal. Therefore, we conclude that the State did not meet the requirements of § 43-254 to justify the child's continued detention pending adjudication.

We conclude that the juvenile court erred when it granted the detention order and continued the child's temporary custody with DSS pending adjudication. Since we conclude that the detention order should not have been granted, because the evidence was insufficient, we need not address the grandmother's remaining assignment of error.

For the reasons stated above, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF AMANDA H., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. VELMA S., APPELLEE, AND ROBERT H., APPELLANT.

542 N.W.2d 79

Filed January 16, 1996. No. A-95-666.

1. **Judgments: Jurisdiction: Appeal and Error.** Where 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. ____: ____: ____. Where a jurisdictional question rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly wrong.
3. **Juvenile Courts.** In a dependency action, the only inquiry is whether a child is in need of care which for any reason is not being provided.
4. **Juvenile Courts: Evidence: Jurisdiction.** If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.
5. **Juvenile Courts: Notice.** No summons or notice shall be required to be served on any person who shall voluntarily appear before the court and whose appearance is noted on the records thereof.
6. **Juvenile Courts: Jurisdiction: Parental Rights: Due Process.** If a parent is not accorded his or her due process rights, the parent can readily appear and ask the court to terminate jurisdiction upon a showing that the child is no longer in need of protection.
7. **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.
8. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
9. **Juvenile Courts: Parental Rights: Due Process.** A parent who is deprived of due process is entitled to litigate his rights anew without prejudice from the adjudication proceedings from which he was excluded.
10. **Juvenile Courts: Appeal and Error.** The failure of a juvenile court to recite a factual basis in an adjudication hearing constitutes plain error that results in damage to the integrity, reputation, and fairness of the judicial process.
11. **Juvenile Courts: Parental Rights: Jurisdiction.** The failure of the juvenile court to recite a factual basis for the adjudication at an adjudication hearing causes the juvenile court to lack jurisdiction to later terminate parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions to dismiss.

Craig H. Borlin for appellant.

James S. Jansen, Douglas County Attorney, and Mary M. Carnazzo for appellee State.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

In this juvenile proceeding, a child was adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) without the child's father being allowed to participate in the proceedings, being advised of his rights, or being accorded his right to counsel, in spite of the fact that he was present at all of the hearings. A year after the first hearing, a new judge became aware of the situation and appointed the father an attorney and allowed him to intervene. The father moved the court to dismiss the proceedings for lack of jurisdiction on the basis that he was not made a party. The trial court denied the motion, and the father appeals. We conclude that jurisdiction of the juvenile court under § 43-247(3)(a) is dependent upon whether the child is in fact in need of care at the commencement of the proceedings, and not on whether a parent is allowed to participate in the proceedings. However, we also conclude that the father's due process rights were seriously violated and that on the basis of plain error the initial adjudication proceeding was fatally flawed, and therefore, the court did not acquire jurisdiction of the child. Accordingly, we reverse the judgment and remand the cause with directions to dismiss the proceedings for lack of jurisdiction, without prejudice to the commencement of new proceedings.

PROCEDURAL BACKGROUND

On March 30, 1994, a deputy county attorney for Douglas County filed a petition alleging in substance that Amanda H., born on May 8, 1993, was found in Douglas County; that the child's mother, Velma S., resided at a specific Omaha address; that Amanda was currently in the custody of the Department of Social Services (DSS); and that Amanda is a child defined in § 43-247(3)(a) because she lacked proper parental care by reason of the faults or habits of Velma. The petition alleged that Velma suffers from manic depression and seizures which impair

her ability to care for Amanda and that she does not cooperate with her medical treatment. The State prayed for a summons to be served upon the "parent" and the persons having custody of the child, requiring them to appear before the court at a time and place stated. The child's father, Robert H., is not mentioned in the petition.

On April 7, 1994, a guardian ad litem was appointed for the child, and an attorney was appointed for Velma. The deputy county attorney had also filed a motion for temporary custody, alleging immediate and urgent necessity for the protection of the child. On April 13, DSS was ordered to take immediate custody of Amanda for placement in foster care. Both parents were present at the April 13 hearing and all of the subsequent hearings, and Velma always appeared with counsel. The judge advised her of all of the rights specified under Neb. Rev. Stat. § 43-279.01 (Reissue 1993) except the right to counsel.

The evidence at the temporary custody hearing consisted of the testimony of the case manager, Ellen Wilkins. Since most of our knowledge about the case is obtained from that hearing, her testimony will be summarized in greater detail than would normally be the case for the evidence adduced at a temporary custody hearing. Wilkins had been working with Velma and one of her other children since September 1992. Amanda was 10 months old at the time of the hearing. Wilkins testified that Velma voluntarily placed Amanda in foster care through DSS for 30 days, and this time had been extended twice. The child was placed in foster care because "[t]here were concerns; lack of housing and mom's mental condition, to include her psychological well-being." Wilkins testified, "She indicated to me that she was going to divorce her husband who she alleged was being physically abusive to her, and she did not have housing at that time."

In the course of her testimony, Wilkins reported that she had had conversations with "and/or" reviewed reports of a psychiatrist or psychologist. Wilkins then testified that Velma was supposed to be under treatment, but had not kept appointments. Wilkins reported Velma was seeing a psychiatrist at the Douglas County Hospital. Velma was seen by Dr. Michael Coy and Dr. Michael Kelly, a psychologist. By having

conversations with these individuals and reviewing their reports, Wilkins became aware that Velma "suffers from mental illness." Dr. Kelly diagnosed her as suffering from "major depression, single episode." Velma was supposed to be continuing in treatment and taking medication. Velma stated to Wilkins that in February 1994 she had not taken her medication, but had done so in the past month. Wilkins had knowledge that Velma was diagnosed as chemically dependent and that she was to refrain from drinking.

Wilkins testified that Velma suffers from seizures, and Velma told her that during the month of February 1994 she fell down the stairs. She has been told not to drive, but she does so anyway. Wilkins testified that Velma told her that Dr. Stan Moore, a psychologist, tested Velma; that he said her seizures were not caused by epilepsy but by stress; and that he took her off medication. In February, Velma said she had suicidal thoughts, and on several occasions Velma said she felt overwhelmed. This indicated that she suffered from depression and needed "inpatient ongoing supervision."

When foster care was started, Velma was supposed to find housing, participate in therapy, and file for divorce. Apparently, Velma also has an older child who is the subject of separate juvenile proceedings, and it appears that the conditions of the dispositional plan for that child were the same or similar to the voluntary foster care arrangement for Amanda. Wilkins testified that Velma did not comply, and they agreed on a 30-day extension. Velma then moved in with a friend, started drinking again, and was having seizures. She also stated to Wilkins that she was suicidal.

Wilkins testified that when Amanda came into foster care she was not "up to date on her immunizations," and she had a bald spot on the back of her head. She was not "up to snuff developmentally," that is, she was not able to sit up without being tied with a towel, but was able to sit upright by the time of the hearing. Wilkins would have expected her "to sit up on her own and do some of those things." (We observe that time elements indicate that Amanda came into foster care at 7 or perhaps 8 months of age.) She could not recommend that Amanda be allowed to go home with Velma at the time of the hearing.

On cross-examination, Wilkins admitted that she had no basis for her testimony regarding Velma's medical condition and treatment, other than what Velma had told her and the most recent psychological evaluation from February 1993. She did not know what "major depression, single episode" meant. Velma reported to her that Velma suffered from manic depression. The only report Wilkins had of Velma putting Amanda at risk was a report from a family support worker that Velma had left Amanda in her apartment and gone "across the way to do some laundry."

At the conclusion of the hearing, the court ordered Amanda detained by DSS temporarily, and Velma was given reasonable visitation, to be supervised because of "the mother's use of alcohol and her propensity to have seizures, which she herself, I presume, cannot control."

An adjudication hearing was held on August 24, 1994, after various continuances. Both parents were again present at that hearing; no witnesses were sworn. The judge stated, "And you originally had a detention hearing, is that right, at which time I told you what your rights were. Do you remember that, mother?" Velma said she had no questions about her rights.

> THE COURT: So after talking to your lawyer, do you wish to admit or deny these charges?
>
> [VELMA]: I admit these charges.
>
> THE COURT: He showed you the paper with that one line drawn through, right? So in other words, you're telling me the children lack proper parental care by reason of your faults or your habits in that you suffer from depression and seizures which impair your ability to care for the child, right?
>
> [VELMA]: Yes.
>
> THE COURT: And that you do not always cooperate with your medical treatment. That means you don't do what the doctor tells you to do all the time; is that correct? That's true?
>
> [VELMA]: That's true.

The judge then quizzed Velma why and to what extent she failed to follow her doctor's direction and about her doctor, her medication, and her injured arm. In the course of the colloquy,

Velma stated that she was living with her husband at the Open Door Mission, but they were planning to move to a two-bedroom apartment. Velma referred to "Bob, that man sitting right there," and the judge replied, "Well, he's not involved in the case. This all reads from your viewpoint, okay?"

The judge then asked: "And admitting this, you know that your child will remain in foster care until the foreseeable future until we can get back on an even keel?" At the end of the hearing, a lawyer told the judge that Robert desired to speak to the court. He asked for visitation, and the judge told him he would have to take that up with the guardian ad litem and Wilkins and, if no agreement could be reached, to come back.

In the order issued after that hearing, the court found, among other items, that Amanda is a child "within the meaning of Section 43-247(3a) . . . by a preponderance of the evidence based on the admission plea entered herein and accepted by the Court."

A journal entry shows a dispositional hearing was held on October 21, 1994, and as a result, the court ordered custody of Amanda to remain with DSS and ordered Velma to do certain things such as obtain her own housing and appropriate income and get treatment and counseling for her chemical dependency and treatment for "her existing medical issues." The court also ordered that the "family" be allowed reasonable rights of visitation to be supervised and arranged by DSS.

A different judge handled the later hearings. At a review hearing held on April 18, 1995, Wilkins testified, and at the end of the hearing Robert asked to be heard. This made the judge aware that Amanda's father was present, that he was married to Velma, and that they were living together. The judge inquired why he was not mentioned in the pleadings, and the guardian ad litem stated: "I'm just saying they haven't been physically together consistently throughout these proceedings. In and around at the time of the petition being filed, [Robert] was in South Dakota and Velma was maintaining a residence in Omaha." The replacement judge announced he would appoint Robert counsel upon the filing of a proper poverty affidavit.

In the journal of that hearing, the court found reasonable efforts had been made, but the best interests of the child

required temporary custody to be in DSS. Velma was allowed reasonable supervised visitation rights to "occur on a weekly basis for one hour." The order stated, "The Court further notes that this matter is referred to the County Attorney's Office and to the Guardian ad Litem to be taken under advisement and reviewed for possible termination of parental rights."

On May 4, 1995, Robert's court-appointed attorney filed a motion to intervene and a motion requesting the court to terminate jurisdiction. A hearing was held May 26. No evidence was adduced, and at the conclusion, the court granted the motion to intervene, but denied the motion to terminate jurisdiction. Robert appeals from the latter order.

ASSIGNMENTS OF ERROR

Robert alleges the trial court erred (1) in finding that it had jurisdiction over Amanda; (2) in ordering custody in DSS when a "non-petitioned custodial parent" was present at the hearing of April 13, 1994, and all subsequent hearings; (3) in denying his motion to terminate jurisdiction; and (4) in finding that the "non-petitioned custodial parent" must show the court that he is a fit parent before ordering custody from DSS to that parent.

STANDARD OF REVIEW

[1,2] The following rule controls the standard of review in this case:

> [W]here 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, *Wagner v. Unicord Corp., ante* p. 217, 526 N.W.2d 74 (1995); however, where such a question rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly wrong . . . .

In re Interest of Constance G., 247 Neb. 629, 632, 529 N.W.2d 534, 537-38 (1995).

In this case, there is no factual dispute, at least not that affects the question of jurisdiction. We are therefore confronted with a question of law and must reach a conclusion independent of the trial court.

DISCUSSION

As a general proposition, we note the unsatisfactory record in this case. The only factual information in the record before the adjudication order is the rather vague testimony of Wilkins at the temporary custody hearing held on April 13, 1994, and the few admissions the judge elicited from Velma during her interrogation at the August 24, 1994, hearing. The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts. Probably, the judge and the attorneys were aware of many facts from hearings involving Velma's other child, or from consultations in chambers, but the record is practically devoid of any properly established facts. For instance, we know where Robert was at the time the petition was filed only by the assertion of the guardian ad litem to the judge at the April 18, 1995, hearing. The record of the adjudication hearing does not make sense unless the reader is aware of the testimony at the temporary custody hearing. No factual basis was given at the adjudication hearing.

We also note that no evidence or stipulations were offered at the hearing of May 26, 1995, although the attorneys included in their arguments such facts as they thought significant to the judge's decision on the motion to intervene and the motion to terminate jurisdiction. We caution that this is not the proper procedure for any motion requiring facts as the premise for some act by a judge at a hearing.

Procedural Jurisdiction.

The basis of Robert's claim that the trial court lacked jurisdiction is that the petition alleges that Amanda was a child lacking proper parental care by reason of the faults or habits of Velma, but it contains no allegations against him, and the petition did not make him a party or give him any notice that his rights were affected. Hence, he argues that the juvenile court did not acquire jurisdiction over Amanda or him and that he is entitled to the custody of Amanda because he is her father.

We note that in his assignments of error Robert refers to a "non-petitioned custodial parent." We understand that by the "non-petitioned" part of that expression Robert is referring to

a parent who is not included as a party in the operative petition upon which the jurisdiction of the juvenile court is based. In that sense, Robert was clearly a "non-petitioned" parent. However, the "custodial" parent part of Robert's designation is not established by any evidence. And such record as we have clearly shows that Amanda was in the custody of DSS for at least 60 days and perhaps 90 days before the petition was filed and that Velma had sole custody of Amanda for at least some time before DSS.

For purposes of considering the effect of the failure to make Robert a party, we shall assume that the petition states facts which if proved would give the juvenile court jurisdiction and that these facts were proved at the adjudication hearing. Section 43-247(3)(a) gives the juvenile court jurisdiction over any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent.

[3,4] The recent case *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995), gives some guidance. In that case, the mother admitted the allegations under § 43-247(3)(a), and the father pled no contest, to the effect that the child was homeless and destitute, or without proper support through no fault of his or her parents, guardian, or custodian. In *In re Interest of Constance G.*, 3 Neb. App. 1, 520 N.W.2d 784 (1994), this court had held the juvenile court lacked jurisdiction because there was insufficient evidence with regard to the father. In *In re Interest of Constance G., supra*, the Supreme Court reviewed the authorities and concluded the rule is: "In a dependency action, the only inquiry is whether a child is in need of care which for any reason is not being provided." 247 Neb. at 633, 529 N.W.2d at 538. We think this ruling must be read in light of previous rulings to this effect: "If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused." *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 1030, 480 N.W.2d 160, 161-62 (1992).

[5] Neb. Rev. Stat. § 43-263 (Reissue 1993) provides that upon filing the petition, summons shall be served upon "the person who has custody of the juvenile or with whom the

juvenile may be staying." Neb. Rev. Stat. § 43-265 (Reissue 1993) provides: "If the person so summoned under section 43-263 is other than a parent or guardian of the juvenile, then the parent or guardian or both, if their residence is known, shall also be notified of the pendency of the case and of the time and place appointed . . . ." Neb. Rev. Stat. § 43-262 (Reissue 1993) provides in part: "No summons or notice shall be required to be served on any person who shall voluntarily appear before the court and whose appearance is noted on the records thereof." The record of each of the several hearings shows that Robert was present. We therefore conclude that the juvenile court acquired jurisdiction without service upon Robert.

[6] Section 43-247 provides in significant part: "[T]he juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual . . . ." Since the juvenile court acquired jurisdiction, it is not required to divest itself of jurisdiction upon a motion showing that the proceedings were not instituted against the parent. We also conclude that this result is necessary because if a child is in need of protection, then the juvenile court should first and foremost look to the protection of the child, even if the proper persons were not notified or allowed to participate. However, this is not to say that the adjudication has any effect upon the rights of the excluded parent. If a parent is not accorded his or her due process rights, the parent can readily appear and ask the court to terminate jurisdiction upon a showing that the child is no longer in need of protection.

In this particular case, Robert did not make any showing that Amanda was no longer in need of protection, and therefore the fact that he was made a party is not in and of itself sufficient to require the juvenile court to terminate jurisdiction.

Robert's Due Process Rights.

The above is not to say that Robert's due process rights were not seriously violated or that he does not have a remedy. A parent deprived of his or her due process rights with regard to a child will always have a remedy.

[7,8] The constitutional rights of parents are well known, but a summary of some of the applicable principles will put those rights in perspective. "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, 284, 455 N.W.2d 138, 144 (1990). The relationship between a parent and child is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). "The concept of due process embodies the notion of fundamental fairness and defies precise definition . . . ." *In re Interest of L.V.*, 240 Neb. at 413, 482 N.W.2d at 256–57.

Section 43-279.01(1) provides in significant part:

> When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences . . . ;
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
>
> (c) Right to remain silent . . . ;
>
> (d) Right to confront and cross-examine witnesses;
>
> (e) Right to testify and to compel other witnesses to attend and testify;
>
> (f) Right to a speedy adjudication hearing; and
>
> (g) Right to appeal and have a transcript or record of the proceedings for such purpose.

The record clearly shows that Robert was never notified of these rights at any time, and the initial trial judge told him in effect that he had nothing to do with the proceedings. The record shows that at the April 13, 1994, hearing the initial judge gave Velma a reasonable explanation of these rights, except the right to counsel. However, the court addressed these remarks solely to Velma, and in no sense can these remarks be considered to have advised Robert of his rights. At the adjudication

hearing, the judge told Velma in the presence of Robert, "Well, he's [Robert's] not involved in the case." At the end of the first disposition hearing, the guardian ad litem expressed the opinion that Robert was the father and therefore a party and that "[m]y concern is down the road the big picture is taking care . . . ." To which the judge replied, "I know what you're concerned about. We'll take it up in chambers. It's got nothing to do with this child as filed."

We share the guardian's concern. If on one hand the father is capable of caring for the child, he is being deprived of a constitutionally protected right to his child. If on the other hand he is not capable of caring for the child, the welfare of the child and the rights of the public to an efficient disposition of such juvenile matters are adversely and seriously affected. One does not need to have great familiarity with juvenile matters to realize that a great many of the proceedings under § 43-247(3)(a) end in a termination proceeding based upon Neb. Rev. Stat. § 43-292(6) and (7) (Reissue 1993) (providing for termination upon grounds that parent failed to correct conditions leading to determination under § 43-247(3)(a)). When a known parent claiming to be willing and able to care for a child is excluded from the proceeding, that proceeding cannot be used as a basis for terminating that parent's rights under § 43-292(6) and (7).

It seems self-evident that Robert was not treated with fundamental fairness. In fact, until a new judge became aware of the situation more than a year after the first hearing, Robert was only treated by being excluded. In *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992), the Supreme Court stated that parents are deprived of due process by the trial court's failure to tell them of the possibility of the termination of their parental rights and advise them of their right to have counsel. In the case *In re Interest of A.D.S. and A.D.S.*, 2 Neb. App. 469, 511 N.W.2d 208 (1994), this court held a parent's due process rights were violated when the parent was not given the explanation required under § 43-279.01(1), and the cause was remanded for a new adjudication hearing.

[9] It seems clear that a parent who is deprived of due process is entitled to litigate his rights anew without prejudice from the adjudication proceedings from which he was excluded.

Lack of Jurisdiction of Amanda.

This proceeding has even more serious flaws than the failure to allow the father to participate in the proceeding.

The petition alleges Amanda is lacking proper care by reason of the faults or habits of Velma in that Velma "suffers from manic depression and seizures which impair her ability to care for said child; she does not cooperate with her medical treatment." Velma admitted "the charges." She said yes to the question: "[Y]ou're telling me the children lack proper parental care by reason of your faults or your habits in that you suffer from depression and seizures which impair your ability to care for the child, right?" Velma admitted she does not always follow her doctor's prescribed treatment. She admitted, "I have suicidal seizures and epileptic seizures." Velma said that she was living at the Open Door Mission, but that "within a month we're planning on moving out to 83rd and Maple." She also admitted Amanda is "approximately a year old." At the end of her interrogation, Velma answered yes to the question, "Now, you're admitting these things because they really indeed happened, right?" and no to the question, "Nobody's forcing you to do something against your will?"

Section 43-279.01(2) provides with respect to adjudications under § 43-247(3)(a):

> After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. *The court shall ascertain a factual basis for an admission or an answer of no contest.*

(Emphasis supplied.)

We are unable to locate any recitation of the factual basis for the finding that Amanda was a juvenile defined in § 43-247(3)(a), nor are we able to find any evidence, stipulations, or statements in the record which would support such a finding. Velma admitted to conclusions contained in the petition.

[10,11] With regard to the failure of a trial court to find a factual basis, the Supreme Court has held that the failure of a juvenile court to recite a factual basis in an adjudication hearing

constitutes plain error that results in damage to the integrity, reputation, and fairness of the judicial process. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). In *In re Interest of D.M.B.*, the Supreme Court went on to conclude that the failure of the juvenile court to recite a factual basis for the adjudication at an adjudication hearing caused the juvenile court to lack jurisdiction to later terminate parental rights. We think that in the case at hand it was plain error for the trial court to claim jurisdiction of Amanda because it failed to recite the factual basis for jurisdiction and that therefore the father's motion for termination of jurisdiction should have been granted.

This particular case has another troubling jurisdictional aspect. The allegation is that Amanda lacks proper parental care by reason of the faults or habits of her mother, Velma, in that Velma suffers from manic depression and seizures. We are loath to accept any finding of a fact which is based upon the premise that if a person suffers from recognized medical conditions, such as manic depression, major depression, and seizures, then that parent is not going to give his or her children proper care. The record contains no evidence showing how Velma's medical problems affect her ability to care for Amanda, and the evidence shows that her seizure problem caused Velma to fall once.

There is also a question of whether a particular mental condition is the fault of the person suffering from it. Section 43-247(3)(a) allows proceedings involving a juvenile "who is homeless or destitute, or without proper support through no fault of his or her parent." We realize that people that suffer from mental illness may have faults or habits which endanger their children and in the proper condition might allow the court to take jurisdiction under § 43-247(3)(a), but we seriously dispute any notion that proof that a person suffers from the conditions known as depression or seizures is proof that that person is incapable of giving his or her children proper care.

In this case, the State established Velma's medical condition by her admissions that she suffered from depression and seizures. Even if one includes the testimony of Wilkins at the previous hearing, that testimony establishes nothing other than that unknown doctors and the parent of questionable education

said she suffers from depression and seizures. There is no evidence as to how the symptoms of either disease manifest themselves in Velma, or generally in members of the public who suffer from those diseases, or how Velma is unable to care for Amanda because of these medical conditions.

The evidence also suggested that Velma had an alcohol and drug abuse problem, but again the evidence does not establish the nature and extent of Velma's problem with substance abuse or if the problem was great enough to endanger Amanda. The record leads one to believe that Velma has had habits that might support a finding that Amanda will lack proper care by reason of Velma's faults or habits, but no such evidence was introduced. Instead, the State rested on proof of Velma's admission to suffering "from manic depression and seizures."

We therefore conclude that the adjudication hearing did not give the juvenile court jurisdiction over Amanda. We also realize that it is quite likely that a proper hearing could establish that Amanda is in danger of not receiving proper care. We therefore direct that the juvenile court dismiss the proceedings, but that such dismissal shall be without prejudice to any new proceedings if the facts at the time of the filing of new proceedings justify such proceedings.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

TONY E. MATHIS, APPELLEE, V. LINDA S. MATHIS, APPELLANT.
542 N.W.2d 711

Filed January 30, 1996. No. A-94-438.

1. **Divorce: Appeal and Error.** In marital dissolution proceedings, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the issues.

3. **Judgments: Final Orders.** A conditional order is void because it does not operate in praesenti, and thus it leaves to speculation and conjecture what its final effect may be.
4. **Alimony.** Installments of alimony become vested as they accrue, and courts are generally without authority to retroactively cancel or reduce accrued amounts.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

Robert J. Hovey, P.C., for appellant.

Tony E. Mathis, pro se.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Appellant seeks review of a district court accounting of alimony arrearages. The district court, after computing appellee's alimony obligation over the previous several years, determined that appellant had been overpaid and ordered appellant to reimburse appellee for the overpayment. Appellant alleges the district court used the wrong monthly amounts when computing appellee's alimony obligation. Because we find that the district court committed error in computing appellee's alimony obligation and in ordering appellant to reimburse appellee, we reverse, and remand for further proceedings.

II. FACTUAL BACKGROUND

The marriage of appellant, Linda S. Mathis, and appellee, Tony E. Mathis, was dissolved on April 2, 1984, when the district court entered a final decree of dissolution. At the time of dissolution there was one minor child of the marriage. The decree awarded custody of the minor child to Linda and granted reasonable visitation rights to Tony along with an obligation to pay child support. Tony was further ordered to pay $150 per month alimony.

On June 4, 1985, Tony filed an application seeking a modification of the decree. Tony alleged Linda had denied him reasonable visitation, and he requested that the court terminate his alimony obligation. On September 4, the district court

entered an order modifying Tony's alimony obligation. The order provided in part:

> [T]he Court upon the oral stipulation of both parties finds as follows:
>
> 1. That the Petitioner's alimony obligation of One Hundred Fifty Dollars ($150.00) per month under the original Decree entered herein should be temporarily reduced to Seventy-Five Dollars [$75] per month to be effective August 1, 1985. Said reduction should continue until June 1, 1986, and continue after aforesaid date until the Petitioner obtains fulltime employment or part-time employment paying him a gross wage equal to or greater than Twelve Hundred Dollars ($1,200.00) per month. If aforesaid employment conditions are met, the alimony should be increased to One Hundred Fifty Dollars ($150.00) per month effective on the month following the meeting of the aforesaid condition.

Almost 4 years later, on April 11, 1989, Linda filed a pleading captioned "Application to Determine Arrearage and Modify Decree." Linda alleged that Tony had met the employment condition of the September 1985 modification order, but that he had not increased the alimony payments to $150 per month as decreed in the September 1985 order. Linda requested a determination of the arrearage. On June 1, 1989, Tony filed an answer to Linda's pleading, in which he denied that the employment condition of the September 1985 order had been satisfied.

On August 27, 1990, a hearing was conducted by the district court to determine the merits of Linda's application to determine the arrearage. Tony did not appear for the hearing. The court issued an order on September 11 finding that Tony "obtained . . . employment paying him a gross wage equal to or greater than [$1,200] per month on June 1, 1986" and that Tony "should pay [$150] per month alimony effective June 1, 1986 when [Tony] met the aforesaid employment condition." The court ordered Tony to pay $150 per month alimony commencing on September 1, 1990, and continuing until February 1, 1994. The court further ordered the clerk of the

district court to "determine the arrearage of said alimony in consideration of the foregoing findings."

Subsequent to the September 1990 order, Tony failed to consistently make his alimony payments. On June 1, 1992, Linda filed a transcript of the September 1990 order with the district court and secured a judgment lien against Tony's real estate for the amount in arrears. On September 22, 1993, the district court issued an order releasing the judgment lien against Tony's property on the condition that any proceeds from the sale of the property be placed in escrow with the district court until an accounting could be accomplished. On October 4, the district court received a check in the amount of $8,443.66 from the sale of Tony's real property. The clerk of the district court paid the entire sum to Linda before the accounting was accomplished.

On December 29, 1993, the district court conducted a hearing to determine the amount of arrearage from Tony's failure to pay alimony. The matter was continued for additional hearing until February 10, 1994. Among the matters argued to the court during this hearing was the amount of alimony Tony had been obligated to pay during the period of June 1, 1986, through September 1, 1990. Linda argued that the court, in the September 1990 order, had interpreted the September 1985 modification order as requiring Tony's alimony obligation to increase immediately upon satisfaction of the employment condition and that the court, in the September 1990 order, had ordered that Tony was responsible for arrearages between June 1, 1986, and September 1, 1990, computed at $150 per month. Tony argued that the court had ordered the alimony obligation to increase to $150 per month effective September 1, 1990, and that the arrearages between June 1, 1986, and September 1, 1990, should be computed at $75 per month.

On March 30, 1994, the district court issued an order. The court declared that the clerk of the district court had made an unauthorized payment of $8,443.66 to Linda before the court had completed an accounting to determine the amount of money she was entitled to receive. The court further determined that Tony's alimony obligation was reduced to $75 per month for the period of September 1, 1985, through August 1, 1990, and that

Tony's alimony obligation was increased to $150 per month commencing on September 1, 1990. Based upon these findings, the court determined that Linda had been overpaid $6,589.69 when she received the check from the clerk of the district court. The court ordered Linda to reimburse Tony in that amount. This appeal followed.

III. ASSIGNMENT OF ERROR

Linda's brief in this appeal designated five assignments of error, which we have consolidated into one. Linda alleges the district court committed error by computing Tony's alimony obligation between June 1, 1986, and September 1, 1990, at a rate of $75 per month instead of $150 per month.

IV. STANDARD OF REVIEW

[1] In marital dissolution proceedings, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Garrett v. Garrett*, 3 Neb. App. 384, 527 N.W.2d 213 (1995). The awarding of alimony is a matter entrusted to the discretion of the trial judge, and, on appeal, the trial judge's decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Thiltges v. Thiltges, supra.*

[2] 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 issues. *Id.* If the evidence as presented by the record is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge had the opportunity to hear and observe the witnesses and accepted one version of the facts rather than another. *Id.*; *Jirkovsky v. Jirkovsky, supra.*

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Jirkovsky v. Jirkovsky, supra.*

V. ANALYSIS

1. 1985 Modification Order

(a) Conditional Order

The modification order entered by the district court on September 4, 1985, provided in part:

> [T]he Petitioner's alimony obligation of One Hundred Fifty Dollars ($150.00) per month under the original Decree entered herein should be temporarily reduced to Seventy-Five Dollars [$75] per month to be effective August 1, 1985. Said reduction should continue until June 1, 1986, and continue after aforesaid date until the Petitioner obtains fulltime employment or part-time employment paying him a gross wage equal to or greater than Twelve Hundred Dollars ($1,200.00) per month. If aforesaid employment conditions are met, the alimony should be increased to One Hundred Fifty Dollars ($150.00) per month effective on the month following the meeting of the aforesaid condition.

A portion of this order is clearly a conditional order. The language of the district court providing that the reduction of Tony's monthly alimony obligation should continue "until [Tony] obtains . . . employment paying him a gross wage equal to or greater than [$1,200] per month" and that the alimony obligation would increase "[i]f aforesaid employment conditions are met" is conditional. To the extent that the September 1985 modification order is a conditional order, it is void.

The Nebraska Supreme Court has held conditional orders void in a wide variety of contexts. See, e.g., *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995) (conditional order that fines for violation of misdemeanor nuisance ordinances would be reduced to undetermined amount if defendant cleaned up property is void); *County of Sherman v. Evans*, 247 Neb. 288, 526 N.W.2d 232 (1995) (conditional order purporting to automatically dismiss action upon party's failure to act within set time is void); *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992) (Nebraska Motor Vehicle Industry Licensing Board order terminating franchise agreements effective when replacement dealer found is not final, appealable

order); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992) (conditional order purporting to automatically dismiss action upon party's failure to act within set time is void); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991) (punitive contempt sanction conditioned upon future failure to pay child support is void); *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991) (judgment providing for civil contempt penalty for future failure to comply with decree within limited period of time is void); *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989) (order suspending driver's license if evidence of compliance with citation not received by Department of Motor Vehicles within limited period of time is void).

[3] A conditional order is void because it does not operate in praesenti, and thus it leaves to speculation and conjecture what its final effect may be. *Village of Orleans v. Dietz, supra*; *Garber v. State, supra*; *Schaad v. Simms, supra*; *Maddux v. Maddux, supra*; *Romshek v. Osantowski, supra*. See, also, *County of Sherman v. Evans, supra*; *State v. Wessels and Cheek, supra*. A judgment determines the rights and obligations which currently exist between the parties, and it should not look to the future in an attempt to judge the unknown. *Village of Orleans v. Dietz, supra*; *Romshek v. Osantowski, supra*.

The language of the September 1985 order in the present case stating that the reduction of Tony's monthly alimony obligation should continue "until [Tony] obtains . . . employment paying him a gross wage equal to or greater than [$1,200] per month" and that the alimony obligation would increase "[i]f aforesaid employment conditions are met" leaves to speculation and conjecture what its final effect may be. Also, the order does not indicate whether Tony is to notify the court or Linda when the employment condition is satisfied, nor does it provide for an alternative means for the court or Linda to be made aware of the satisfaction of the condition. The order does not provide for any way of determining when the event will occur, if ever, and merely leaves to speculation how the parties are to be apprised of Tony's situation and how the court can enforce the requirement that Tony pay more alimony when the employment

condition is satisfied. Therefore, to the extent the September 1985 order is conditional, it is void and of no effect.

(b) Definite Order

The September 1985 order is valid, however, to the extent that it provides that Tony's alimony obligation "should be temporarily reduced to [$75] per month to be effective August 1, 1985," and that "[s]aid reduction should continue until June 1, 1986," and is not conditioned upon Tony's securing employment paying him $1,200 per month. But see *Village of Orleans v. Dietz, supra* (where entire order was subject to modification upon occurrence of condition, entire order was conditional and order was wholly void). The September 1985 order, therefore, provided for a temporary modification of Tony's alimony obligation to $75 per month until June 1, 1986, at which time the alimony obligation returned to $150 per month.

Although we are unable to find any Nebraska Supreme Court case specifically addressing the propriety of temporarily modifying alimony for a fixed period of time, we note that a temporary modification of child support was apparently affirmed in *Ferguson v. Ferguson*, 224 Neb. 763, 401 N.W.2d 165 (1987). Additionally, other jurisdictions have approved of temporary modifications of alimony. See, e.g., *In re Marriage of Ward*, 740 P.2d 18 (Colo. 1987) (temporary modification of maintenance award within discretion of trial court); *Taylor v. Taylor*, 8 Ark. App. 6, 648 S.W.2d 505 (1983) (trial court may order temporary modification of alimony). See, also, *In re Marriage of Betts*, 172 Ill. App. 3d 742, 526 N.E.2d 1138 (1988) (2-month reduction of child support obligation). Although we are not reviewing this order on appeal, it does not appear that the district court abused its discretion in temporarily modifying Tony's alimony obligation to $75 per month from August 1985 to June 1986.

The September 1985 order is, to the extent it is a conditional order, void and of no force and effect. To the extent the September 1985 order provides for Tony's alimony obligation to be temporarily reduced until June 1986, it is valid, and Tony's alimony obligation returned to $150 per month effective June 1, 1986.

2. 1990 Order

On April 11, 1989, Linda filed a pleading captioned "Application to Determine Arrearage and Modify Decree," alleging Tony was in arrears with regard to his alimony payments. Linda alleged that the employment condition of the September 1985 modification order had been satisfied and that Tony was therefore obligated to increase his alimony payments to $150 per month, but that Tony had not done so. Linda sought enforcement of the September 1985 order and a determination of the amount of arrearage. On June 1, 1989, Tony answered Linda's application and denied that the employment condition had been satisfied.

On August 27, 1990, the district court conducted a hearing on Linda's application. Tony failed to appear for the hearing. On September 11, the court entered an order finding that the employment condition had been satisfied on June 1, 1986, and that Tony should have increased his alimony payments to $150 per month beginning on June 1, 1986. The court ordered Tony to pay $150 per month effective September 1, 1990, and ordered the clerk to determine the arrearages consistent with the court's findings.

To the extent the September 1990 order can be read as enforcing the conditional portion of the September 1985 order, it is invalid because it enforces a void order. See, *County of Sherman v. Evans*, 247 Neb. 288, 526 N.W.2d 232 (1995); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989) (void order has no effect). To the extent the September 1990 order determined that Tony's alimony obligation should have returned to $150 per month effective June 1, 1986, it is consistent with our findings above interpreting the September 1985 order.

3. 1994 Order

[4] Installments of alimony become vested as they accrue, and courts are generally without authority to retroactively cancel or reduce accrued amounts. See, Neb. Rev. Stat. § 42-365 (Reissue 1993) ("[*u*]*nless* amounts have accrued prior to the date of service of process on a petition to modify, orders

for alimony may be modified or revoked for good cause shown" (emphasis supplied)); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985); *Wolter v. Wolter*, 183 Neb. 160, 158 N.W.2d 616 (1968). See, also, *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990) (courts generally without authority to retroactively modify child support obligations); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995) (generally courts are without authority to reduce amounts of accrued payments).

Because the arrearages should have been computed at $150 per month commencing June 1, 1986, the district court committed prejudicial error by computing the arrearages at $75 per month from June 1, 1986, through September 1, 1990. This error rises to the level of an abuse of discretion.

VI. CONCLUSION

Finding that the original modification order was, in part, a conditional order, we hold that the alimony obligation was temporarily modified to $75 per month until June 1, 1986. On June 1, 1986, the obligation returned to $150 per month. Finding the district court abused its discretion by computing arrearages at $75 per month from June 1, 1986, to September 1, 1990, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SWAIN CONSTRUCTION, INC., APPELLANT, V. READY MIXED CONCRETE CO. AND LYMAN-RICHEY CORPORATION, APPELLEES.

542 N.W.2d 706

Filed January 30, 1996. No. A-94-507.

1. **Jurisdiction: Appeal and Error.** After an appeal is perfected, the trial court is generally divested of jurisdiction over the case until an appellate court renders a final determination, which ordinarily occurs when the appellate court issues its mandate.

2. ____: ____. An appellate court has jurisdiction to determine whether it has jurisdiction.
3. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has a duty to determine whether the lower court had the power to enter the judgment or order sought to be reviewed.
4. **Jurisdiction: Appeal and Error.** While a case is on appeal, the trial court ordinarily cannot take action in the case, and in order for the inferior court to reacquire jurisdiction, it must take action on an appellate court's mandate.
5. ____: ____. Action taken pursuant to a Nebraska Supreme Court opinion prior to the issuance of the Nebraska Supreme Court's mandate is inappropriate because the opinion is not a final determination of the matter until a mandate has been issued.
6. **Jurisdiction: Time: Costs: Appeal and Error.** A mandate is issued in cases where the Nebraska Supreme Court or Nebraska Court of Appeals has determined that the appellate court lacked jurisdiction, and the issuance of the mandate follows the opinion or order of dismissal by a time sufficient to permit the filing of the motions provided for in Neb. Ct. R. of Prac. 14A(1) (rev. 1992) and the taxing of costs pursuant to rule 14B(1).
7. **Jurisdiction: Appeal and Error.** Although the dismissal of an appeal for lack of jurisdiction may be evident from the substance of an appellate court's opinion or order, the dismissal is not accomplished until the issuance of the mandate.
8. ____: ____. The general policy in Nebraska is against concurrent jurisdiction of trial and appellate courts.

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

Monte Taylor, of Taylor, Connolly & Kluver, for appellant.

Neil B. Danberg, Jr., and Conal L. Hession, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Plaintiff-appellant, Swain Construction, Inc. (Swain), appeals the May 16, 1994, order of the district court for Douglas County, Nebraska, which dismissed Swain's petition against defendants-appellees, Ready Mixed Concrete Co. and Lyman-Richey Corporation (collectively Ready Mixed). For the reasons recited below, we dismiss for lack of jurisdiction.

PROCEDURAL HISTORY

Swain filed its petition against Ready Mixed on January 7, 1994. Swain alleged two theories of recovery in the petition: (1) tortious interference with a business relationship or expectancy

and (2) unlawful restraint of trade under Neb. Rev. Stat. § 59-805 (Reissue 1993) (part of the Junkin Act). Ready Mixed demurred to Swain's petition on February 7, contending that Swain's petition failed to state a cause of action upon which relief may be granted. After a hearing on the demurrer on February 22, the district court sustained the demurrer and gave Swain 2 weeks to file an amended petition. Swain did not amend its petition within the 2-week period following the demurrer or at a later date.

On March 21, 1994, Swain appealed the district court's ruling sustaining the demurrer to this court (first appeal). On May 5, this court summarily dismissed Swain's appeal under Neb. Ct. R. of Prac. 7A(2) (rev. 1992) for lack of jurisdiction, as the district court's sustaining of the demurrer without an order of dismissal did not constitute a final, appealable order. Prior to the June 10 issuance of the mandate by this court, on May 16, the district court dismissed Swain's petition, making this notation in its journal: "Amended Petition having not been filed within time limit, case is dismissed." On May 18, Swain filed its current appeal with this court (second appeal). The second appeal challenges the district court's actions in sustaining Ready Mixed's demurrer and in dismissing Swain's petition.

JURISDICTION

[1] Ready Mixed claims that this court does not have jurisdiction to hear Swain's second appeal because the district court's May 16, 1994, dismissal of Swain's petition prior to the issuance of this court's mandate regarding the first appeal is not a final, appealable order. The basis of Ready Mixed's contention is that due to Swain's first appeal, the district court did not reacquire jurisdiction of this case until after this court issued its mandate on June 10. Therefore, Ready Mixed argues that the district court did not have jurisdiction to dismiss this case on May 16, prior to the issuance of the mandate, in which case the dismissal would be null, void, and a nonfinal order from which Swain cannot appeal. Ready Mixed relies on *Chapman v. Universal Underwriters Ins.*, 549 So. 2d 679 (Fla. App. 1989), and similar cases in support of the contention that

an appellate court has jurisdiction to determine whether it has appellate jurisdiction and that such consideration deprives the trial court of jurisdiction to dispose of the case after an interlocutory appeal. Ready Mixed argues that the trial court is generally divested of jurisdiction over the case until an appellate court renders a final determination, which ordinarily occurs when the appellate court issues its mandate. See *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992). See, also, *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Ready Mixed thus contends that the trial court's order of dismissal of May 16, prior to the issuance of this court's mandate on June 10, was an extrajudicial act from which an appeal does not lie.

Swain argues that this court has properly acquired jurisdiction over its second appeal. Swain claims that the first appeal, taken from the sustaining of the demurrer, was an appeal from a nonfinal order which was not appealable and that an appeal from an order that is not appealable does not divest the trial court of jurisdiction over the case. Swain thus argues that the trial court retained jurisdiction of the case and properly exercised that authority in entering its order of dismissal on May 16, 1994, from which Swain now appeals. Swain relies on 5 Am. Jur. 2d *Appellate Review* § 424 at 172 (1995), in which it is stated that a "notice of appeal that is premature or patently frivolous is . . . insufficient to deprive the trial court of jurisdiction to proceed in the case." This proposition relies on the jurisprudence of several states, not including Nebraska. Swain also cites to *Doolittle v. American Nat. Bank of Omaha*, 58 Neb. 454, 78 N.W. 926 (1899), in which the trial court proceeded to try the case, notwithstanding the pendency of an error proceeding. *Doolittle* does not appear to be consistent with the more recent Nebraska cases referred to below disapproving of concurrent jurisdiction.

[2,3] The Nebraska cases consistently hold that an appellate court has jurisdiction to determine whether it has jurisdiction. See, e.g., *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). It has also been held that an appellate court has a duty to determine whether the lower court had the power

to enter the judgment or order sought to be reviewed. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). Thus, the Nebraska Supreme Court has found various orders by the trial courts entered after the perfection of the appeal to be nullities. See, e.g., *WBE Co., supra* (holding that trial court lacked jurisdiction to award attorney fees after perfection of appeal from prior order denying motion for new trial); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989) (holding that trial court lacked jurisdiction to strike party's written offer of proof regarding alleged irregularities in connection with jury deliberations after perfection of appeal on merits of case). For the sake of completeness, we note that contrary to the general policy against concurrent jurisdiction, certain actions of the trial court following perfection of an appeal have been treated as proper either by statute or case law. See, e.g., Neb. Rev. Stat. § 42-351(2) (Reissue 1993) (providing in dissolution actions that when appeals are pending, trial court may continue to make necessary orders regarding child custody, visitation, and support); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995); *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995) (holding that trial court may rule on in forma pauperis motion notwithstanding perfection of an appeal).

[4,5] A review of the Nebraska case law shows that while a case is on appeal, the trial court ordinarily cannot take action in the case, and "in order for the inferior court to reacquire jurisdiction, it must take action on [an appellate] court's mandate." *Joubert*, 246 Neb. at 299, 518 N.W.2d at 895. It has been stated that action taken pursuant to a Nebraska Supreme Court opinion prior to the issuance of the Nebraska Supreme Court's mandate is inappropriate because the opinion is "not a final determination of the matter until a mandate has been issued." *Leitz*, 239 Neb. at 910, 479 N.W.2d at 467. Thus, where the statutory language stated that an award of the Workers' Compensation Court cannot be enforced until it has become "conclusive upon the parties at interest," Neb. Rev. Stat. § 48-188 (Reissue 1988), the Nebraska Supreme Court stated that "[a] mandate from this court is required to reinvest

the compensation court with jurisdiction." *Leitz*, 239 Neb. at 910, 479 N.W.2d at 467.

[6,7] In connection with mandates, we note that Neb. Ct. R. of Prac. 2F(7) (rev. 1992) provides for this court to issue mandates only after the expiration of the time allowed for filing a petition for further review, which is the 30-day period following the order of this court. If the petition for further review is sustained, the mandate will not issue during the pendency of the appeal in the Nebraska Supreme Court or within 30 days after the appellate order. Neb. Ct. R. of Prac. 14A(1) (rev. 1992) provides that the mandate shall not issue during the time allowed for the filing of a motion for rehearing or petition for further review, or pending consideration thereof. Rule 14B(1) provides that certain costs shall be taxed and itemized on the mandate. A mandate is issued in cases where the Nebraska Supreme Court or this court has determined that the appellate court lacked jurisdiction, and the issuance of the mandate follows the opinion or order of dismissal by a time sufficient to permit the filing of the motions provided for in rule 14A(1) and the taxing of costs pursuant to rule 14B(1). Thus, although the dismissal of an appeal for lack of jurisdiction may be evident from the substance of an appellate court's opinion or order, the dismissal is not accomplished until the issuance of the mandate.

We are aware of the cases, consistent with the quoted language from the legal encyclopedia relied on by Swain, in which it has been held that where an appeal was from a nonappealable order, jurisdiction did not rest in the appellate court, and the trial court could proceed with the case. See, e.g., *U.S. v. Green*, 882 F.2d 999 (5th Cir. 1989); *Welch v. City of Evanston*, 181 Ill. App. 3d 49, 536 N.E.2d 866 (1989); *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (1984). We are also aware of *Szafranski v. Radetzky*, 31 Wis. 2d 119, 141 N.W.2d 902 (1966), in which the Supreme Court of Wisconsin concluded it had jurisdiction over an appeal challenging the sustaining of a demurrer with leave to replead. In *Szafranski*, the Supreme Court of Wisconsin stated that the sustaining of the demurrer was an appealable order and that the filing of appellate briefs by the appellees, in the absence of a motion to

dismiss the appeal, waived the appellees' potential challenge to appellate jurisdiction. We note that, in contrast to *Szafranski*, the Nebraska Supreme Court has clearly indicated that an order sustaining a demurrer with leave to replead, in the absence of an order of dismissal, is not a final order from which an appeal may be taken. *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992). In *Schaad*, the trial court sustained a demurrer with leave to replead. The plaintiffs appealed. The Nebraska Supreme Court in 1992 dismissed the appeal for lack of jurisdiction. The plaintiffs returned to the district court, obtained a dismissal, and filed a second appeal, the merits of which were ruled upon in 1994 in an opinion of this court. *Schaad v. Sims*, 94 NCA No. 16, case No. A-92-903 (not designated for permanent publication). Based on the foregoing, we find the non-Nebraska authority cited by Swain to be inconsistent with Nebraska jurisprudence.

We are aware of a line of cases in which the appeal lacked a final, appealable order and the appellate court awaited a final order and reinstated the appeal. See, e.g., *Knox v. Dick*, 99 Nev. 514, 665 P.2d 267 (1983); *Sloman v. Florida Power and Light Co.*, 382 So. 2d 834 (Fla. App. 1980); *Armes v. Louisville Trust Co.*, 306 Ky. 155, 206 S.W.2d 487 (1947). We are also aware of the cases that for the sake of efficiency and judicial economy conclude that notwithstanding the absence of an order of dismissal, where it is clear that the trial court intends a dismissal, the "deficiency in form" does not preclude an appeal. See *Fernald v. Maine State Parole Bd.*, 447 A.2d 1236, 1238 (Me. 1982). See, also, *Lovellette v. Southern Ry. Co.*, 898 F.2d 1286 (7th Cir. 1990). The outcomes in these cases are generally based on the invocation of the rules of civil procedure or local rules which provide for the appeal of a certified portion of a case or provide a mechanism for placing an appeal in limbo while awaiting a final order or judicially sanctioned solutions created for the stated purpose of judicial efficiency and do not serve as precedent in Nebraska.

[8] Under Nebraska jurisprudence, an appellate court has jurisdiction to determine if it has jurisdiction. An appellate dismissal based on lack of jurisdiction is followed by a mandate. The general policy in Nebraska is against concurrent

jurisdiction of trial and appellate courts. In the instant case, while the appeal of the nonfinal order was pending in this court, the trial court was without authority to enter an order of dismissal, even though the interlocutory appeal pending before this court was dismissed for lack of jurisdiction. This court had jurisdiction of the case to determine if it had jurisdiction and retained such jurisdiction until the issuance of the mandate, depriving the trial court of jurisdiction to dispose of the case during the pendency of the first appeal. The first appeal was, in effect, pending in this court on May 16, 1994, when the trial court ordered the case dismissed prior to issuance of this court's mandate on June 10. The second appeal, from the May 16 order of dismissal, is an appeal from an order which the trial court was not authorized to enter. An appeal from an extrajudicial order does not confer jurisdiction upon this court.

We recognize the potential efficiency, employed by some jurisdictions noted above, of permitting the trial court to somehow enter an order of dismissal during the pendency of an appeal, such as by maintaining the appeal in limbo or reinstating the appeal, thus converting a nonappealable order into an appealable order. Nebraska jurisprudence does not currently appear to provide this accommodation to the parties or the trial bench.

Because we find that the trial court's order of dismissal of May 16, 1994, was entered at a time that this case was pending before this court and that the order appealed from is a nullity, we conclude that we do not have jurisdiction to consider this appeal. Therefore, the appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

IN RE INTEREST OF ZACHARY L., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. GAIL L. AND ROBERT L., APPELLANTS.

543 N.W.2d 211

Filed February 6, 1996. No. A-95-391.

1. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.
2. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction may be raised sua sponte by an appellate court.
3. **Juvenile Courts: Parental Rights: Visitation: Final Orders.** An order terminating visitation is a final order.
4. **Jurisdiction: Time: Appeal and Error.** The timeliness of an appeal is a jurisdictional necessity and may be raised sua sponte.
5. **Juvenile Courts: Parental Rights: Collateral Attack: Jurisdiction: Final Orders.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. Such challenges should timely be made after adjudications, which are final orders.
6. **Jurisdiction: Time: Appeal and Error.** An appellate court has jurisdiction over those assignments of error that raise an issue with respect to that portion of an order entered within the 30 days preceding the perfection of the appeal that contradicts an order entered more than 30 days before the appeal was perfected, but not over the assignments of error which deal with those portions of the second order that were consistent with the first order.
7. **Juvenile Courts: Parental Rights: Final Orders.** The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Appeal dismissed.

Robert F. Martin, P.C., and Connie Kearney for appellants.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

Gail L. and Robert L., the parents of Zachary L., appeal from an order dated March 8, 1995, in which the juvenile court

(1) retained temporary custody of Zachary with the Department of Social Services (DSS), (2) continued to deny the parents visitation, (3) required them to pay $208 per month for Zachary's support, (4) required DSS to submit "long term foster home recommendations" by April 5, and (5) set a hearing for May 24. Since all of the assigned errors, except the alleged error concerning long-term foster care, relate to issues that were settled by previous orders of the court upon which the time for appeal has passed, and since the court had not ruled upon the long-term foster care issue, we conclude that we do not have jurisdiction over any of the matters appealed. We therefore dismiss the appeal without reaching the errors assigned.

PROCEDURAL HISTORY

We are supplied with a bill of exceptions that contains a record of only the March 8, 1995, hearing, but the transcript contains orders resulting from a temporary detention hearing, the adjudication hearing, the dispositional hearing, and postdispositional hearings, all of which are described later in this opinion. The record before this court may be summarized as follows:

On March 4, 1994, a temporary detention hearing was held which resulted in Zachary's temporary custody being placed with DSS, with his parents being allowed a minimum of three supervised visits per week. On March 8, 1994, the prosecuting attorney filed a petition alleging that Zachary, a minor born on September 4, 1991, was a child as defined under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) in that his parents neglected or refused to provide proper or necessary subsistence, education, or other care necessary for his health, morals, or well-being or that they are in a situation or engage in an occupation dangerous to his life or injurious to his health or morals.

In its journal entry of the June 8, 1994, adjudication hearing, the court found that when Zachary was removed from his home he required hospitalization and that medical testing showed Zachary was malnourished and deprived of emotional nurturing and love while in his parents' custody. The court found that Zachary was a child as described in § 43-247(3)(a) in that "the parents refuse to provide proper and necessary subsistence and

care necessary for the health of the juvenile and the juvenile was in a situation dangerous to his life and injurious to his health." The court also made general findings, ordered the child to remain in the custody of DSS, and ordered visitation to continue as previously ordered. The transcript shows that the adjudication order was appealed to the district court and affirmed by that court.

On August 3, 1994, a dispositional hearing was held. The juvenile court made only generalized findings and found that it could not approve any rehabilitation plan until the parents obtained a psychiatric evaluation. In summary, the court ordered (1) that Zachary's custody was to remain with DSS; (2) that the "Visitation Plan" was approved, subject to unsupervised visitation being allowed only upon written approval by the court; and (3) that the parents should obtain a psychiatric examination, become fully involved in individual and family therapy, follow the therapist's recommendations, utilize the services of a family support worker, complete the Boys Town parenting class, obtain an appropriate support system, develop a recreation and leisure plan meeting the approval of the case manager, utilize the services of a nutritionist if requested by the case manager, pay $208 per month for Zachary's support, and maintain medical and health insurance covering Zachary.

In an order dated October 26, 1994, the court made several general findings and then assented to the "Case Plan and Court Report and the Visitation Plan, which meet the reasonable requirements." That journal entry then goes on to order, in summary, that custody should remain with DSS, with the parents being allowed supervised visitation of at least 1 hour per week. The order also requires the parents to follow substantially the same procedures for therapy, child support, health insurance, nutrition, and the other directions as required by the order of August 3.

The transcript contains a journal entry of an "evaluation" hearing held on January 25, 1995. This order contained most of the same findings and directions as the previous orders, but it provides that "[d]ue to the lack of sufficient progress and not being in the juvenile's best interest, the supervised visits . . . are hereby terminated." The order also provides that "should

[the parents] wish to be considered for a placement for Zachary, they shall become fully involved in individual and family therapy and follow all recommendations of the therapist," which shall include weekly therapy sessions for the parents; play therapy for their daughter, Cassandra L.; evaluation by a pediatrician for another son, Trevor L., regarding his diet; and the requirement that the parents are to follow the recommendations of all doctors regarding care of their children. This order also includes a restatement of other elements such as a leisure plan, child support, and similar general matters contained in the previous orders. No appeal was taken from the order.

On January 31, 1995, the parents filed a motion for reconsideration of the order terminating their visitation. The record does not show that the court ruled on this motion.

The transcript contains a journal entry of a February 1, 1995, hearing. This order contains findings substantially the same as the findings and orders of the January 25 order. It provides that custody shall remain with DSS and that the temporary rehabilitation plan to achieve visitation shall include the items summarized as follows: (1) The parents must provide proof of health insurance for Zachary by February 8, 1995; (2) they must make a doctor's appointment for Trevor; (3) they must cooperate with the family support worker and demonstrate a willingness to "invest themselves in the services offered by the family support worker"; (4) they must discuss, decide on, and inform the case manager of an appropriate support system for themselves and their children; (5) they must sign a release of their complete file to Dr. Judith Libow in California; (6) Gail must sign a release to allow mental health records to be released to her therapist; and (7) the parents must begin work on therapeutic goals. The order provides that each of the last six items shall be done by February 15. The order also provides that the matter be continued until March 8.

The bill of exceptions contains only a record of the "evaluation" hearing of March 8, 1995. The issue that can be decided by this appeal requires only a quick summary of the evidence adduced at that hearing. The State produced a family support worker, a DSS worker, and a court-appointed special

advocate volunteer. These witnesses had observed Zachary during visitations with his parents and while he was in his foster home. The effect of this evidence was that during visits, the parents and siblings frequently did not include Zachary in their activities, and that Zachary generally did not like the visits. The State's evidence tended to establish that Zachary frequently did not want to go on home visits and that since the visits have stopped, his aggressive behavior has ceased and he sleeps better, plays by himself, seems happier and more content, and has not asked his foster parents about his parents. The State's witnesses also testified in person or by letters to the several ways in which the parents failed or refused to comply with the various orders summarized above. Since we are dismissing this case on jurisdictional grounds, we do not consider the admissibility of this evidence, or its sufficiency.

At the conclusion of the hearing, the court stated that it was difficult to work with Zachary's parents unless they admitted that there was serious wrongdoing by one of them and that Zachary was seriously endangered. The court stated that because of Robert's "passivity" and Gail's "aggressivity," it had entered an order stopping visitation with a chance to allow them to rehabilitate themselves, but that they had not done so. The court also stated that if they do not make any changes, it is clearly not in Zachary's best interests to have contact with them. The court ordered that the visitation be suspended until the parents were willing to cooperate and to make some changes. The court stated it would continue the hearing until May 3, 1995, to make a determination on the recommendation for long-term foster care. The court stated, "I might add Mr. and Mrs. [L.], that gives you an opportunity between now and May 3rd to make some admissions, to make some changes, and to invest in the appropriate changes so that [Zachary] can have contact with you." At that point, a DSS official interjected that it would take 6 to 8 weeks for Dr. Russell Alexander to make a diagnosis and report back. The court concluded a 10-week delay would be necessary and set the next hearing for May 24.

The journal entry of the March 8, 1995, hearing is short, and in it the court made the usual general findings and then ordered that temporary custody shall remain with DSS, that due to lack

of "sufficient therapeutic progress" the parents shall not have visitation until they comply, that they shall continue to pay $208 per month child support, and that DSS shall submit long-term foster home recommendations by April 5. The court continued the hearing until May 24.

ASSIGNMENTS OF ERROR

Zachary's parents allege the court erred (1) in placing Zachary with DSS for long-term foster home placement, (2) in terminating their visitation with Zachary, (3) in finding Zachary must be placed outside of the home and that no services were available to keep him in the home, (4) by admitting exhibit 40 and the hearsay and opinion testimony of the State's witnesses, (5) in finding that the therapeutic goals and rehabilitation plan were reasonable, and (6) in denying the parents effective counsel and due process. In the argument portion of the parents' brief, it is clear that the alleged denial of effective assistance of counsel and due process is based upon the fact that the parents' trial counsel did not object to the hearsay and opinion evidence of the witnesses and the letters containing information from the parents' therapists and one of the witnesses. We dispose of this case on jurisdictional grounds and do not reach the assigned errors.

STANDARD OF REVIEW

[1] We dispose of this appeal on legal issues. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

DISCUSSION

[2] The adjudication of Zachary as a child defined under § 43-247(3)(a) was appealed and affirmed. A dispositional hearing was held on August 3, 1994, and the parents' visitation rights were terminated on January 25, 1995. This is an appeal from an order dated March 8, 1995. The substantive orders complained about in this appeal were entered prior to the March 8 hearing and order. We must first decide whether this court has jurisdiction over the substantive matters appealed. Subject

matter jurisdiction may be raised sua sponte by an appellate court. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992); *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994). The order of January 25 which deprived the parents of visitation with Zachary was merely continued and refined by the orders of February 1 and March 8. The question of jurisdiction arises on our own motion in two respects: Is the appeal timely? Did Zachary's parents lose their right to appeal the termination of their visitation rights when they failed to appeal from the order of January 25?

The notice of appeal in this case was filed on April 13, 1995. The journal entry of the March 8 order was not filed with the clerk of the county court until March 13. Under Neb. Rev. Stat. § 25-2729(3) (Cum. Supp. 1994), the effective date of that order is March 13, 1995, and therefore the notice of appeal from that order was filed within the 30 days provided in § 25-2729(1). However, any attempt to appeal the orders of January 25 or February 1 is clearly too late because the journal entries of those orders were filed shortly after the dates they bear. The January 25 order terminated visitation with Zachary, and the February 1 order provided for a rehabilitation plan and set forth guidelines in order for the parents to achieve visitation.

[3] The order of March 8, 1995, did not change the orders regarding visitation, but it made clear that the parents could regain visitation by complying with previous orders. A review of the transcript shows the court terminated the parents' visitation by the order that was dated January 25, 1995, and filed January 26. An order terminating visitation is a final order. See *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995). Thus, the order of January 25 was an appealable order. The order of February 1 does not purport to terminate visitation, but supplies guidelines for the parents to achieve visitation with greater specificity than the January 25 order. The order of February 1 could have been appealed on any issue dealing with any new term it imposes, but not on the issue of termination of visitation or the terms contained in the January 25 order. The order of March 8 does not change either of the previous orders with respect to the termination or suspension of visitation. It clarified that visitation could be restored if the

parents comply with the court's orders, and if anything, it is more favorable to the restoration of the parents' visitation than the previous orders.

[4,5] The timeliness of an appeal is a jurisdictional necessity and may be raised sua sponte. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). A comparison of the assignments of error with the order of March 8, 1995, shows that it mandates nothing new and imposes no new requirements—at least it mandates no activity that is assigned as an error in this appeal. The court indicated that long-term foster care for Zachary would be considered at a later hearing. It should take no authority to establish that the March 8 order does not contain an appealable error on the issue of long-term foster care. The alleged errors in placing Zachary outside of the home and in finding the therapeutic goals and the rehabilitation plan reasonable were settled in previous hearings, of which we do not even have a bill of exceptions. The same is true with regard to the termination of visitation. These assignments attempt to relitigate settled issues. The assignment of these errors represents a collateral attack. "Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter . . . . Such challenges should timely have been made after the adjudications, which were final orders . . . ." *In re Interest of C.W. et al.*, 239 Neb. 817, 822, 479 N.W.2d 105, 110 (1992).

[6] In *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986), the court entered a second order about 6 weeks after its first order, and the orders were similar except that the second contradicted the first on one point. The notice of appeal was held to have been timely filed with regard to the second order, but untimely with regard to the first order. The Supreme Court held that an appellate court has jurisdiction over those assignments of error that raise an issue with respect to that portion of an order entered within the 30 days preceding the perfection of the appeal that contradicts an order entered more than 30 days before the appeal was perfected, but not over the assignments of error which deal with those portions of the

second order that were consistent with the first order. The same principle must apply in juvenile cases, where each order affecting a substantial right may be appealed. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). However, in the case at hand, the assignments of error do not relate to any portion of the March 8, 1995, order that was inconsistent with the earlier orders. If the order of March 8 changed any previous orders, the parents are not complaining about that change. They are simply complaining about the previous orders. This appeal is therefore an attempt to appeal after the time for appeal has expired. We do not have jurisdiction to entertain an appeal raising issues in a juvenile case that settled a substantial right more than 30 days before the appeal was perfected. We must therefore dismiss this appeal without discussing the issues raised.

[7] We discuss one other point, lest our not discussing it might imply a decision on it. In *In re Interest of R.G., supra*, Justice Caporale traced the statutory and case law basis controlling appeals from orders in juvenile courts which do not end the case involved. There is no point in our retracing those steps. In that case, the Supreme Court concluded that an order in a juvenile case is appealable if it affects a substantial right, and then stated:

> [T]he question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

238 Neb. at 415, 470 N.W.2d at 788. Under that holding, this court has held that an order terminating visitation is a final order. See *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995). However, under *In re Interest of R.G., supra*, not all orders "terminating" visitation are appealable, because by their terms they might not operate for a long enough period of time. Unlike the court's order dated January 25, 1995, in which it rendered its decision to terminate visitation in this case, the March 8 order made clear that visitation would be restored to the parents by the court if they would comply with the previous orders with regard to therapy, et cetera, and the

court set a later hearing date to check their compliance. Stated in another way, the order of March 8 might be more properly referred to as a temporary suspension order rather than a termination order. There is at least a question of whether the length of time over which the order of March 8 could reasonably be expected to disturb the parents' visitation with Zachary is sufficient to make that order a final order. We do not decide this issue, because it is unnecessary to do so. The appeal must be dismissed for lack of jurisdiction for the reasons stated above.

APPEAL DISMISSED.

IN RE INTEREST OF CASSANDRA L. AND TREVOR L., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. GAIL L. AND ROBERT L., APPELLANTS.
IN RE INTEREST OF ZACHARY L., CASSANDRA L., AND TREVOR L., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. GAIL L. AND ROBERT L., APPELLANTS.

543 N.W.2d 199

Filed February 6, 1996. Nos. A-95-439, A-95-1369.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.
3. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, one entered under Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1993), after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing to determine whether the juvenile is neglected, is final and thus appealable.

4. **Final Orders.** When there is no oral pronouncement accompanied by a trial docket notation, or a filed journal entry, judgment has not yet been rendered.
5. **Judgments.** The meaning of a judgment is determined, as a matter of law, by its contents.
6. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** An ex parte temporary detention order cannot be appealed, not because it was issued ex parte, but, rather, because such detention orders operate for only a short time.
7. **Juvenile Courts: Parental Rights: Affidavits: Records.** The information upon which the State seeks an ex parte temporary detention order shall be contained in the affidavit of one who has knowledge of the relevant facts, and such affidavit shall be presented to the juvenile court and be made a part of the record of the proceedings.
8. **Juvenile Courts: Parental Rights: Proof.** At a preadjudication detention hearing, the State has the burden to prove by a preponderance of the evidence that placement out of the parents' home is necessary.
9. **Juvenile Courts: Parental Rights.** If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to Neb. Rev. Stat. § 43-248(3) (Reissue 1993), the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.
10. **Juvenile Courts.** An action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of the court.
11. **Juvenile Courts: Parental Rights.** No statute authorizes the State to detain children without an order adjudicating the children under Neb. Rev. Stat. § 43-247 (Reissue 1993) or a termination of parental rights under Neb. Rev. Stat. § 43-292 (Reissue 1993), except for those statutes which provide for temporary detention pending an adjudication under § 43-247.
12. **Jurisdiction: Appeal and Error.** When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, the appellate court lacks jurisdiction, but may nevertheless enter an order canceling the order issued by a lower court without jurisdiction.
13. **Moot Question.** A case becomes moot when issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome.
14. **Juvenile Courts: Parental Rights: Right to Counsel.** A parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Judgment in No. A-95-439 reversed, and cause remanded with direction. Appeal in No. A-95-1369 dismissed, and cause remanded with direction.

Robert F. Martin, P.C., and Connie Kearney for appellants.

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

HANNON, IRWIN, and MILLER-LERMAN, Judges.

HANNON, Judge.

In case No. A-95-439, Gail L. and Robert L., the parents of Cassandra L. and Trevor L., appeal from a preadjudication juvenile court proceeding in which the State removed the two children from their custody and placed custody with the Department of Social Services (DSS). The parents maintain that the predispositional order depriving them of custody of their children was improper because the evidence did not support the findings of the trial court in several respects, the court permitted double hearsay, the petition was vague and ambiguous, and the court did not appoint counsel or advise them of their rights. The State maintains that the order is not appealable and that this appeal is moot because it moved to dismiss the case in the juvenile court after the appeal was perfected. We conclude that the order appealed from is appealable, that the appeal was not rendered moot by the attempted dismissal, and that the record does not support further detention of the children pending adjudication. Accordingly, we reverse, and remand with direction to return the children to their parents unless within 8 days after the mandate is issued by this court the State establishes facts at a hearing which shall justify preadjudication removal of the children from their parents' home.

RECORD IN TRANSCRIPT

The transcript of case No. A-95-439 shows that on March 24, 1995, a deputy county attorney filed a supplemental petition to have Cassandra and Trevor, who are minors alleged to have been born on December 27, 1989, and November 2, 1993, respectively, declared children as defined under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) because they

> are children whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence or other care necessary for the health, morals or well-being of such juveniles, or who are [sic] in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juveniles.

On that date, the judge also signed a summons commanding the parents to appear at a hearing set for March 27, 1995, at 10:30

a.m. "to respond to the matters raised in the foregoing petition."

The transcript contains an order which is dated March 24, 1995, but was filed March 29. This order shows the appearance of the judge, the guardian ad litem, a deputy county attorney, DSS protective service workers Tom Ritchie and Sara Baker, and Deputy Sheriff Steve Hespen, but not the parents of the children. This order states that Deputy Hespen was sworn. In the order, the court found that

> there is probable cause to believe Court will obtain jurisdiction.
>
> The Court further finds that reasonable efforts have been made to prevent placement of the children outside of the parental home; that continuation of the children in the parental home would be contrary to the welfare of the children; that reasonable efforts are being made to make it possible for the children to have a stable home; and the facts establish that emergency removal from the parental home was necessary and that the services available to the family could not have prevented placement of said endangered children.

The court order provided that the children should be placed with DSS for emergency foster care, with the parents being allowed supervised visitation "as outlined and determined by" DSS.

EVIDENCE ADDUCED

The only bill of exceptions presented in case No. A-95-439 is for a hearing held on March 27 at which the parents were present but unrepresented. The typed transcription of the hearing is 12 pages in length. Before that hearing, the judge stated in the record: "The purpose of this hearing is solely for detention at this time. Anything presented here today will not be used for any other hearing."

The only evidence presented was the testimony of Deputy Hespen. He related that DSS reported to him that on March 9, Robert brought Cassandra to "play therapy," but she told her therapist that Robert was staying in the car because he was angry. Deputy Hespen also stated that he was told Cassandra

"had reportedly demonstrated to Terri [the therapist] that Bob [Robert] had — she flailed her arms around[,] that Bob had hit her all over, and had taken her — cupped her hands and hit herself on the side of the head, trying to imitate what was done to her." The deputy then testified that he talked to the therapist, but he related only what he told the therapist, not what, if anything, the therapist might have told him. It was also "reported" to him that Gail would not let Cassandra attend therapy or be interviewed unless one or both of the parents were present. On either March 17 or March 23, the therapist had requested that she be allowed to visit with Cassandra alone, but the parents objected. Deputy Hespen reported the alleged abuse to the county attorney, and an emergency pickup order was issued "out of the County Attorney's office." When Deputy Hespen picked the children up on March 24, the parents were upset, but allowed him to take the children. The therapist told Deputy Hespen that Cassandra stated to her that Cassandra wanted to visit with her without Gail being present. The therapist also told Deputy Hespen that Gail told her Gail did not like Cassandra's attitude after a visit with the therapist.

The reader will undoubtedly wonder as to the source of some of the deputy's hearsay. In the above summary, we have identified the source of his hearsay as fully as did his testimony. The above testimony was elicited by examination by the deputy county attorney and the guardian ad litem. When the guardian ad litem stated he had no further questions, the judge stated: "As indicated, Mr. and Mrs. [L.], this is solely for detention purposes. It might be best at this point that you have an opportunity to talk to counsel. With that in mind, you can step down." No further evidence was adduced.

After the hearing, the court orally found "probable cause for court jurisdiction" and asked the guardian ad litem for a recommendation. The guardian ad litem stated that the children are currently in foster care with DSS and that he "would recommend that that continue pending adjudication, and that the Court allow supervised visitation with the parents until the adjudication." At that point, Gail stated, "We need counsel." Apparently, poverty affidavits were prepared, but not made a part of the record. The judge then stated: "You've completed it?

May I see those please? Now, you've stated under oath that your total income is $1,753.00 a month, is that correct?" The judge stated that the parents did not qualify for court-appointed counsel. Robert stated: "If I may, sir, our attorney wants a $5,000.00 retainer. We will not be able to afford a proper defense here." The judge explained that they did not qualify for court-appointed counsel because the "federal guidelines show" that with their income they do not qualify. The court stated it "would allow supervised visitation" and set the next hearing for April 12 at 10 a.m. We find no journal entry of this hearing in the transcript.

The transcript contains an order dated March 24, 1995, and filed March 29, appointing a guardian ad litem for Cassandra and Trevor.

On April 24, the parents filed a notice of appeal to this court. This notice refers to their intention to appeal

> from the order of this court concerning the hearing occurring on March 27, 1995, detention hearing removing these children from the parental home, and from the issuance of the order dated March 24, 1995, in the absence of an affidavit showing probable cause or grounds, removing said children.

ASSIGNMENTS OF ERROR

The parents allege 12 errors in case No. A-95-439, but we conclude these may be consolidated into allegations that the court erred (1) in signing the summons allowing removal of the children from the home without documentation showing reasons for emergency removal; (2) in finding probable cause for jurisdiction; (3) in removing the children from the home because the evidence does not show (a) that the children were in imminent danger, (b) that reasonable efforts were made to keep the children in their home, (c) that continuing custody in the parents was contrary to the children's welfare, and (d) that the children were placed in the least restrictive environment; (4) in permitting double hearsay; (5) in failing to find that the petition was vague and ambiguous; and (6) in failing to appoint the parents counsel or to advise them of their rights in juvenile proceedings.

PROCEEDINGS AFTER APPEAL

Before oral argument was had in case No. A-95-439, the State filed a motion to dismiss on the basis that the order appealed from is not a final order. In effect, this motion is denied by this opinion.

On November 29, the State filed a motion asking this court to dismiss the appeal because it was moot, alleging that the underlying juvenile petition had been dismissed, that a petition to terminate the parents' rights to the children had been filed, and that "[t]he above-stated children were detained pursuant to the Petition to Terminate Parental Rights." This motion was not ruled upon prior to argument, but is overruled by this opinion.

Since the appeal in case No. A-95-439, the parents have filed two additional appeals. In case No. A-95-1368, the transcript shows that on November 21, the county attorney filed a motion to dismiss the proceedings in case No. A-95-439, and the judge signed an order of dismissal without prejudice on that date. The parents appealed from that order on the basis that the State continues to detain the children.

The parents also filed an appeal designated as case No. A-95-1369. The transcript of that case shows that on October 25, the State filed a petition requesting the termination of Robert and Gail's parental rights to Cassandra, Trevor, and another son, Zachary L., who is the subject of a separate juvenile proceeding in this court, case No. A-95-391. The petition for termination in case No. A-95-1369 alleges that

> under Section 43-292(2) R.R.S. Neb., grounds exist for the termination of the parental rights of the parents of said children, and that such termination would be in the best interest of the children, in that the parents have substantially and continuously or repeatedly neglected the juveniles and refused to give the juveniles necessary parental care and protection[.]

The transcript in case No. A-95-1369 also shows that on November 14, the court filed an order in that proceeding in which it found the parents were indigent and appointed separate counsel for them and also found that emergency custody of the children should be placed with DSS for appropriate placement. Interestingly, that order provides visitation shall be as previously

approved. There was also an order dated November 21, 1995, which is substantially the same as the previous order except that it orders the payment of child support and orders that all pretrial motions shall be filed by December 22, which matters shall be heard on January 10, 1996, and sets trial to commence on January 17. The parents appeal from the order of November 21, 1995.

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). In addition, regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

DISCUSSION

Appealability of Order.

[3] The State moved to dismiss the appeal in case No. A-95-439 on the basis that the order of temporary detention was not appealable. The Supreme Court has announced a clear and easy rule to follow:

> Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, one entered under § 43-247(3)(a) and Neb. Rev. Stat. § 43-254 (Reissue 1988), after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing to determine whether the juvenile is neglected, is final and thus appealable.

In re Interest of R.R., 239 Neb. 250, 252-53, 475 N.W.2d 518, 520 (1991) (citing *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991)). In this case, the orders and hearings are sufficiently confused that it is difficult to apply even this clear rule.

The record shows that the children were removed from the home on March 24. Deputy Hespen testified that he took the children from their parents on March 24 pursuant to a court order directing him, through the county attorney's office, to take custody at once. The Supreme Court has stated that our statutes do not provide for a procedure where the juvenile court issues an ex parte order directing a sheriff to pick up a child, but that Neb. Rev. Stat. § 43-248 (Reissue 1993) authorizes any peace officer to take temporary custody of a juvenile who is endangered as defined in that statute, and therefore the issuance of such an unauthorized order was held not to be prejudicial. *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985). However, as discussed below, the Supreme Court has directed a procedure that should be followed for ex parte temporary detention orders. See *In re Interest of R.G., supra*. In this case, it appears that neither procedure was followed.

[4] The matter is further complicated by the fact that the hearing of March 27 was not journalized, and the transcript does not show that the court made a trial docket note. Furthermore, the bill of exceptions shows that the judge did not orally order that the children remain in foster care with DSS, although this might be implied from the discussion of visitation and the accompanying order allowing visitation. The fact remains that with regard to county courts,

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

Neb. Rev. Stat. § 25-2729(3) (Cum. Supp. 1994). " 'In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. . . .' " *In re Interest of L.W.*, 241 Neb. 84, 95, 486 N.W.2d 486, 495 (1992) (quoting *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991)). This court recently held that when there is no oral pronouncement accompanied by a trial docket notation, or a filed journal entry, judgment has not

yet been rendered. *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995).

Unless the journal entry purporting to record a hearing of March 24 was in fact a journal entry of the March 27 hearing, there is no order of March 27. The ex parte order of March 24 would then be the only order in case No. A-95-439 depriving the parents of the custody of their children. We are therefore confronted with two possibilities. One, that the journal entry, dated March 24, 1995, and filed March 29, records a hearing on March 24, and that is the only order, or two, that the journal entry records the court's action after the March 27 hearing and thus is the effective order.

Long-term Effect of March 24 Order.

[5] The order of March 24 by its terms does not purport to be a temporary order pending a further order after a hearing, but, rather, it purports to be an ex parte order for an unlimited duration. The meaning of a judgment is determined, as a matter of law, by its contents. *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990); *In re Interest of Teela H., supra.* Furthermore, this order was not modified by any later order.

> [T]he effect of the ex parte temporary detention order on [the mother's] interest is tempered by its short duration. It hinges continued custody in the department on further action by the State. The effect of the ex parte order on the mother's liberty interest is further tempered by the fact that the order plays no part in determining the propriety of continuing further temporary custody in the department until adjudication.

In re Interest of R.G., 238 Neb. 405, 417, 470 N.W.2d 780, 789 (1991).

[6] The process which is due in order that "the State may temporarily seize and place an endangered juvenile outside the parent's home pending the filing of a petition requesting continued placement of the juvenile until adjudication must be responsive to the parent's liberty interest while not eviscerating the State's parens patriae interest." *Id.* at 418, 470 N.W.2d at 790. In determining that an ex parte order was not appealable in *In re Interest of R.G., supra*, the Supreme Court observed that the order in that case was by its terms of limited duration,

8 judicial days. In this case, the order of March 24 does not by its terms purport to be limited in time. Obviously, an ex parte temporary detention order cannot be appealed, not because it was issued ex parte, but, rather, because such detention orders operate for only a short time. The order of March 24 is appealable because it is not an order which is by its terms limited in duration. Furthermore, on the record before this court, the ex parte order is still in effect and was not superseded by any other order, except the possible dismissal of the case by the trial court.

[7] If there was a hearing on March 24, we are not supplied with any evidence that might have been adduced at that hearing. The Supreme Court has said:

> [T]he better practice, and the practice which shall henceforth be followed, is that the information upon which the State seeks an ex parte temporary detention order be contained in the affidavit of one who has knowledge of the relevant facts and that such affidavit be presented to the juvenile court and be made a part of the record of the proceedings. In addition, the affected juvenile's parent shall be given prompt notice of the order.

In re Interest of R.G., 238 Neb. at 419–20, 470 N.W.2d at 791.

The journal entry of March 24 refers to the sworn testimony of Deputy Hespen, but that testimony is not in the bill of exceptions, in spite of the fact that the praecipe for bill of exceptions expressly asks for all evidence presented at all hearings "from March 24, 1995, through the present date." We can only conclude that if he testified on March 24 in addition to March 27, his testimony was not preserved by the court reporter. Juvenile courts are courts of record, and a verbatim record of all proceedings is required. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The order of March 24, filed March 29, is appealable, but since no evidence was placed in the record, we must conclude that it must be reversed because it is not supported by any evidence.

Sufficiency of Evidence for a March 27 Order.

There is no journal entry in the transcript purporting to journalize the hearing of March 27. The journal entry dated March 24, 1995, shows that Deputy Hespen was sworn and

testified, and it contains a finding that "emergency removal from the parental home was necessary." That journal entry also sets a hearing for April 12, not March 27, and the order does not purport to be limited with respect to time in any fashion. These inconsistencies at least leave open the possibility that the journal entry of March 24, which was not filed until March 29, is really a journal entry of both hearings, or perhaps a misdated journal entry of the March 27 hearing. We will now analyze the record upon the assumption that the order is a journal entry of the hearing of March 27.

In *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), the Supreme Court noted that what saved the juvenile court's jurisdiction in that case was that the evidence adduced at a hearing held 14 days later supported what was done at the earlier hearing. We fear that is not the situation in this case. In fact, even when we consider the journal entry filed on March 29 to be a journal entry of the March 27 hearing, the record still does not support an order depriving the parents of their children pending adjudication. We say this because the evidence adduced at that hearing is multiple hearsay in form and ambiguous in content. The only witness for the State had no first hand knowledge. (It will be noted that the Supreme Court stated in *In re Interest of R.G., supra*, that the affiant shall be one who has knowledge of the relevant facts.)

The hearsay that Deputy Hespen related was the only evidence and is barely coherent. At most, it says that Cassandra indicated by gestures that her father had hit her. Such questions as Where? When? How much? How hard? Did it leave marks? Is the child prone to exaggerate? Where was the mother? are only a few that would naturally arise in trying to determine if these children should be removed from their home. The bill of exceptions contains practically no facts, and therefore this court and both parties found it necessary to use allegations as though they were facts in order to make the briefs and the opinion intelligible. The evidence does not show the names or ages of the children, the names of the parents of the children, where they lived, or any other information which would give the small amount of information imparted by Deputy Hespen some meaning.

There is no evidence supporting the court's findings, including what efforts, if any, were made to prevent placement outside of the home. The separate case regarding Zachary, No. A-95-391, is also before this court. While we may not use the information gleaned from that record to satisfy the void in this record, that information does lead us to conclude that some of the DSS people shown to be present by the transcript and bill of exceptions in case No. A-95-439 probably had sufficient information to establish a decent factual record and that evidence might exist which would justify the court's action.

[8,9] The Supreme Court has held that at a preadjudication detention hearing, the State has the burden to prove by a preponderance of the evidence that placement out of the parents' home is necessary. *In re Interest of R.G., supra*. The evidence offered by the State in case No. A-95-439 establishes very little, and certainly does not establish facts, as required by Neb. Rev. Stat. § 43-254 (Reissue 1993):

> "If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home."

In re Interest of Cherita W., ante p. 287, 291, 541 N.W.2d 677, 679-80 (1996) (quoting § 43-254). See *In re Interest of R.G., supra*.

We conclude that the record of March 27 would not support an order depriving the parents of their children pending adjudication, even if we found there was a valid order issued by the juvenile court as a result of that hearing.

Mootness.

The appeal in case No. A-95-439 was perfected on April 24 and placed upon the call to be argued before this court in December. On November 21, the State filed a motion for dismissal of the case in the juvenile court, and the judge signed

a dismissal order on the same date. The State then moved this court to dismiss the appeal as moot.

[10] We realize that an action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of the court. *In re Interest of Moore*, 186 Neb. 67, 180 N.W.2d 917 (1970). That rule, however, does not consider whether the State may dismiss an action in the juvenile court while that case is pending in this court. Neb. Rev. Stat. § 43-2,106 (Cum. Supp. 1994) provides, in significant part:

> When a juvenile court proceeding has been instituted before a county court sitting as a juvenile court, the original jurisdiction of the county court shall continue until the final disposition thereof and no appeal shall stay the enforcement of any order entered in the county court . . . . The county court shall continue to exercise supervision over the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition. . . . Upon determination of the appeal, the appellate court shall remand the case to the county court for further proceedings consistent with the determination of the appellate court.

[11] We are unable to find any case law interpreting the meaning of the phrase "original jurisdiction of the county court shall continue." However, this phrase does not imply the power to dismiss the case. The phrase "no appeal shall stay the enforcement of any order" likewise throws no light upon the effect a motion for dismissal by the State might have on an appeal by the parents. However, the record before us shows that the State did not intend to return the children to their parents. The State maintains that it is keeping custody of the children on the basis of the termination of parental rights proceeding. However, no statute authorizes the State to detain children without an order adjudicating the children under § 43-247 or a termination of parental rights under Neb. Rev. Stat. § 43-292 (Reissue 1993), except for those statutes which provide for temporary detention pending an adjudication under § 43-247. The statutes that provide for termination do not provide for the State to keep children from their parents pending a termination

hearing except by the same statutory steps necessary to keep them pending adjudication under § 43-247.

Orders of November 14 and 21.

[12] We can find no jurisdictional basis for the juvenile court to have issued the order filed November 14 or the order dated November 21, 1995, both of which place custody of the children with DSS, as shown in case No. A-95-1369. Since these orders were issued without jurisdiction, we summarily dismiss the appeal in that case for lack of jurisdiction. See Neb. Ct. R. of Prac. 7A(2) (rev. 1992). When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court lacks jurisdiction, but may nevertheless enter an order canceling the order issued by a lower court without jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). See *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). We therefore direct the trial court to cancel the order filed November 14 and the order dated November 21, 1995, insofar as they purport to place custody of the children with DSS.

We note that any question presented by the appeal in case No. A-95-1368 is not presented in such a fashion that it may be disposed of summarily, and it will therefore continue to pend until disposed of by other means.

[13] With regard to the State's claim that the juvenile court dismissal makes the appeal in case No. A-95-439 moot:

> A case becomes moot when issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome. [Citations omitted.] 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. McCormick, 246 Neb. 890, 892-93, 523 N.W.2d 697, 698 (1994).

> "There is an exception to the general rule regarding moot questions which should be examined. That exception applies to cases involving matters of public interest. . . . The public interest exception to the rule precluding consid-

> eration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem."

Bamford v. Upper Republican Nat. Resources Dist., 245 Neb. 299, 304-05, 512 N.W.2d 642, 647 (1994) (quoting *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989)).

In the first place, the question presented is not moot because notwithstanding the supposed dismissal, DSS still keeps custody of the children, and at the time of the dismissal neither the State nor the court intended to return the children to their parents. The attempt to dismiss the original case and at the same time keep custody without statutory authorization as part of a termination proceeding appears to this court to be an attempt to deny the parents a right of appeal.

It also appears that there is a great likelihood that similar errors will occur in the future and that it is desirable to have an opinion for future guidance. We therefore conclude that the appeal is not moot.

Advisement of Rights.

In *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991), the Supreme Court held that the trial court did not violate due process when it proceeded with a preadjudication hearing without the presence of counsel for the mother. However, in that case the court noted that "the trial court twice informed the mother of her right to appointed counsel, but the mother did not request an appointed attorney." *Id.* at 256, 475 N.W.2d at 522. The court also noted that the mother was partly at fault because she had received notice on February 17 of a March 1 hearing and did not contact a lawyer until the night before the hearing. In case No. A-95-439, Gail stated that she and Robert needed counsel, and Robert stated that their attorney wanted a $5,000 retainer and that they were unable to afford a proper defense. When the judge learned that their income was $1,753 per month, he stated: "The purpose of looking at

financial affidavit — it is based upon the federal guidelines for eligibility. Based upon the income — not necessarily based upon all the expenses involved, the Court would find based upon that that's presented, that you're not qualified for court-appointed counsel." Robert then stated it would be very difficult for them to obtain an attorney because they had no available cash to give a retainer. The judge stated that did not mean the parents qualified for a court-appointed attorney. The parents have pro bono counsel handling this appeal, and we learn from the termination proceeding, case No. A-95-1369, that the court has now appointed counsel for the parents.

[14] With regard to review hearings, the Supreme Court has stated: "We hold that a parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer. § 43-279.01(1)(b)." *In re Interest of N.M. and J.M.*, 240 Neb. 690, 697, 484 N.W.2d 77, 82 (1992). Neb. Rev. Stat. § 43-279.01 (Reissue 1993) provides in significant part that when the petition alleges the juvenile is within § 43-247(3)(a), the court shall inform the parties of the "(b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer." With regard to the duty of the court to advise the parents of such a child of his or her rights, this court has said:

> There is, however, nothing in the record to show that B.S. was informed of her right to testify and to compel other witnesses to attend and testify, her right to a speedy adjudication hearing, or her right to appeal and have a transcript or record of the proceedings for such purpose as required by § 43-279.01(1)(e), (f), and (g). The statute clearly mandates that B.S. be informed of each of these rights without regard to whether she is represented by counsel. The failure of the court to advise B.S. as required by § 43-279.01 necessitates that the order in this case be reversed and the cause remanded for a new adjudication hearing.

In re Interest of A.D.S and A.D.S., 2 Neb. App. 469, 472, 511 N.W.2d 208, 210-11 (1994).

Since this matter is only a temporary detention hearing, the failure to appoint an attorney might not be sufficient to cause a

reversal of the orders appealed from. However, not only did the judge fail to advise the parents as directed by § 43-279.01, the judge's statement to them at the conclusion of the guardian ad litem's examination of Deputy Hespen was likely to be interpreted by a layperson as a denial of any right to proceed pro se.

Miscellaneous.

Under different headings, we have ruled upon the parents' assignments of error Nos. 2, 3, 4, and 6. The act alleged as the first assignment of error, that the judge signed a summons removing the children from the home, amounted to no more than entering an ex parte order that is truly of limited duration, and therefore that act is not appealable.

In the fifth assignment of error, the parents allege that the petition in case No. A-95-439 is vague and ambiguous, and we agree that it is. However, this appeal involves a preliminary matter, and this question was not presented to the trial court. We therefore decline to consider the effect of such a vague petition.

CONCLUSION

We therefore reverse the judgment and remand the cause in case No. A-95-439 with direction to return the children to their parents unless the State shall establish the facts necessary to deprive the parents of custody of their children within 8 days of the filing of the mandate in this case.

In case No. A-95-1369, we dismiss the appeal for lack of jurisdiction of the order appealed from. However, we also direct the trial court to cancel its orders of November 14 and 21, insofar as they affect the custody of the children, because the court lacked jurisdiction to enter them. The State's motions to dismiss for lack of an appealable order or because of mootness are denied.

JUDGMENT IN NO. A-95-439 REVERSED, AND CAUSE REMANDED WITH DIRECTION.
APPEAL IN NO. A-95-1369 DISMISSED, AND CAUSE REMANDED WITH DIRECTION.

SALLY CURTICE, APPELLANT, V. BALDWIN FILTERS COMPANY, A CORPORATION, ET AL., APPELLEES.

543 N.W.2d 474

Filed February 13, 1996. No. A-95-375.

1. **Demurrer: Pleadings: Appeal and Error.** A demurrer which challenges the sufficiency of the allegations is a general demurrer, and in an appellate court's review of a ruling on such demurrer, the court is required to accept as true all facts which are well pled and proper and reasonable inferences of law and fact which may be drawn therefrom, but not conclusions of the pleader.
2. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
3. **Courts: Jurisdiction: Legislature.** The district courts shall have both chancery and common-law jurisdiction, and such other jurisdiction as the Legislature may provide.
4. **Courts: Jurisdiction: Injunction: Legislature.** Jurisdiction in suits for injunction is in the district courts. This cannot be legislatively limited or controlled.
5. **Specific Performance: Equity.** Specific performance is an equitable remedy.
6. **Workers' Compensation: Courts: Jurisdiction.** Neither a county court nor a district court has any original jurisdiction to determine the legality of a claim for workers' compensation.
7. **Workers' Compensation: Legislature.** The Workers' Compensation Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit.
8. **Equity: Statutes.** Equitable remedies are not available where a statute provides an adequate remedy at law.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

James E. Schneider, of Schneider Law Office, P.C., for appellant.

Jay L. Welch and Douglas E. Baker, of Welch, Wulff & Childers, for appellees.

HANNON, SIEVERS, and INBODY, Judges.

HANNON, Judge.

This is an equity action in which the plaintiff, Sally Curtice, sought to have the district court find an oral settlement agreement which she alleges to have entered into with two of the defendants, her employer, Baldwin Filters Company, and its workers' compensation insurance carrier, Liberty Mutual Insurance Group, to be valid and to require the defendants to submit the necessary documents to the Nebraska Workers'

Compensation Court. The district court sustained a demurrer both because it concluded it did not have jurisdiction and because the petition did not state a cause of action. The district court also concluded the petition could not be amended to cure the defects and therefore dismissed the case. Curtice appeals. We conclude that the petition does not state a cause of action because Curtice has an adequate remedy at law in the Workers' Compensation Court. We therefore affirm.

PETITION

In summary, Curtice alleges that she was injured in the course of her employment with Baldwin and that a claims representative from Liberty Mutual called her attorney, and they agreed to settle Curtice's claim for the lump sum of $7,631.40. Curtice orally agreed to the settlement, and Baldwin and Liberty Mutual's attorney, defendant Jay L. Welch, ultimately drafted an "Application for Approval of Final Lump Sum Settlement" prepared for the signature of Curtice and the parties' attorneys, a "Receipt and Satisfaction" prepared for Curtice's signature, and an "Order Approving Final Lump Sum Settlement" prepared for Curtice's attorney to sign in approval and the workers' compensation judge to sign upon approval of the settlement. Welch also prepared an affidavit for Curtice to sign. Both Curtice and her attorney signed the application. Curtice also signed the receipt, and her attorney signed the order in the place provided. The application and the order were returned to Welch. However, for whatever reason, Curtice refused to sign the affidavit, and Welch refused to submit the settlement to the Workers' Compensation Court without the affidavit. Curtice maintained that the affidavit was unnecessary to complete the settlement and demanded that the settlement be submitted to the Workers' Compensation Court. Welch refused; this action ensued. The defendants' demurrer was sustained, and the case was dismissed as stated above. Curtice appeals.

ASSIGNMENTS OF ERROR

Curtice alleges that the trial court erred in concluding (1) that the trial court lacked jurisdiction and (2) that the petition failed to state a cause of action.

STANDARD OF REVIEW

[1] A demurrer which challenges the sufficiency of the allegations is a "general demurrer," and in an appellate court's review of a ruling on such demurrer, the court is required to accept as true all facts which are well pled and proper and reasonable inferences of law and fact which may be drawn therefrom, but not conclusions of the pleader. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). In ruling on a demurrer, the petition is to be construed liberally; if as so construed, the petition states a cause of action, the demurrer is to be overruled. *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995).

[2] Subject matter jurisdiction is a question of law for the court. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994); *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994). 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).

DISCUSSION

Most of the cases involving disputes over the proper place to proceed in suits involving workers' compensation claims naturally arise via an appeal from the Workers' Compensation Court. These cases are directly concerned with the jurisdiction of the Workers' Compensation Court. See, *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991); *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990); *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). However, this case was commenced in the district court, and we are therefore concerned with the jurisdiction of the district court. We are only concerned with the jurisdiction of the Workers' Compensation Court insofar as it

affects the relief Curtice is entitled to receive, if any, in the district court.

[3-5] Article V, § 9, of the Nebraska Constitution provides that "[t]he district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." "Jurisdiction in suits for injunction [is] in the district courts. Neb. Const. art. 5, § 9. This cannot be legislatively limited or controlled." *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 112, 302 N.W.2d 379, 380 (1981) (citing *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975)). See, also, *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937). Specific performance is an equitable remedy. *Bauer v. Bauer*, 136 Neb. 329, 285 N.W. 565 (1939). Curtice seeks an equitable remedy that she is constitutionally entitled to seek in district court. For reasons set forth below, we conclude that at least in this case, Curtice has an adequate remedy at law in the Workers' Compensation Court and that therefore Curtice is not entitled to an equitable remedy.

[6,7] It is a long-established rule that neither a county court nor a district court has any original jurisdiction to determine the legality of a claim for workers' compensation. See *Duncan v. A. Hospe Co.*, 133 Neb. 810, 277 N.W. 339 (1938). The jurisdiction of the Workers' Compensation Court is based upon the provision in Neb. Const. art. V, § 1, which provides that the "judicial power of the state shall be vested in . . . such other courts inferior to the Supreme Court as may be created by law." "The Workmen's Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit." *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 843, 212 N.W.2d 704, 706 (1973).

[8] "By statute the Nebraska Workmen's Compensation Court has exclusive original jurisdiction in actions arising under the Workmen's Compensation Act. [Citations omitted.] As a general rule declaratory relief is not available where a statutory remedy has been provided with another tribunal given exclusive jurisdiction over the action." *Peak v. Bosse*, 202 Neb. 1, 4, 272 N.W.2d 750, 752 (1978). By the same logic, equitable remedies

are not available where a statute provides an adequate remedy at law. *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993). Therefore, if Curtice has an adequate remedy in the Workers' Compensation Court, she has an adequate remedy at law, and thus she cannot seek an equitable remedy.

Curtice has a claim under the Workers' Compensation Act, and that claim is disputed. It necessarily follows that the Workers' Compensation Court has jurisdiction over that claim. The alleged settlement agreement complicates matters.

Neb. Rev. Stat. § 48-161 (Reissue 1993) provides in part: "All disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment." With the passage of 1990 Neb. Laws, L.B. 313, effective July 10, 1990, the Legislature included the following language as the next sentence in the statute: "Such compensation court shall have jurisdiction to decide any issue *ancillary to* the resolution of an employee's right to workers' compensation benefits." (Emphasis supplied.)

The legislative history of L.B. 313 reveals that the above language was added at the request of the Workers' Compensation Court after the decision of *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). See Floor Debate, 91st Leg., 2d Sess. 10431 (Mar. 5, 1990). In *Thomas*, the majority held that absent express statutory language granting jurisdiction over a particular matter to the compensation court, the compensation court did not have jurisdiction to determine workers' compensation insurance coverage disputes. The addition of the jurisdiction to decide issues ancillary to the resolution of an employee's right was intended to give the Workers' Compensation Court jurisdiction that the *Thomas* case concluded it did not have. Black's Law Dictionary 86 (6th ed. 1990) defines "ancillary jurisdiction" as the "[p]ower of court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action."

In this case, Curtice has a claim under the Workers' Compensation Act, regardless of whether that claim is deemed to be a direct result of an injury received in the course of her

employment or the result of a settlement which must be approved by the court. Therefore, the compensation court might have had jurisdiction to determine the validity of the alleged settlement agreement without the 1990 amendment to § 48-161, but it is clear that after that amendment which gave the court ancillary jurisdiction, the compensation court clearly had such jurisdiction.

We therefore conclude that Curtice has a remedy under the Workers' Compensation Act in the Workers' Compensation Court, and therefore she may not bring an action in the district court for the equitable remedy of specific performance. Strictly speaking, this is not a holding that the district court does not have jurisdiction. A district court has jurisdiction to maintain equity actions for specific performance under Neb. Const. art. V, § 9. Therefore, we conclude that under the allegations of the petition, Curtice has not stated a cause of action for specific performance because the petition shows she has an adequate remedy in the compensation court.

Having arrived at this conclusion, we need not consider the other issues argued by the parties.

CONCLUSION

We therefore conclude that the petition does not state a cause of action and that the trial court was correct when it sustained the demurrer and dismissed the case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE O. WATKINS, JR., APPELLANT.

543 N.W.2d 470

Filed February 13, 1996. No. A-95-593.

1. **Judgments: Appeal and Error.** In reviewing a question of law, an appellate court reaches a conclusion independent of that of the lower court.
2. **Licenses and Permits: Revocation.** Any person operating a motor vehicle on the highways or streets while his or her operator's license has been revoked pursuant

to Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993) shall be guilty of a Class IV felony.

3. **Right to Counsel: Records: Presumptions.** Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected.
4. **Prior Convictions: Collateral Attack: Proof.** The case law applicable to collateral attacks on prior convictions at enhancement hearings is applicable to the use of prior convictions to prove an essential element of a crime charged.
5. **Prior Convictions: Evidence: Right to Counsel: Waiver: Proof.** In whatever form the evidence of a prior conviction is offered, the State must prove that the prior conviction was counseled or that the defendant waived counsel to establish that the conviction was constitutionally valid.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions to dismiss.

Thomas M. Kenney, Douglas County Public Defender, and Stephen P. Kraft for appellant.

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

HANNON, SIEVERS, and INBODY, Judges.

HANNON, Judge.

Lawrence O. Watkins, Jr., appeals his conviction for operating a motor vehicle while his license was revoked, a Class IV felony. Watkins received a sentence of not less than 4 nor more than 5 years' incarceration. Except for the State's proof of Watkins' prior conviction, the sufficiency of the evidence is not questioned. Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993) requires proof that a defendant's operator's license was revoked pursuant to § 60-6,196(2)(c), in order for the defendant to be convicted. The only proof the State offered of Watkins' prior conviction was a certified copy of the records of the Department of Motor Vehicles (DMV) showing that Watkins' operator's license was revoked, a method of proof allowed by Neb. Rev. Stat. § 60-4,104 (Reissue 1993). This evidence does not prove that Watkins either had counsel or waived counsel at the time he was convicted of the prior offense. Over objection, the trial court admitted this evidence and found it to be sufficient. Watkins appealed. We conclude that the evidence does not prove

that Watkins had or waived counsel, and therefore we reverse the conviction and remand the cause to the trial court with directions to dismiss.

FACTUAL BACKGROUND

Watkins was charged with driving a motor vehicle in violation of § 60-6,196(6) on August 27, 1994. All of the evidence, except the necessary prior conviction, was admitted by stipulation, and Watkins does not contest its sufficiency. We are only concerned with the admissibility and sufficiency of the State's evidence of Watkins' prior conviction. Therefore, we shall not summarize any other evidence.

The State introduced exhibit 2 to prove Watkins' prior conviction. This exhibit is a certified copy of Watkins' file at DMV. Watkins objected to the introduction of this evidence and, at the close of the State's case, moved to dismiss on the basis that this evidence was insufficient to prove the required prior conviction.

ASSIGNMENTS OF ERROR

Watkins alleges that the trial court erred (1) in overruling his motion to dismiss at the end of the State's case; (2) in finding him guilty beyond a reasonable doubt, as the evidence adduced at trial was insufficient to establish Watkins waived or had counsel at the time of his prior conviction for third-offense driving while intoxicated; and (3) in imposing an excessive sentence.

STANDARD OF REVIEW

[1] This appeal raises a question of law. In reviewing a question of law, an appellate court reaches a conclusion independent of that of the lower court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

DISCUSSION

[2] Watkins was convicted of violating § 60-6,196(6), which reads: "Any person operating a motor vehicle on the highways or streets . . . while his or her operator's license has been revoked pursuant to subdivision (2)(c) . . . shall be guilty of a Class IV felony." Thus, the prior conviction is an essential element of the charged offense.

Section 60-6,196(2) reads as follows:

> Any person who operates or is in the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section [driving under the influence of alcoholic liquor or drugs] shall be guilty of a crime and upon conviction punished as follows:
>
> . . . .
>
> (c) If such person (i) has had two or more convictions under this section in the eight years prior to the date of the current conviction, (ii) has been convicted two or more times under a city or village ordinance enacted pursuant to this section in the eight years prior to the date of the current conviction, or (iii) has been convicted as described in subdivisions (i) and (ii) of this subdivision a total of two or more times in the eight years prior to the date of the current conviction, such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period. Such revocation shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. Such revocation shall not run concurrently with any jail term imposed.

The trial court ultimately accepted the DMV records and determined Watkins guilty, by relying upon the language of § 60-4,104. Section 60-4,104 provides:

> A copy of the order of the director suspending or revoking any operator's license or the privilege of operating a motor vehicle, duly certified by the director and bearing the seal of the Department of Motor Vehicles, shall be admissible in evidence without further proof and shall be prima facie evidence of the facts therein stated in any proceeding, civil or criminal, in which such suspension or revocation is an issuable fact.

One of the DMV documents contained in exhibit 2 revealed that Watkins was "convicted of DRIVING UNDER INFLU-

ENCE-3RD on 11-05-1992, in the COUNTY Court at OMAHA Nebraska, and that [his] operator's license was revoked for a period of 15 YEARS, beginning 03-22-1993 until 03-22-2008." The State argued that this evidence was admissible and sufficient to establish the prior conviction because § 60-4,104 so provides.

In his brief, Watkins challenges the constitutionality of § 60-4,104. This court must operate as though the statute is constitutional, because this court does not have jurisdiction to decide the constitutionality of a statute. Neb. Const. art. V, § 2; Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 1994). However, the Court of Appeals does have jurisdiction to determine whether a constitutional question was properly raised. *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). Watkins did not file a separate written notice that the case involved a constitutional question, as is required by Neb. Ct. R. of Prac. 9E (rev. 1992). We therefore do not consider the constitutionality of § 60-4,104.

[3] As a matter of historical perspective, we note that the present § 60-4,104 was initially enacted in 1961 (1961 Neb. Laws, ch. 318, § 1, p. 1018), and it has only been amended once since that time by substituting the word "director" for the phrase "Director of Motor Vehicles," deleting the words "motor vehicle" before the phrase "operator's license," and deleting two commas. 1989 Neb. Laws, L.B. 285. The law on a defendant's right to counsel in such cases developed after this statute was enacted. The case giving rise to right to counsel was *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The *Boykin* rule was applied to misdemeanors in Nebraska in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). In *State v. Smith*, 213 Neb. 446, 449, 329 N.W.2d 564, 566 (1983), the Supreme Court clarified the State's burden of proof in the use of prior convictions as follows:

> [In an enhancement proceeding,] the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. [Citation omitted.] Where a record is silent as to a defendant's opportunity for counsel, we may not presume

> that such rights were respected. [Citations omitted.] A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment. The objection should have been sustained.

It is difficult to see how the Supreme Court could have been clearer. We conclude that the rule in *Smith* made § 60-4,104 ineffective as a means of proving prior convictions in enhancement proceedings, because the statute does not provide a method to prove that which the Supreme Court has held must be proved.

[4] Both sides spend a large portion of their briefs arguing whether or not the rules regarding collateral attacks of prior convictions at enhancement proceedings apply where the prior conviction is an essential element of a crime. We conclude that the same rules apply, and this issue has generally been determined by *State v. Jones*, 1 Neb. App. 816, 510 N.W.2d 404 (1993). In *Jones*, this court addressed this issue and "determined that the case law applicable to collateral attacks on prior convictions at enhancement hearings is applicable to [the use of prior convictions to prove an essential element of a crime charged]." *Id.* at 820, 510 N.W.2d at 407. See, also, *State v. Yelli*, 3 Neb. App. 148, 524 N.W.2d 353 (1994) (applying enhancement type rules by analogy to paternity criminal nonsupport proceedings), *aff'd as modified* 247 Neb. 785, 530 N.W.2d 250 (1995).

[5] We conclude that in whatever form the evidence of a prior conviction is offered, the State must prove that the prior conviction was counseled or that the defendant waived counsel to establish that the conviction was constitutionally valid. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991). The State must first lay foundation for its admission by evidence tending to show that the defendant was represented by counsel or that the defendant knowingly or intelligently waived such right. *Id.*

We do not think that the documents used to prove a particular point can dispense with a constitutional right. Thus, we conclude that even though the State, pursuant to the language of § 60-4,104, proved that Watkins' license was revoked in a prior

proceeding, the State did not prove the additional requirement that that conviction was constitutionally sound, as the DMV records were silent as to whether or not Watkins was counseled or waived his right to counsel at the time of the prior conviction. Therefore, the State failed to prove an element that was necessary to sustain the conviction in this case, and it follows that Watkins' conviction in this case must be reversed. The cause is remanded with directions to set aside Watkins' conviction and to dismiss the case.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

NITA KATHERINE BABCOCK, APPELLANT, V. SAINT FRANCIS MEDICAL CENTER, A NONPROFIT CORPORATION, AND THE MEDICAL STAFF OF SAINT FRANCIS MEDICAL CENTER, GRAND ISLAND, NEBRASKA, APPELLEES.

543 N.W.2d 749

Filed February 20, 1996. No. A-94-619.

1. **Summary Judgment: Appeal and Error.** To review a summary judgment, an appellate court views the evidence in the 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. **Summary Judgment.** A summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
4. **Injunction: Equity.** The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.
5. **Federal Acts: Physicians and Surgeons.** One of the purposes of the federal Health Care Quality Improvement Act is to encourage physicians, without fear of

litigation, to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.

6. **Federal Acts: Health Care Providers: Damages: Immunity.** The federal Health Care Quality Improvement Act bestows limited immunity from lawsuits for money damages upon those who participate in professional peer reviews.
7. **Federal Acts: Health Care Providers: Immunity: Intent.** Immunity under the federal Health Care Quality Improvement Act is a question of law, and it was the intent of Congress that questions regarding immunity under the act be resolved during the early stages of litigation, such as upon a motion for summary judgment.
8. **Federal Acts: Health Care Providers: Immunity: Presumptions.** The federal Health Care Quality Improvement Act creates a rebuttable presumption that a professional review action met the requirements of the act necessary to qualify for immunity under the act.
9. **Health Care Providers: Due Process.** A private hospital's actions do not constitute state action and therefore are not subject to scrutiny by the courts for compliance with due process protection.
10. **Governmental Subdivisions.** State action exists only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains.
11. **Health Care Providers: Due Process.** The decision of a private hospital to revoke, suspend, or limit the privileges of a physician or other member of the medical staff is subject to limited judicial review to ensure that the hospital substantially complied with its medical staff bylaws, as well as to ensure that the bylaws provide for basic notice and fair hearing procedures.
12. **Health Care Providers: Contracts.** A hospital's obligation to follow its own bylaws can stem from a contractual relationship between the hospital and physician.
13. **Contracts.** Construction of a written contract is a question of law for the court.
14. **Health Care Providers: Due Process.** Absent evidence of actual bias, the fact that a board or committee or some of its members might have earlier considered suspending a physician's privileges does not amount to an unfair hearing.
15. **Health Care Providers: Evidence: Due Process.** To the extent that courts examine the evidentiary basis for a hospital's decision to suspend privileges, such examination is in recognition that an inherent element of fair hearing procedures is that there be sufficient evidence to support the hospital's decision. Nonetheless, the decision of a hospital, whether private or public, concerning medical staff privileges is entitled to judicial deference.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Judy K. Hoffman and James H. Truell for appellant.

Patrick G. Vipond and James W. Ambrose II, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Dr. Nita Katherine Babcock appeals the district court order granting summary judgment to Saint Francis Medical Center and the medical staff of Saint Francis, hereinafter collectively referred to as St. Francis or the hospital for convenience. Babcock's medical staff privileges as an anesthesiologist were suspended by St. Francis after concerns arose about Babcock's drinking. Babcock filed suit against St. Francis, asking for injunctive relief, reinstatement of her staff privileges, and damages. St. Francis moved for summary judgment, which was granted, and Babcock now appeals.

STATEMENT OF FACTS

Babcock applied for staff privileges with St. Francis as an anesthesiologist. St. Francis' bylaws provide that all practitioners who apply for medical staff privileges shall be provided with an application, a copy of the bylaws, and rules and regulations pertaining to the staff. Under the bylaws, the application form is to include an acknowledgment and agreement that the applicant has received and read the bylaws and agrees to be bound by them.

The record does not contain a complete application form filled out by Babcock. Instead, it contains two pages from the application. On one page of the application form, Babcock acknowledged that she has had a "physical or mental health condition (to include, but not limited to, drug or alcohol abuse) that affects or is reasonably likely to affect your ability to perform professional or medical staff duties." The second page from the application in the record is an attachment made by Babcock in which she states, in further explanation of her admission to her physical or mental health condition:

> In February of 1992, I was an inpatient at Hazelden Treatment Center for alcoholism for 30 days. Following inpatient treatment, I have continued outpatient counselling and frequently and regularly attend AA. . . . Since inpatient treatment I have not taken a sick day or vacation day, and have assumed regular call schedules and full-time physician duties.

The bylaws of the hospital state that the executive committee of the medical staff is empowered to review applications and

make recommendations, including any special conditions to be attached to the offer of medical staff privileges, to the hospital board. The hospital board then makes a decision whether to adopt the recommendation of the executive committee. The bylaws provide that all initial appointments to the medical staff are provisional and for 1 year. The provisional appointees are supervised and observed by other members of the St. Francis medical staff during the provisional period.

Babcock's application for staff privileges led to an agreement dated July 12, 1993, made between Babcock and the hospital, in which she was required to meet certain conditions to be retained as a medical staff member with clinical privileges. The conditions include participation in aftercare to follow up on her inpatient treatment for alcoholism, verification of her aftercare participation, and random drug screenings. The agreement states that "[i]f at any time in the future, as a result of ongoing monitoring activities, it is deemed that the practitioner is not appropriately carrying responsibilities as a member of the medical staff, the practitioner may be subject to suspension or revocation of privileges."

Eleven days after the date of this agreement, a registered nurse and a fellow physician each reported smelling alcohol on Babcock's breath in the surgical preoperating room. The physician reported that "[h]er subsequent actions seemed to be uncoordinated." An ad hoc committee met with Babcock to notify her of the complaints against her and to allow her to take "appropriate action to resolve the concerns." As a result of this incident and executive committee action concerning the incident, Babcock then voluntarily took a leave of absence and was admitted to St. Francis' own inpatient alcoholism treatment program.

Upon her return to work, on September 7, 1993, Babcock and St. Francis entered into a second agreement which was substantially identical to the first agreement, save for the following provision: "If at any time in the future, as a result of ongoing monitoring activities *or in the event of recurrence*, it is deemed that the practitioner is not appropriately carrying responsibilities as a member of the medical staff, the practi-

tioner will be subject to termination of privileges." (Emphasis supplied.)

One month later, Babcock was arrested for second-offense driving while intoxicated in York County. Accompanying Babcock in the car on October 7, 1993, was her 5-year-old son. Babcock was tested for blood alcohol content (BAC) upon her arrest and had a BAC of .25. Babcock was scheduled to provide anesthesia for a surgery at 7:30 a.m. on October 8, but did not show up, since she was in jail. An affidavit in the record of Dr. Henry Nipper, an expert with respect to blood alcohol, states that at 7:30 a.m. on October 8, Babcock would have had a BAC of .09, given her BAC of .25 at the time she was tested when arrested. Because she did not show up for surgery, the hospital arranged to have anesthesia provided by a nurse anesthetist. Babcock called St. Francis at 1:30 p.m. on October 8, stating that she had been involved in an automobile accident and was in Omaha "getting checked up." However, the hospital quickly became aware of the true situation in York County.

On October 14, 1993, Dr. D.G. Wirth, president of the medical staff, notified Babcock that her privileges were temporarily suspended pending resolution of the criminal charge of driving while intoxicated. Under the hospital's bylaws, the president of the medical staff has the authority "whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner." The bylaws provide that the practitioner may then request that a hearing before the executive committee of the medical staff be held to review the suspension in accordance with the "Hearing and Appellate Review Procedure" of the bylaws. On October 20, Babcock requested such a hearing, asking that it be held as soon as possible, but no later than 10 days. Babcock was notified on October 21 that a hearing had been set for October 27.

Under the hearing and appellate review procedure of the bylaws, the hearing before the executive committee must be recorded, the practitioner must be present, and neither the practitioner nor the hospital may be represented by counsel. However, the practitioner may be represented by a physician. The bylaws state that all participants shall be allowed a

reasonable opportunity to present relevant evidence, but that the rules of law relating to examination of witnesses and admission of evidence shall not be strictly followed. The practitioner has the right to call and examine witnesses, to introduce evidence, to cross-examine any witness, to challenge any witness, and to rebut any evidence.

The report from the executive committee hearing held on October 27, 1993, states that after the committee accepted documents into evidence regarding Babcock's application, the agreements earlier referred to herein, reports of alcohol on her breath, and the complaint charging her with second-offense driving while intoxicated, Babcock read a statement to the committee and asked Dr. B.D. Urbauer to speak on her behalf. Babcock was dismissed for an executive committee discussion. The report states that after Babcock was dismissed, Urbauer talked to the executive committee about Babcock's progress and treatment. Urbauer was then excused from the hearing. The report states that committee members expressed concern about patient care issues and the medical staff's responsibility for maintaining quality of patient care should Babcock be allowed to keep her privileges. The executive committee decided to recommend to the hospital board of directors that Babcock's suspension should continue pending resolution of the driving while intoxicated charge.

On November 3, 1993, Babcock was notified that the executive committee would recommend to the board of directors that her suspension should continue, pending the outcome of the criminal case. This notification also informed Babcock that she had a right to an appellate review of the executive committee's decision, by appeal to the governing body of the hospital, in accordance with the hearing and appellate review procedure of the bylaws. On November 12, Babcock requested appellate review. She was notified on November 23 that an appellate hearing had been set for November 29.

At the hearing before the appellate review committee, Babcock and St. Francis were represented by counsel. Babcock was allowed to make a statement. Under the bylaws, the appellate review hearing is to be based on the record from the executive committee hearing. However, Babcock was allowed to

enter into evidence a letter from a doctor which explains, she stated, the difference between a "relapse" and a "slip" in recovery from alcoholism. As a result of the appellate review committee hearing, the committee affirmed the executive committee's recommendation, but modified the recommendation so that the suspension would be permanent, rather than temporary and dependent upon the outcome of Babcock's criminal case. The recommendation was sent to the governing board, which in turn referred the matter to a joint conference committee. The bylaws provide that if the recommendations of the executive committee and the appellate review committee differ, the matter shall be referred to a joint conference committee for review and recommendation. In between the appellate review committee hearing and the joint conference committee review hearing, Babcock pleaded guilty to the charge of driving while intoxicated, second offense.

At the joint conference committee hearing on January 5, 1994, Babcock was represented by counsel, was allowed to introduce evidence and present witness testimony, and was allowed to cross-examine witnesses. At the conclusion of the hearing, the joint conference committee recommended that the board of directors terminate Babcock's privileges. The minutes from the board of directors meeting state that "[i]t was felt that the Medical Center cannot reasonably protect patients . . . short of terminating [Babcock's] staff membership and privileges." The board then voted to terminate Babcock's staff privileges. On January 28, St. Francis mailed a report for the National Practitioner Data Bank, pursuant to the requirements under the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq. (1988 & Supp. V 1993) (the Act), notifying the data bank that Babcock's medical staff privileges had been terminated over concern about her drinking.

Babcock filed an amended petition in district court on February 8, 1994, against St. Francis, alleging that the actions of St. Francis were not supported by the evidence, were in violation of the hospital's own bylaws, and were not based on the conditions set forth in the September 7, 1993, agreement. Babcock requested an injunction to prevent St. Francis from notifying the National Practitioner Data Bank that her privileges

had been terminated and to prevent the enforcement of the suspension, a declaration that the suspension was contrary to the agreement and the bylaws, and an order reinstating her staff privileges as well as an award of damages for lost income. St. Francis filed a motion for summary judgment, which was granted by the district court.

ASSIGNMENT OF ERROR

In this court, Babcock alleges that the district court erred when it granted St. Francis' motion for summary judgment.

STANDARD OF REVIEW

[1,2] To review a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). A summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

[3] An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

ANALYSIS

Enjoin Report to National Practitioner Data Bank; Enjoin Suspension of Privileges.

Babcock requested that the court enjoin St. Francis from filing a report with the National Practitioner Data Bank following disciplinary action taken against Babcock by St. Francis and that the court enjoin the hospital from suspending her privileges. Under the Act, and the rules and regulations promulgated pursuant to the Act, all licensed hospitals which take an action adversely affecting a practitioner's clinical privileges for more than 30 days are required to report such action to the state board of medical examiners, which in turn is required under the Act to report any information it receives

from such hospital to the National Practitioner Data Bank, as well as to report such information to the state licensing board. See, 42 U.S.C. §§ 11133 and 11134; 45 C.F.R. § 60.9 (1995). Both the hospital and the state board of medical examiners are subject to sanctions under the Act if they fail to comply with the Act's reporting requirements. §§ 11133 and 11134; 45 C.F.R. § 60.9.

[4] Babcock's request for an injunction was made after St. Francis had already suspended her privileges and mailed the report required under § 11133. "The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done." *Koenig v. Southeast Community College*, 231 Neb. 923, 925, 438 N.W.2d 791, 794 (1989). Because the reporting to the National Practitioner Data Bank was already a fait accompli when Babcock requested the injunction, she was not entitled to this form of relief, and the district court correctly granted summary judgment on her requests for injunctive relief. See *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994) (holding that natural resources district order against farmers in fifth year of water allocation was moot by passage of time when fifth year was already over, but recognizing public interest exception to mootness doctrine, citing *Koenig v. Southeast Community College, supra*).

However, this is not to say that if Babcock's privileges were wrongfully suspended and reporting should not have occurred, a court could not fashion appropriate equitable relief. However, from an analytical standpoint, when the matter of the timing of the request for injunction is put aside, the district court could only err in not granting the injunction if St. Francis had wrongfully suspended Babcock's privileges. If St. Francis was entitled to summary judgment on the core issue of whether Babcock's privileges were properly suspended, then it logically follows that there could be no error in failing to grant the requested injunction. In addition to seeking to enjoin an act

which has already occurred, Babcock's appeal fails on this fundamental proposition, as will hereafter be fully detailed.

Damages Against St. Francis.

In her petition, Babcock sought damages against St. Francis for loss of income incurred as a result of the alleged breach of contract between Babcock and St. Francis. Because we find that the Act provides immunity from damages to St. Francis, Babcock is not entitled to any recovery for damages.

[5,6] One of the purposes of the Act is to encourage physicians, without fear of litigation, to " 'identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1321 (11th Cir. 1994). In furtherance of this purpose, the Act bestows limited immunity from lawsuits for money damages upon those who participate in professional peer reviews. 42 U.S.C. § 11111. The Act provides:

> If a professional review action . . . of a professional review body meets all the standards specified in section 11112(a) . . .
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

§ 11111.

The Act defines a "professional review body" as a health care entity, including hospitals, and any governing body or any committee of a hospital which determines physicians' privileges at such hospital. 42 U.S.C. § 11151(11). A "professional review action" is an action or recommendation which is based on the competence or professional conduct of an individual physician and which adversely affects or may affect such physician's clinical privileges. § 11151(9).

The standards which the "professional review body" must follow to enjoy immunity are set forth in 42 U.S.C. § 11112(a), as follows:

> [A] professional review action must be taken—
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

[7] Immunity under the Act is a question of law. *Bryan v. James E. Holmes Regional Medical Center, supra.* It was the intent of Congress that questions regarding immunity under the Act be resolved during the early stages of litigation, such as upon a motion for summary judgment. *Bryan v. James E. Holmes Regional Medical Center, supra.*

[8] It is important to note, however, that the Act creates a rebuttable presumption that the professional review action "met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." § 11112(a). This provision "creates a somewhat unusual standard: Might a reasonable jury, viewing the facts in the best light for [the disciplined physician] conclude that [the physician] has shown, by a preponderance of the evidence, that [the hospital's] actions are outside the scope of § 11112(a)?" *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). "[T]he presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable." *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d at 1333.

This doctrine from the Act is the functional and procedural equivalent to the well-established rule in Nebraska that after a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party then has the burden to present *evidence* showing an issue of material fact which would prevent judgment as a matter of law for the

movant. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). See, also, *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995) (when movant for summary judgment makes prima facie case, burden of producing *evidence* shifts to party opposing motion). Thus, we review the record to determine whether Babcock has satisfied her burden of producing evidence (which under the Act means by a preponderance) which would allow a reasonable jury to conclude that St. Francis' actions failed to meet the four standards under the Act. Only if Babcock has met this burden of producing evidence can immunity be denied St. Francis and summary judgment foreclosed on the question of damages. Thus, we turn to the predicates for immunity under the Act.

First, a review of the record firmly establishes that the decision to terminate Babcock's privileges at St. Francis was made "in the reasonable belief that the action was in the furtherance of quality health care." § 11112(a)(1). Babcock had been reported as having alcohol on her breath in the preoperating room on one occasion, and on October 8, 1993, if she had shown up as scheduled to administer anesthesia, she would have been in no condition to work. The evidence shows that on October 8, if she had reported for work, she would have had a BAC level perilously close to exceeding the legal limit for a driver. It goes without saying that an anesthesiologist can be held to a higher standard than a driver. It seems obvious that the skill and delicacy required of an anesthesiologist demand, at minimum, complete sobriety. St. Francis should not have to wait until Babcock injures or kills someone before taking action. St. Francis had given Babcock a chance to recover after the first incident, and Babcock failed. The board's minutes stated that nothing short of terminating Babcock's privileges would adequately protect its patients. That St. Francis acted with a reasonable belief that it was furthering quality health care is clear. Babcock introduced no evidence to show any other motive or reason behind the action of St. Francis.

Second, the record establishes that St. Francis took its action "after a reasonable effort to obtain the facts of the matter." § 11112(a)(2). The issue of Babcock's termination was examined by no less than four different review panels at St. Francis.

Babcock was allowed to present evidence during three of these reviews, and each reviewing group based its decision upon the entire documentary record developed during consideration of Babcock's situation. In fact, by the time of the joint conference committee's decision, Babcock had admitted her guilt in the criminal proceeding for second-offense driving while intoxicated, arising from the October 7, 1993, incident. The second requirement for immunity is unquestionably satisfied.

Third, it is abundantly clear from the record that Babcock's staff privileges were revoked only "after adequate notice and hearing procedures [were] afforded to the physician involved or after such other procedures as [were] fair to the physician under the circumstances." § 11112(a)(3). While § 11112(b) provides the exact conditions a hospital must meet to qualify under § 11112(a)(3), the failure to meet the exact conditions does not, "per se, constitute a failure to meet the standards" of § 11112(a)(3) " '[i]f other [fair] procedures are followed.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.2d 1318, 1336 (11th Cir. 1994). Moreover, the physician waives the requirement that the enumerated conditions under § 11112(b) be followed if the physician fails to object to the notice or hearing procedures. *Bryan v. James E. Holmes Regional Medical Center, supra*. The record establishes that during the peer review process Babcock never raised any objection on the ground of inadequate notice or faulty hearing procedure. She was fully notified of the various proceedings and participated in the hearings which were provided to her. It is also clear that the procedures used by St. Francis to decide to terminate Babcock's privileges, and to review that decision, were fundamentally fair.

Finally, the record clearly establishes that St. Francis decided to terminate Babcock's privileges "in the reasonable belief that the action was warranted by the facts known." § 11112(a)(4). The board terminated Babcock because she posed a possible danger to St. Francis' patients. The role of the courts in review of a hospital's actions under this subsection is not " 'to substitute our judgment for that of the hospital's governing board or to reweigh the evidence regarding the . . . termination of medical staff privileges.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d at 1337 (quoting *Shahawy v. Harrison*, 875

F.2d 1529 (11th Cir. 1989)). We do not substitute our judgment for the hospital's, but hold that as a matter of law, under the facts disclosed by the record before it from the peer review process, St. Francis could hold a reasonable belief that suspension of Babcock's privileges was warranted.

In summary, we conclude that no reasonable jury could conclude, even viewing the facts most favorably to Babcock, that Babcock has produced evidence, rising to the level of a preponderance as the Act requires, that St. Francis' actions were outside the scope of § 11112(a). As a result, St. Francis is immune from any liability for damages under the Act, and therefore, the district court correctly granted summary judgment against Babcock on her claim for damages.

Reinstatement of Staff Privileges; Declaration that Suspension Was Contrary to Contract and Hospital's Bylaws.

Babcock alleges that St. Francis can terminate her privileges for breach of the September 7, 1993, agreement only and that because she did not breach that agreement, St. Francis cannot terminate her privileges. Babcock alleges that there are material issues of fact regarding whether she breached the agreement. Moreover, Babcock alleges that she was entitled to due process during the proceedings to terminate her privileges and that there are material issues of fact regarding whether she was denied due process by St. Francis.

[9] A private hospital's actions do not constitute state action and therefore are not subject to scrutiny by the courts for compliance with due process protection. *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248 (8th Cir. 1987); *Tunca v. Lutheran General Hosp.*, 844 F.2d 411 (7th Cir. 1988); *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982); *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3d Cir. 1978); *Owens v. New Britain General Hosp.*, 229 Conn. 592, 643 A.2d 233 (1994); *Adkins v. Sarah Bush Lincoln Hea. Ctr.*, 129 Ill. 2d 497, 544 N.E.2d 733 (1989).

[10] Babcock complains that she was not allowed to perform full discovery to determine whether the hospital received Hill-Burton funding and medicaid and medicare funds or whether it was regulated by the state, received tax-free bonds,

was exempt from taxes, and received tax-deductible contributions, all of which, she argues, would demonstrate that the hospital was a public or quasi-public entity and thus that its actions were state actions. However, all of these factors, even if proved, "are insufficient to establish state action, which exists 'only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.' " (Emphasis omitted.) *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d at 1252. See, also, *Modaber v. Culpeper Memorial Hospital, Inc., supra*. Here, Babcock has not alleged or otherwise identified a nexus between the various forms of alleged government involvement with the hospital and the hospital's decision to suspend Babcock's privileges. Therefore, even if Babcock had been able to perform additional discovery and establish that St. Francis was not a private hospital, such fact would not have established a causal connection between state action and the decision to suspend her privileges. See *Pariser v. Christian Health Care Systems, Inc., supra*. The causal nexus for Babcock's suspension is the furtherance of quality health care. Babcock has not carried her burden of proof to make out a genuine issue of material fact that the motive or reason behind her suspension was "state action" or something other than the furtherance of quality health care. However, even though the hospital's actions are not subject to a strict due process analysis, this is not to say that courts have not reviewed a hospital's actions concerning suspension of privileges to ensure some basic level of fairness.

Our research has revealed that only the Michigan courts have held that a private hospital's decision to exclude a physician from practicing at the hospital is not subject to any form of judicial review. In *Sarin v Samaritan Health Ctr*, 176 Mich. App. 790, 440 N.W.2d 80 (1989), the court refused to review a hospital's decision to terminate privileges, even when the physician alleged a failure by the hospital to follow its own bylaws. The court in *Sarin* said that to do so would "necessarily involve a review of the decision to terminate and the methods or reasons behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals." *Id.* at 794, 440 N.W.2d at 83.

[11] However, the majority of the courts have held that the decision of a private hospital to revoke, suspend, or limit the privileges of a physician or other member of the medical staff is subject to limited judicial review to ensure that the hospital substantially complied with its medical staff bylaws, as well as to ensure that the bylaws provide for basic notice and fair hearing procedures. *Owens v. New Britain General Hosp.*, 229 Conn. 592, 643 A.2d 233 (1994); *Mahmoodian v. United Hosp. Center, Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (citing cases from other jurisdictions); *Bouquett v. St. Elizabeth Corp.*, 43 Ohio St. 3d 50, 538 N.E.2d 113 (1989); *Adkins v. Sarah Bush Lincoln Hea. Ctr.*, 129 Ill. 2d 497, 544 N.E.2d 733 (1989); *Kiracofe v. Reid Memorial Hosp.*, 461 N.E.2d 1134 (Ind. App. 1984); *Garrow v. Elizabeth General Hospital and Dispensary*, 79 N.J. 549, 401 A.2d 533 (1979). Such a review "ensures procedural fairness to the physician while preserving decisions concerning staff privileges for the expert judgment of hospital officials." *Owens v. New Britain General Hosp.*, 229 Conn. at 608, 643 A.2d at 242.

[12] A hospital's obligation to follow its own bylaws can stem from a contractual relationship between the hospital and physician. *Owens v. New Britain General Hosp., supra*; *Mahmoodian v. United Hosp. Center, Inc., supra*; *Berberian v. Lancaster Osteo. Hosp. Assn.*, 395 Pa. 257, 149 A.2d 456 (1959). Under St. Francis' bylaws, all physicians applying for staff privileges must agree to be bound by the hospital's bylaws. Thus, St. Francis and Babcock were not only bound by the conditional agreement, but by the bylaws.

[13] Construction of a written contract is a question of law for the court. *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989). It is clear, from an examination of the bylaws, that St. Francis has the ability to offer conditional, provisional staff privileges to physicians who wish to join the medical staff at St. Francis. The agreement between Babcock and St. Francis stated certain conditions Babcock had to fulfill to be retained; however, the bylaws also require physicians to be able to continually demonstrate to the members of the medical staff that any patient who may be treated by the physician will receive quality care. The bylaws

also provide that whenever the activities or professional conduct of any physician is considered lower than the standards or aims of the medical staff, corrective action may be taken. St. Francis had the ability to terminate Babcock's staff privileges for breach of the agreement, breach of the bylaws, or both.

[14] Our examination of the hospital's bylaws reveals a fundamentally fair procedure which affords the practitioner notice and the ability to have the charges reviewed by an impartial body, to which the physician has the ability to present evidence, and the physician is accorded the right to an appeal. Such provisions are sufficiently fair. *Adkins v. Sarah Bush Lincoln Hea. Ctr., supra*. The hallmarks of procedural due process are notice concerning the nature and subject of the proceeding, an opportunity to be heard and to present evidence, representation by counsel when required by statute or constitutional provisions, and a hearing before an impartial decisionmaker. See *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994), and cases collected therein. Babcock received these fundamental protections from St. Francis. While Babcock argues that because the executive committee and the various appeal panels contained some of the same members, she was denied a fair and impartial hearing, we cannot agree. Absent evidence of actual bias, the fact that a board or committee or some of its members might have earlier considered suspending a physician's privileges does not amount to an unfair hearing. *Adkins v. Sarah Bush Lincoln Hea. Ctr., supra*; *Chessick v. Sherman Hospital Ass'n*, 190 Ill. App. 3d 889, 546 N.E.2d 1153 (1989). Babcock has failed to show any evidence of actual bias; therefore, under the bylaws, she was afforded a fair hearing.

[15] To the extent that courts examine the evidentiary basis for a hospital's decision to suspend privileges, such examination is in recognition that an inherent element of fair hearing procedures is that there be sufficient evidence to support the hospital's decision. See *Mahmoodian v. United Hosp. Center, Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991). The measure of evidence, irrespective of phraseology, according to the court in *Mahmoodian*, "appears to be either an arbitrary and capricious (or abuse of discretion) standard or a substantial evidence

standard." *Id.* at 71, 404 S.E.2d at 762. Nonetheless, *Mahmoodian* acknowledges that the decision of a hospital, whether private or public, concerning medical staff privileges is entitled to "judicial deference." *Id.* at 71, 404 S.E.2d at 762.

The Supreme Court of Connecticut in *Owens v. New Britain General Hosp.*, 229 Conn. 592, 643 A.2d 233 (1994), although citing the above holdings of *Mahmoodian* in a footnote, did not adopt a standard of review by courts on the measure of evidence necessary to support medical staffing decisions. Instead, the *Owens* court held:

> The exercise of their [hospital staff's and administration's] discretion should be subject only to limited judicial surveillance to determine if the hospital substantially complied with its applicable bylaw procedures. . . .
>
> . . . [W]e conclude that the substantial compliance test ensures procedural fairness to the physician while preserving decisions concerning staff privileges for the expert judgment of hospital officials.

229 Conn. at 606-08, 643 A.2d at 241-42. Thus, judicial review properly encompasses the subject of whether the hospital substantially complied with its bylaws, whether notice was provided, whether fair procedures were employed, and whether there was sufficient evidence behind the decision to suspend so that the decision cannot be said to be arbitrary and capricious.

In summary, the evidence establishes that Babcock came to St. Francis with a history of serious alcohol problems for which she had previously undergone inpatient treatment. Soon after Babcock began her employment with St. Francis, other staff noticed when they were preparing for surgery that she exhibited signs of having been drinking. In response to those complaints, she again underwent inpatient treatment, but within 30 days of the agreement for her return to work she was arrested for second-offense driving while intoxicated. In addition to her having a high BAC of .25 in the October 7, 1993, incident, her 5-year-old son was a passenger in the vehicle—reinforcing the conclusion that her addiction was serious and interfering with her judgment. There was evidence that had she reported for work the next morning, she would have been laboring under a BAC of .09—not quite too drunk to legally drive, but surely too

drunk to be in an operating room. Babcock did not dispute these basic facts, and during the review process she pleaded guilty to second-offense driving while intoxicated.

Given that an anesthesiologist literally has the life of surgical patients in her hands, the potential threat to patients from Babcock is obvious. She was not a fully recovered alcoholic, but a person still strongly in the grasp of alcohol. The hospital need not have waited for a patient's death or injury at her hands before acting, when faced with the evidence showing the hold alcohol had over her. Given the facts known to St. Francis and the potential for harm, the decision to suspend Babcock's staff privileges was not arbitrary or capricious. There is no genuine issue of material fact as to whether St. Francis substantially complied with its own bylaws when determining whether Babcock's staff privileges should be terminated; it did substantially comply. The district court correctly granted St. Francis' motion for summary judgment on all aspects of Babcock's claim.

AFFIRMED.

BLUFF'S VISION CLINIC, P.C., APPELLEE, V. SUSAN KRZYZANOWSKI, APPELLANT.

543 N.W.2d 761

Filed February 20, 1996. No. A-94-787.

1. **Jurisdiction.** A jurisdictional question that does not involve a factual dispute is a matter of law.
2. **Federal Acts: Civil Rights: Fair Employment Practices.** Since the Nebraska Fair Employment Practice Act is patterned after title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 & Supp. V 1993), it is appropriate to consider federal court decisions construing the federal legislation.
3. **Fair Employment Practices: Jurisdiction.** Generally, part-time employees can be counted as employees when jurisdiction is contested.
4. **Fair Employment Practices.** A payroll method for determining the number of employees for the purpose of complying under Neb. Rev. Stat. § 48-1102(2) (Reissue 1993) shall be used.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for further proceedings.

Tylor J. Petitt, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellant.

James M. Worden, of Simmons, Olsen, Ediger & Selzer, P.C., for appellee.

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

INBODY, Judge.

INTRODUCTION

The appellant, Susan Krzyzanowski, pursuant to the Nebraska Fair Employment Practice Act, brought an employment discrimination action against her employer, Bluff's Vision Clinic, P.C. (Bluff's). After a hearing, the Nebraska Equal Opportunity Commission (NEOC) first found it had jurisdiction and then held for Krzyzanowski. Bluff's appealed to the district court, which found that the NEOC lacked jurisdiction, because Bluff's was not an "employer" as described in the act. Krzyzanowski appeals that order. We conclude that Bluff's can be considered an employer under the statutory definition, and therefore the NEOC had jurisdiction. Thus, we reverse the judgment of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

Since the only issue raised on this appeal relates to the jurisdiction of the NEOC over Bluff's, most of the facts are for background purposes, and the relevant facts relating to jurisdiction are undisputed and will be discussed in greater detail in the analysis portion of this opinion.

Krzyzanowski filed a complaint with the NEOC charging Bluff's with employment discrimination on the basis of her gender, in violation of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1993) (the Act). The complaint was amended to add a charge of retaliation. Bluff's filed a motion to dismiss the complaint, arguing that the NEOC lacked jurisdiction over Bluff's. A hearing examiner for

the NEOC held a hearing, and on October 27, 1993, the hearing examiner overruled the motion to dismiss. Following a public hearing, the examiner made his findings and issued an order on February 25, 1994.

The examiner found that the NEOC had jurisdiction over Bluff's. Specifically, the examiner found that although Bluff's did not by itself employ the requisite 15 employees to be considered an employer under the Act, it was proper to consolidate Bluff's with another entity, The Meat Shoppe, Inc., in order to acquire jurisdiction. The examiner found that the two entities were sufficiently interrelated to be considered one employer for the purposes of the Act.

The examiner came to the following additional conclusions: (1) that Krzyzanowski is a protected person under the Act, (2) that Krzyzanowski established a prima facie case of intentional employment discrimination, (3) that Bluff's met its burden of production of evidence by showing legitimate nondiscriminatory reasons for Krzyzanowski's rate of pay and for terminating her, (4) that Krzyzanowski proved by a preponderance of the evidence that Bluff's proferred reasons were not the true reasons, (5) that Krzyzanowski is entitled to recover certain wages and reasonable attorney fees, (6) that reinstatement is not practicable and should not be ordered, and (7) that a cease and desist order should be issued against Bluff's.

On March 4, 1994, after reviewing the findings and conclusions of the examiner, the NEOC ordered that these findings and conclusions be entered as the official final order of the NEOC. Bluff's appealed that final order to the district court, alleging, among other things, that it was error for the NEOC to find it had jurisdiction over Bluff's. After a hearing, the district court found that the NEOC did not have jurisdiction, specifically finding that it was improper to find that Bluff's and The Meat Shoppe were sufficiently interrelated to be considered one employer, and thus ordered the case dismissed. It is from this order that Krzyzanowski timely appeals.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is a matter of law. Therefore, we reach a conclusion

independent from that of the trial court on the jurisdictional issue. *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

ANALYSIS

Bluff's denies that the NEOC had jurisdiction because Bluff's is not an "employer" as defined by § 48-1102 due to the fact that it does not employ the minimum requisite number of employees. Krzyzanowski argues that Bluff's meets the definition of "employer" because (1) part-time employees should be counted toward the requisite number or, alternatively, (2) The Meat Shoppe should be combined with Bluff's for purposes of jurisdiction because the two enterprises are sufficiently interrelated.

[2] Since the Act is patterned after title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 & Supp. V 1993), it is appropriate to consider federal court decisions construing the federal legislation. *City of Fort Calhoun v. Collins*, 243 Neb. 528, 500 N.W.2d 822 (1993) (relying on federal case law to hold that volunteer firefighters are not employees under Nebraska Fair Employment Practice Act); *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984). Federal courts have determined whether an entity meets the definition of "employer" by counting the number of employees an entity has for the time periods in question and also by determining whether the entity in question is sufficiently related to another entity so that combining the two would allow the entity in question to fall within the statutory requirement. See, e.g., *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983); *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977); *Switalski v. Local Union No. 3*, 881 F. Supp. 205 (W.D. Pa. 1995); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327 (N.D. Ind. 1992).

Appealable Issue.

Both sides agree that in determining whether the requisite number of employees existed to establish Bluff's as an employer

under the Act, examination can be made of Bluff's by itself or in combination with another sufficiently related entity. However, Bluff's asserts that only the latter issue is properly presented to this court on appeal. In support of this argument, Bluff's directs this court to the way in which the jurisdiction issue was presented throughout the appeal process.

The NEOC specifically found that Bluff's by itself did not meet the statutory requirement, but that Bluff's met the requirement when it was combined with The Meat Shoppe. Only Bluff's appealed this ruling to the district court, and Bluff's argues that since it assigned as error the NEOC ruling on jurisdiction, by Krzyzanowski's answer on appeal in district court that requested the findings of the NEOC be upheld, Krzyzanowski consented to that part of the NEOC determination that Bluff's by itself lacked the requisite number of employees.

Bluff's argues that in order to preserve the finding that Bluff's by itself did not meet the statutory definition of "employer," Krzyzanowski should have cross-appealed in district court. Thus, the narrow issue presented to the district court was whether the NEOC erred in combining Bluff's with The Meat Shoppe in order to acquire jurisdiction over Bluff's. The district court determined that the NEOC lacked jurisdiction on that basis and specifically stated that the two entities were not sufficiently related. Therefore, Bluff's asserts that in Krzyzanowski's appeal to this court, the only issue properly presented is whether the district court erred in not combining the two entities for purposes of acquiring jurisdiction.

As stated above, courts determine whether an employer meets the definitional requirement by looking first at whether the entity by itself has employed the requisite number of employees for the requisite amount of time. Then, if the entity has not met this first requirement, the court looks to determine if the entity in question can be combined with another entity that is sufficiently related. We conclude that the district court, in order to reach its specific findings, first must have taken the necessary step of determining that Bluff's by itself did not have the requisite number of employees. It makes no sense to attempt to combine two entities to meet the requisite number of employees

if the entity in question alone meets the requirements. Therefore, we conclude that the issue of jurisdiction, no matter how obtained, is properly presented before this court.

Part-Time Employees.

The NEOC has jurisdiction over Bluff's if Bluff's falls under the statutory definition of "employer." "Employer" is defined in part as "a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 48-1102(2).

The facts are undisputed as to the number of Bluff's employees and the hours each worked. The parties agree that whether the NEOC has jurisdiction depends on how, if at all, Bluff's part-time employees are counted.

Although Bluff's employed 15 or more employees during each of the weeks in question, some of the employees were part time. Because of the schedule of these part-time employees, there were not always 15 employees working each and every day of every week in question. For example, during the first quarter of 1991, Bluff's employed 11 full-time employees and 5 part-time employees. However, at least three part-time employees did not work on at least 2 days of each week. Therefore, even though Bluff's paid more than 15 people during each of these weeks, Bluff's did not have 15 people working on at least 2 days of each of these weeks. Although the numbers are different, the result is the same for the remaining quarters of 1991 and 1992.

[3] Generally, part-time employees can be counted as employees when jurisdiction is contested. See, e.g. *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983); *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327 (N.D. Ind. 1992). However, the question presented by this case is how those employees should be counted. There is a split of authority in the federal decisions regarding this matter. See *Reith v. Swenson*, 63 Fair Emp. Prac. Cas. (BNA) 885 (D. Kan. 1993) (discussing in detail rationale for majority and minority views).

Krzyzanowski argues the majority view, that a "payroll" theory should be adopted by this court in order to effectuate the legislative intent and purpose of the statute. In essence, this theory sets forth that as long as the employer had 15 employees on its payroll during a given week, that meets the requirement set forth in the statute for that week. Krzyzanowski relies on *Thurber v. Jack Reilly's, Inc., supra*, in support of this proposition.

In *Thurber*, a waitress brought a gender discrimination action against her employer, a bar, alleging that she was not given an opportunity to train for a higher paying position. Each day, the bar had approximately 9 employees working; however, in total, the bar employed and paid over 15 employees in each of the weeks in question. Some of these employees were full time, and some were part time. The bar argued that the language "for each working day," found in the definition of "employer," required that the word "employees" be limited to those persons actually working on each day in question.

The U.S. Court of Appeals for the First Circuit rejected the employer's argument. The court examined the legislative history and decided that a strict interpretation of the language "for each working day" was inconsistent with the remedial purposes of title VII. The court held that to examine the payroll, and not to merely count the number of employees who reported to work, was more consistent with the remedial purposes of title VII. See, also, *Reith v. Swenson, supra*; *Simmons v. Vliets Farmers Cooperative*, 55 Fair Emp. Prac. Cas. (BNA) 1341 (D. Kan. 1991); *E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F. Supp. 1430 (S.D. Fla. 1989) (all using payroll method).

Krzyzanowski also argues the Equal Employment Opportunity Commission (EEOC) has rejected the minority "counting" method, which Bluff's argues should be favored over the payroll method. In its policy statement, the EEOC states:

> [S]tatutory construction permits, and policy considerations and congressional intent mandate that under Title VII an employer who has fifteen employees on the payroll for twenty weeks of the year meets the statutory definition of employer . . . .
>
> . . . .

> The Commission's position is that all regular part-time employees are counted whether they work part of each day or part of each week.

Notice No. N-915-052, EEOC Compliance Manual (CCH) ¶ 2167 at 2313-14 (April 20, 1990).

Bluff's argues this court should adopt the minority view, that the plain language of the statute dictates that a counting method should be used, whereby only those employees who either worked or were paid leave each working day of each of the weeks in question should be counted. In support of its position, Bluff's relies on the leading case of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), and the case of *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983), in which the Eighth Circuit adopted the ruling and rationale of *Zimmerman*.

In *Zimmerman v. North American Signal Co., supra*, the Seventh Circuit rejected the payroll method and instead held that the language "each working day" could not be overlooked. Although the court was counting employees for purposes of the Age Discrimination in Employment Act (ADEA), the court looked to interpretations of title VII because of the similarities in the definition of "employer" in both acts. The court held that even though the ADEA is a remedial act which is intended to be construed liberally to achieve its purpose, the court could not interpret the statute to contradict its language. Based on this rationale, the *McGraw* court held that part-time workers who did not work each day of the workweek were not employees for that entire week. See, also, *E.E.O.C. v. Garden and Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992) (citing favorably *McGraw* and *Zimmerman*).

[4] It is undisputed by the parties, and the record, that if Krzyzanowski's position is adopted, then Bluff's will have met the definition of "employer." However, if Bluff's position is adopted, then the requisite number of employees will not have been met. We conclude that the majority view and the position stated by the EEOC is the better rationale because it does effectuate the remedial purposes and intent of the Act. Therefore, a payroll method shall be used for determining the number of employees under § 48-1102(2). Thus Bluff's, by

itself, did employ 15 employees for each week in question, and we need not decide whether or not the NEOC properly combined the two entities.

CONCLUSION

Bluff's was an employer as statutorily defined by § 48-1102(2) because when the payroll method is applied to count the number of employees, the record shows that Bluff's employed the requisite number for the requisite amount of time. Thus, we conclude that the district court erred in finding the NEOC was without jurisdiction, and we therefore reverse the judgment and remand this matter to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MICHAEL J. KNIGHT, APPELLANT, V. ROBERT G. HAYS, APPELLEE.

544 N.W.2d 106

Filed February 27, 1996. No. A-94-701.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
2. **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.
3. **Summary Judgment.** Summary judgment is to be granted 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.

4. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** A lawsuit brought under the Political Subdivisions Tort Claims Act rests upon a waiver of immunity. The waiver is conditional and is set out in statutory provisions establishing procedures which must be followed to proceed against the subdivision and its employees.
5. **Political Subdivisions Tort Claims Act: Jurisdiction: Negligence: Notice.** Compliance with the notice requirement of the Political Subdivisions Tort Claims Act is not a jurisdictional prerequisite for a negligence action brought under the act, but, instead, filing or presenting a claim against a political subdivision is a condition precedent for a claimant's right to commence a tort action against a political subdivision and, logically, against its officers, agents, and employees.
6. **Political Subdivisions Tort Claims Act: Notice.** Filing or presenting a tort claim against a political subdivision is a procedural matter.
7. **Political Subdivisions Tort Claims Act: Negligence: Notice.** Under the Political Subdivisions Tort Claims Act, a plaintiff does not have immediate and unrestricted access to a court for redress on account of a political subdivision's negligence, but, rather, has a qualified right to commence a negligence action, or, more simply, has a limitation on the right to commence a tort action against a political subdivision in the form of a precedent filed claim prescribed by Neb. Rev. Stat. § 13-905 (Reissue 1991).
8. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** A general denial will not raise the issue of noncompliance, which must be raised as an affirmative defense specifically alleging noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1991).
9. **Political Subdivisions Tort Claims Act: Pleadings: Notice: Proof.** Where a defendant alleges noncompliance with the notice requirement in a demurrer or an answer, the plaintiff has the burden to show compliance with the notice requirement.

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

Michael J. Knight, pro se.

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

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

MILLER-LERMAN, Chief Judge.

FACTS

On December 6, 1990, Michael J. Knight was convicted by a jury of conspiracy to commit first degree murder (prior action). On December 10, 1991, Knight filed a petition in the district court for Lancaster County alleging that Robert G. Hays, a deputy public defender, committed professional

malpractice in connection with the defense of Knight in the prior action. The petition states that Hays failed to perform a variety of duties in connection with the defense of Knight in the prior action and that Knight suffered physical and mental injuries as a result of his conviction and additionally suffered monetary damages consisting of lost wages and lost employment opportunities due to his incarceration.

On December 31, 1991, Hays filed a demurrer claiming that the court lacked subject matter jurisdiction pursuant to Neb. Rev. Stat. § 25-806 (Reissue 1989). Knight opposed the demurrer. Neither the specific basis for the demurrer nor the ruling on the demurrer are contained in the record, but the parties agree that the demurrer was overruled.

On February 27, 1992, Hays filed his answer, alleging that the court lacked subject matter jurisdiction. Knight replied. On April 16, 1993, Hays filed a motion to amend his answer, which motion the court granted. In his amended answer, Hays alleges that Knight failed to comply with the notice requirements of Neb. Rev. Stat. § 13-905 (Reissue 1991) of the Political Subdivisions Tort Claims Act. Knight replied to the amended answer, alleging that he was not suing a political subdivision or its employee and that his claims against Hays were individual in nature and were not filed against Hays involving circumstances under which Hays was acting under color of state law.

On January 24, 1994, Hays filed a motion for summary judgment pursuant to Neb. Rev. Stat. § 25-1331 (Reissue 1989). Attached to the motion were the affidavits of Lancaster County Public Defender Dennis Keefe and Lancaster County Clerk Denis Fettinger.

The Keefe affidavit states that during the relevant time period in connection with the prior action, Hays was appointed as an assistant public defender, Hays was an employee of Lancaster County, Hays was prohibited from engaging in the private practice of law during this period, and Hays was acting in the scope and course of his employment as an assistant public defender in connection with his representation of Knight. The Fettinger affidavit states that Fettinger was acting county clerk in and for Lancaster County, that he was responsible for receiving tort claims filed under the Political Subdivisions Tort

Claims Act, and that a review of official records did not reveal notice of a tort claim filed against Lancaster County or any of its employees by Knight in connection with the prior action.

A hearing was held on June 6, 1994, at which the pleadings and affidavits of Keefe and Fettinger were received in evidence, and the court heard oral arguments. On June 16, the district court sustained Hays' motion for summary judgment and ordered the case dismissed. The basis of the trial court's ruling was that § 13-905 of the Political Subdivisions Tort Claims Act requires that notice be filed with the clerk, secretary, or other official as a condition precedent to bringing a suit based in tort against an employee of a political subdivision and that Knight had failed to file such a notice. Knight appeals from this dismissal. For the reasons recited below, we affirm.

ASSIGNMENT OF ERROR

Phrased in a variety of ways, Knight claims on appeal that the district court erred in granting Hays' motion for summary judgment.

STANDARD OF REVIEW

[1-3] The Nebraska Supreme Court has recently repeated the scope of appellate review of summary judgments. The Nebraska Supreme Court has stated:

> The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).
>
> 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. *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

> Summary judgment is to be granted 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. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995).

Oliver v. Clark, 248 Neb. 631, 635-36, 537 N.W.2d 635, 639 (1995). See, also, *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995).

ANALYSIS

The trial court granted Hays' motion for summary judgment and dismissed the case on the basis that Knight failed to give timely notice of his intention to sue Hays, as required under the Political Subdivisions Tort Claims Act. Our review of the record shows that the trial court properly granted Hays' motion for summary judgment on this basis.

Knight argues that his petition makes allegations against Hays individually and that, therefore, the Political Subdivisions Tort Claims Act does not apply to this case. We do not agree.

In *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993), the Nebraska Supreme Court found that allegations against a Douglas County assistant public defender comparable to those in Knight's petition amounted to a suit seeking money damages on account of personal injuries, as contemplated by and included in Neb. Rev. Stat. § 13-920 (Reissue 1991). In *Gallion*, the Nebraska Supreme Court concluded that the suit therein was one commenced against an employee of a political subdivision for money and, therefore, was a suit under the Political Subdivisions Tort Claims Act. Although Knight suggests in his brief that his suit may sound in contract, a review of the petition shows otherwise. A review of the petition's essential factual allegations by which Knight seeks relief shows that the allegations are based in tort. See *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). We, therefore, conclude that the instant action was subject to the provisions of the Political Subdivisions Tort Claims Act.

Neb. Rev. Stat. § 13-902 (Reissue 1991) of the Political Subdivisions Tort Claims Act provides as follows:

> The Legislature hereby declares that no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489. The Legislature further declares that it is its intent and purpose through this enactment to provide uniform procedures for the bringing of tort claims against all political subdivisions, whether engaging in governmental or proprietary functions, and that the procedures provided by sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489 shall be used to the exclusion of all others.

Section 13-905 provides:

> All tort claims under sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489 shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. It shall be the duty of the official with whom the claim is filed to present the claim to the governing body. All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.

Section 13-920(1) reads as follows:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment occurring after May 13, 1987, unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued in accordance with section 13-905.

[4] A lawsuit brought under the Political Subdivisions Tort Claims Act rests upon a waiver of immunity. The waiver is conditional and is set out in statutory provisions establishing procedures which must be followed to proceed against the subdivision and its employees. *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990).

[5,6] In *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), the Nebraska Supreme Court concluded that compliance with the notice requirement of the Political Subdivisions Tort Claims Act is not a jurisdictional prerequisite for a negligence action brought under the act, but, instead, filing or presenting a claim against a political subdivision is a condition precedent for a claimant's right to commence a tort action against a political subdivision and, logically, against its officers, agents, and employees. As stated in *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 477 N.W.2d 20 (1989), filing or presenting a tort claim against a political subdivision is a procedural matter. We note that in *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993), the Nebraska Supreme Court affirmed the sustaining of a demurrer by the district court based on plaintiff's failure to comply with the notice requirements of the Political Subdivisions Tort Claims Act. Although in *Gallion*, the Nebraska Supreme Court referred to this procedural defect as "jurisdiction[al]," 242 Neb. at 262, 494 N.W.2d at 534, we believe that *Millman*, which holds that the notice requirements of the Political Subdivisions Tort Claims Act are not jurisdictional, controls this case.

[7-9] In *Millman*, 235 Neb. at 930-31, 458 N.W.2d at 217, the Nebraska Supreme Court stated that

> under the Political Subdivisions Tort Claims Act, a plaintiff does not have immediate and unrestricted access to a court for redress on account of a political subdivision's negligence, but, rather, has a qualified right to commence a negligence action, or, more simply, has a limitation on the right to commence a tort action against a political subdivision in the form of a precedent filed claim prescribed by § 13-905.

The *Millman* court also stated that although noncompliance with the notice requirement affords a political subdivision a defense

to a negligence action under the Political Subdivisions Tort Claims Act, a general denial will not raise the issue of noncompliance, which must be raised as an affirmative defense specifically alleging noncompliance, with the notice requirement of § 13-905. Failure to allege the affirmative defense of noncompliance with the notice requirements of § 13-905 results in a waiver of that defense. *Millman, supra.* By asserting a plaintiff's noncompliance with § 13-905 as an affirmative defense, the question of whether "plaintiff has in fact filed a complaint in compliance with § 13-905 may be properly raised and preserved for disposition in a summary judgment." *Id.* at 934, 458 N.W.2d at 219. See *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990). Where a defendant alleges noncompliance with the notice requirement in a demurrer or an answer, the plaintiff has the burden to show compliance with the notice requirement. *Millman, supra*; *Thompson v. City of Aurora*, 263 Ind. 187, 325 N.E.2d 839 (1975).

In the instant case, Hays alleged in his amended answer the affirmative defense of noncompliance with "the notice requirement contained in Neb.Rev.Stat. §13-905," thus preserving the defense of noncompliance. Knight's reply to the amended answer asserted in essence that § 13-905 was not applicable to this case. Noncompliance with the notice requirement of § 13-905 was the basis of Hays' motion for summary judgment. A review of the record at the hearing on the motion for summary judgment shows that Hays established by reference to the petition that the case was subject to the Political Subdivisions Tort Claims Act and by reference to the affidavits of Keefe and Fettinger that Knight had not given timely notice, as required by §§ 13-905 and 13-920(1). Following Hays' showing, Knight did not claim or offer evidence of compliance with the notice requirement, and none can be found in the record.

Based on the foregoing, viewing the evidence most favorably to Knight, as we must, we conclude that, as a matter of law, Hays' motion for summary judgment was properly granted. The record demonstrates that the subject matter of Knight's allegations makes the petition subject to the Political

Subdivisions Tort Claims Act and that Knight failed to comply with the notice requirement of the act, timely compliance with which is a condition precedent to bringing a suit of this nature. The trial court properly sustained Hays' motion for summary judgment and properly dismissed the petition.

AFFIRMED.

DIANNA L. QUINTELA, APPELLEE, V. PEDRO I. QUINTELA, APPELLANT.

544 N.W.2d 111

Filed February 27, 1996. No. A-95-086.

1. **Statutes: Presumptions.** Absent a demonstration of foreign law, Nebraska courts presume the common law and statutory law of other jurisdictions to be the same as the law of Nebraska.
2. **Paternity: Presumptions.** In Nebraska, a child born during wedlock is presumed to be the legitimate offspring of the married parties.
3. **Paternity: Presumptions: Proof.** The presumption of legitimacy is not an irrebuttable presumption, and it may be rebutted by clear, satisfactory, and convincing evidence.
4. **Parent and Child.** In the absence of a biological or adoptive relationship between a husband and his wife's child, certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child.
5. **Paternity.** The Nebraska paternity statutes provide that paternity may be established by acknowledgment.
6. **Paternity: Child Support.** If paternity is established by acknowledgment, a man is liable for support in the same manner as if the child had been born in lawful wedlock.
7. **Paternity.** As of July 1, 1994, an alleged father can be found to have acknowledged paternity only if he executes a notarized writing indicating that he considers himself to be the father.
8. **Due Process: Notice.** To comply with the requirements of procedural due process, a person whose rights are to be affected by proceedings must be provided with notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.
9. **Due Process.** The requirements of due process mandate that the individual be given a reasonable opportunity to refute or defend against the charge or accusation, a reasonable opportunity to confront and cross-examine adverse

witnesses, and a reasonable opportunity to present evidence on the charge or accusation.

10. **Paternity: Child Support: Estoppel.** The Nebraska Supreme Court has never used paternity by estoppel to impose a support obligation on someone who is not the biological father of his ex-wife's child.
11. **Paternity: Estoppel.** The doctrine of paternity by estoppel involves the application of established principles of equitable estoppel.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for further proceedings.

Karen L. Vervaecke for appellant.

No appearance for appellee.

HANNON, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pedro I. Quintela appeals from a divorce decree which ordered him to pay child support for a minor child born during the parties' marriage but who paternity tests establish is not his biological child. We find that Pedro was not provided with a full and fair hearing on the issue of paternity, and we therefore reverse, and remand for further proceedings.

II. FACTUAL BACKGROUND

The bill of exceptions in this case is 11 pages long and reveals the following facts:

Dianna L. Quintela and Pedro I. Quintela were married on June 21, 1986, in Jackson County, Mississippi. Both parties were in the Navy at the time. After their marriage, Pedro's ship was sent to Scotland, and Dianna moved to Virginia Beach, Virginia. Pedro returned to Virginia in 1987 and resumed living with Dianna.

Joshua Quintela was born on January 12, 1991. Dianna testified that the parties stopped living together in mid-1991. In December 1992, Dianna and Joshua moved to Nebraska.

On October 13, 1993, Dianna filed a petition for legal separation and alleged that Pedro was Joshua's father. On January 5, 1994, Dianna amended her filing to a petition for dissolution and again alleged that Pedro was Joshua's father. Pedro filed an answer and cross-petition on March 11, denied

that he was Joshua's father, and requested a blood test to determine paternity. On March 21, Dianna filed a reply and affirmatively alleged that Pedro was Joshua's father.

According to the court's docket sheet, the matter was set for trial on October 6, 1994, on the court's own motion. The bill of exceptions reflects that when the matter was called by the court on October 6, the following colloquy ensued:

> THE COURT: Court is considering Quintela vs. Quintela at Docket 9369, Page 1396. Petitioner is present with counsel. Respondent present by counsel. Is this resolved?
>
> MS. WAGEMAN [Dianna's counsel]: Yes, it is. Only thing we are going to do is prove up on it. We still have to send the decree down to the respondent.

Dianna appeared with her counsel, and Pedro's counsel appeared. Although a guardian ad litem had been appointed to represent Joshua's interests, the guardian was not present at trial. It is uncontroverted that the parties believed they had resolved the issues prior to trial, and Dianna appeared merely to "prove up" the petition. In fact, regarding issues surrounding the child, Dianna's counsel questioned her as follows:

> Q The respondent has denied that he is the biological father of this child?
>
> A Right.
>
> Q You and the respondent and your child voluntarily underwent paternity testing; correct?
>
> A Right.
>
> Q The results of that test indicated that in fact the respondent is not the biological father.
>
> A Right.
>
> Q So you understand today that the Court is not making any findings regarding issues of child custody between you and the respondent.
>
> A Yes.

Pedro's counsel questioned Dianna as follows: "Q You and Pedro have agreed he is not the father and he is forever barred from seeing the child? A That's correct."

The results of the paternity test were received by the court. The test indicated that there was a "0.0" percent chance that

Pedro was Joshua's father. According to the test results, Pedro "lack[ed] the genetic markers that must be contributed to [Joshua] by the biological father," and Pedro was thus "excluded as the biological father of [Joshua]." According to Dianna's testimony, the parties all agreed that Pedro is *not* Joshua's father.

After the petition had been proven by examination of Dianna, the court examined Dianna regarding the relationship between Pedro and Joshua. Dianna testified that she had thought someone other than Pedro was Joshua's father when she was pregnant. Dianna further testified that she informed Pedro he was not Joshua's father, although she did not testify as to when she so informed him. Dianna testified that she knew the biological father's name, although she never maintained a paternity action against him and testified that she did not know where he was at the time of trial.

Dianna testified that she had furnished the hospital Pedro's name as the father, although she knew Pedro was not the father. She also testified that Pedro had treated Joshua as his child "[u]ntil right after Josh's first birthday when [the parties] split up." Pedro had stopped visiting Joshua after Dianna and Joshua moved to Nebraska, although Dianna testified that Pedro had called and sent birthday cards to Joshua. Dianna testified that Pedro had sent support for her and Joshua until February 1994.

During the trial, the court expressed concern over Joshua's best interests. The court suggested that Pedro should be obligated to support Joshua despite the paternity test results. On December 21, 1994, the court entered a decree of dissolution. The court found that Pedro "has acknowledged paternity of [Joshua] and therefore . . . both parties are estopped from denying paternity of [Joshua] and [Joshua] is a child born from the marriage" of Pedro and Dianna. The court ordered Pedro to pay $335 in child support per month. On October 19, Pedro had filed a "Motion to Hear Additional Evidence" with a supporting affidavit of counsel which stated that it was counsel's understanding that no trial had been necessary because matters had been resolved between the parties. This motion was denied. A motion for new trial was also filed. This was also denied by the court. This appeal followed.

III. ASSIGNMENTS OF ERROR

In this appeal, Pedro assigns three errors, which we have consolidated for discussion to one: The district court erred in determining paternity and ordering Pedro to pay child support for a minor child who is not his biological offspring.

IV. STANDARD OF REVIEW

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

V. ANALYSIS

This case presents us with the question of whether a husband has a legal duty to support a child born during the course of the marriage when paternity tests conclusively demonstrate that he is not the child's biological father.

1. Choice of Law

[1] We note at the outset that there was a potential conflict-of-laws problem in this case. Joshua was born and lived together with Pedro and Dianna for a period of time in Virginia. Some of the actions upon which the trial court appears to have based Pedro's support obligation occurred in Virginia. At the time of trial, Pedro was a resident of Texas, and Dianna and Joshua were residents of Nebraska. Although any of these three states may have had an interest in having its law applied to this case, the parties did not raise at trial and do not raise on appeal the issue of which state's law should apply. It appears that Nebraska has the most significant relationship to the case and, correspondingly, the most significant interest in having its law applied to the case. See Restatement (Second) of Conflict of Laws §§ 6 and 287 (1971). However, even if Virginia or Texas law was deemed to control the case, no presentation was made to the trial court concerning what Virginia or Texas law is on the subject of paternity. Under such circumstances, we presume the common law and statutory law of other jurisdictions to be the same as the law of Nebraska. See, *Gruenewald v. Waara*,

229 Neb. 619, 428 N.W.2d 210 (1988); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

2. Paternity of Joshua

(a) Presumption of Legitimacy

[2,3] In Nebraska, a child born during wedlock is presumed to be the legitimate offspring of the married parties. See, e.g., *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992). The presumption of legitimacy is not an irrebuttable presumption, however, and it may be rebutted by clear, satisfactory, and convincing evidence. *Ford v. Ford, supra*; *Cavanaugh v. deBaudiniere, supra*. This court noted in *Cavanaugh* that blood tests may be used to rebut the presumption that the husband is the biological father of children born during wedlock.

In the present case, a paternity test was voluntarily consented to by the parties. The test resulted in a medical determination that Pedro is not Joshua's father. Specifically, the test revealed that there was a "0.0" percent possibility that Pedro could be Joshua's father. The paternity test results provided clear, satisfactory, and convincing evidence to rebut the presumption that Pedro is Joshua's father. As a result, in the present case an obligation of child support cannot be premised on the legal presumption that Pedro is Joshua's father.

(b) In Loco Parentis

[4] In the absence of a biological or adoptive relationship between a husband and his wife's child, the Nebraska Supreme Court and this court have recognized that certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child. See, *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946); *Cavanaugh v. deBaudiniere, supra*. The Nebraska Supreme Court has held:

> " 'A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation,

> without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.' . . ."

Hickenbottom v. Hickenbottom, 239 Neb. at 592, 477 N.W.2d at 17 (quoting *Austin v. Austin, supra*).

As indicated by this court, it is a husband's desire to remain in an in loco parentis relationship with his wife's child that gives rise to the rights and corresponding responsibilities usually reserved for natural or adoptive parents. See *Cavanaugh v. deBaudiniere, supra* (cause remanded for determination of ex-husband's desire to continue in loco parentis relationship with ex-stepchild). As a corollary, termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby. See, e.g., *id.*; *Jackson v. Jackson*, 278 A.2d 114 (D.C. 1971) (trial court erred in ordering support when husband demonstrated intent to end in loco parentis relationship); *Portuondo v. Portuondo*, 570 So. 2d 1338 (Fla. App. 1990) (when in loco parentis relationship terminated, support obligation terminated).

In the present case, Pedro and Joshua shared the same household for less than 1 year. Assuming, arguendo, that Pedro did assume such an in loco parentis relationship, his denial of paternity and challenge to Dianna's request for child support demonstrate that Pedro now wishes to terminate the relationship. Some jurisdictions consider such a relationship automatically terminated upon dissolution of the marriage between the parties. See, *Jackson v. Jackson, supra* (absent intention otherwise, in loco parentis relationship terminates upon divorce in most jurisdictions); *Portuondo v. Portuondo, supra* (dissolution of marriage terminates in loco parentis relationship); *E.H. v. M.H.*, 512 N.W.2d 148 (S.D. 1994) (responsibilities of in loco parentis relationship terminate upon dissolution of marriage). Because it is within Pedro's power to terminate the in loco parentis relationship, and because Pedro has made it clear that he does not desire such a relationship in the present case, an obligation to support Joshua cannot be

premised on the existence of an in loco parentis relationship between Pedro and Joshua.

(c) Acknowledgment

[5,6] In the decree, the trial court found that Pedro "has acknowledged paternity of [Joshua]." The Nebraska paternity statutes do provide that paternity may be established by acknowledgment. See, e.g., Neb. Rev. Stat. § 43-1401 et seq. (Reissue 1993 & Cum. Supp. 1994). If paternity is established by acknowledgment, a man is liable for support in the same manner as if the child had been born in lawful wedlock. § 43-1402.

[7] Prior to July 1, 1994, the Nebraska statutes provided that a person could be found to have acknowledged paternity either by stating in writing that he is the father of the child or by performing acts, such as furnishing support, which reasonably indicated that he considered himself to be the father. See § 43-1409 (Reissue 1993). The statute was amended, however, and as of July 1, 1994, an alleged father can be found to have acknowledged paternity only if he executes a notarized writing indicating that he considers himself to be the father. § 43-1409 (Cum. Supp. 1994).

In the present case it is not alleged, and the evidence does not suggest, that Pedro has executed any written acknowledgment of paternity. Based on Dianna's testimony and the language of the decree, it appears the court may have based its finding of paternity and obligation to support Joshua on a belief that Pedro acknowledged paternity by performing acts, such as furnishing support, indicating that he considered himself to be Joshua's father. Because Pedro allegedly performed these acts prior to the operative date of the amendment of § 43-1409, Pedro may be deemed to have acknowledged paternity under § 43-1409 (Reissue 1993) if he in fact performed acts, such as furnishing support, indicating that he considered himself to be Joshua's father.

The problem with the district court's finding that Pedro acknowledged paternity of Joshua is not that it was an erroneous conclusion based on the evidence before the court, but, rather, that it was made as a result of a hearing at which neither party

anticipated Pedro's paternity of Joshua would be an issue. Because paternity tests had demonstrated conclusively that Pedro was *not* Joshua's biological parent, it is clear that Pedro, Dianna, and Joshua's guardian ad litem anticipated that paternity and child support obligations would not be at issue. Dianna appeared at trial merely to "prove up" the petition, and Pedro, apparently in the belief that all matters were settled, did not personally appear. Additionally, the guardian ad litem did not appear. The district court, in an appropriate attempt to protect Joshua's best interests, raised the issue of paternity on its own motion.

[8,9] The Nebraska Supreme Court has held that to comply with the requirements of procedural due process, a person whose rights are to be affected by proceedings must be provided with notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). In addition, the requirements of due process mandate that the individual be given a reasonable opportunity to refute or defend against the charge or accusation, a reasonable opportunity to confront and cross-examine adverse witnesses, and a reasonable opportunity to present evidence on the charge or accusation. *Id.*

The record supports the conclusion that paternity and child support were not within the topics contemplated by the parties to be at issue. If Pedro is to be ordered to pay a specific liability, such as child support, as to which he may have a valid defense, he should at least receive notice and have the opportunity to be heard and present evidence on his own behalf. See *Weber v. Weber*, 203 Neb. 528, 279 N.W.2d 379 (1979). The record indicates that Pedro filed a motion requesting the court hear additional evidence on the paternity issue after the trial, but the court denied the motion. Pedro also filed a motion for new trial, which was denied by the court. Because Pedro was not provided with a full and fair hearing on the question of acknowledgment, we reverse the trial court's conclusion in this regard.

(d) Paternity by Estoppel

(i) Paternity by Estoppel in Nebraska

The trial court also found in the decree that "both parties are estopped from denying paternity of [Joshua]." Based on Dianna's testimony and the language of the decree, it is possible the court may have based its finding of paternity and obligation to support Joshua on a theory of paternity by estoppel. Many jurisdictions, including Nebraska, have had occasion to consider the application of estoppel to paternity and child support obligation cases.

[10] The Nebraska Supreme Court has never used paternity by estoppel to impose a support obligation on someone who is not the biological father of his ex-wife's child. In *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992), the court discussed the theory of paternity by estoppel. In *Mendoza*, the State brought an action against a biological father to recover support. The biological father in *Mendoza* attempted to use a theory of paternity by estoppel to suggest the mother's new husband should be estopped from denying paternity and the obligation of supporting the child.

[11] In *Mendoza*, the court held that the doctrine of paternity by estoppel involves the application of established principles of equitable estoppel. The court held that there were six elements to a claim of estoppel:

> "The elements of equitable estoppel are, as to the party estopped, (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; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (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, to his injury, detriment, or prejudice."

State on behalf of J.R. v. Mendoza, 240 Neb. at 164, 481 N.W.2d at 175 (quoting *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991)).

In *Mendoza*, the court determined that estoppel was technically inapplicable because the correct parties were not present. The *Mendoza* court questioned whether estoppel should be applied in paternity cases in Nebraska absent a demonstration that the acts of the party to be estopped have interfered with the child's ability to seek financial support from his or her biological parent. In *Mendoza*, the court reserved judgment on whether Nebraska would ever apply the doctrine of paternity by estoppel when the child has not suffered a financial detriment. The *Mendoza* court did, however, discuss a Maryland case, *Knill v. Knill*, 306 Md. 527, 510 A.2d 546 (1986), in which the Maryland court held that the doctrine applies *only* if the acts of the reputed father interfere with the child's ability to seek financial support from his or her natural parent.

(ii) Other Jurisdictions

State appellate courts nationally have reached varying results in considering the application of estoppel to paternity cases. See *K.B. v. D.B.*, 37 Mass. App. 265, 639 N.E.2d 725 (1994) (discussing divergent results of state courts). In some jurisdictions, courts appear eager to apply the doctrine. See, e.g., *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 664, 11 Cal. Rptr. 707, 710 (1961) ("[t]here is an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child's support, announces, and relies upon his bastardy"); *Judson v. Judson*, No. FA 94 0065962, 1995 WL 476848 at *5 (Conn. Super. July 21, 1995) (denying paternity test based on estoppel theory and quoting *Clevenger v. Clevenger, supra*, that " '[t]he relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted' "); *Commonwealth ex rel. Gonzalez v. Andreas*, 245 Pa. Super. 307, 312, 369 A.2d 416, 419 (1976) ("[a]bsent any overriding equities in favor of the putative father, such as fraud,

the law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized"). In other jurisdictions, however, courts appear willing to apply the doctrine of paternity by estoppel only sparingly. See, e.g., *Knill v. Knill, supra* (husband not estopped from denying paternity); *K.B. v. D.B., supra* (husband not estopped from raising defense of nonpaternity); *Marriage of A.J.N. & J.M.N.*, 141 Wis. 2d 99, 414 N.W.2d 68 (1987) (husband not estopped from denying paternity and obligation to support child).

The jurisdictions which appear ready to apply the doctrine of paternity by estoppel tend to focus on the loss to the minor child when the alleged father asserts nonpaternity. The California court, in *Clevenger v. Clevenger, supra*, stated:

> We are dealing with the care and education of a child during his minority and with the obligation of the party who has assumed as a father to discharge it. The law is not so insensitive as to countenance the breach of an obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly sundered.

189 Cal. App. 2d at 674, 11 Cal. Rptr. at 716. In contrast, the jurisdictions which only sparingly apply the doctrine tend to focus on encouraging husbands to voluntarily assume the role of father to illegitimate children born to their spouses without imposing the risk of assuming a permanent obligation of support. The Maryland court, in *Knill v. Knill*, 306 Md. 527, 538–39, 510 A.2d 546, 552 (1986), stated:

> In this case, Charles knew that Stephen was not his son and, nevertheless, treated him as his son and as a member of the Knill family. Such conduct is consistent with this State's public policy of strengthening the family, the basic unit of civilized society. We encourage spouses to undertake, where feasible, the support, guidance, and rearing of their spouses' children, so long as such conduct does not deprive the children of their right to support from their natural parents. . . . We believe that [Charles] should not be penalized for his conduct . . . .

All jurisdictions appear to have a common aim of fostering "the raising of illegitimate children within the protective wing of the

family unit." *K.B. v. D.B.*, 37 Mass. App. at 270, 639 N.E.2d at 728.

The jurisdictions favoring paternity by estoppel and the jurisdictions hesitating to apply the doctrine diverge from one another in application of the technical elements of estoppel. The elements of estoppel are usually stated as representation, reliance, and detriment. *K.B. v. D.B., supra.* The largest distinction between the two groups of jurisdictions appears to be in application of the "detriment" element. See *id.* The jurisdictions favoring paternity by estoppel tend to focus on the psychological or emotional impact on a child of learning that the man he or she thinks of as a father is now denying paternity in order to avoid a support obligation. See, e.g., *Clevenger v. Clevenger, supra*; *Judson v. Judson, supra.* In contrast, the jurisdictions hesitating to apply paternity by estoppel tend to confine their analysis of detriment to financial factors and rarely find that the husband's past provision of financial support has adversely affected the child's claim for support from his or her biological father. See, e.g., *Knill v. Knill, supra.*

(iii) Application to Present Case

Although the Nebraska Supreme Court expressly reserved judgment on the question of whether Nebraska would ever apply paternity by estoppel when the child has suffered no financial detriment, the court's discussion in *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992), suggests that Nebraska will not apply the doctrine in the absence of financial detriment. After citing and discussing the Maryland opinion in *Knill v. Knill, supra*, the *Mendoza* court noted that no financial detriment was present in the case before it.

In the case before us, we find that the requisite elements of estoppel are not present regardless of whether "detriment" is construed as meaning a financial detriment or a psychological detriment. As noted above, the elements of estoppel in Nebraska are,

> "as to the party estopped, (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; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (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, to his injury, detriment, or prejudice."

State on behalf of J.R. v. Mendoza, 240 Neb. at 164, 481 N.W.2d at 175 (quoting *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991)). We need not expressly decide whether the elements, as to Pedro, are satisfied, however, because we find that the record does not demonstrate any detriment to Joshua arising from Pedro's actions.

The record in the present case fails to establish *any* detriment to Joshua, either financial or psychological. Dianna testified that she has never maintained a paternity action against Joshua's biological father, although she testified that she does know who the biological father is. There is nothing in the record to suggest that Pedro's actions or representations, even assuming they are enough to satisfy the conduct requirements of estoppel, have in any way adversely affected Joshua's right and opportunity to seek support from his biological father. The record does not demonstrate any financial detriment.

The record reveals that Pedro and Dianna stopped living together in mid-1991. Joshua was born in January 1991. Additionally, Dianna and Joshua moved to Nebraska in December 1992, while Pedro remained in Virginia. As a result, Pedro and Joshua lived in the same home for less than 1 year and the same state for less than 2 years. Dianna testified that Pedro treated Joshua as his own child "[u]ntil right after Josh's first birthday." Regardless of what meaning is attached to Dianna's testimony that Pedro treated Joshua as his own child, the relationship between Pedro and Joshua appeared to effectively end when Joshua was only 1 year old.

The record does not indicate that Pedro and Joshua have any kind of a psychological bond. In *A.R. v. C.R.*, 411 Mass. 570, 574–75, 583 N.E.2d 840, 843 (1992), the Massachusetts Supreme Judicial Court held a husband was not estopped from denying paternity when the children were 2½ years and less than 1 year old, because it was "doubtful that either child relied in any meaningful sense on any representation of paternity that the husband may have made." Similarly, in the present case the record is devoid of any evidence that Joshua or his mother relied in any meaningful sense on any representation of paternity that Pedro may have made. The record does not support a finding of psychological detriment, even if psychological detriment is deemed enough to satisfy the elements of paternity by estoppel in Nebraska.

We find the following language from *K.B. v. D.B.*, 37 Mass. App. 265, 273, 639 N.E.2d 725, 730 (1994), to be highly persuasive:

> "We would proceed with caution, as other courts have, in imposing a duty of support on a person who has not adopted a child, is not the child's natural parent, but has undertaken voluntarily to support the child and to act as a parent. [Citations omitted.] In most instances, such conduct should be encouraged as a matter of public policy. The obligation to support a child primarily rests with the natural parents, and one who undertakes that task without any duty to do so generally should not be punished if he or she should abandon it. . . ."

(Quoting *A.R. v. C.R., supra*.) To the extent the record suggests Pedro may have voluntarily supported Joshua and acted like a parent to him, he should not be obligated to continue supporting Joshua on a theory of paternity by estoppel, absent any real detriment to Joshua from such action.

Prior to trial, a guardian ad litem had been appointed to represent Joshua's interests. The guardian, however, did not appear or testify at trial. From the record, it is clear that the parties and the guardian did not contemplate the possibility that Pedro might be estopped from denying paternity and his support obligation. As a result, although the present record does not support a finding of estoppel, it also does not demonstrate that

there is *no* possibility that a sufficient detriment, either financial or psychological, could exist and could be considered to have arisen because of reliance on a misrepresentation by Pedro. To the extent the district court premised Pedro's obligation to pay child support on a theory of estoppel, we reverse the court's conclusion in this regard. It is necessary that we remand for further proceedings to determine whether the requisite elements of paternity by estoppel exist in the event that Pedro is not found to have satisfied § 43-1409 (Reissue 1993) regarding acknowledgment. On remand, careful consideration should be given to whether or not each of the requisite elements of estoppel is satisfied in this case.

VI. CONCLUSION

We find that Pedro was not provided with a full and fair hearing on the issues of paternity and the corresponding rights and obligations which may accompany a finding of paternity. We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HANNON, Judge, dissenting in part.

I agree that the trial court erred in determining paternity and in ordering Pedro to pay support for Joshua, but I do not think further proceedings are permissible or desirable. I would simply reverse with directions to determine that Joshua was not Pedro's child and to cancel the child support obligation. The record, as discussed in the opinion, establishes that the doctrine of estoppel does not apply. However, even assuming that facts could exist which would justify a finding that Pedro is estopped from denying he is Joshua's father, I would still object to either the trial court or this court framing that issue.

I realize that " '[a] court of equity, if cognizant of the facts, should, on its own motion, protect the rights of minors, when involved in litigation to which they are not parties.' " *Workman v. Workman*, 167 Neb. 857, 869, 95 N.W.2d 186, 194 (1959) (quoting *Jones v. Hudson*, 93 Neb. 561, 141 N.W. 141 (1913)). The trial judge did so by appointing a guardian ad litem. After a guardian ad litem is appointed:

> In order to protect fully the infant's interest the court should exercise a general supervision over the conduct of the next friend or guardian ad litem, and determine whether such representative has in fact acted to protect his ward. The court should advise such representative as to what steps to take or what pleadings to file, and see that the infant's rights are in no way sacrificed, impaired, infringed on, or destroyed. As otherwise stated, the court must see that the infant's rights are not prejudiced or abandoned, that all proper defenses are made for him, and that he is given a fair and impartial hearing, before judgment is rendered against him.

43 C.J.S. *Infants* § 220 at 565–66 (1978).

The pleadings filed by the parties raised only the issue of whether Pedro was Joshua's biological father. Obviously, the trial judge thought Pedro should be held responsible as the child's father. In such a situation, I can see a trial judge continuing the hearing, calling the guardian ad litem before the court to see if the guardian had properly investigated and considered the matter, and in the proper case appointing a different guardian ad litem. However, with no pleadings that addressed this issue, the trial judge simply found that Pedro acknowledged paternity and "therefore . . . that both parties are estopped from denying paternity." I realize that the judge has some heavy burdens when it comes to looking after children's rights in litigation, but he or she can never lose sight of the fact that even with children's rights the judge should act as a disinterested arbiter in an adversarial system, and not an advocate. Beyond directing the guardian ad litem to perform his or her duty, I do not think either the trial court or this court should frame the issues to be tried. I think the record shows that a competent guardian ad litem would not have sought to impose parental responsibility upon Pedro.

STATE OF NEBRASKA, APPELLEE, V. HUGH C. JACKSON, APPELLANT.

544 N.W.2d 379

Filed March 5, 1996. No. A-95-045.

1. **Constitutional Law: Prior Convictions: Sentences: Appeal and Error.** Nebraska appellate courts have long recognized the right of criminal defendants to challenge the use of constitutionally invalid convictions when offered for sentence enhancement.
2. **Prior Convictions: Pleas: Right to Counsel: Sentences.** A prior conviction, based on a defendant's plea of guilty, but obtained in violation of the defendant's right to counsel, is unconstitutional and void and, therefore, cannot be used to enhance the sentence the defendant receives for a subsequent conviction.
3. **Prior Convictions: Pleas: Right to Counsel: Waiver: Proof.** If the record of a defendant's prior conviction, based on the defendant's guilty plea, does not affirmatively demonstrate that the defendant was represented by counsel, or that the defendant knowingly, voluntarily, and intelligently waived that right, the burden is on the State to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel.
4. **Constitutional Law: Right to Counsel: Sentences.** The 6th and 14th Amendments to the U.S. Constitution require that no indigent criminal defendant be sentenced to a period of imprisonment without being afforded the assistance of counsel.
5. **Prior Convictions: Misdemeanors: Sentences.** An uncounseled misdemeanor conviction, valid because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.
6. **Sentences: Appeal and Error.** A sentence within the statutory limits will not be modified as excessive unless the trial court's reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

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

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

IRWIN, Judge.

I. INTRODUCTION

Appellant, Hugh C. Jackson, pled guilty in the district court for Douglas County to the crime of shoplifting in an amount

less than $200. See Neb. Rev. Stat. §§ 28-511.01 (Reissue 1989) and 28-518 (Cum. Supp. 1994). At a subsequent enhancement hearing, the district court determined that Jackson was guilty of third-offense shoplifting, a felony. See § 28-518. Jackson objected to the use of two prior convictions for enhancement, contending the record failed to establish that he knowingly, intelligently, and voluntarily waived his right to counsel. On appeal, Jackson alleges the district court erred in using prior uncounseled convictions for enhancement and in imposing an excessive sentence. We find that Jackson's prior uncounseled convictions are constitutionally valid because he was not sentenced to terms of imprisonment for them, but, rather, was fined. Consequently, the prior convictions may be used to enhance the potential punishment for the present conviction. Additionally, we find that the sentence was not excessive. Accordingly, we affirm.

II. FACTUAL BACKGROUND

Via an information, Jackson was charged in the district court for Douglas County with the crime of theft by shoplifting, third offense. The information alleged that he committed the crime of shoplifting on March 4, 1994, and that he had been convicted of similar charges on two prior occasions.

Jackson appeared with his court-appointed counsel and entered a plea of guilty to the underlying charge of misdemeanor shoplifting. Pursuant to a plea agreement, the State agreed to dismiss a separate charge of shoplifting, but reserved the right to enhance Jackson's sentence regarding the crime to which he did plead guilty. Before accepting Jackson's guilty plea, the trial judge informed him of his rights, the elements of the crime with which he was charged, and the possible penalties for conviction of first-offense, second-offense, and third-offense shoplifting. After a factual basis was presented for the present shoplifting charge, the judge accepted Jackson's plea, adjudged him guilty, and continued the matter for an enhancement hearing and sentencing hearing to be held at a later time.

At the enhancement hearing, the State offered two exhibits. These exhibits were certified copies of the transcripts of

proceedings from two of Jackson's prior shoplifting convictions. Jackson's counsel objected to both exhibits, arguing that although they showed Jackson waived his right to counsel, they did not show he made a *knowing*, *intelligent*, and *voluntary* waiver of counsel in the prior proceedings.

The first page of both of the exhibits is a checklist setting forth the record of the prior proceedings. A box preceding the words "Defense Counsel" was left blank on both of the exhibits, and the line following the words "Defense Counsel" is blank as well. On exhibit 1, under a section entitled "Arraignment and Advisement," there is a check in a box next to the following: "Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Counsel; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt." Exhibit 2 shows the advisement of these rights was identical, except the language regarding a request for transfer to juvenile court, defendant's presumption of innocence, and the State's burden of proof beyond a reasonable doubt was stricken.

Underneath the advisement-of-rights box on each exhibit is a box next to a line reading "Defendant waived each of the above and foregoing rights." These boxes appear to have been checked on both exhibits, although exhibit 2 is less clear in that regard.

Beneath the boxes and lines concerning defendant's waivers are lines indicating that the pleas were entered knowingly, intelligently, and voluntarily. The box next to this line was checked on exhibit 1, but not on exhibit 2. Both exhibits also disclose that Jackson was sentenced to pay fines as his punishment in each case. The judge in the present case overruled Jackson's objections to the exhibits, and Jackson was subsequently sentenced for third-offense shoplifting, a Class IV felony. See § 28-518. Jackson was sentenced to a term of incarceration of not less than 18 nor more than 24 months.

III. ASSIGNMENTS OF ERROR

Jackson contends that the district court committed two errors. First, he alleges the court erred in enhancing his shoplifting

offense to a third offense by admitting exhibits 1 and 2 over his objection. Second, he alleges the court erred in imposing an excessive sentence.

IV. STANDARD OF REVIEW

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

A sentence within statutory limits will not be disturbed upon appeal absent a showing of an abuse of discretion. *State v. Juarez*, 3 Neb. App. 398, 528 N.W.2d 344 (1995).

V. ANALYSIS

1. Prior Convictions Used to Enhance

Jackson alleges that the district court was in error when it enhanced the shoplifting charge to third offense. Specifically, he objects to the prior convictions offered for purposes of enhancement, contending that they do not show he knowingly, intelligently, and voluntarily waived his right to counsel.

[1] Nebraska appellate courts have long recognized the right of criminal defendants to challenge the use of constitutionally invalid convictions when offered for sentence enhancement. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983) (following *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980)).

[2,3] The Nebraska Supreme Court has recognized that a prior conviction, based on a defendant's plea of guilty, but obtained in violation of the defendant's right to counsel, is unconstitutional and void and, therefore, cannot be used to enhance the sentence the defendant receives for a subsequent conviction. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993). Consequently, the Supreme Court has held that in an enhancement proceeding, if the record of a defendant's prior conviction, based on the defendant's guilty plea, does not affirmatively demonstrate that the defendant was represented by counsel, or that the defendant knowingly, voluntarily, and

intelligently waived that right, the burden is on the State to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel. *Id.* The State must prove the constitutional validity of the prior conviction before the State may use the prior conviction for an enhanced penalty. *Id.*

[4] In *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985), the Supreme Court was presented with a case on direct appeal wherein the defendant challenged his conviction because the record demonstrated that he was not afforded an opportunity to have counsel appointed and the record did not demonstrate that he knowingly and intelligently waived counsel. The court upheld Austin's conviction despite the lack of counsel, because he was not imprisoned for any period of time, but, rather, was fined. The *Austin* court, following the U.S. Supreme Court decision in *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), noted that in this regard, the 6th and 14th Amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a period of imprisonment without being afforded the assistance of counsel. As a result, because the defendant in *Austin* was fined, rather than imprisoned, his conviction was deemed valid despite the fact that the record failed to demonstrate that he was afforded his right to counsel. See, also, *State v. Dean*, 2 Neb. App. 396, 510 N.W.2d 87 (1993).

[5] The U.S. Supreme Court was recently presented with a situation similar to the present case. See *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). The Court in *Nichols* discussed whether a prior uncounseled misdemeanor conviction could be used to enhance a subsequent misdemeanor conviction when the result of enhancement was that the subsequent misdemeanor was enhanced to a felony offense. The Court reviewed its holding in *Scott v. Illinois, supra*, and noted that "where no sentence of imprisonment [is] imposed, a defendant charged with a misdemeanor [has] no constitutional right to counsel." *Nichols v. United States*, 511 U.S. at 743. The *Nichols* Court recognized that 1 year after its decision in *Scott*, a majority of the Court, in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L.

Ed. 2d 169 (1980), held that a prior uncounseled misdemeanor conviction, although constitutional under *Scott*, could nevertheless not be used to convert a second misdemeanor conviction into a felony. In *Nichols*, the Court expressly overruled *Baldasar* and held that "consistent with the Sixth and Fourteenth Amendments of the Constitution . . . an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Nichols v. United States*, 511 U.S. at 748–49.

The Nebraska Supreme Court has previously followed the U.S. Supreme Court teachings of *Scott v. Illinois, supra*. See *State v. Austin, supra*. In the court's recent decision in *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), the court declined to follow the proposition from *Nichols v. U.S., supra*, and *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), that *separate proceedings are no longer constitutionally mandated to challenge prior convictions* used for enhancement purposes. The *LeGrand* court did not indicate, however, that it would not follow *Nichols* with regard to the *constitutional validity of prior uncounseled misdemeanor convictions* used for enhancement purposes.

In the present case, Jackson was not imprisoned for the prior convictions, but, rather, received only fines. Because he was not sentenced to terms of imprisonment, his prior uncounseled convictions were constitutionally valid. See, *State v. Austin, supra*; *State v. Dean, supra*. Because the record demonstrates that his prior convictions were constitutionally valid, despite the fact that the record fails to establish he knowingly, intelligently, and voluntarily waived his right to counsel, the prior convictions were properly used to enhance his subsequent conviction. This assigned error is without merit.

2. Excessive Sentence

Jackson alleges that the district court imposed an excessive sentence in sentencing him to a term of incarceration of 18 to 24 months. Third-offense shoplifting is a Class IV felony, and the Nebraska statutes provide that the maximum sentence for a Class IV felony is 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Reissue 1989).

[6] The law is very clear in Nebraska that "[a] sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion." *State v. Juarez*, 3 Neb. App. 398, 407, 528 N.W.2d 344, 350 (1995). In other words, "a sentence within the statutory limits will not be modified as excessive unless the trial court's reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result." *Id.*

One of the factors to be considered by a sentencing judge is the defendant's past criminal record. See, *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993); *State v. Sanchez*, 2 Neb. App. 1008, 520 N.W.2d 33 (1994). The criminal history portion of the presentence investigation report prepared in this case is over two pages long. Jackson was convicted of weapons charges in the State of New York in both 1981 and 1982. Jackson received probation for one weapons charge and 2 to 4 years' incarceration for the other. Jackson has three prior convictions for shoplifting, two of which were the convictions used for enhancement in the present case. Jackson did serve jail time for a second-offense shoplifting conviction in 1993. Jackson has also been convicted of numerous traffic offenses, including several counts of driving while under suspension for which he has previously been incarcerated.

The record in the present case indicates that Jackson had been convicted of shoplifting at least twice before this conviction. At the enhancement proceeding, Jackson's counsel argued that Jackson has a problem with drugs. Although it does not appear that Jackson's drug problem has ever directly resulted in criminal charges, his counsel argued that the present shoplifting incident was precipitated by the drug problem. The probation officer who completed Jackson's presentence investigation report indicated that Jackson would not be a very successful candidate for probation and that Jackson would benefit from a more structured and intensive form of supervision. The sentencing judge found that a sentence other than incarceration would depreciate the seriousness of the offense. The sentence ordered is well within the statutory limits, and we see no abuse of discretion by the trial court. This assigned error is also without merit.

VI. CONCLUSION

Having found that the court correctly enhanced the punishment to that for third-offense shoplifting and imposed a sentence that was not excessive, we affirm the conviction and sentence.

AFFIRMED.

COURTNEY KUEBLER, APPELLEE, V. ALVIN ABRAMSON, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

544 N.W.2d 513

Filed March 12, 1996. No. A-94-1069.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
3. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter, which are in pari materia, the statutes may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are perceived as consistent and sensible.
4. **Statutes: Appeal and Error.** An appellate court will, if possible, try to avoid construing a statute such that it would lead to an absurd, unjust, or unconscionable result.
5. **Motor Vehicles: Police Officers and Sheriffs: Blood, Breath, and Urine Tests: Notice.** An arresting officer is not required to attempt to personally serve notice upon the arrested driver if the test results for blood alcohol content are not available when the arrest or detention comes to an end.

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

Don Stenberg, Attorney General, and Jay C. Hinsley for appellant.

Vikki S. Stamm, of Ross, Schroeder, Brauer & Romatzke, for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

The director of the Department of Motor Vehicles (Department) appeals the district court order which reversed the Department's order revoking Courtney Kuebler's driver's license. Kuebler's license was revoked by the Department under the administrative license revocation procedures after her arrest for driving while intoxicated. The issue in this appeal is the manner of service upon Kuebler of notice of intent to administratively revoke her driver's license.

STATEMENT OF FACTS

On April 16, 1994, Kearney police officer Scott Gronewoller was on patrol when he observed Kuebler's gray Honda Civic weaving in the roadway. Gronewoller then observed the Honda cross the centerline, cross back, and make a wide right turn, nearly striking a parked vehicle. As a result, Gronewoller stopped the vehicle. Gronewoller smelled alcohol coming from inside the vehicle and observed that Kuebler's eyes were bloodshot. Gronewoller asked Kuebler to come back to the patrol car to perform a number of field sobriety tests. Prior to administering a preliminary breath test, Gronewoller advised Kuebler of the consequences of failing the test and of refusing to take the test. Gronewoller then placed Kuebler under arrest and read her the "Administrative License Revocation Advisement Post Arrest" form, advising her of the consequences of taking or refusing to take a blood test.

Kuebler agreed to submit to a blood test, and Gronewoller transported Kuebler to Good Samaritan Hospital, where blood was drawn, sealed as evidence, and left with a lab technician to be tested. Gronewoller received the results of the blood test via certified mail 10 days later on April 26, 1994, and the results indicated a blood alcohol content of .18 grams of alcohol per 100 milliliters of blood. After receiving the results, Gronewoller completed a sworn report, which was sent to the Department. Gronewoller did not make any attempt to personally serve the report on Kuebler, although he knew she resided in Buffalo County and knew her address, nor did any other officer attempt to personally serve the report upon Kuebler.

A copy of the sworn report, sent by the Department to Kuebler via certified mail, states that the sworn report, issued on May 2, 1994, would serve as a temporary license for 30 days from the date of the notice and, therefore, would expire on June 1, 1994. Enclosed with the copy of the sworn report was a cover letter, sent by the Department, which explained that the sworn report was filed by a law enforcement officer, alleging that Kuebler was arrested for driving while intoxicated, and that she could contest the revocation by following the procedure set forth on the back of the report. A petition to request an administrative hearing was also enclosed.

An administrative hearing was held on May 26, 1994. At the hearing, Kuebler argued that under the administrative license revocation statute, Neb. Rev. Stat. § 60-6,205 (Reissue 1993), the arresting officer must make some attempt to personally serve the driver with notice before resorting to sending the report to the Department, which then serves the notice upon the driver by certified mail. Alleging that she had been improperly served, Kuebler claimed her license should not be revoked because the Department did not have jurisdiction over her. The Department rejected her argument and revoked her license. Kuebler appealed to the district court.

The district court found that the Department had failed to properly serve Kuebler because the arresting officer made no attempt to personally serve notice of the revocation upon Kuebler, nor did he offer any explanation as to why he would have been unable to serve that notice. The court found that because the Department failed to gain jurisdiction over Kuebler, the revocation must be reversed. The Department appeals.

ASSIGNMENT OF ERROR

The Department alleges that the district court erred when it found that the arresting officer is required to attempt personal service of the notice of revocation and erred when it reversed the Department's order of revocation.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the

court below. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994).

ANALYSIS

Under § 60-6,205(3), if a person arrested for driving while intoxicated submits to a chemical test of blood or breath which reveals that the driver has a blood alcohol content of .10 or greater, the arresting officer must immediately give verbal notice to the driver of the intention to immediately impound and revoke the driver's license, which revocation will automatically begin 30 days after arrest unless the driver petitions for a hearing. Under this section, the arresting officer is required to immediately file a sworn report, which must state (1) that the driver was validly arrested for driving while intoxicated, (2) that the driver was requested to submit to the test, (3) that the driver was advised of the consequences of submitting to the test, and (4) that the driver submitted to the test, the type of test, and the results of such test.

Under § 60-6,205(4), an arresting officer who files a sworn report under § 60-6,205(3) must serve notice of the revocation upon the arrested person, and the revocation becomes effective 30 days after the date of the arrest. The notice explains administrative license revocation and the driver's rights. The officer is also required to give the driver an addressed envelope and a petition to request a hearing. If the driver has an operator's license, the arresting officer is required to take possession of the license and issue a temporary license, valid for 30 days.

Section 60,6-205(5) provides:

> (a) If a peace officer is *unable* to serve the notice of revocation as required by subsection (4) of this section following the receipt of results of a chemical test which indicate the presence of alcohol [in violation of the driving while intoxicated statute], the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section immediately upon receipt of the results of the chemical test.
>
> (b) Upon receipt of the report, the director shall serve the notice of revocation on the arrested person by certified

> . . . mail to the address appearing on the records of the director. . . . The revocation shall be effective thirty days after the date of mailing.

(Emphasis supplied.) Subsection (5)(b) also requires that the director must send the driver an addressed envelope and a petition to request a hearing.

Service of the notice was by the Department, not the arresting officer. The case at hand turns on the meaning of "unable to serve." Kuebler alleges that "unable" implies that the arresting officer must make an attempt to serve the notice before resorting to filing the sworn report and requiring the Department to serve notice. The Department alleges that "unable" means that any time the blood, breath, or urine test results are not immediately available at the time of arrest or detention of the driver, the arresting officer is "unable" to serve notice, and therefore the provisions of § 60-6,205(5) should apply, allowing service via certified mail by the Department. Typically, breath test results are immediately known to the arresting officer, but not so with blood or urine test results.

[2] "A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous." *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 525, 537 N.W.2d 312, 317 (1995). Because "unable to serve" is not specifically defined in the statute, and may reasonably be considered ambiguous, we must interpret this phrase, as used in § 60-6,205(5)(a). Interpretation of a statute requires the court to determine and give effect to the intent of the Legislature and the purpose intended to be advanced by adoption of the statute, as can be ascertained from the entire language of the statute, given the plain, ordinary, and popular sense of the statute's language. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue, supra.*

L.B. 291, adopted by the Legislature in 1992, first instituted the administrative license revocation procedures as found in § 60-6,205. After its introduction, L.B. 291 was substantially amended. The amendment containing the current provisions found in § 60-6,205 which are at issue here was introduced by Senator Doug Kristensen, who gave the following interpretation of the procedures under that statute:

> At the time of your stop, if you refuse, or if you test over .10, as usual procedure, your license will be taken and you will be given a petition, and you will be told that you have 10 days to file this petition with the Department of Motor Vehicles. . . . If you have your license on your person at the time, you'll surrender it. What happens if you have a blood test and you don't have test results immediately available? As soon as the blood tests are back, those are sent to the Department of Motor Vehicles. The Department of Motor Vehicles will then mail you a letter telling you that your license will be revoked within 30 days of mailing of the notice. You then have 10 days, from the time you receive that notice, to file your petition, if you choose to challenge the administrative hearing.

Floor Debate, L.B. 291, Transportation Committee, 92d Leg., 2d Sess. 8566–67 (Feb. 4, 1992).

[3–5] In resolving a question of statutory construction, we are bound by the following rules: First, when considering a series or collection of statutes pertaining to a certain subject matter, which are in pari materia, the statutes may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are perceived as consistent and sensible. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991). Second, an appellate court will, if possible, try to avoid construing a statute such that it would lead to an absurd, unjust, or unconscionable result. *Id.* A common sense reading of the statutes leads us to believe that the arresting officer is not required to attempt to personally serve notice upon the arrested driver if the test results for blood alcohol content are not available when the arrest or detention comes to an end.

Drivers are typically released from custody in short order. Recognizing that arrested drivers may not be residents of the city or county where they are arrested, it would be an absurd result to require that an arresting officer, upon receipt of test results days after the arrest, then travel all over the state in order to personally serve the driver with notice before resort could be had to the statutory provision allowing the Department to serve by certified mail. In so concluding, we believe a number of

observations are important. First, the purpose of § 60-6,205(4) is to give notice of the revocation of the driver's license to the arrested driver, to provide a written explanation of administrative license revocation procedure, and to give the driver the petition to be filled out and filed with the Department in order to contest the revocation. In short, § 60-6,205(4) provides for notice to the driver of revocation and delivers to the driver the paperwork needed to contest the revocation.

A sued defendant in a civil proceeding is entitled to notice of the action brought by the plaintiff, receives the supporting paperwork, and receives basic directions on how and when to proceed, i.e., answer or default will be entered. See Neb. Rev. Stat. §§ 25-503.01 and 25-504.01 (Reissue 1989). The service on an arrested driver in an administrative license revocation context and the service on a sued defendant have the same basic purposes in each instance: to give notice, to serve the paperwork, to give basic directions on how to respond, and to advise of the consequences of not responding. Neb. Rev. Stat. § 25-508.01 (Reissue 1989) provides for service of process upon a sued civil defendant by "personal, residence, or *certified mail service*." (Emphasis supplied.) The method of service is the plaintiff's choice, which suggests that the law views the three methods as being of equal stature. The pertinent observations for the case at hand are that service of notice by certified mail is firmly entrenched in our legal system, that as a method it is not inherently inferior to personal service, and that it is obviously deemed good enough when a citizen is sued.

Consequently, we construe the phrase "unable to serve" to mean those situations where the arrested driver is released before the results of the blood alcohol content test are known, which, of course, is the information which triggers the administrative license revocation procedure. Any other construction of "unable to serve" would result in law enforcement officers having to chase all over the state to attempt personal service of notice when such lengths are not required to be taken in other, equally significant situations where notice must be given. Thus, when a driver is released before the results of blood alcohol content testing are known to the arresting officer, then he or she is "unable to serve" the notice,

and the statutory provisions allowing service by certified mail by the Department become operative. This construction fulfills the purpose of providing notice to the driver of the governmental action, is consistent with the intent of the Legislature, and allows service in a manner which has long been considered adequate in this state in matters of equal or greater significance. In fact, service of notice by certified mail is expressly authorized by the Nebraska Legislature in over 200 different statutes. Many of these provisions involve matters similar in import and with similar administrative procedures to driver's license revocation. Some examples are Neb. Rev. Stat. § 1-141 (Reissue 1991) (disciplinary actions against accountants), Neb. Rev. Stat. § 25-1226 (Reissue 1989) (service of subpoenas), Neb. Rev. Stat. § 60-1413 (Supp. 1995) (revocation of car dealer's license), Neb. Rev. Stat. § 71-1,147.10(3) (Reissue 1990) (suspension of permit to operate pharmacy), Neb. Rev. Stat. § 77-3906 (Supp. 1995) (sale of taxpayer's property for failure to pay state tax), Neb. Rev. Stat. § 79-4,181 (Reissue 1994) (Student Discipline Act/long-term suspension or expulsion from school), and Neb. Rev. Stat. § 81-885.25 (Reissue 1994) (suspension of broker's or salesperson's license by State Real Estate Commission).

Therefore, we determine that the arresting officer was "unable to serve" Kuebler because the results of her blood test were not available to the arresting officer until long after her release from detention. Thus, she was properly served by the Department under § 60-6,205. Consequently, the Department had jurisdiction over Kuebler and could revoke her driver's license. The district court's order is reversed, and the matter is remanded to the district court with directions to reinstate the revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF THEODORE W., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. GEORGE W., SR., APPELLANT.

545 N.W.2d 119

Filed March 12, 1996. No. A-95-455.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** An appellate court must decide a case involving termination of parental rights de novo on the record. An appellate court is required to reach a conclusion independent of the findings of the juvenile court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another.
2. **Judgments: Appeal and Error.** With respect to matters of law, an appellate court reaches independent conclusions.
3. **Parental Rights: Rules of Evidence.** The strict rules of evidence do not apply to proceedings to terminate parental rights.
4. **Parental Rights: Due Process: Evidence.** The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
5. **Parental Rights: Due Process.** In a termination proceeding, the State must provide the parents with fundamentally fair procedures.
6. **Criminal Law: Pleas: Sentences.** Before accepting a guilty plea, a criminal court is required to inform a defendant of only the penal consequences of the plea.
7. **Parental Rights: Evidence: Proof.** To terminate parental rights, the State must show that such termination is in the child's best interests and that at least one of the seven statutory grounds for termination of parental rights under Neb. Rev. Stat. § 43-292 (Reissue 1993) exists. The State must prove these elements by clear and convincing evidence, that is, by that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
8. **Parental Rights: Abandonment: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1993), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.
9. **Abandonment.** The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances.
10. **Parental Rights: Abandonment.** Parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights.
11. ____: ____. The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child.
12. ____: ____. Abandonment is not an ambulatory thing, the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.

13. **Parental Rights.** A child cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity.
14. **Double Jeopardy: Penalties and Forfeitures.** One objective of the Double Jeopardy Clause is to prevent multiple punishments for the same offense.
15. ____: ____. A civil penalty may constitute punishment for the purposes of double jeopardy.
16. **Double Jeopardy.** Under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
17. **Juvenile Courts.** Juvenile proceedings are civil in nature.
18. **Juvenile Courts: Parental Rights.** A petition in juvenile court is brought on behalf of the child, not to punish the parents.
19. **Judges: Recusal: Appeal and Error.** Where a case on appeal is tried de novo, refusal by the trial judge to disqualify himself or herself is immaterial.

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

Lisa Ferguson Lozano, of Aman, Aman & Lozano, Attorneys at Law, for appellant.

Carole McMahon-Boies, guardian ad litem, and Rod Reuter, Deputy Lancaster County Attorney, for appellee.

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

IRWIN, Judge.

INTRODUCTION

George W., Sr. (George), appeals the order of the juvenile court terminating his parental rights to Theodore W. The natural mother of Theodore, Tonia M., relinquished her parental rights to Theodore and is not involved in this appeal. For the reasons stated below, we affirm.

FACTUAL BACKGROUND

Theodore was born May 27, 1991. George and Tonia are his natural parents and have never been married. George has three other children, George W., Jr., born in August 1985; Galvin N., born in January 1989; and Jordan K., born in March 1989. These three children are not involved in the present case.

Theodore first entered the juvenile court system on December 11, 1991, when a petition was filed by the county attorney, alleging that Theodore was a juvenile as defined by Neb. Rev.

Stat. § 43-247(3)(a) (Reissue 1993) because he lacked proper parental care by reason of the faults or habits of his mother, Tonia. Tonia admitted several allegations of the petition. Theodore remained in Tonia's custody under the supervision of the Department of Social Services (DSS) until June 2, 1993. On June 4, the court approved Theodore's placement in DSS' custody, and he was placed in foster care, where he remained until trial. Although George was permitted to be involved in all proceedings, no allegations were made against him, and no plan was ordered for him. Throughout these proceedings, George was incarcerated.

On May 16, 1994, the guardian ad litem filed an "application" to terminate the parental rights of Tonia and George. This "application" was amended July 19. The amendments included changing the title of the pleading to "Amended Petition for Termination of Parental Rights." A trial on the amended petition began November 3. After a portion of the testimony was received, the judge recused herself because of a conflict of interest in that she had prosecuted George when she was a deputy county attorney.

A second amended petition to terminate the parental rights of Tonia and George was filed on December 5, 1994. Another juvenile judge presided over all proceedings regarding this petition, and Tonia and George were personally served. On January 25, 1995, Tonia and George were informed of their rights and the possible consequences of an action to terminate parental rights; they waived the reading of the second amended petition, and they entered their denials.

George filed a motion in limine in which he claimed that his criminal history prior to Theodore's birth was irrelevant to the issues before the court and that if his parental rights were terminated, the introduction of that criminal history would constitute double jeopardy. The court sustained the motion as to any convictions more than 10 years old, but overruled the remainder of the motion. At trial, George preserved his objections to the introduction of his criminal history. George also filed a "Motion to Vacate Adjudication of Jurisdiction" in which he claimed the order of adjudication of jurisdiction issued by the recused judge should be vacated for various reasons. This

motion was also overruled.

Trial was held March 27, 29, 30, and 31, 1995. The record comprises over 1,100 pages of testimony and numerous exhibits. We will summarize the relevant evidence elicited. On the first day of trial, Tonia executed a relinquishment of parental rights regarding Theodore and a consent for adoption in favor of Cindi R. and Mark R., Theodore's foster parents.

Testimony revealed that after Theodore's birth on May 27, 1991, George spent June 1 through 28 in jail for driving on a suspended license. On August 13, George was arrested for possession of crack cocaine with the intent to deliver, and he has remained incarcerated since that date. He was convicted and sentenced to 15 to 30 years' imprisonment. The parties stipulated that his earliest possible parole date is February 8, 1999.

George provided Tonia support during her pregnancy and was present for Theodore's birth. George helped Tonia care for Theodore prior to George's incarceration and saw him daily. Tonia testified that George gave her approximately $800 for Theodore during his first months in jail after Theodore was born.

During George's incarceration, Tonia brought Theodore to visit George on at least eight occasions. George made numerous requests for visitation to the DSS Child Protective Services worker in charge of Theodore's case, but he did not formally request an order granting visitation until March 2, 1995. George's first visit with Theodore after he was placed in DSS' custody was December 23, 1993. Through August 1994, DSS scheduled seven visits, and six occurred. The visits did not last longer than 20 minutes, and George never requested longer visits. The DSS workers who supervised the visits testified that George often spent the time talking with them and that Theodore would play with them and others present rather than play with George. Visitation ceased after an August 25, 1994, visit because the DSS worker felt that Theodore was having a "negative reaction." Theodore began moaning and went limp on the floor in a fetal position when he was told he was going to visit George that day. George never called Theodore or his foster parents or sent any gifts to Theodore. George did contact

the DSS worker in charge of Theodore's case to discuss visitation and George's concerns regarding Theodore's placement. George also sent birthday and Christmas cards.

George set up a bank account in Theodore's name to which he sent his prison earnings. The account, at times, contained nearly $200. Josie Y., Tonia's mother, had access to the account, and George would direct her to do various things with the money. At George's direction, Josie took out approximately $30 total during George's incarceration to provide things for Theodore. The last time she made such a withdrawal, except to buy Theodore snacks during visitation, was approximately 2 years prior to the trial, when she used approximately $10 to purchase him a pair of shoes and a coat. In addition, at George's direction, Josie took out money and sent money orders to George in prison.

George engaged in other criminal activity prior to Theodore's birth. In the 10 years prior to trial and prior to the birth of Theodore, George was incarcerated for, at least, the following periods of time: March 1985 to May 1986 for criminal trespass and escape; November 1988 to January 1990 for possession of a controlled substance with the intent to deliver; and May 1990 to June 1990 for a parole violation. He admitted at trial to being convicted, in that same 10-year period, 8 or 9 times for assault, 10 times for trespass, 4 times for shoplifting, numerous times for driving on a suspended license, 5 times for keeping a disorderly house, and 2 times for conditions likely to produce disease. For many of these convictions, he chose to "serve out" his time in jail rather than pay the fines.

Regarding his job history, George testified that the longest he held a job in the 10 years prior to trial was for 7 to 8 months. He held other jobs off and on for no more than a couple of months at a time. He had not worked since the summer of 1990. George admitted that he supported himself exclusively with drug sales in early 1991 and other times supported himself in part with drug sales.

According to George and his other witnesses, he spent significant amounts of time with his children and shared in their care. George testified that his children were not present when he was engaging in criminal activities, but according to a DSS

worker handling a case involving other children of George's, he had exposed them to drug use and sexual activity. There was no evidence that George provided financially for his children, other than Theodore, before or during his incarceration.

All parties agree that Theodore has bonded with his foster parents and that Theodore refers to them as his "mommy and daddy." Theodore refers to George as "my friend George."

The deposition of Dr. Rick McNeese, a psychologist, was read into evidence, and his testimony shows as follows: Theodore is an anxious, withdrawn child who needs security and consistency in parenting. Theodore's behavior shows the " 'effects of insecure and poor attachments in an important time in [his] life' " and of " 'inconsistent and deficient parenting.' " Theodore's response on August 25, 1994, when told he was going to visit George was " 'typical of an anxious, insecured [sic] child [with] a fear of some — some object or some event' " and is " 'evidence of an insecure attachment to that parental figure.' " Theodore has positive interactions with his foster parents and seems to have a positive emotional and secure attachment to them. Dr. McNeese opined that it was in Theodore's best interests that George's parental rights be terminated and that it would not be in Theodore's best interests to remain in foster care until George is released from prison.

Dr. McNeese stated that George's efforts to initiate contact with Theodore were positive. However, based upon a review of the records and George's history, Dr. McNeese was concerned with George's " 'chronic long-standing problem' " with behavioral control, his major antisocial characteristics, and his physical and psychological unavailability to Theodore. Dr. McNeese opined that after his release, George would need at least 3 to 5 years of long-term therapy to address these problems before he could be considered as a custodian for Theodore.

According to George, while in prison he has improved himself. He has violated no laws while in prison and has not used illegal drugs. He has successfully completed therapy for drug and alcohol abuse, which was a condition of eligibility for parole, and he expected to receive his GED in June 1995. He plans to take college courses after receiving his GED and would

like to be a counselor for children in gangs and with substance abuse problems.

In an order dated April 3, 1995, the juvenile court terminated George's parental rights to Theodore. The court found it had jurisdiction over the matter, the child, and the father. The court also found that George had been incarcerated for Theodore's entire life except for approximately 2 months, he had failed to provide for Theodore's emotional and monetary needs, he had exhibited a lifestyle over the past 10 years which prevented him from parenting Theodore, and he was unfit by reason of debauchery or repeated lewd or lascivious behavior, which conduct is seriously detrimental to Theodore's health, morals, and well-being. Based upon its findings, the court concluded that George had abandoned Theodore for 6 months or more immediately prior to the filing of the second amended petition and had substantially and continuously or repeatedly neglected him and refused to give him necessary parental care and protection. The court also found that termination of George's parental rights was in Theodore's best interests. This appeal timely followed.

ASSIGNMENTS OF ERROR

George assigns as error the following actions of the juvenile court: determining there was clear and convincing evidence of one or more of the circumstances prescribed in Neb. Rev. Stat. § 43-292 (Reissue 1993); determining there was clear and convincing evidence that the termination of George's parental rights was in Theodore's best interests; overruling George's motion in limine and admitting into evidence, over objection, George's criminal history prior to the birth of Theodore; admitting into evidence, over objection, George's criminal history and lifestyle more than 10 years prior to the birth of Theodore; overruling George's "Motion to Vacate Adjudication of Jurisdiction"; and violating George's due process rights and placing him in double jeopardy.

STANDARDS OF REVIEW

[1,2] An appellate court must decide a case involving termination of parental rights de novo on the record. An appellate court is required to reach a conclusion independent of

the findings of the juvenile court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). With respect to matters of law, an appellate court reaches independent conclusions. *In re Interest of A.K.*, 2 Neb. App. 662, 513 N.W.2d 42 (1994).

ANALYSIS

Evidence of George's Criminal History.

George claims in two separate assignments of error that evidence of his criminal history prior to Theodore's birth should not have been allowed. First, he assigns that evidence of his criminal record and lifestyle more than 10 years old should not have been allowed as evidence. This assignment is without merit. The trial court sustained his motion in limine on this basis, and such evidence was not allowed at trial.

We address George's assignment that his criminal history for the 10 years prior to trial was improperly allowed as evidence. George argues that this evidence was irrelevant and prejudicial because it occurred prior to Theodore's birth. George also separately assigns that the admission of this evidence violated his due process rights. We will consider these claims together. We note that George cites no authority stating that a juvenile court cannot look to a parent's behavioral history predating the birth of the juvenile.

[3-5] The strict rules of evidence do not apply to proceedings to terminate parental rights. See *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991). The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). See, also, *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). In a termination proceeding, the State must provide the parents with fundamentally fair procedures. *In re Interest of*

Tina L.K. & Billy M., 3 Neb. App. 483, 528 N.W.2d 357 (1995). See *In re Interest of D.J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986).

> " '[I]t is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska Rules of Evidence provide a guidepost in that determination.' "

In re Interest of J.H., 242 Neb. at 912, 497 N.W.2d at 352 (quoting *In re Interest of C.W. et al., supra*).

George first argues that his criminal history prior to Theodore's birth is irrelevant. Under Neb. Evid. R. 401, Neb. Rev. Stat. § 27–401 (Reissue 1989), evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. Clearly, George's criminal history is relevant based upon the broad concerns of juvenile proceedings. We also conclude that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice as urged by George. See Neb. Evid. R. 403, Neb. Rev. Stat. § 27–403 (Reissue 1989).

George also assigns that the admission of evidence of his criminal history violates his due process rights, namely his liberty interest in raising his child. See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). His argument seems to be that the admission of this evidence was fundamentally unfair.

Our review of Nebraska jurisprudence shows that when reviewing juvenile proceedings, the Nebraska Supreme Court has considered evidence of a parent's conduct prior to the birth of the juvenile. See, e.g., *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985); *In re Interest of C.L.F.*, 216 Neb. 631, 344 N.W.2d 674 (1984); *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983); *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981). Based upon our de novo

review of the record before us, we cannot conclude that it was fundamentally unfair for evidence of George's criminal history to be admitted.

Inadequate Advisement.

[6] We next address George's argument that he was denied due process because his criminal history was introduced against him at the termination hearing and he was not informed when he was convicted and sentenced for his crimes that the convictions could be used as a basis to terminate his parental rights. Based upon the record before us, we cannot determine the circumstances surrounding George's convictions. However, even if George pled guilty in one or more of his convictions, the criminal court was not required to inform him of such a potential consequence. Before accepting a guilty plea, a criminal court is required to inform a defendant of only the " 'penal consequences of the plea.' " *State v. Stastny*, 223 Neb. 903, 905, 395 N.W.2d 492, 494 (1986) (quoting *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974)). See, also, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Because juvenile proceedings are civil in nature, this assignment is without merit. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

Sufficiency of Evidence.

[7] George contends that the evidence is insufficient to sustain the juvenile court's finding that his parental rights should be terminated. To terminate parental rights, the State must show that such termination is in the child's best interests and that at least one of the seven statutory grounds for termination of parental rights under § 43-292 exists. The State must prove these elements by clear and convincing evidence, that is, by that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

The juvenile court found that two of the statutory grounds under § 43-292 justified the termination of George's parental rights: abandonment and neglect. The juvenile court also found

that termination of George's parental rights was in Theodore's best interests.

[8,9] We first address whether there was sufficient evidence to terminate George's parental rights based upon abandonment. George seems to argue that the termination of his parental rights was based solely upon his incarceration and, therefore, improper. Abandonment, for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances. *In re Interest of L.V., supra*; *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990). Circumstantial evidence of intent may be used to establish abandonment. *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990); *In re Interest of McCauley H.*, 3 Neb. App. 474, 529 N.W.2d 77 (1995).

[10] The Nebraska Supreme Court has held that "parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights." *In re Interest of L.V.*, 240 Neb. at 422, 482 N.W.2d at 261. However,

> "[i]ncarceration of a parent, standing alone, does not furnish a ground for automatic termination of parental rights. . . . Incarceration, however, does not insulate an inmate from the termination of his parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent."

Id. at 418, 482 N.W.2d at 259 (quoting *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986)). The court also quoted with approval the following language from *In re Pawling*, 101 Wash. 2d 392, 679 P.2d 916 (1984):

> "[I]n termination proceedings we do consider 'a parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpe-

> trated are all relevant to the issue of parental fitness and child welfare, as [is] the parent's conduct prior to imprisonment and during the period of incarceration.' . . ."

In re Interest of L.V., 240 Neb. at 420, 482 N.W.2d at 260-61.

The Nebraska Supreme Court stated when considering a parent's incarceration for theft that "while the fact of incarceration was involuntary as far as [the mother] was concerned, her illegal activities leading to incarceration were voluntary on [her] part." *In re Interest of R.T. and R.T.*, 233 Neb. 483, 487, 446 N.W.2d 12, 16 (1989). In *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985), the Nebraska Supreme Court upheld the termination of a mother's parental rights based upon the mother's many years of incarceration, lack of contributions to support, lack of gainful employment when not incarcerated, and lack of cooperation, even though the mother expressed interest in the child and sent the child small gifts.

Our de novo review of the record shows that George has been incarcerated for all but approximately 2 months of Theodore's life and will remain incarcerated until at least the year 1999. George is presently incarcerated for dealing drugs. According to George, he committed this crime while Tonia was pregnant with Theodore, and he was not gainfully employed during her pregnancy or the first months of Theodore's life. The record also shows that for most of his adult life George has voluntarily and intentionally engaged in criminal activities which led to periods of incarceration.

Although George proclaims he wants to be a parent to Theodore, it does not appear that George has provided or will provide the emotional, psychological, and financial support that Theodore needs. According to the record, for at least 2 years prior to trial, George did not provide financial support for Theodore, except money for snacks during visitation, although it appears George has some available resources. Although George requested visits, he never sought to lengthen the visits past 20 minutes. Furthermore, outside the brief and sporadic visits, George never sought to call Theodore and never wrote to him besides occasional birthday and Christmas cards.

[11,12] We note that the parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child. *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990). Furthermore, "[a]bandonment is not an ambulatory thing, the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *Id.* at 735, 457 N.W.2d at 296–97.

For these reasons, we conclude that the evidence clearly and convincingly established that George abandoned Theodore for a period of at least 6 months before the filing of the second amended petition without justifiable excuse. See § 43-292(1). In addition, considering all aspects of George's intentional conduct, we find, from our de novo review, that the evidence clearly and convincingly establishes that George has substantially and continuously or repeatedly neglected Theodore and has refused to provide parental care and protection for him, all without any justifiable reason or excuse for such parental failure. See § 43-292(2).

[13] George also argues that there was insufficient evidence that termination was in Theodore's best interests. The evidence shows that George has been incarcerated for essentially Theodore's entire life of 4½ years, will remain incarcerated until Theodore is almost 8 years old, and even when released, may still not be in a position to parent Theodore. Theodore views his foster parents as his "mommy and daddy" and refers to George as "my friend George." The evidence also shows that Theodore is doing well with his foster family, has advanced developmentally, and has developed secure attachments. A child cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). We conclude, based upon our review of the record, that the termination of George's parental rights is in Theodore's best interests.

Double Jeopardy.

George also assigns that the termination of his parental rights violates the Double Jeopardy Clause of the U.S. Constitution.

He seems to argue that he is being punished twice for his past crimes because he was already convicted and sentenced in the criminal system and these same convictions are now being used against him as a basis to terminate his parental rights.

[14-16] It is fundamental that one objective of the Double Jeopardy Clause is to prevent multiple punishments for the same offense. See, *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). A civil penalty may constitute punishment for the purposes of double jeopardy. See, *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994); *Halper, supra*. *Halper* involved criminal charges and convictions followed by a civil lawsuit brought by the government, resulting in a monetary penalty. In *Halper*, the Court concluded that a legislative characterization of a sanction as civil does not preclude the possibility that the civil sanction could be a punishment under the Double Jeopardy Clause. The *Halper* Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-49.

[17,18] Juvenile proceedings are civil in nature. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). According to its preamble, the Nebraska Juvenile Code is intended to effectuate the rights of juveniles to care, protection, and a stable living environment and to provide for intervention in the interest of the juvenile with due regard to parental rights. Neb. Rev. Stat. § 43-246 (Reissue 1993). In a case involving a claim that the juvenile was homeless, destitute, or without proper support through no fault of the parents, the Nebraska Supreme Court stated that a petition in juvenile court is "brought on behalf of the child, not to punish the parents." *In re Interest of Constance G.*, 247 Neb. 629, 635, 529 N.W.2d 534, 539 (1995). Based upon the foregoing, the present juvenile case was clearly remedial in nature and did not expose George to double jeopardy. See *Malone v. State*, 864 S.W.2d 156 (Tex. Crim. App. 1993) (holding termination of father's parental

rights to child was civil proceeding with remedial result not triggering double jeopardy for subsequent criminal proceeding).

Recusal Issue.

Finally, George claims that his motion to vacate adjudication of jurisdiction should have been granted. The basis for this motion was that the judge who presided over the adjudication and dispositional proceedings against Tonia and the first partial trial on the termination of his and Tonia's parental rights recused herself because of a conflict of interest.

[19] It is unclear how a vacation of the adjudication order would affect George and this termination proceeding. The adjudication order involved a finding that Theodore was within the jurisdiction of the juvenile court because of actions of Tonia. After the first judge recused herself, a second amended petition for the termination of George's and Tonia's parental rights was filed and served, the parties were again informed of their rights and entered their denials, and a trial was had on this petition. Furthermore, where a case on appeal is tried de novo, refusal by the trial judge to disqualify himself or herself is immaterial. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980); *Garrett v. Garrett*, 3 Neb. App. 384, 527 N.W.2d 213 (1995). This assignment is without merit.

For the reasons stated above, we affirm.

AFFIRMED.