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REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 5, 2006 and OCTOBER 8, 2007

IN THE

# Nebraska Court of Appeals

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# NEBRASKA APPELLATE REPORTS

## VOLUME XV

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PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

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PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

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No. A-04-715: **Otte v. Neth**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge. Inbody, Chief Judge, dissents.

No. A-04-1191: **Frazier v. Eberspacher**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-04-1258: **Pedersen v. Pedersen**. Affirmed as modified. Sievers, Irwin, and Carlson, Judges.

No. A-04-1373: **Cook v. Cook**. Affirmed as modified. Moore, Sievers, and Cassel, Judges.

No. A-04-1430: **Rickman v. Rickman**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-064: **State on behalf of Snyder-Brandt v. Bartels**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-065: **Watson v. Colchin**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-05-126: **State v. Fair**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-155: **Robison v. Robison**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-196: **Blair v. Delman**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-205: **Empkey v. Empkey**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-265: **Cosentino v. Harrison**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-291: **Tippett v. Nebraska State Patrol**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-05-297: **Starman v. Chas. Vrana & Son Constr. Co.** Affirmed. Sievers, Irwin, and Carlson, Judges.

Nos. A-05-315, A-05-453: **Knoll v. Knoll**. Affirmed. Cassel and Moore, Judges. Inbody, Chief Judge, participating on briefs.

No. A-05-337: **Scherich v. Scherich**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-05-369: **Hollibaugh v. Hollibaugh**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-400: **Weller v. Metro Area Transit**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-450: **Engel v. Engel**. Affirmed in part as modified, and in part vacated and remanded for further proceedings. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-461: **Pasko v. City of Omaha**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-469: **Bush v. Central Valley Ag Transport**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-492: **Jura v. Player's, Inc**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-504: **State v. Buggs**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-05-508: **In re Estate of Petereit**. Affirmed in part, and in part vacated and remanded with directions. Sievers and Irwin, Judges, and Hannon, Judge, Retired.

No. A-05-509: **Southall v. Southall**. Affirmed as modified. Sievers and Irwin, Judges, and Hannon, Judge, Retired.

No. A-05-562: **In re Estate of Sklenar**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-622: **Wiedel v. Wiedel**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-659: **Dinslage v. Westside Community Schools**. Affirmed. Per Curiam.

No. A-05-764: **Baker v. Juilfs**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-05-782: **Butts v. Liebaert**. Affirmed. Sievers and Cassel, Judges, and Hannon, Judge, Retired.

No. A-05-786: **State v. Hoover**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-792: **Hanger v. Hanger**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-861: **State v. Akins**. Affirmed. Hannon, Judge, Retired, and Sievers and Cassel, Judges.

No. A-05-895: **City of Ashland v. Remmen**. Affirmed in part, and in part remanded with directions. Sievers, Carlson, and Cassel, Judges.

No. A-05-905: **Cooper v. Cooper**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-936: **State v. Gonzales**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-937: **Mather v. Stevenson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-955: **Jackson v. Neth**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-958: **Havlat v. Havlat**. Affirmed as modified. Sievers, Irwin, and Cassel, Judges.

No. A-05-960: **Tyrrell v. Nebraska State Patrol**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-963: **State v. Leonor**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-998: **S.D. Citibank v. Wilkins**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-1007: **Goeke v. Goeke**. Affirmed as modified. Irwin, Sievers, and Cassel, Judges.

No. A-05-1027: **Whitlow v. Casey-Witzenburg-Hall Funeral Chapel**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1075: **Lira v. Hy-Vee, Inc**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-05-1077: **Harris v. Spring Ctr. Mental Health Agency**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1082: **Sears v. Sears**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1091: **White v. White**. Affirmed as modified, and in part remanded with directions. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

No. A-05-1092: **Praus v. Praus**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1099: **Ajlouny v. Commonwealth Land Title Ins. Co**. Appeal dismissed, and cause remanded with directions. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1120: **Siebert v. AGO, Inc**. Affirmed. Hannon, Judge, Retired, and Sievers and Cassel, Judges.

No. A-05-1125: **Hooks v. Johnson**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-05-1154: **Puentes v. Department of Motor Vehicles**. Reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

No. A-05-1172: **State v. Frazier**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1198: **Westerby v. City of Grand Island**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1208: **Santo v. Department of Motor Vehicles**. Reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

No. A-05-1257: **Picard v. Allmerica Fin. Life Ins. & Annuity Co**. Reversed and remanded. Sievers, Carlson, and Cassel, Judges.

No. A-05-1265: **Wilson v. Wilson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1270: **Farris v. Mangiameli**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1274: **Stoeger v. Stoeger**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1291: **Dunn v. Wallace Sch. Dist**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1292: **Jacobson v. Shresta**. Reversed and remanded for further proceedings. Cassel, Irwin, and Sievers, Judges.

No. A-05-1304: **Rose Investments v. Lobo**. Affirmed. Per Curiam.

No. A-05-1305: **Law v. Terratrack, Inc**. Affirmed. Inbody, Chief Judge, and Moore, Judge. Carlson, Judge, participating on briefs.

No. A-05-1316: **Empire Park Partnership v. Vecchio**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1361: **State v. Lopez-Mariscal**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1369: **Young v. Young**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1372: **Overfield v. Edwards**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-1377: **Paulsen v. Paulsen**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-1393: **State v. Phipps**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-1395: **Meier v. Lemmer**. Affirmed in part, reversed in part, vacated and set aside in part. Sievers, Carlson, and Cassel, Judges

No. A-05-1399: **Petersen v. Lindsay Mfg. Co**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-1406: **In re Interest of Michael M**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1412: **Attaie v. Attaie**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1421: **Garrett v. Garrett**. Affirmed as modified. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1422: **United States Cold Storage v. Pinnacle Foods Corp**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-05-1443: **Hall v. Hall**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1461: **Johnson v. Johnson**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1464: **Koziol v. Koziol**. Affirmed as modified. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1466: **State v. Plambeck**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-1476: **Hannon v. Hannon**. Affirmed. Irwin, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-05-1500: **Braddock v. Ristow**. Reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

No. A-05-1506: **Noordam v. Vickers, Inc**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-1522: **State v. Sledge**. Affirmed. Moore and Carlson, Judges. Sievers, Judge, participating on briefs.

No. A-05-1523: **State v. Riggle**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-1532: **State v. Hummer**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-05-1543: **State v. Abboud**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-1553: **Anderson v. Anderson**. Appeal dismissed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1560: **Smith v. Smith**. Reversed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1577: **State v. Curry**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-006: **Akins v. Shipflett**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-008: **State v. Zephier**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-011: **State on behalf of Douglas v. Douglas**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-029: **Sinsel v. Weinand**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-033: **Hoppes v. Neth**. Reversed and remanded with directions. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-034: **In re Interest of Todd A**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-036: **Citibank South Dakota v. Hansen**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-042: **State v. Hansen**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-064: **Carver v. Giles**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-068: **State v. Wiese**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-097: **Mid-States Acceptance Corp. v. Carrier's Servs**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-098: **Stock v. Stock**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-100: **State v. Lopez**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-111: **In re Interest of Bubba W**. Reversed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-117: **Wiles Bros. Fertilizer v. S & S Seeding**. Reversed and remanded for further proceedings. Cassel, Irwin, and Sievers, Judges.

No. A-06-121: **State v. Hernandez**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-125: **State v. McDaniels**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-06-126: **Schuman v. Roether**. Affirmed. Sievers, Judge, and Inbody, Chief Judge. Moore, Judge, participating on briefs.

No. A-06-146: **State v. Cattau**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-148: **Rodriguez v. Nebraska Dept. of Corr. Servs**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-158: **State on behalf of Michaelson v. Martin**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-06-198: **State v. Rodriguez-Servin**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-200: **Chereck v. Chereck**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-207: **State v. Munoz-Gonzales**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-212: **State v. Rutan**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-220: **Munoz v. Wagner**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-232: **In re Interest of Michael P**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-233: **In re Interest of Shayann D. & Jeremiah H**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Irwin, and Carlson, Judges.

No. A-06-235: **In re Interest of Fedalina G**. Affirmed. Irwin and Sievers, Judges, and Hannon, Judge, Retired.

No. A-06-236: **In re Estate of Rockhill**. Reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

No. A-06-247: **Wolever v. Wolever**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-255: **Powers v. Drivers Mgmt**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-259: **In re Interest of Connor S. & Marissa T**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-06-273: **In re Interest of Isaiah B**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-274: **In re Interest of Michael B**. Vacated and remanded. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-276: **State v. Becker**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-278: **Jensen v. Jensen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-282: **State v. Hernandez**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-284: **State v. Baker**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-291: **State v. Tagwerker**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-293: **State v. Bartlett**. Appeal dismissed in part, and in part affirmed. Irwin, Carlson, and Cassel, Judges.

No. A-06-294: **State v. Nikolas**. Reversed and remanded with directions. Cassel, Irwin, and Moore, Judges.

No. A-06-303: **In re Interest of Diamond T**. Appeal dismissed. Carlson, Irwin, and Sievers, Judges.

No. A-06-304: **Furman v. Olsen**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-305: **Wood v. Wood**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-306: **Hrnchir v. Hrnchir**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-324: **State v. Kemper**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-326: **State v. White**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-06-341: **Porter v. Porter**. Affirmed in part as modified, vacated in part, and in part reversed and remanded. Inbody, Chief Judge, and Sievers and Moore, Judges.

Nos. A-06-359 through A-06-361: **Mohrmann v. Gdowski**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-371: **Kistner v. Cleary's Building Corp**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-377: **Motley v. Motley**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-382: **Brummels v. C & M Land Co**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-400: **State v. Benish**. Affirmed in part, and in part dismissed. Carlson and Moore, Judges. Cassel, Judge, participating on briefs.

No. A-06-407: **In re Interest of Bethany W**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-413: **In re Interest of Savannah S. et al**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-416: **State v. Farley**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-417: **In re Interest of Brandy W. & Bridget H**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-421: **State v. Price**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-430: **Nutter v. Nutter**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-435: **State v. Bartels**. Order vacated. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-436: **Treffer v. Treffer**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-438: **In re Interest of Lane Z**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge. Moore, Judge, dissenting.

No. A-06-440: **In re Interest of Joshua A. et al**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-441: **Snodgrass v. Nebraska Machinery Co.** Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-06-446: **State v. Peeks**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-449: **State v. Nelson**. Affirmed. Carlson, Moore, and Cassel, Judges

No. A-06-450: **State v. Smith**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-06-453: **In re Interest of Shaylee A**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-458: **Ozuna v. Maruffo**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-468: **In re Interest of Vontavious H**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-472: **In re Interest of Amber Y**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-483: **Witmer v. Witmer**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-489: **In re Interest of Vinnie F. et al**. Affirmed in part, and in part reversed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-500: **Adams v. Stahly**. Reversed and remanded for further proceedings. Per Curiam.

No. A-06-501: **Hiddleston v. Douglas Cty. Bd. of Equal**. Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-509: **State v. Payne**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-511: **Jones v. Platteview Apartments**. Reversed and remanded for further proceedings. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-513: **In re Interest of Megan R**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-520: **In re Interest of Ciera M**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-544: **In re Interest of Aleisha L**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-545: **In re Interest of Ashlei L**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-550: **State v. Brown**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-551: **State v. Roundtree**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-581: **State v. Harr**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-588: **Meisinger v. Messer**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-590: **Henke v. Penske Truck Leasing**. Affirmed. Moore and Sievers, Judges. Irwin, Judge, participating on briefs.

No. A-06-599: **State v. Potter**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-613: **Clark v. Clark**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-617: **State on behalf of Deidel v. Deidel**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-618: **State v. Monje**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-06-619: **Gonzales v. Dun-Par**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-626: **State v. Watkins**. Affirmed. Cassel, Carlson, and Moore, Judges.

Nos. A-06-635 through A-06-639: **State v. Curry**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-647: **State v. Campbell**. Affirmed. Cassel and Sievers, Judges. Inbody, Chief Judge, participating on briefs.

No. A-06-650: **Gurley v. Baugh**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-656: **In re Interest of Jason B. & Michael B**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-657: **State v. Stewart**. Affirmed as modified. Cassel, Sievers, and Carlson, Judges.

No. A-06-659: **State v. Sorenson**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-667: **State v. Castellanos**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-674: **In re Interest of Austin M.** Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-704: **Lecuona v. Express Messenger Sys.** Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-708: **In re Interest of Travon G. & Amariyon G.** Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-717: **In re Interest of Savannah S. et al.** Affirmed. Per Curiam.

No. A-06-718: **In re Interest of Ciera C.** Reversed and remanded for further proceedings. Cassel, Sievers, and Carlson, Judges.

No. A-06-723: **In re Interest of Rachael G.** Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-726: **State v. Scheffert.** Affirmed in part, and in part sentence vacated and cause remanded for further proceedings. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-752: **State v. Buckman.** Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-755: **In re Interest of Lashawnta H.** Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-766: **In re Interest of Elizabeth G. & Tobin G.** Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-767: **In re Interest of Julio M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-768: **In re Interest of Lourdes M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-769: **In re Interest of Yesenia M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-770: **In re Interest of Israel M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-780: **Cooper v. Slosburg Co.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-812: **In re Interest of Amber M. et al.** Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-827: **State v. Brown.** Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-837: **Maldonado v. Hansen.** Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-841: **In re Interest of Xavier H.** Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-846: **State v. Gray**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-854: **Paus v. Paus**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-862: **State v. Hill**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-863: **State v. Schneider**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-867: **State v. Jenkins**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-879: **Lickliter v. Farmers Coop. Elev. Co.** Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-882: **In re Interest of Amber K. et al.** Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-900: **Williams v. Williams**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-06-916: **In re Interest of Brenda F.** Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-933: **Lonsdale v. Big Sky Energy Equip.** Affirmed. Cassel, Carlson, and Moore, Judges. Carlson, Judge, concurs.

No. A-06-947: **State v. Berg**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-958: **State v. Prien**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-978: **In re Interest of Elba L. & Angel L.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-994: **State v. Plasencio**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-1000: **State v. Henderson**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-1014: **Serie v. Serie**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1020: **In re Interest of Michael B.** Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-1022: **Neujahr v. Western Hills Ltd. Partnership**. Affirmed. Cassel, Sievers, and Irwin, Judges.

No. A-06-1031: **State v. Busch**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-1046: **Buettgenback v. Kehn**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-1053: **Arias v. IBP, inc**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-1060: **In re Interest of Patrick W. et al**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-1068: **Eugene S. v. Stephanie B**. Reversed and remanded with directions. Cassel, Irwin, and Sievers, Judges.

No. A-06-1073: **Wilson v. Mumm**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-1096: **In re Interest of Skylar B**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1122: **Krantz v. Krantz**. Affirmed as modified and in part remanded with directions. Sievers, Irwin, and Cassel, Judges.

No. A-06-1140: **In re Interest of Terra K**. Reversed and remanded with directions. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-1144: **Hassan v. Kawasaki Motors Mfg. Corp**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-1145: **In re Conservatorship of Heuertz**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-1154: **Collett v. Collett**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-1159: **Purcell v. Christiancy**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-1164: **State v. Heil**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-1169: **State v. Knotek**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-1196: **Knight v. Kubr Construction**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-06-1198: **State on behalf of Lee v. Lee**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1201: **Trimm v. Trimm**. Affirmed. Sievers and Cassel, Judges. Carlson, Judge, participating on briefs.

No. A-06-1212: **Wood v. Nebraskaland Tire**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-1228: **State v. Dan**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-06-1232: **Ingswersen v. American Tool Cos.** Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-1240: **In re Interest of Jimmy D.** Affirmed. Irwin, Sievers, and Cassel, Judges.

Nos. A-06-1242, A-06-1243: **In re Interest of Jake T.** Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1244, A-06-1245: **In re Interest of Preston S.** Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1246, A-06-1247: **In re Interest of Thomas S.** Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1248, A-06-1249: **In re Interest of Franklin S.** Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-1252: **State v. Pope**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1291: **In re Interest of Steven M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

Nos. A-06-1313 through A-06-1317: **State v. Delao**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1357: **In re Guardianship of Charles H. & Natalya H.** Reversed. Sievers, Carlson, and Cassel, Judges.

No. A-06-1359: **Garcia v. Hillcrest Nursing Home**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-1369: **In re Interest of Sabastian Q.** Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-1370: **In re Interest of Mia Q**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

Nos. A-06-1378, A-07-147: **Beal v. Beal**. Appeal in No. A-06-1378 dismissed. Judgment in No. A-07-147 affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1380: **In re Interest of Destiny A. et al**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-06-1382: **State v. Zesatti**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-06-1388: **Byam v. Modern Equip. Co**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1392: **State v. Larue**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

Nos. A-06-1415 through A-06-1420: **Howard Cty. Bd. of Equal. v. Bahensky**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-1421: **Lagemann v. Nebraska Methodist Hospital**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-1423: **State v. Schreck**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-07-015: **In re Interest of Joseph E**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-07-031: **Panhandle Cmty. Servs. v. Morrill Cty. Bd. of Equal**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-07-052: **In re Interest of Tierra M. et al**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-079: **State v. Sainz**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-082: **In re Interest of Kyle W. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-127: **State v. Al-Hakemi**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-07-158: **In re Interest of Bobbie W**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-07-183: **In re Interest of Garrett E**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-07-201: **In re Interest of Kolt S. & Ariel R**. Reversed. Sievers, Carlson, and Cassel, Judges.

No. A-07-214: **State v. Rott**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-07-220: **General Motors Acceptance Corp. v. Leth**. Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-257: **Davis v. Johnson**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-07-265: **FourThought Group v. Oligmueller**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-07-267: **State v. Jafferis**. Affirmed in part, and in part reversed and remanded for resentencing. Cassel, Irwin, and Sievers, Judges.

No. A-07-281: **In re Interest of Naif A. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-310: **In re Interest of Jeff D**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-311: **In re Interest of Mindy D**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-398: **In re Interest of KirstieAlley M. & Promise M**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-413: **In re Interest of Mason S**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-427: **In re Interest of Tyler L. & Alyssa L**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-07-636: **Jacob v. Department of Corr. Servs**. Reversed and remanded with directions. Carlson, Sievers, and Cassel, Judges. Cassel, Judge, concurring.

## LIST OF CASES DISPOSED OF WITHOUT OPINION

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No. A-05-166: **One Ninety-Two, L.L.C. v. Schaben**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-548: **Towne v. Towne**. Stipulation allowed; appeal dismissed.

No. A-05-665: **Maple Hill Dairy v. Dolezal-Soukup**. Stipulation allowed; appeal dismissed.

No. A-05-686: **Hughes-Hastings v. Hastings**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-709: **Shepard v. Department of Corrections**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-05-912: **Christensen v. Mulhall's Nursery**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-925: **Carlson v. Mackjust**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-934: **Progressive Ins. Co. v. Warfield**. Stipulation allowed; appeal dismissed with prejudice.

No. A-05-1047: **Edwards v. Edwards**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004). Purported order nunc pro tunc rendered October 4, 2006, is vacated. See, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Camp v. Camp*, 14 Neb. App. 473, 709 N.W.2d 696 (2006).

No. A-05-1149: **Hansen v. Vampola**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

Nos. A-05-1156, A-05-1165, A-05-1166: **In re Trust of Beyer**. Motions of appellant to dismiss appeal sustained; appeals dismissed with prejudice; each party to pay own costs.

No. A-05-1190: **State v. Brown**. Motion of appellee for summary affirmance sustained. See, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995).

No. A-05-1224: **Eggerling v. Sandylot Cattle Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1242: **Reeder v. Reeder**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1256: **Fletcher v. State**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-05-1261: **In re Estate of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1262: **In re Estate of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1263: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1264: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1297: **In re Guardianship & Conservatorship of Preston B**. Appeal dismissed as moot.

No. A-05-1301: **Benjamin v. Skyline Retirement Community**. Stipulation allowed; appeal dismissed with prejudice.

No. A-05-1332: **Rural Environ. Action Conser. Team v. Thayer Cty. Bd. Comrs**. Appeal dismissed. See, rule 7A(1); *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006); *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003). See, also, *State v. Belk*, 14 Neb. App. 53, 703 N.W.2d 652 (2005).

No. A-05-1333: **State v. Vera**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1396: **Mosley v. Hudson**. Appeal dismissed. See, rule 7A(2); *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-05-1408: **State v. Lohman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1475: **State ex rel. Arroyo v. Arroyo**. Affirmed. See, rule 7A(1); *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000); *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999).

No. A-05-1490: **Tyler v. Woodard**. Affirmed. See rule 7A(1).

No. A-05-1511: **Ross v. Panhandle Concrete Products**. Stipulation allowed; appeal dismissed.

No. A-05-1522: **State v. Sledge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006); *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

No. A-05-1522: **State v. Sledge**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1549: **Nemec v. Nemec**. Appeal dismissed. See, rule 7A(2); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-06-027: **Pusch v. Pelshaw**. Affirmed. See, rule 7A(1); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

No. A-06-035: **State v. Segura**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-037: **In re Guardianship of Charles H. & Natalya H**. Appeal dismissed. See rule 7A(2).

No. A-06-041: **State v. Perry**. Summarily affirmed. See, rule 7A(1); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

No. A-06-072: **Hansen v. County of Saline**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-091: **Hadrick v. Hadrick**. Motion of appellee for summary dismissal sustained. See Neb. Rev. Stat. §§ 42-352 (Reissue 2004) and 25-517.02 (Reissue 1995).

No. A-06-094: **Timmons v. Hirschman**. Appeal dismissed. See, rule 7A(2); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-06-095: **Russell v. Kriefels**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 25-1149 (Reissue 1995); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

No. A-06-140: **Barden v. Neth**. Affirmed. See, rule 7A(1); *In re Petition of Navrkal*, 270 Neb. 391, 703 N.W.2d 247 (2005); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-06-142: **Langdon v. Langdon**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-06-144: **Sommerfeld v. City of Gibbon**. Motion of appellee for summary dismissal for mootness sustained.

No. A-06-166: **Davis v. Neth**. Amended stipulation for summary reversal allowed; judgment of district court summarily reversed, and cause remanded with directions. See, rule 7C(1); *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006).

No. A-06-169: **State v. Stanclift**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-173: **State v. Colchin**. Motion of appellee for summary affirmance granted. See rule 7B(2).

No. A-06-190: **Lamar Co. v. Omaha Admin. Bd. of Appeals**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-192: **School Dist. No. 128 v. Randall**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-193: **Pautsch v. Blumanthal**. Affirmed. See, rule 7A(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-06-202: **Hernandez v. Irwin Industrial Tool Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-208: **State v. Aron**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-213, A-06-214: **State v. Reising**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-221: **Stanko v. Hlava**. Affirmed. See, rule 7A(1); *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

No. A-06-222: **Buggs v. Cruise**. Affirmed. See rule 7A(1).

No. A-06-227: **State v. Piso**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-237: **Tilman v. Stevens**. Appeal dismissed. See, rule 7A(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

No. A-06-241: **Clayton v. Warford**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-251, A-06-252: **State v. Enriques**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-253: **Murray v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-06-283: **State v. Kollars**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-285: **Huffman v. Adams County**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 28-716 (Supp. 2005).

No. A-06-307: **State v. Guajardo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-315: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-316: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-317, A-06-318: **State v. Trump**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-322: **Rodriquez v. Rodriquez**. Order of district court entered March 6, 2006, summarily vacated and cause remanded for further proceedings. See, rules 5A(1) and 7C; *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002).

No. A-06-327: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-331: **State v. Goldsworthy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-336: **Yeutter v. Bartlett**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-06-338: **State v. Zanca**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-339: **State v. Minter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-342: **State v. Snoddy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

Nos. A-06-343, A-06-344: **State v. Cisar**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-345: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-346: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-347: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-348: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-353: **Tarar v. Tarar**. Affirmed. See, rule 7A(1); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986); *Redfield v. Redfield*, 6 Neb. App. 274, 572 N.W.2d 422 (1997).

No. A-06-356: **Barnes v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-06-364: **Shasteen v. LaPointe**. Affirmed. See, rule 7A(1); *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

No. A-06-365: **Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *State v. Billups*, 10 Neb. App. 424, 632 N.W.2d 375 (2001).

No. A-06-374: **State v. Beavers**. Affirmed. See rule 7A(1).

No. A-06-375: **State v. Hanway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-376: **Tyler v. Heineman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-379: **Lara v. Advance Services**. Affirmed. See, rule 7A(1); *Bronzynski v. Model Electronic*, 14 Neb. App. 355, 707 N.W.2d 46 (2005).

No. A-06-381: **State v. Loughry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-386: **State on behalf of Penn v. Hollingsworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-388: **Long v. State Patrol**. Affirmed. See rule 7A(1).

No. A-06-389: **State v. Braymen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

No. A-06-391: **Cavalieri v. Gause**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-392: **Kerwin v. Wolff**. Stipulation allowed; appeal dismissed with prejudice.

No. A-06-395: **State v. Mosley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-398: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-399: **State v. Rees**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976).

No. A-06-401: **State v. Lindsay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

No. A-06-410: **In re Guardianship of Mackinzi W**. Stipulation allowed; appeal dismissed.

No. A-06-411: **State on behalf of Wesson v. Harker**. Appeal dismissed. See, rule 7A(2). *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2002).

No. A-06-426: **Harvey v. Harvey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-434: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-437: **State v. Warnsing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-445: **State v. Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-451: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-460: **City of Grand Island v. Strohl**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-461: **In re Guardianship & Conservatorship of Chloe D**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-462: **State v. Lawver**. Summarily affirmed. See rule 7A(1).

No. A-06-463: **State v. Heston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-464: **State v. Quevedo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-469: **Theis v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-473: **State v. Tracy**. Motion of appellee for summary affirmance sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. §§ 25-1912(1) and 29-2306 (Cum. Supp. 2004); *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

No. A-06-474: **Eilers v. Star City/Federal, Inc**. Appeal dismissed. See rule 7A(2).

Nos. A-06-476, A-06-478: **State v. Cooper**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-477: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-479: **State v. Wenke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-484: **Devillier v. Devillier**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-485: **Kaelin v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-491: **State v. McKethan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-493: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-495: **State v. Hittle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-06-496, A-06-497: **State v. Porter**. Affirmed. See, rule 7A(1); *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

No. A-06-498: **State v. Bang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-503: **Ramos v. Egan Trucking Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-504: **State v. Craig**. Motion of appellant for rehearing sustained. Appeal reinstated. See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-06-505: **State v. Bogan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-506: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-507: **State v. Pham**. Affirmed. See rule 7A(1).

No. A-06-514: **State on behalf of Blackbonnet v. Pelter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-515: **State v. Pinkelman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

No. A-06-516: **State v. Humphrey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-518: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-519: **Schroeder v. Chapman**. Summarily affirmed. See, rule 7A(1); *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002).

No. A-06-522: **Cash v. State**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-527: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-528: **Sherman v. Sherman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-529: **General Motors Acceptance Corp. v. Leth**. Reversed, vacated, and remanded with directions.

No. A-06-530: **In re Application of Brown v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-533: **Tyler v. City of Omaha**. Affirmed. See rule 7A(1).

No. A-06-534: **State v. Spangler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-535: **State v. Gutierrez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

No. A-06-537: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-539: **State v. Weekly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-540: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-542: **Misiunas v. Saitta-Misiunas**. Stipulation allowed; appeal dismissed.

No. A-06-552: **Berglund v. Berglund**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-555: **State v. Davlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

No. A-06-557: **Dughman v. Dughman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-558: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-559: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-573, A-06-574: **State v. Lock**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-578: **State v. Bivens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-587: **State v. McClain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-589: **Peery v. Sims**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-592: **State v. Patchin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-596: **Walker v. Malone**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-600: **State v. LoGrande**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-601: **Grantham v. Grantham**. Affirmed. See rule 7A(1).

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-06-604: **Tyler v. Houston**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-06-610: **Serrano v. Serrano**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-611: **State v. McCabe**. Motion of appellee for summary affirmance of denial of postconviction relief sustained; judgment affirmed.

No. A-06-621: **Schlichenmaier v. Whitlock**. Appeal dismissed. See, rule 7A(2); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-06-623: **In re Interest of Desiree D**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-646: **State v. Red Bear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-651: **State v. Perez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-653: **State v. Le**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-654: **State v. Brejcha**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-655: **State v. Chapman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-660: **State v. Calderon-Munoz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-668: **State v. DeLay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-669: **State v. DeLay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-673: **State v. Haman**. Appellee's suggestion of remand sustained. See rule 7C. Convicton reversed, sentence vacated, and cause remanded for a new trial. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

No. A-06-679: **Thompson v. Separate Juv. Ct. for Douglas Cty**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. Appeal dismissed. See rule 7A(2).

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-687: **State v. Rhamy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-688: **State v. Lowery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-691: **State v. Cramer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-695: **Rohrbouck v. Rohrbouck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-697: **Tyler v. Sherwin Williams Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-698: **State v. Tyler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

No. A-06-700: **State v. Costello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-701: **State v. Krieger**. Motion of appellee for summary affirmance under rule 7B(2) sustained; convictions and sentences affirmed.

No. A-06-707: **State v. Cossio-Astorga**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-06-711: **Barrett v. Fabian**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-712: **State v. Jimenez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-713: **State v. Bell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-714: **State v. Reyes-Barnett**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-715: **State v. Martin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-720: **McElhinny v. Camron, Inc**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. A-06-727, A-06-728: **State v. Gould**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

No. A-06-729: **CACV of Colorado v. Larson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-730: **Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-733, A-06-734: **State v. Cockson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-735: **State v. Cogley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-739: **State v. Boeck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997).

No. A-06-740: **State v. Jordan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-743, A-06-758: **State v. Anderson**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-06-748: **MBNA America Bank v. Hansen**. Affirmed. See rule 7A(1).

No. A-06-748: **MBNA America Bank v. Hansen**. Motion of appellant for rehearing sustained in part. Appeal reinstated.

No. A-06-749: **Stuart v. Lewis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-06-750: **Rader v. Lewis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-06-751: **In re Interest of Marquez S**. Stipulation allowed; appeal dismissed.

No. A-06-754: **State v. Felder**. Affirmed. See, rule 7A(1); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

No. A-06-759: **State v. Klaus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

No. A-06-760: **Cash v. Cash**. Appeal dismissed. See, rule 7A(2); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-762: **Scholting v. Scholting**. Summarily affirmed. See, rule 7A(1); *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

No. A-06-763: **Barrett v. Fabian**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-06-772: **State ex rel. Tyler v. Stennis-Williams**. Appeal dismissed. See, rule 7A(2); *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001).

No. A-06-773: **Pinson v. Jordon**. Appeal dismissed. See, rule 7A(2); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-06-775: **State v. Ashford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-777: **Colling v. Price**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-06-778: **Newman v. Newman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-784: **State v. Parnell**. Affirmed. See, rule 7A(1); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

No. A-06-785: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-787: **Evers v. American Nat. Bank**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-06-788: **Evers v. Bellevue City Office**. Affirmed. See, rule 7A(1); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005); *Dennes v. Dunning*, 14 Neb. App. 934, 719 N.W.2d 737 (2006).

No. A-06-789: **Gunhus v. Gunhus**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-790: **State v. Lemuz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-791: **State v. Kutschara**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

No. A-06-796: **Geer v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-797: **State v. Yager**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-801: **Hillig v. Hillig**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2004); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). See, also, Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004).

No. A-06-803: **Citibank South Dakota v. Schroeder**. Appeal dismissed for lack of jurisdiction, and judgment of district court on appeal vacated for lack of jurisdiction. See, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999).

No. A-06-805: **State v. Broussard**. Affirmed. See rule 7A(1).

No. A-06-806: **Carlson v. Mackjust**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-807: **State ex rel. Tyler v. Kenney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-808: **Ellis v. Ellis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-811: **State v. Fletcher**. Appeal dismissed. See rule 7A(2).

No. A-06-816: **State v. Jelinek**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

No. A-06-819: **State v. Oneal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-821: **State v. Anderson**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

Nos. A-06-828 through A-06-830: **State v. Wright**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-833: **Buggs v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-834: **Buggs v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-835: **State ex rel. Tyler v. Marcuzzo**. Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-836: **First National Equip. Financing v. Tabke**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2004).

No. A-06-839: **State v. Hernandez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-840: **State v. Hernandez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-842: **Pauley v. Pauley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-843: **In re Guardianship & Conservatorship of Rosemary D**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-847: **State v. Dan**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-848: **State v. Tilton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-849: **Darrington v. Ray Martin Co. of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-850: **State v. Risney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-855: **Simmons v. Baily**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-856: **Mengedoht v. Buckley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006); *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997).

No. A-06-857: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-859: **State on behalf of Saltzman v. Schildt**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-861: **State v. Hansen**. After review of appellee's suggestion of remand, dismissal of appeal entered by district court on July 7, 2006, is vacated and cause is remanded to district court with directions to set matter for hearing, with notice to parties.

No. A-06-864: **In re Interest of Micah C**. Appeal dismissed. See, Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-865: **In re Interest of William B**. Appeal dismissed. See, Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-868: **State v. Enriquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-869: **State v. Enriquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-871: **Santo v. Santo**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-06-880: **State v. Nye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-881: **In re Interest of Devon M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-883: **State v. Jenkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-884: **State v. Ford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-885: **State v. Ford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-886: **State v. Baldwin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-887: **Buck's, Inc. v. Delozier**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-888: **Walton v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-889: **Williams v. Baird**. Appeal dismissed. See, rule 7A(2); *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

No. A-06-890: **In re Interest of Kyah H**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-891: **Livingston v. Pacific Realty Commercial**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-892: **State v. Velazquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-893: **State v. Harlan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-894: **Bush v. County of Lancaster**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-895: **Schmalken v. Schmalken**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-897: **Paradigm Properties v. TSN Properties**. Stipulation allowed; appeal dismissed.

No. A-06-898: **Wilson v. Nebraska Dept. of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-899: **State v. Moses**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

No. A-06-901: **Onuachi v. Meylan Enters**. Appeal dismissed. See rule 7A(2).

No. A-06-902: **Schrader v. Titterington**. Appeal dismissed. See, rule 7A(2); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

No. A-06-903: **City of Blair v. Thompson**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-904: **State v. Gallegos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-905: **Novak v. Community Redevelopment Auth.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-906: **Jones v. Jones**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-06-907: **Guajardo v. Carlson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-912: **State v. Ricks**. Stipulation for summary reversal allowed; portions of sentences regarding restitution vacated, and cause remanded for resentencing on issue of restitution, including restitution hearing. See, rule 7C(1); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

No. A-06-913: **State v. Villarreal**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-915: **In re Interest of Alexis H.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-917: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-922: **State v. Kelley**. Motion of appellee for summary affirmance sustained. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-923: **State v. Chollett**. Appellee's suggestion of remand sustained. Case remanded to the district court for a new sentencing hearing.

No. A-06-926: **Smallcomb v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-928: **Blair v. McArthur**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-06-929: **Yoder v. Work A While**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 48-185 (Reissue 2004) and 25-1912(1) (Cum. Supp. 2004).

No. A-06-931: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-932: **State v. Applegate**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-934: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-935: **State v. Hymond**. Affirmed. See rule 7A(1).

No. A-06-936: **David Mgmt. & Constr. v. Pearson**. Affirmed. See rule 7A(1).

No. A-06-937: **Swedburg v. Nutt**. Stipulation allowed; appeal dismissed.

No. A-06-940: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-941: **Hearst-Argyle Properties v. Entrex Communication Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-942: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-943: **Warford v. Warford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-944: **Fox v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-946: **State v. Wamboldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-948: **In re Interest of Seth S. & Annalynn S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-950: **Retherford v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-952: **Portsche v. Department of Motor Vehicles**. Appeal dismissed as moot.

No. A-06-953: **Klug v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-954: **City of LaVista v. Long**. Summarily dismissed. See rule 7A(2).

No. A-06-955: **Stricker v. Neth**. Affirmed. See rule 7A(1).

No. A-06-956: **State v. Stricker**. Motion for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

No. A-06-957: **State v. York**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

No. A-06-960: **Hardy v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-962: **State v. Lentz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-964: **Buggs v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-967: **State v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-968: **Kline v. Minard**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-969: **State v. Schuneman**. Appellee's suggestion of remand granted. Case remanded to the district court to recalculate the number of days credited for time previously served.

No. A-06-970: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-971: **State v. Schumacher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-972: **State v. Watson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

No. A-06-973: **State v. Terry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-974: **State v. Castor**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-976: **Clark v. Modern Equip. Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-977: **Hammond v. Kelly Industries**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-979: **Witte v. Witte**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-06-980: **Walz v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-981: **Mashek v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-982: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-984: **First Resolution Investment v. Llanes**. Appeal dismissed. See, rule 7A(2); *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

No. A-06-985: **Brock v. Smith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2004); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

No. A-06-985: **Brock v. Smith**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-986: **Streeks v. Walgreen Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-987: **Amerisourcebergen Corp. v. Heidelk Pharmacy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-988: **Foltz v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-06-989: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-990: **State v. Penix**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-991: **State v. Hatch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-992: **State on behalf of Graham v. Jensen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-993: **State v. Cruz**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 29-118 and 29-826 (Cum. Supp. 2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-06-996: **State on behalf of Diaz v. Weaver**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-997: **State ex rel. Bonner v. McSwine**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. §§ 25-2001(4) and 25-2008 (Cum. Supp. 2006); *State ex rel. Bonner v. McSwine*, 14 Neb. App. 486, 709 N.W.2d 691 (2006).

No. A-06-998: **State v. Matthies**. Affirmed. See, rule 7A(1); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006); *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003); *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963).

No. A-06-999: **State v. Wells**. Appeal dismissed pursuant to appellee's suggestion of mootness. See, rule 7D(1); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993).

No. A-06-1002: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1003: **Kuhn v. Wells Fargo Bank**. Motion of appellee to dismiss appeal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-1005: **State v. Berg**. Motion of appellee for summary affirmance sustained. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1007: **Martin v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1009: **Steffens v. Steffens**. Stipulation allowed; appeal dismissed.

No. A-06-1011: **State v. Poessnecker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 28-932 (Cum. Supp. 2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1012: **Rivera v. DCS Sanitation**. Stipulation allowed; appeal dismissed.

No. A-06-1013: **State v. Scheil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1015: **State v. Raven**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1017: **Van Ert v. State Farm Mut. Auto. Ins. Co.** Appeal dismissed. See, rule 7A(2); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-06-1018: **Shepard v. Roach**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1019: **County of Hitchcock v. Barger**. Appeal dismissed. See rule 7A(2).

No. A-06-1023: **State v. Krutilek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

Nos. A-06-1024, A-06-1025: **State v. Eagle Elk**. Motions for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1029: **Stade v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1033: **Zion Lutheran Church v. Mehner**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

No. A-06-1034: **Workman v. Workman**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-1040: **Lawler v. Lawler**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-1042: **State v. Cave**. Appeal dismissed. See, rule 7A(2); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

No. A-06-1043: **State v. Loyd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1048: **Phelps v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-06-1052: **In re Interest of Donita D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1057: **Bromwich v. Bromwich**. Appeal dismissed. See, rule 7A(2); *City of Beatrice v. Meints*, 12 Neb. App. 276, 671 N.W.2d 243 (2003).

No. A-06-1058: **State v. Fernen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1059: **George v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1061: **In re Guardianship of Jessica R**. Appeal dismissed. See rule 7A(2).

No. A-06-1062: **Addison Ins. Co. v. L&M Siding & Window**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1064: **Classe v. College of Saint Mary**. Appeal dismissed. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). See, also, *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

No. A-06-1069: **Villarreal v. Anderson**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-1708 (Reissue 1995).

No. A-06-1070: **State v. Sledge**. Appellee's suggestion of remand granted. See *State v. Boye*, 1 Neb. App. 548, 499 N.W.2d 860 (1993). Case remanded to district court to review sufficiency of evidence to sustain conviction.

No. A-06-1074: **Campbell v. Wise**. Affirmed. See rule 7A(1).

No. A-06-1075: **Domeier v. Yaney**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1076: **State v. Buck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1077: **State v. Lindteigen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1078: **State v. Shelby**. Affirmed. See, rule 7A(1); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

No. A-06-1079: **Shellenberger v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-1080: **Engelbart v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1081: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1082: **State v. Lamont**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1083: **Modern Farm Equip. v. Stanko**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1084: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1086: **SFI Ltd. Partnership IV v. Marks**. Stipulation allowed; appeal dismissed.

No. A-06-1087: **Pollet v. Anschutz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1090: **Johnson v. City of Lincoln**. Appeal dismissed. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

No. A-06-1092: **State v. Schwisow**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-1094, A-06-1095: **State v. Sandlin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-1098: **In re Estate of Chrisp**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-06-1100: **Feld Investment Co. v. Valley West Apartments**. Appeal dismissed. See, rule 7A(2); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-06-1101: **State v. Pfitzer**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-2728 and 25-2729 (Cum. Supp. 2004).

No. A-06-1102: **Cubas v. Alcazar**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-1104: **Alfredson v. Alfredson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1105: **Prokop v. Jarecke**. Affirmed. See, rule 7A(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-06-1108: **State ex rel. Freeman v. Freeman**. Affirmed. See, rule 7A(1); *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Dartmann v. Dartmann*, 14 Neb. App. 864, 717 N.W.2d 519 (2006).

No. A-06-1109: **State v. Strasburg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1110: **State v. Jones**. Motion for summary affirmance sustained; judgment affirmed as modified. See rule 7B(2).

No. A-06-1111: **State v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1112: **Wade v. Ferguson**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-06-1114: **State v. Urwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1115: **State v. Ashburn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987).

No. A-06-1118: **Strelko v. Larson**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See, rule 7B(1); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-1119: **Dumas v. Daro**. Affirmed. See, rule 7A(1); *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005).

No. A-06-1120: **Dumas v. Daro**. Affirmed. See, rule 7A(1); *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005).

No. A-06-1121: **State v. Andres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1125: **Cook v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1127: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

No. A-06-1129: **State v. Barns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1130: **Juhlin v. Personal Rep. of Estate of Brown**. Affirmed. See rule 7A(1). See, also, Neb. Ct. R. of Cty. Cts. 52(I)(G); Neb. Rev. Stat. § 30-2404 (Reissue 1995); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001).

No. A-06-1132: **County of Douglas v. Petrmichl**. Affirmed. See rule 7A(1).

No. A-06-1134: **McCook Pub. Power Dist. v. City of McCook**. Stipulation allowed; appeal dismissed.

No. A-06-1135: **State v. Kite**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1136: **State v. Lacy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1137: **Settje v. Settje**. Affirmed. See, rule 7A(1); *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

No. A-06-1142: **State v. Newson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1143: **State v. Brockman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1147: **Marcovitz v. Rogers-Farkas**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-1149: **State v. Schulte**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1150: **State v. Paez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1151: **State v. Hollenback**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1152: **State v. Lowe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1153: **Steffens v. Steffens**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004).

No. A-06-1155: **Berry v. Colorado Investment Corp**. Affirmed. See, rule 7A(1); *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990).

No. A-06-1156: **State v. Montin**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-06-1157: **Cobb v. Froehlich**. Stipulation to dismiss appeal sustained.

No. A-06-1158: **In re Name Change of Rosales**. Affirmed. See rule 7A(1).

No. A-06-1165: **State v. Schulte**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1167: **State v. Koester**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-1168, A-06-1253: **State v. Cisneros**. Stipulations allowed; appeals dismissed.

No. A-06-1172: **State v. Tolan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1173: **State v. Valasek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1174: **State v. Gallagher**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. §§ 25-1329 and 29-2926(2)(f) (Cum. Supp. 2006); *Cumming v. Red Willow Sch. Dist. No. 179*, 273 Neb. 483, 730 N.W.2d 794 (2007).

No. A-06-1177: **Spotanski v. Willyard**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-1179: **State v. McKinnie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-1182, A-06-1183: **State v. McSwine**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

No. A-06-1185: **McMichael v. McMichael**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1187: **Mead v. Mead**. Affirmed. See rule 7A(1).

No. A-06-1189: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1190: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1191: **Villarreal on behalf of Villarreal v. Tran**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1192: **Villarreal on behalf of Villarreal v. Anderson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1194: **Wiech v. Wiech**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-06-1200: **Partain v. Sheffield**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1203: **State v. Erickson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1204: **Brooks v. Farringer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007); *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

No. A-06-1209: **State v. Rosales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1210: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

No. A-06-1211: **Kreifels v. Pamida, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-1214: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-1215: **In re Interest of Haley M**. Appeal dismissed. See, rule 7A(2); *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

No. A-06-1219: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1222: **In re Interest of Ethan M**. Appeal dismissed as moot. See *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006).

No. A-06-1225: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1226: **State v. Lorenzana-Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1227: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1229: **Goeser v. Allen**. Stipulation allowed; appeal dismissed.

No. A-06-1231: **Buckman v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 83-4,123 (Reissue 1999); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1234: **In re Guardianship & Conservatorship of Rosemary D**. Appeal dismissed and matter remanded to the county court for further proceedings. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

No. A-06-1235: **State v. Bartholomew**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1236: **Smith v. Breeden**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1237: **Villarreal v. Villarreal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

No. A-06-1238: **State v. Brazzell**. Affirmed. See rule 7A(1).

No. A-06-1239: **State v. Fitzgerald**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1241: **In re Interest of Alicia P. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1257: **Hernandez v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

No. A-06-1259: **Tyler v. Union Pacific RR. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1260: **Miller v. Neth**. Appeal dismissed. See *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

No. A-06-1261: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1262: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1263: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1264: **State v. Payne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1265: **State v. Huffman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-06-1269: **Hilt v. Hilt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1272: **In re Interest of Anthony L. et al**. Response to order to show cause considered; judgment affirmed. See rules 1B(1)(b) and 7A(1).

No. A-06-1273: **State v. Channel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1274: **Grayek v. Platte Valley Auto Mart**. Stipulation allowed; appeal dismissed with prejudice.

No. A-06-1279: **State on behalf of Conkling v. Matlock**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1286: **State v. Charbonneau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1290: **In re Interest of Lauren B**. Appeal dismissed. See, rule 7A(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-06-1291: **In re Interest of Steven M**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1291: **In re Interest of Steven M**. Motion of appellant for rehearing sustained. Order of December 22, 2006, vacated, and appeal reinstated.

No. A-06-1292: **Santo v. Santo**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1293: **Santo v. Santo**. Affirmed. See, rule 7A(1); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

No. A-06-1294: **State v. Lange**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1295: **In re Guardianship & Conservatorship of Dorothy M**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1298: **Nemec v. Nemec**. Appeal dismissed. See, rule 7A(2); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-1299: **EPCO Carbon Dioxide Products v. Abengoa Bioenergy Corp**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-06-1300: **State v. Jermark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1301: **State v. Salinas**. Order denying postconviction relief affirmed. See, rule 7A(1); *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999); *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988).

No. A-06-1302: **Obermeyer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-06-1303: **Bitner v. Department of Motor Vehicles**. Appeal dismissed.

No. A-06-1304: **State v. Finch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1306: **Aguirre-Waters v. Alegent Health Fontenelle**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-1308: **State v. Parrott**. Affirmed. See, rule 7A(1); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gonzales*, 14 Neb. App. 493, 709 N.W.2d 707 (2006).

No. A-06-1309: **State v. Hassan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1312: **Purnell v. Purnell**. Affirmed. See, rule 7A(1); *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

No. A-06-1319: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-06-1320: **State v. Trostheim**. Affirmed. See rule 7A(1).

No. A-06-1321: **State v. Good Plume**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1322: **State v. Anderson**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1323: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

Nos. A-06-1324, A-06-1325: **State v. Hall**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-1328: **Welsh v. Department of Motor Vehicles**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-1333: **State v. Concannon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1335: **Arterburn v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1336: **Tjaden v. Department of Motor Vehicles**. Parties' stipulation for summary reversal sustained. See, rule 7C(1); *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984). Order of district court is reversed and cause is remanded with instructions to reinstate order of revocation.

No. A-06-1337: **Costanzo v. City of Omaha**. Affirmed. See, rule 7A(1); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

No. A-06-1339: **Hoffman v. Repass**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1340: **Wieck v. Galvan**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-06-1341: **State v. Frerichs**. Conviction and sentence affirmed as modified. See *State v. Mann*, 196 Neb. 824, 246 N.W.2d 604 (1976).

No. A-06-1342: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1343: **Benes v. Scurto**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1345: **In re Estate of Jensen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1346: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1347: **DeWall Enters. v. Boyle**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-1348: **State v. Schill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1352: **State v. Jarosz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1353: **State v. Enevoldsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1358: **Hall v. Mogensen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1360: **Nelson v. Nelson**. Affirmed. See, rule 7A(1); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

No. A-06-1365: **Zwink v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1366: **Hinspeter v. Hinspeter**. Appeal dismissed. See, rule 7A(2); *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-06-1368: **State v. Tuttle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1372: **State v. Caldwell**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1375: **Davis v. Vincentini**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-1376: **State ex rel. Tyler v. Board of Parole**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-1377: **State v. Ozuna**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1381: **State v. Enamorado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1384: **Rognirhar v. Kinlund**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1387: **State v. Palmateer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1389: **In re Interest of Lauren B**. Appeal dismissed as moot. See, rule 7A(2); *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006).

No. A-06-1390: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1391: **State v. Villarreal**. Appeal dismissed. See rule 7A(2).

Nos. A-06-1394, A-06-1434: **State v. Schneider**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-06-1397: **ABC Native American Consulting v. Hatch**. Appeal dismissed. See, rule 7A(2); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

No. A-06-1398: **Moulton v. Seng**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1399: **Store Kraft Mfg. Co. v. Chaney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1401: **In re Guardianship & Conservatorship of Ann B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1404: **McCaslin v. Neth**. Appeal dismissed. See, rule 7A(2); *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006); *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993).

No. A-06-1405: **Wicker v. Abboud**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1406: **State v. Moten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1407: **State v. Blair**. Appeal dismissed as moot. See rule 7D.

No. A-06-1409: **State v. Damme**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1410: **State on behalf of Phillips v. Motton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1411: **State on behalf of Clark v. Motton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1412: **State on behalf of Motton v. Motton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1413: **State on behalf of Ziegenbein v. Motton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1422: **Martin v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1424: **State v. Miller**. Motion of appellant to dismiss appeal considered; appeal dismissed at cost of appellant.

No. A-06-1425: **State v. Starr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1426: **State v. Schaff**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1427: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1428: **Werner v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1429: **State v. Gonzalez-Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-06-1430: **State v. Ebers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1432: **State v. Trussel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1433: **Goss v. Goss**. Affirmed. See, rule 7A(1); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

No. A-06-1435: **Barrett v. Fabian**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-06-1438: **Powers v. Mangiameli**. Appeal dismissed. See rule 7A(2).

No. A-06-1446: **Sullivan v. Superior Street Family Physicians**. Motion of appellees Noble and Lincoln Orthopedic Center for summary affirmance sustained; judgment affirmed. See rule 7B(2). As to remaining appellees, judgment affirmed. See rule 7A(1). See, also, *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

No. A-06-1447: **McElroy v. Paden**. Motions of appellees for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1448: **State v. Parks**. Affirmed. See, rule 7A(1); *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

No. A-06-1451: **Patterson v. Nebraska Legislature**. Motion considered; appeal dismissed.

No. A-06-1453: **Koziol v. Koziol**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-1454: **Classe v. College of Saint Mary**. District court orders of September 22 and December 8, 2006, affirmed. See, rule 7A(1); *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256 (1994); *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). See, also, Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003); *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991).

No. A-06-1455: **State v. Stevens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

No. A-06-1456: **State v. Bowie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1457: **State v. Roundtree**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1458: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1459: **State v. DeLa Cruz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1460: **State v. Sainz**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1462: **In re Trust of Short**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1464: **Ramirez v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-1467: **Tyler v. Sherwin Williams Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Nos. A-06-1469, A-06-1470: **State v. Poole**. Motions of appellee for summary affirmance sustained; judgments affirmed.

No. A-07-001: **State v. Ford**. Stipulation considered; appeal dismissed.

No. A-07-004: **Parks v. Neth**. Reversed pursuant to joint stipulation of parties for summary reversal. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

No. A-07-005: **TierOne Bank v. Cup-O-Coa, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-007: **HGR Acquisitions v. DeWall**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-009: **Mortgage Express v. Tudor Ins. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-07-011: **State v. Oknewski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-012: **State v. Barfield**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-017: **Ballinger v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-019: **Warner v. Warner**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-025: **State ex rel. Linder v. Remmen**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-07-026: **Widtfeldt v. Tax Equal. & Rev. Comm.** Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-07-027: **State v. Swartz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-029: **State v. Gonzales**. Affirmed. See, rule 7A(1); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

No. A-07-030: **Womack v. Crawford**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-032: **Robinson v. Hormel Foods**. Affirmed. See, rule 7A(1); *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

No. A-07-033: **Chader v. Langford**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-035: **State on behalf of Savick v. Savick**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-036: **In re Interest of Eva J. & Shakeela J.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-038: **State v. Ayer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-039: **State v. Jones**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-040: **State v. Sedoris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

No. A-07-041: **Tiny's Boat & Motor v. Ellis**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-042: **Crotty v. Crotty**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-07-045: **Tift v. Tift**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-046: **State ex rel. Kafele v. Lacey**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-048: **State ex rel. Tyler v. Warren**. Affirmed. See rule 7A(1).

No. A-07-050: **St. Monica's v. Lancaster Cty. Bd. of Equal**. Stipulation for summary reversal sustained. The order of the Tax Equalization and Review Commission is reversed, and the cause is remanded to the commission for hearing on the merits. See, rule 7C(1); Neb. Rev. Stat. § 77-202.04(1) (Cum. Supp. 2006); *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002).

No. A-07-051: **State v. Kolar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-055: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-07-059: **Nielsen v. Nielsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1219(3) (Cum. Supp. 2006); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-07-060: **Duda v. American Fam. Ins. Group**. Appeal dismissed. See, rule 7A(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-07-062: **State v. Hobbs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-063: **Ware v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-064: **Hobbs v. Hobbs**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-066: **State ex rel. Tyler v. Kenney**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-07-067: **Tyler v. Lang**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-071: **In re Interest of Montreon R**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-072: **Yelli v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

Nos. A-07-077, A-07-078: **State v. Clark**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-081: **Storm v. Lancaster Cty. Civil & Small Claims Ct**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-083: **In re Interest of Travis H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-086: **Wells v. Wells**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-088: **In re Interest of Precious W**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-091: **In re Interest of Jaymir P**. Appeal dismissed as moot.

No. A-07-095: **State v. Perry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-097: **State v. Blakeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-107: **Finnell v. Jacobsen**. Appeal dismissed. See, rule 7A(2); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006); *Lopez v. IBP, inc.*, 264 Neb. 273, 646 N.W.2d 628 (2002).

No. A-07-108: **Breinig v. Breinig**. Appeal dismissed. See, rule 7A(2); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-110: **State v. Hibberd**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-111: **State v. Oliver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986).

No. A-07-113: **Bykerk v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-114: **Gunter v. Gunter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-115: **Bare v. Hiner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-116: **Partch v. Partch**. Appeal dismissed. See, rule 7A(2); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-07-120: **Jacob v. Hill**. Appeal dismissed. See rule 7A(2).

No. A-07-123: **Martin v. Lanphier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-125: **State on behalf of Lahrs v. Perez**. Summarily affirmed. See, rule 7A(1); *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985); *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 544 (2003).

No. A-07-126: **In re Estate of Hue**. Appeal dismissed. See, rule 7A(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-07-128: **State v. Petersen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-129: **State v. Holloway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-07-130: **State v. Clayton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-132: **State v. Sever**. State's suggestion of remand and request that we affirm conviction of third offense is considered and sustained. Conviction affirmed, and cause remanded to district court for remand to county court, with directions to conduct new enhancement hearing. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

No. A-07-134: **Timmerman v. Timmerman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-136: **State v. Fowler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-143: **Hendrix v. Sivick**. Appeal dismissed. See, Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-07-145: **Bull v. City of Omaha**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-07-148: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000); *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007).

No. A-07-149: **Myers v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-150: **Myers v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-152: **State v. Robinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-153: **Westwood v. Hemminger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-156: **State v. Russell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-157: **In re Guardianship & Conservatorship of Rosemary D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-159: **State v. Brooks**. Motion of appellee for summary dismissal sustained for lack of jurisdiction. See, rule 7B(1) and (2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. A-07-160: **In re Interest of Brianna N**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-161: **In re Interest of Brianna N**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-162: **State v. Stover**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-07-163: **City of Omaha v. Tract 1**. Summarily dismissed. See rule 7A(2).

No. A-07-164: **City of Omaha v. Tract No. 3**. Summarily dismissed. See rule 7A(2).

No. A-07-166: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-168: **State v. Fudge**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-825 (Cum. Supp. 2006); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-07-169: **State v. Singletary**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-825 (Cum. Supp. 2006); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-07-170: **State v. Copeland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-172: **State v. Rademaker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-173: **State v. Green**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-176: **State v. Jarman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-177, A-07-178: **State v. Albrecht**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-180: **Jacob v. Schlichtman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-07-180: **Jacob v. Schlichtman**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-185: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-194: **K.V. Joint Venture v. Maxamillion, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-195: **Bragg v. Bragg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-196: **State v. Hansen**. Affirmed. See rule 7A(1).

No. A-07-197: **Vanderzee v. Vanderzee**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-199: **Watkins v. Regan**. Appeal dismissed. See, rule 7A(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-07-200: **Sherrod v. State**. Appeal dismissed. See, rule 7A(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-07-202: **Felder v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-203: **State v. English**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-205: **City of Omaha v. Tract No. 3**. Summarily dismissed. See rule 7A(2).

No. A-07-207: **Tyler v. Rocafort**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-208: **Velehradsky v. Velehradsky**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-07-210: **Hall v. Swartz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-211: **In re Guardianship & Conservatorship of Jack P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-212: **State v. Tillemans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-213: **State v. Myers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-217: **Taylor v. Dahlsten Truck Line**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-218: **Guardian Real Estate v. Hunt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-219: **Tyler v. Murray**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-222: **Livingston v. Pacific Realty Commercial**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-224: **State v. Reising**. Appeal dismissed. See rule 7A(2).

No. A-07-225: **State v. Reising**. Appeal dismissed. See rule 7A(2).

No. A-07-226: **State v. Manuel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-227: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-07-229, A-07-230: **Sunbeam Properties v. Department of Nat. Resources**. Stipulations allowed; appeals dismissed.

No. A-07-233: **State v. Detter**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-234: **In re Estate of Carlson**. Summarily dismissed. See Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2006).

No. A-07-235: **State v. Troyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

No. A-07-236: **State v. Stafford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-237: **In re Interest of Joseph W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-241: **State v. Standley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-242: **State v. Osborn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-244: **Jones v. Gibilisco**. Appeal dismissed. See, rule 7A(2); *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999); *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996).

No. A-07-248: **In re Interest of Steven K**. Stipulation allowed; appeal dismissed.

No. A-07-249: **State v. Marker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

No. A-07-254: **Hudson v. Physician Mut. Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-258: **Tripp v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-260: **In re Interest of Madason G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-262: **Cann v. Barnett**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2006). See, also, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-07-266: **State v. Piseno**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-270: **In re Interest of Daniel V. et al**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1902 (Reissue 1995), 25-1912(1) (Cum. Supp. 2006), and 43-2,106.01 (Reissue 2004).

No. A-07-270: **In re Interest of Daniel V. et al**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-271: **State v. Crane**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-272: **State v. Kelly**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-274: **Carter v. Knott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-276: **Mesa v. Douglas Cty. Bd. of Equal**. Motion of petitioner-appellant to dismiss appeal considered; appeal dismissed.

No. A-07-277: **State v. Latzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-278: **State v. Honstein**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-279: **Pavel v. Douglas Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-282: **In re Interest of Stephanie G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-285: **Brummels v. Brummels**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-287: **Humlicek v. Ferguson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-292: **State v. Harbour**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-293: **Hudson v. Hartigan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-294: **State v. Gifford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-295: **State v. Newman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-296: **State v. Hellbusch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-301: **Caton v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-305: **State v. Ashley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-306: **Walker v. Walker**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-309: **In re Interest of James M.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-314: **In re Interest of Dustina H.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-315: **Hibler v. Albrecht**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-317: **Bacon v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-319: **State v. Chapman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *State v. Hernandez*, 1 Neb. App. 830, 511 N.W.2d 535 (1993).

Nos. A-07-322, A-07-323: **State v. Lunsford**. Affirmed in part, sentence of restitution vacated, and cause remanded with directions to hold a restitution hearing. See, rule 7A(1); Neb. Rev. Stat. § 29-2281 (Reissue 1995); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

No. A-07-327: **Womack v. Perkins**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-07-330: **State v. Dollen**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-07-331, A-07-332: **State v. Harding**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-333: **State v. Spencer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-334: **State v. Templeton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-335: **State v. Abboud**. Appeal dismissed as moot. See, rule 7D(1); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. A-07-341: **State v. Mathis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-342: **State v. Long**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-344: **State v. Devitt**. Affirmed. See, rule 7A(1); *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007); *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984).

No. A-07-347: **Hughes v. Hughes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-348: **State v. Shannon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-349: **State v. Gray**. Appeal dismissed. See, rule 7A(2); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-07-352: **Henry v. Neth**. Reversed pursuant to joint stipulation of parties for summary reversal. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

No. A-07-353: **Sackett v. Sackett**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-354: **Geilenkirchen v. Baisden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-355: **State v. Hellbusch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-357: **In re Guardianship of James G**. Appeal dismissed as notice of appeal prematurely filed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-07-360: **Pfingston v. Greenfield**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-368: **State v. Stier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007); *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

No. A-07-371: **Agarwal v. Gopalakrishnan**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-07-377: **Davis v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988).

No. A-07-378: **State v. Helmstadter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-382: **Velehradsky v. Velehradsky**. Appeal dismissed. See, rule 7A(2); *Harvey v. Harvey*, 14 Neb. App. 380, 707 N.W.2d 444 (2005).

No. A-07-394: **State v. Long**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-396: **State v. Thompson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-400: **State v. Barber**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-401: **Davis v. Shaw**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-402: **Cummings v. Seward**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-403: **State v. Barritt**. Appeal dismissed. See rule 7A(2).

No. A-07-406: **Blair v. McArthur**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-07-407: **Melgar v. Divercon Constr**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-408: **Spotanski v. Willyard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-410: **State v. Hamilton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-411: **Thacker v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-418: **In re Trust of Shaneyfelt**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-07-420: **Hoskins v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-421: **In re Interest of Ginger C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-422: **In re Guardianship of Charles J**. Appeal dismissed as moot; each party to pay own costs.

No. A-07-435: **State v. Merwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-438: **State v. Hjorth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-441: **Gibson v. Gibson**. Appeal dismissed. See rule 7A(2).

No. A-07-442: **State v. Lecher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-445: **State v. Bickford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-446: **State v. Gray**. Appeal dismissed. See, rule 7A(2); *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

No. A-07-451: **Feld Invest. Co. v. Valley West Apartments**. Appeal dismissed. See rule 7A(2).

No. A-07-456: **In re Interest of Jeremy H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-459: **State v. Elliott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2306 (Cum. Supp. 2006).

No. A-07-460: **State v. Zitterkopf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-461: **State v. Guerrero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-468: **Drudik v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-470: **State v. Land**. Appeal remanded with directions to remand to county court with directions to dismiss and vacate judgment and conviction. See *State v. Campbell*, 187 Neb. 719, 193 N.W.2d 571 (1972).

No. A-07-471: **State v. Hernandez**. Stipulation allowed; appeal dismissed.

No. A-07-473: **Waite v. Carpenter**. Motions of appellees for summary dismissal sustained. See, rule 7B(1) and (4); *Waite v. Carpenter*, 3 Neb. App. 879, 533 N.W.2d 917 (1995).

No. A-07-483: **In re Estate of Hue**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006).

No. A-07-496: **State v. Beadle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-499: **State v. Narcisse**. Appeal dismissed. See, rule 7A(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-07-500: **State v. Orozco**. Appeal dismissed. See, rule 7A(2); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-07-504: **State v. Nesiba**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-507: **Finova Capital Corp. v. Carl S. Baum Druggists**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-508: **In re Guardianship & Conservatorship of Edna B**. Stipulation allowed; appeal dismissed.

No. A-07-510: **Beverly Enterprises-Nebraska v. Bockstadter**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-513: **In re Interest of Justice S. et al**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 25-1912(1) (Cum. Supp. 2006).

No. A-07-518: **Delgado-Canas v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-522: **Jones v. Gibilisco**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-523: **Bellino v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

Nos. A-07-525, A-07-532: **State v. Cave**. Appeals dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-07-527: **Omaha Truck Center v. Oak Hills, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2006); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001).

No. A-07-528: **Seastedt v. Thompson**. Appeal dismissed. See rule 7A(2).

No. A-07-537: **State v. Hagan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006).

No. A-07-555: **State v. Clifford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-557: **State v. Randolph**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-558: **State v. Whitelaw**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-563: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-564: **State v. Dugan**. Appeal dismissed. See, rule 7A(2); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

Nos. A-07-570, A-07-571: **State v. Voss**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-584: **State v. Dugan**. Appeal dismissed. See, rule 7A(2); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

No. A-07-585: **State v. Roberts**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-591: **In re Estate of Weibel**. Appeal dismissed. See, rule 7A(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-07-598: **State v. Young**. Appeal dismissed. See rule 7A(2).

No. A-07-600: **Ernesti v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-602: **Stevens v. Dolan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006).

No. A-07-607: **State v. Rideout**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-608: **State v. Haley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-614: **Blair v. McArthur**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-616: **Cavanaugh v. Cavanaugh**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-625: **State v. Alameen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-629: **Coffey v. Coffey**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005). See, also, rule 5B(5); *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989).

No. A-07-631: **In re Interest of Clayden M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-632: **First National Bank v. Sheets**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-633: **McMurry v. Sanders-McMurry Enters**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-648: **Timmerman v. Neth**. Appeal dismissed. See rule 7A(2).

No. A-07-648: **Timmerman v. Neth**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-651: **Clayton v. Warford**. Appeal dismissed. See rule 7A(2).

No. A-07-656: **Norby v. Farnam Bank**. Appeal dismissed. See, rule 7A(2); *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

No. A-07-660: **McKinnis v. Strobel**. Stipulation considered; appeal dismissed at cost of appellant.

No. A-07-664: **Van Ert v. State Farm Mut. Auto. Ins. Co**. Order of district court summarily vacated, and cause remanded for evidentiary hearing on record. See, rule 5A(1); *KEB, Inc. v. Farris Constr. Co.*, 12 Neb. App. 38, 665 N.W.2d 667 (2003). See, also, *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002); *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001); *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

No. A-07-674: **State v. Dvarro**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-688: **State v. Dubray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-696: **State v. Drewes**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

No. A-07-700: **In re Interest of Allen E. et al**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-707: **Pittman v. Stickney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-708: **Clarke v. Dodge Cty. Bd. of Equal**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-510.02 (Reissue 1995); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-07-714: **Glasson v. Penrose**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-735: **Sarik v. Ryan**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-736: **Village of Wilsonville v. Stoltz**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-737: **State v. McCarthy**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-07-741: **In re Estate of Grooms**. Appeal dismissed. See rule 7A(2).

No. A-07-744: **State on behalf of McCowin v. Wells**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-748: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-751: **Heimes Corp. v. Paradigm Properties**. Motion of appellee for summary dismissal sustained.

No. A-07-756: **Harden v. Harden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-759: **State v. Heath**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

No. A-07-764: **State v. Vance**. Appeal dismissed. See rule 7A(2).

No. A-07-768: **In re Interest of Courtney J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-769: **In re Interest of Michaela J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-778: **State v. Moshier**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-779: **Bihuniak v. Robert Corrigan Farm**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-789: **Renneke v. Health & Human Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999). See, also, *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993).

No. A-07-795: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-798: **State v. Jensen**. Appeal dismissed. See, rule 7A(2); *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992); *State v. Pawling*, 9 Neb. App. 824, 621 N.W.2d 821 (2000).

No. A-07-823: **State v. Alvarado**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-826: **Hawks v. Williamson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-835: **Lewis v. Health & Human Servs**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-851: **State v. Dockery**. Affirmed. See rule 7A(1).

No. A-07-864: **State v. Batten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-879: **State v. Miller**. Appeal dismissed. See rule 7A(2).

No. A-07-901: **State v. Johnson**. Appeal dismissed. See rule 7A(2).

No. A-07-902: **Brooks v. Brooks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-967: **Davis v. ConAgra Foods**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 48-179 (Cum. Supp. 2006); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-982: **Miller v. Miller**. Appeal dismissed. See, rule 7A(2); *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987). See, also, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. S-04-715: **Otte v. Neth**. Petition of appellant for further review sustained on November 22, 2006.

No. S-04-835: **Robbins v. Neth**, 15 Neb. App. 67 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-04-1016: **Wilmot v. Snelling**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1030: **State v. Henderson**. Petition of appellant for further review overruled on September 18, 2006, as untimely filed.

No. A-04-1077: **Anderson v. Christensen**. Petition of appellee for further review overruled on August 30, 2006.

No. A-04-1098: **R & S Investments v. Auto Auctions**, 15 Neb. App. 267 (2006). Petition of appellant for further review overruled on February 22, 2007.

No. A-04-1189: **Davis v. Fraternal Order of Police**, 15 Neb. App. 470 (2007). Petition of appellant for further review overruled on May 25, 2007, as untimely filed.

No. A-04-1191: **Frazier v. Eberspacher**. Petition of appellants for further review overruled on November 29, 2006.

No. A-04-1193: **Eran Indus. v. City of La Vista**. Petition of appellee for further review overruled on January 18, 2007.

No. A-04-1214: **Lenzen v. JG Shopping Ctr. Mgmt**. Petition of appellant for further review overruled on October 12, 2006.

No. A-04-1236: **Berens v. McNeil Company**. Petition of appellee McNeil Company for further review overruled on August 30, 2006.

No. A-04-1238: **Thomas v. Hollinger**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1373: **Cook v. Cook**. Petition of appellant for further review overruled on April 11, 2007.

No. A-04-1473: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on June 6, 2007.

No. A-05-035: **Underwood v. Underwood**. Petition of appellant for further review overruled on January 4, 2007.

No. A-05-064: **State on behalf of Snyder-Brandt v. Bartels**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-106: **Jepsen v. Greenfield Sales**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-126: **State v. Fair**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-130: **State ex rel. Wagner v. Kay**, 15 Neb. App. 85 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-196: **Blair v. Delman**. Petition of appellant for further review overruled on July 18, 2007.

No. A-05-200: **Weigert-Stathes v. American Fam. Mut. Ins. Co**. Petition of appellee for further review overruled on June 20, 2007.

No. A-05-206: **Reed v. City of Omaha**, 15 Neb. App. 234 (2006). Petition of appellant for further review overruled on February 22, 2007.

No. A-05-289: **Poppe v. City of Lincoln**, 15 Neb. App. 164 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-365: **In re Estate of Schindler**. Petition of appellant for further review overruled on November 20, 2006.

No. A-05-374: **Conroy v. Columbia Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-379: **ADT Security Servs. v. A/C Security Systems**, 15 Neb. App. 666 (2007). Petition of appellant for further review overruled on September 20, 2007.

No. A-05-379: **ADT Security Servs. v. A/C Security Systems**, 15 Neb. App. 666 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-05-460: **Perez v. City of Omaha**, 15 Neb. App. 502 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-05-461: **Pasko v. City of Omaha**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-463: **B & B Sales v. Union Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-467: **City of Ashland v. Strode**. Petition of appellant for further review overruled on July 11, 2007.

No. A-05-492: **Jura v. Player's, Inc**. Petition of appellant for further review overruled on March 26, 2007, for lack of jurisdiction.

No. A-05-496: **State v. Gray**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-504: **State v. Buggs**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-508: **In re Estate of Petereit**. Petition of appellant for further review overruled on May 17, 2007.

No. A-05-518: **Henningsen v. Pacesetter Homes**. Petition of appellant for further review overruled on March 21, 2007.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review sustained on August 30, 2006.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review dismissed on January 24, 2007, as having been improvidently granted.

No. A-05-541: **Bosiljevac v. Board of Trustees of City of Omaha**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-622: **Wiedel v. Wiedel**. Petition of appellant for further review overruled on April 11, 2007.

No. A-05-652: **Barger v. Abboud**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-669: **In re Estate of Anderson**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-693: **State Law Enforcement Barg. Council v. State**. Petition of appellee for further review overruled on July 18, 2007.

No. A-05-695: **Yenney v. Nebraska Dept. of Motor Vehicles**, 15 Neb. App. 446 (2007). Petition of appellee for further review overruled on May 17, 2007.

No. A-05-707: **State v. Rose**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-713: **Omaha Cold Storage Terminals v. Patterson**, 15 Neb. App. 548 (2007). Petition of appellee for further review overruled on July 11, 2007.

No. A-05-786: **State v. Hoover**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-817: **Schrier v. Schrier**. Petition of appellee for further review overruled on March 14, 2007.

No. A-05-849: **In re Charles C. Wells Revocable Trust**, 15 Neb. App. 624 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-05-861: **State v. Akins**. Petition of appellant for further review overruled on June 13, 2007.

No. A-05-885: **Finnegan v. Leslie**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-898: **Applied Underwriters v. Employer Outsource Serv**. Petition of appellant for further review overruled on July 18, 2007.

Nos. A-05-920 through A-05-922: **State v. Ajamu**. Petitions of appellant for further review overruled on April 25, 2007.

No. A-05-936: **State v. Gonzales**. Petition of appellant for further review overruled on September 20, 2007.

No. S-05-947: **State v. Muse**, 15 Neb. App. 13 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-05-956: **Wright v. County of Douglas**. Petition of appellant for further review overruled on July 11, 2007.

No. A-05-962: **State v. Benish**. Petition of appellant for further review overruled on September 27, 2006.

No. A-05-963: **State v. Leonor**. Petition of appellant for further review overruled on May 9, 2007.

No. S-05-1033: **In re Interest of Jeffrey K.**, 14 Neb. App. 818 (2006). Petition of appellee for further review sustained on August 30, 2006.

No. A-05-1043: **State v. Hysell**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1051: **In re Estate of Corbin**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-1067: **Knittel v. State**. Petition of appellant for further review overruled on June 20, 2007.

No. A-05-1077: **Harris v. Spring Ctr. Mental Health Agency**. Petition of appellant for further review overruled on September 26, 2007.

No. A-05-1084: **Trueblood v. Roberts**, 15 Neb. App. 579 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-05-1096: **Pflepsen v. KC Concrete Placement**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1120: **Siebert v. AGO, Inc**. Petition of appellant for further review overruled on June 20, 2007.

No. A-05-1130: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1131: **State v. Stetz**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1153: **State v. Agee**. Petition of appellant for further review overruled on October 25, 2006.

No. A-05-1160: **Omaha Police Union Local 101 v. City of Omaha**. Petition of appellee for further review overruled on June 27, 2007.

No. A-05-1172: **State v. Frazier**. Petition of appellant for further review overruled on July 18, 2007.

No. A-05-1189: **Brandt v. Heil**. Petition of appellant for further review overruled on June 13, 2007.

No. A-05-1190: **State v. Brown**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1201: **In re Interest of Walter W.**, 14 Neb. App. 891 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1220: **State v. Devitt**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1253: **State v. Stevens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-1258: **Scheurich v. Drivers Mgmt., Inc**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1269: **State v. Dupre**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-1291: **Dunn v. Wallace Sch. Dist**. Petition of appellants for further review overruled on August 29, 2007.

No. A-05-1292: **Jacobson v. Shresta**. Petition of appellee for further review overruled on August 29, 2007.

No. A-05-1304: **Rose Investments v. Lobo**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1322: **Lynch v. Sparks**. Petition of appellant for further review overruled on August 30, 2006.

No. S-05-1328: **Davis v. Crete Carrier Corp.**, 15 Neb. App. 241 (2006). Petition of appellee for further review sustained on April 11, 2007.

No. A-05-1331: **State v. Cole**. Petition of appellant for further review overruled on September 20, 2006.

No. A-05-1337: **Conn v. Conn**, 15 Neb. App. 77 (2006). Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1361: **State v. Lopez-Mariscal**. Petition of appellant for further review overruled on June 27, 2007.

No. A-05-1375: **State v. Pfeifer**. Petition of appellant for further review overruled on September 13, 2006.

Nos. A-05-1381, A-05-1382: **In re Interest of Vanessa R. & Mario R**. Petitions of appellant for further review overruled on August 30, 2006.

No. A-05-1388: **Backhaus v. Calvert**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1394: **Classe v. Fitzgerald, Schorr**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1397: **In re Interest of Dennis W.**, 14 Neb. App. 827 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1408: **State v. Lohman**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1417: **State v. Brown**. Petition of appellee for further review overruled on November 15, 2006.

No. A-05-1418: **State v. Portsche**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-1443: **Hall v. Hall**. Petition of appellant for further review overruled on September 20, 2007.

No. A-05-1454: **Kuhn v. H&H Chevrolet Co**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1465: **Canterbury v. Istas**. Petition of appellee for further review overruled on February 28, 2007.

No. A-05-1477: **In re Interest of Maxwell T.**, 15 Neb. App. 47 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-05-1490: **Tyler v. Woodard**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-1522: **State v. Sledge**. Petition of appellant for further review overruled on April 18, 2007.

No. S-05-1525: **In re Interest of Michael U.**, 14 Neb. App. 918 (2006). Petition of appellant for further review sustained on September 13, 2006.

No. A-05-1535: **State v. Rose**. Petition of appellant for further review overruled on October 18, 2006.

No. A-05-1544: **State v. Prater**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1559: **In re Adoption of Jessica D**. Petition of appellee for further review overruled on August 30, 2006.

No. A-06-007: **State v. Grant**. Petition of appellant for further review overruled on September 20, 2006.

No. A-06-008: **State v. Zephier**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-010: **State ex rel. Tyler v. Houston**, 15 Neb. App. 374 (2007). Petition of appellant for further review overruled on April 11, 2007, as moot.

No. A-06-027: **Pusch v. Pelshaw**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-029: **Sinsel v. Weinand**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-035: **State v. Segura**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-041: **State v. Perry**. Petition of appellant for further review overruled on October 25, 2006.

No. A-06-068: **State v. Wiese**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-070: **State v. Claussen**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-074: **Banks v. Midwest Padding**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-079: **State v. Hale**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-090: **ARL Credit Servs. v. Piper**, 15 Neb. App. 811 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-06-100: **State v. Lopez**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-114: **State v. Myers**, 15 Neb. App. 308 (2006). Petition of appellant for further review overruled on May 17, 2007.

No. A-06-126: **Schuman v. Roether**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-131: **Nocita v. Nocita**. Petition of appellee for further review overruled on September 27, 2006.

No. A-06-144: **Sommerfeld v. City of Gibbon**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-153: **State v. Owen**. Petition of appellant for further review overruled on April 18, 2007.

No. A-06-154: **State v. Wilson**, 15 Neb. App. 212 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-165: **State v. Banks**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-174: **State v. Snyder**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-179: **In re Interest of Ethan M.**, 15 Neb. App. 148 (2006). Petition of appellees and guardian ad litem for further review overruled on January 18, 2007.

Nos. A-06-180, A-06-181: **In re Interest of Chloe H. & Katrina H.**, 15 Neb. App. 148 (2006). Petitions of appellant for further review overruled on January 18, 2007.

No. A-06-184: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 27, 2006.

No. A-06-209: **State v. Aron**. Petition of appellant for further review overruled on July 30, 2007, as untimely filed.

No. A-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-241: **Clayton v. Warford**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-250: **State v. Hauck**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-253: **Murray v. Department of Motor Vehicles**. Petition of appellant for further review overruled on October 12, 2006.

No. S-06-275: **State v. McCulloch**, 15 Neb. App. 616 (2007). Petition of appellee for further review sustained on July 11, 2007.

No. A-06-281: **State v. Lovette**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant for further review overruled on January 31, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant pro se for further review overruled on January 31, 2007.

Nos. A-06-295, A-06-296: **State v. Kenney**. Petitions of appellant for further review overruled on August 30, 2006.

No. A-06-307: **State v. Guajardo**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-315: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-316: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-331: **State v. Goldsworthy**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-337: **Johnson v. Johnson**, 15 Neb. App. 292 (2006). Petition of appellant for further review overruled on January 31, 2007.

Nos. A-06-343, A-06-344: **State v. Cisar**. Petitions of appellant for further review overruled on October 18, 2006.

Nos. A-06-359 through A-06-361: **Mohrmann v. Gdowski**. Petitions of appellants for further review overruled on September 20, 2007.

No. A-06-364: **Shasteen v. LaPointe**. Petition of appellant for further review overruled on September 26, 2007.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-367: **State v. Wiemer**, 15 Neb. App. 260 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-387: **Schlichtman v. Jacob**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-390: **State v. Fisher**. Petition of appellant for further review overruled on June 13, 2007.

No. A-06-400: **State v. Benish**. Petition of appellant for further review overruled on May 14, 2007, as filed out of time.

No. A-06-400: **State v. Benish**. Petition of appellant pro se for further review overruled on May 14, 2007, as filed out of time.

Nos. A-06-404, A-06-405: **State v. McCray**. Petitions of appellant for further review overruled on May 9, 2007.

No. A-06-413: **In re Interest of Savannah S. et al**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-421: **State v. Price**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-437: **State v. Warnsing**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-440: **In re Interest of Joshua A. et al**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-446: **State v. Peeks**. Petition of appellant for further review overruled on February 12, 2007, as filed out of time. See rule 2F(1).

No. S-06-447: **In re Interest of Kevin K.**, 15 Neb. App. 641 (2007). Petition of appellee for further review sustained on July 18, 2007.

No. S-06-449: **State v. Nelson**. Petition of appellant for further review sustained on March 28, 2007.

No. A-06-450: **State v. Smith**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-450: **State v. Smith**. Petition of appellant pro se for further review overruled on January 18, 2007.

No. A-06-452: **In re Interest of Thomas Z**. Petitions of appellant for further review overruled on October 18, 2006.

No. A-06-462: **State v. Lawver**. Petition of appellant for further review overruled on February 22, 2007.

No. A-06-469: **Theis v. Neth**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-470: **Stroh v. Stroh**. Petition of appellant for further review overruled on October 18, 2006.

Nos. A-06-476, A-06-478: **State v. Cooper**. Petitions of appellant for further review overruled on October 12, 2006.

No. A-06-485: **Kaelin v. Neth**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-509: **State v. Payne**. Petition of appellant for further review overruled on January 31, 2007.

No. A-06-516: **State v. Humphrey**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-539: **State v. Weekly**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-544: **In re Interest of Aleisha L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-545: **In re Interest of Ashlei L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-550: **State v. Brown**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-555: **State v. Davlin**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-559: **State v. Rodriguez**. Petition of appellant for further review overruled on January 24, 2007.

No. A-06-571: **Caton v. Clarke**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-581: **State v. Harr**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-599: **State v. Potter**. Petition of appellant for further review overruled on July 18, 2007.

No. A-06-606: **Rue v. Douglas County Corrections**. Petition of appellee for further review overruled on September 20, 2007.

No. A-06-609: **State on behalf of Luna v. Luna**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-612: **State v. Thompson**, 15 Neb. App. 764 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-06-616: **In re Interest of Amanda W**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-619: **Gonzales v. Dun-Par**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-621: **Schlichenmaier v. Whitlock**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-624: **Higginbotham v. Sukup**, 15 Neb. App. 821 (2007). Petition of appellee for further review overruled on August 29, 2007.

No. A-06-625: **State v. Rudnick**. Petition of appellant for further review overruled on August 29, 2007.

Nos. A-06-635 through A-06-639: **State v. Curry**. Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-647: **State v. Campbell**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-653: **State v. Le**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-656: **In re Interest of Jason B. & Michael B**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-667: **State v. Castellanos**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-670: **Travelers Indemnity Co. v. Heim**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-671: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-672: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-674: **In re Interest of Austin M**. Petition of appellant for further review overruled on February 22, 2007.

No. A-06-691: **State v. Cramer**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-692: **In re Interest of Hailey M.**, 15 Neb. App. 323 (2007). Petition of appellee for further review overruled on March 14, 2007.

No. S-06-698: **State v. Tyler**. Petition of appellant for further review sustained on December 13, 2006.

No. A-06-703: **State v. Atchison**, 15 Neb. App. 422 (2007). Petition of appellant for further review overruled on April 11, 2007.

No. A-06-715: **State v. Martin**. Petition of appellant for further review dismissed on November 13, 2006, as moot.

No. A-06-717: **In re Interest of Savannah S. et al**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-718: **In re Interest of Ciera C**. Petition of appellee State for further review overruled on January 24, 2007.

No. A-06-756: **In re Interest of Tabbitha H. & Joshua K**. Petition of appellant for further review overruled on February 28, 2007.

No. A-06-763: **Barrett v. Fabian**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-784: **State v. Parnell**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-790: **State v. Lemuz**. Petition of appellant for further review overruled on May 18, 2007. See rule 2F(1).

No. A-06-794: **State v. White**, 15 Neb. App. 486 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-804: **State v. Sears**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-812: **In re Interest of Amber M. et al**. Petition of appellant for further review overruled on April 18, 2007.

No. A-06-821: **State v. Anderson**. Petition of appellant for further review overruled on November 15, 2006.

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review sustained on May 23, 2007.

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review dismissed on August 31, 2007, and judgment of the Court of Appeals of March 20, 2007, affirming judgment of the district court, is final.

No. S-06-841: **In re Interest of Xavier H**. Petition of appellant for further review sustained on April 25, 2007.

No. A-06-843: **In re Guardianship & Conservatorship of Rosemary D**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-878: **State v. Cervantes**, 15 Neb. App. 457 (2007). Petition of appellant for further review overruled on April 11, 2007.

No. A-06-879: **Lickliter v. Farmers Coop. Elev. Co**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-882: **In re Interest of Amber K. et al**. Petition of appellant for further review overruled on May 9, 2007.

No. A-06-882: **In re Interest of Amber K. et al**. Petition of appellee Richard K. for further review overruled on May 9, 2007.

No. S-06-889: **Williams v. Baird**. Petition of appellant for further review sustained on November 15, 2006.

No. A-06-901: **Onuachi v. Meylan Enters**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-903: **City of Blair v. Thompson**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-932: **State v. Applegate**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-933: **Lonsdale v. Big Sky Energy Equip**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-935: **State v. Hymond**. Petition of appellant for further review overruled on February 28, 2007.

No. A-06-939: **State v. Valverde**. Petition of appellee for further review overruled on June 29, 2007, as untimely filed.

No. A-06-955: **Stricker v. Neth**. Petition of appellant for further review overruled on June 8, 2007, as untimely filed.

No. S-06-957: **State v. York**. Petition of appellant for further review sustained on February 22, 2007.

No. A-06-958: **State v. Prien**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-959: **State v. Jones**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-970: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-971: **State v. Schumacher**. Petition of appellant for further review overruled on March 21, 2007.

No. A-06-973: **State v. Terry**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-979: **Witte v. Witte**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-984: **First Resolution Investment v. Llanes**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-991: **State v. Hatch**. Petition of appellant for further review overruled on May 9, 2007.

No. A-06-997: **State ex rel. Bonner v. McSwine**. Petition of appellant for further review overruled on June 13, 2007.

No. A-06-998: **State v. Matthies**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-999: **State v. Wells**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1003: **Kuhn v. Wells Fargo Bank**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-1007: **Martin v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1013: **State v. Scheil**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-1023: **State v. Krutilek**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-1036: **State v. Dargeloh**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1040: **Lawler v. Lawler**. Petition of appellant for further review overruled on June 13, 2007.

Nos. A-06-1050, A-06-1051: **In re Interest of Markus K. & Justin K**. Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-1059: **George v. Department of Corr. Servs**. Petition of appellant for further review dismissed on February 22, 2007, for lack of jurisdiction. See rule 7A(2).

No. A-06-1069: **Villarreal v. Anderson**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1077: **State v. Lindteigen**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1078: **State v. Shelby**. Petition of appellant for further review overruled on February 26, 2007, as untimely filed.

No. A-06-1101: **State v. Pfitzer**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-1135: **State v. Kite**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1145: **In re Conservatorship of Heuertz**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1153: **Steffens v. Steffens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1164: **State v. Heil**. Petition of appellant for further review overruled on August 24, 2007, as untimely filed.

No. A-06-1174: **State v. Gallagher**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-1177: **Spotanski v. Willyard**. Petition of appellant for further review overruled on January 22, 2007, as untimely filed.

Nos. A-06-1182, A-06-1183: **State v. McSwine**. Petitions of appellant for further review overruled on August 29, 2007.

No. A-06-1197: **In re Interest of Mitchell H. et al**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1201: **Trimm v. Trimm**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1210: **State v. Washington**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1223: **Godsey v. Casey's General Stores**, 15 Neb. App. 854 (2007). Petition of appellant for further review overruled on September 26, 2007.

No. A-06-1225: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1226: **State v. Lorenzana-Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1227: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1228: **State v. Dan**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1235: **State v. Bartholomew**. Petition of appellant for further review overruled on July 18, 2007.

No. A-06-1240: **In re Interest of Jimmy D**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1252: **State v. Pope**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1261: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1262: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1263: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1290: **In re Interest of Lauren B**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1294: **State v. Lange**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on July 13, 2007.

No. A-06-1319: **State v. Baker**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1322: **State v. Anderson**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1340: **Wieck v. Galvan**. Petition of appellant for further review overruled on June 6, 2007.

No. S-06-1380: **In re Interest of Destiny A. et al**. Petition of appellant for further review sustained on July 18, 2007.

No. A-06-1381: **State v. Enamorado**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1425: **State v. Starr**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1432: **State v. Trussel**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-1435: **Barrett v. Fabian**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1438: **Powers v. Mangiameli**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1446: **Sullivan v. Superior Street Family Physicians**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1447: **McElroy v. Paden**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-1457: **State v. Roundtree**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-011: **State v. Oknewski**. Petition of appellant for further review overruled on July 11, 2007.

No. A-07-026: **Widtfeldt v. Tax Equal. & Rev. Comm**. Petition of petitioner-appellant for further review overruled on April 18, 2007.

No. A-07-029: **State v. Gonzales**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-040: **State v. Sedoris**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-055: **State v. Ramirez**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-062: **State v. Hobbs**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-097: **State v. Blakeman**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-107: **Finnell v. Jacobsen**. Petition of appellant for further review overruled on March 28, 2007.

No. A-07-123: **Martin v. Lanphier**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-148: **State v. Wills**. Petition of appellant for further review overruled on July 18, 2007.

No. A-07-163: **City of Omaha v. Tract 1**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-164: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-199: **Watkins v. Regan**. Petition of appellant for further review overruled on May 9, 2007.

No. A-07-205: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-234: **In re Estate of Carlson**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-235: **State v. Troyer**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-241: **State v. Standley**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-277: **State v. Latzel**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-400: **State v. Barber**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-451: **Feld Invest. Co. v. Valley West Apartments**. Petition of appellants for further review overruled on August 29, 2007.

No. A-07-513: **In re Interest of Justice S. et al**. Petition of appellant for further review overruled on July 20, 2007, as untimely filed.

No. S-07-656: **Norby v. Farnam Bank**. Petition of appellant for further review sustained on August 29, 2007.

No. A-07-708: **Clarke v. Dodge Cty. Bd. of Equal**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-826: **Hawks v. Williamson**. Petition of appellant for further review overruled on September 24, 2007.

## LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

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No. A-03-1137: **State v. Blair**. 06 NCA No. 38. Reversed and remanded. Sievers, Judge.

No. A-04-1428: **Jessen v. Uhler**. 06 NCA No. 36. Affirmed. Sievers, Judge. Cassel, Judge, concurring.

No. A-04-1473: **Keup v. Department of Corr. Servs**. 07 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-003: **Heine v. Heine**. 06 NCA No. 39. Affirmed as modified. Cassel, Judge.

No. A-05-004: **Hayden v. Neville**. 07 NCA No. 17. Affirmed in part, and in part reversed. Cassel, Judge.

No. A-05-035: **Underwood v. Underwood**. 06 NCA No. 38. Affirmed. Moore, Judge.

No. A-05-121: **Stephens v. Pillen**. 06 NCA No. 40. Affirmed. Cassel, Judge.

No. A-05-195: **SID No. 177 v. Employers Mut. Cas. Co**. 06 NCA No. 50. Affirmed. Carlson, Judge.

No. A-05-198: **Herres v. Ridgeway**. 06 NCA No. 52. Affirmed. Irwin, Judge.

No. A-05-200: **Wiegert-Stathes v. American Fam. Mut. Ins. Co**. 07 NCA No. 18. Reversed and remanded for further proceedings. Moore, Judge.

No. A-05-233: **State v. Thompson**. 07 NCA No. 19. Affirmed. Cassel, Judge.

No. A-05-281: **Rinne v. Pawnee Cty. Bd**. 07 NCA No. 14. Affirmed. Moore, Judge.

No. A-05-301: **Wagoner v. Tracy**. 06 NCA No. 49. Affirmed. Inbody, Chief Judge.

No. A-05-316: **Khan v. Midwest Cardiology**. 07 NCA No. 15. Affirmed. Moore, Judge.

No. A-05-336: **Perry v. Allied Prop. & Cas. Ins. Co**. 07 NCA No. 18. Affirmed. Moore, Judge.

No. A-05-422: **Naidenovich v. Naidenovich**. 07 NCA No. 18. Affirmed as modified. Cassel, Judge.

No. A-05-452: **Hutchinson v. DeMuth**. 07 NCA No. 5. Affirmed as modified. Inbody, Chief Judge.

No. A-05-467: **City of Ashland v. Strode**. 07 NCA No. 18. Affirmed. Moore, Judge.

No. A-05-500: **Bank v. Neth**. 07 NCA No. 17. Reversed and remanded with directions. Irwin, Judge.

No. A-05-518: **Henningsen v. Pacesetter Homes**. 07 NCA No. 3. Affirmed. Irwin, Judge. Cassel, Judge, concurring. Sievers, Judge, dissenting.

No. A-05-541: **Bosiljevac v. Board of Trustees of City of Omaha**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge.

No. A-05-613: **Montazer v. Folda**. 07 NCA No. 18. Affirmed. Cassel, Judge.

No. A-05-651: **Green v. Ameritrade**. 07 NCA No. 23. Affirmed. Carlson, Judge.

No. A-05-652: **Barger v. Abboud**. 07 NCA No. 20. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-05-654: **Neiman v. Neiman**. 07 NCA No. 39. Affirmed. Carlson, Judge.

No. A-05-693: **State Law Enforcement Barg. Council v. State**. 07 NCA No. 21. Reversed. Sievers, Judge.

No. A-05-707: **State v. Rose**. 06 NCA No. 40. Affirmed. Cassel, Judge.

No. A-05-720: **BCD Farms v. Sandhills Cattle Feeding**. 07 NCA No. 34. Reversed and remanded with directions. Carlson, Judge.

No. A-05-724: **Downey Land Ltd. v. John M. Probandt Co**. 07 NCA No. 26. Affirmed. Moore, Judge.

No. A-05-732: **Heeren v. City of Hastings**. 07 NCA No. 5. Affirmed. Irwin, Judge.

No. A-05-771: **Aramark Uniform Servs. v. Meylan Enters**. 07 NCA No. 22. Affirmed. Irwin, Judge.

No. A-05-817: **Schrier v. Schrier**. 06 NCA No. 49. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Chief Judge. Carlson, Judge, concurs.

No. A-05-852: **Lind v. Clay Cty. Mut. Ins. Co**. 07 NCA No. 6. Affirmed. Irwin, Judge.

No. A-05-880: **Yoachim v. Department of Motor Vehicles**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge.

No. A-05-898: **Applied Underwriters v. Employer Outsource Serv**. 07 NCA No. 21. Affirmed. Carlson, Judge.

Nos. A-05-920 through A-05-922: **State v. Ajamu**. 07 NCA No. 7. Affirmed. Carlson, Judge.

No. A-05-929: **Doyle v. Watts Trucking**. 07 NCA No. 28. Affirmed. Moore, Judge.

No. A-05-930: **Tanner v. Nebraska Health System**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-05-948: **State v. Bryant**. 07 NCA No. 38. Affirmed. Moore, Judge.

No. A-05-956: **Wright v. County of Douglas**. 07 NCA No. 22. Affirmed. Irwin, Judge.

No. A-05-967: **Keating v. Ironwood Golf & Country Club**. 07 NCA No. 35. Affirmed. Sievers, Judge.

No. A-05-982: **State v. Schmader**. 06 NCA No. 36. Sentence vacated, and cause remanded with directions. Irwin, Judge.

No. A-05-1020: **Rambo v. Sullivan R.E. Group**. 07 NCA No. 30. Affirmed in part, and in part reversed. Moore, Judge.

No. A-05-1051: **In re Estate of Corbin**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge,

No. A-05-1052: **State v. Stankoski**. 06 NCA No. 41. Affirmed. Irwin, Judge.

No. A-05-1067: **Knittel v. State**. 07 NCA No. 19. Affirmed. Cassel, Judge.

No. A-05-1132: **State v. Moss**. 07 NCA No. 3. Affirmed. Cassel, Judge.

No. A-05-1160: **Omaha Police Union Local 101 v. City of Omaha**. 07 NCA No. 20. Reversed and remanded with directions. Carlson, Judge.

No. A-05-1189: **Brandt v. Heil**. 07 NCA No. 17. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge.

No. A-05-1215: **State on behalf of F.J. v. McSwine**. 07 NCA No. 34. Affirmed. Sievers, Judge.

No. A-05-1249: **Plater v. Douglas Cty. Treasurer's Office**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-05-1253: **State v. Stevens**. 06 NCA No. 46. Affirmed. Moore, Judge.

No. A-05-1269: **State v. Dupre**. 06 NCA No. 42. Affirmed. Inbody, Chief Judge.

No. A-05-1394: **Classe v. Fitzgerald, Schorr**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-05-1417: **State v. Brown**. 06 NCA No. 38. Sentence modified. Inbody, Chief Judge.

No. A-05-1448: **Robertson v. Burnette**. 06 NCA No. 52. Reversed and remanded with directions. Carlson, Judge.

No. A-05-1465: **Canterbury v. Istas**. 07 NCA No. 3. Reversed. Carlson, Judge.

No. A-05-1487: **Baseggio v. Baseggio**. 07 NCA No. 34. Affirmed. Carlson, Judge.

No. A-06-066: **State v. Holladay**. 07 NCA No. 6. Affirmed. Irwin, Judge.

No. A-06-070: **State v. Claussen**. 07 NCA No. 3. Affirmed. Carlson, Judge. Sievers, Judge, concurring in part and dissenting in part.

No. A-06-079: **State v. Hale**. 07 NCA No. 16. Conviction affirmed, and sentence modified in part. Sievers, Judge.

No. A-06-153: **State v. Owen**. 07 NCA No. 10. Affirmed. Cassel, Judge.

No. A-06-171: **Steskal v. Iams Co**. 06 NCA No. 49. Affirmed. Carlson, Judge.

No. A-06-172: **State v. Russo**. 06 NCA No. 37. Affirmed. Carlson, Judge.

No. A-06-201: **Glodowski v. Glodowski**. 07 NCA No. 10. Affirmed. Irwin, Judge.

No. A-06-209: **State v. Aron**. 07 NCA No. 26. Affirmed. Irwin, Judge.

No. A-06-229: **State v. Stoltz**. 06 NCA No. 46. Affirmed. Irwin, Judge.

No. A-06-230: **DeWester v. Dundy County**. 07 NCA No. 34. Affirmed. Moore, Judge.

No. A-06-250: **State v. Hauck**. 06 NCA No. 49. Affirmed. Inbody, Chief Judge.

No. A-06-254: **State v. Blair**. 07 NCA No. 3. Affirmed. Sievers, Judge.

No. A-06-263: **State v. Monroy**. 06 NCA No. 52. Affirmed. Irwin, Judge.

No. A-06-279: **Noss v. Noss**. 07 NCA No. 11. Affirmed in part, and in part remanded for further proceedings. Irwin, Judge.

No. A-06-301: **State v. Tuttle**. 07 NCA No. 7. Affirmed. Moore, Judge.

No. A-06-302: **Bribiesca v. Rotella's Italian Bakery**. 06 NCA No. 51. Affirmed as modified. Irwin, Judge.

No. A-06-332: **State v. Short**. 07 NCA No. 5. Affirmed. Carlson, Judge.

No. A-06-385: **State on behalf of Schlautman-Sudik v. Schlautman**. 07 NCA No. 11. Affirmed. Irwin, Judge.

No. A-06-390: **State v. Fisher**. 07 NCA No. 9. Affirmed. Moore, Judge.

Nos. A-06-404, A-06-405: **State v. McCray**. 07 NCA No. 15. Affirmed. Moore, Judge.

No. A-06-418: **In re Interest of Taylor P**. 07 NCA No. 6. Affirmed. Cassel, Judge.

No. A-06-431: **In re Guardianship of Grabher**. 07 NCA No. 31. Affirmed. Moore, Judge.

No. A-06-465: **State v. Reddish**. 07 NCA No. 29. Affirmed. Irwin, Judge.

No. A-06-475: **State v. Poppe**. 06 NCA No. 50. Order vacated in part, and in part affirmed. Sievers, Judge.

No. A-06-524: **State v. Malcom**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-541: **MBNA America Bank v. Runyan**. 07 NCA No. 11. Affirmed. Carlson, Judge.

No. A-06-546: **In re Interest of Courtney S. et al**. 06 NCA No. 46. Appeal dismissed. Irwin, Judge.

No. A-06-554: **State v. Colpitts**. 07 NCA No. 5. Affirmed in part, and in part vacated and remanded with directions for resentencing. Cassel, Judge.

No. A-06-567: **State v. Lukowski**. 07 NCA No. 24. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-06-583: **Bice v. Abbott Enters**. 07 NCA No. 9. Affirmed. Cassel, Judge.

No. A-06-606: **Rue v. Douglas County Corrections**. 07 NCA No. 18. Reversed and remanded with directions. Irwin, Judge.

No. A-06-616: **In re Interest of Amanda W**. 06 NCA No. 46. Affirmed. Inbody, Chief Judge.

No. A-06-620: **State v. Barritt**. 07 NCA No. 11. Affirmed. Irwin, Judge.

No. A-06-625: **State v. Rudnick**. 07 NCA No. 28. Affirmed. Sievers, Judge.

No. A-06-658: **State v. Hobbs**. 07 NCA No. 40. Affirmed. Irwin, Judge.

No. A-06-661: **In re Interest of Jasmine B**. 07 NCA No. 3. Reversed. Sievers, Judge.

No. A-06-675: **State v. Stewart**. 07 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-676: **State v. Smith**. 07 NCA No. 17. Affirmed. Irwin, Judge.

No. A-06-702: **State v. Deras**. 07 NCA No. 14. Affirmed. Sievers, Judge.

No. A-06-709: **Hand v. Flexcon Company**. 07 NCA No. 11. Affirmed. Carlson, Judge.

No. A-06-753: **Krumwiede v. Metropolitan Util. Dist**. 07 NCA No. 16. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-06-756: **In re Interest of Tabbitha H. & Joshua K**. 07 NCA No. 5. Affirmed. Carlson, Judge.

No. A-06-771: **In re Interest of Amoria M. et al**. 07 NCA No. 9. Affirmed. Irwin, Judge.

No. A-06-776: **Tyler v. Physicians Mut. Ins. Co**. 06 NCA No. 42. Affirmed. Cassel, Judge.

No. A-06-804: **State v. Sears**. 07 NCA No. 20. Affirmed. Moore, Judge.

No. A-06-809: **Roman v. Werner Enters**. 07 NCA No. 14. Affirmed. Cassel, Judge.

No. A-06-824: **State v. Jacobitz**. 07 NCA No. 9. Affirmed. Cassel, Judge.

No. A-06-831: **State v. Scheffert**. 07 NCA No. 12. Affirmed. Inbody, Chief Judge.

No. A-06-914: **State v. Bearden**. 07 NCA No. 28. Sentences modified. Carlson, Judge.

No. A-06-938: **State v. Coldanghise**. 07 NCA No. 30. Order vacated, and cause remanded with directions. Sievers, Judge.

No. A-06-939: **State v. Valverde**. 07 NCA No. 20. Exception sustained, and cause remanded with directions. Moore, Judge.

No. A-06-959: **State v. Jones**. 07 NCA No. 26. Affirmed. Irwin, Judge.

No. A-06-1010: **Neyens v. Neyens**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-1035: **In re Interest of D.C**. 07 NCA No. 34. Affirmed. Sievers, Judge.

No. A-06-1036: **State v. Dargeloh**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-1045: **In re Interest of R.P**. 07 NCA No. 22. Affirmed. Sievers, Judge.

Nos. A-06-1050, A-06-1051: **In re Interest of Markus K. & Justin K**. 07 NCA No. 16. Affirmed. Carlson, Judge.

No. A-06-1166: **State v. Palu**. 07 NCA No. 39. Affirmed. Carlson, Judge.

No. A-06-1178: **Mays v. Drivers Mgmt., Inc**. 07 NCA No. 28. Affirmed. Carlson, Judge.

No. A-06-1195: **State v. Bennett**. 07 NCA No. 34. Appeal dismissed. Irwin, Judge.

No. A-06-1197: **In re Interest of Mitchell H. et al**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-06-1233: **Romine v. Buckridge Inc**. 07 NCA No. 30. Affirmed. Irwin, Judge.

No. A-06-1270: **Doughty v. Cabela's, Inc**. 07 NCA No. 36. Affirmed. Moore, Judge.

No. A-06-1334: **State v. Dober**. 07 NCA No. 37. Affirmed. Carlson, Judge.

No. A-06-1354: **In re Interest of Ajal B. & Akur B**. 07 NCA No. 30. Reversed and remanded for further proceedings. Cassel, Judge.

No. A-06-1371: **In re Interest of Connor S. & Marissa T**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-07-092: **State v. Garcia**. 07 NCA No. 26. Affirmed. Inbody, Chief Judge.

No. A-07-104: **State v. Davis**. 07 NCA No. 32. Reversed and remanded. Irwin, Judge.

# CASES DETERMINED

IN THE

# NEBRASKA COURT OF APPEALS

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## ROSEN AUTO LEASING, INC., A NEBRASKA CORPORATION, APPELLANT, V. MICHAEL A. JORDAN, APPELLEE.

720 N.W.2d 911

Filed September 5, 2006. No. A-05-477.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) sets forth two ministerial requirements for a final judgment: the rendition of a judgment and the entry thereof; both are prerequisites to appellate court jurisdiction.
4. **Judgments: Records: Words and Phrases.** Rendition of a judgment is defined as the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
5. ____: ____: ____. Entry of a judgment is defined as the act of the clerk of the court in placing the file stamp and date upon the judgment.
6. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** For a final judgment to exist to allow an appellate court to acquire jurisdiction, there must be an order that is both signed by the court as well as file stamped and dated by the clerk of the court.
7. **Jurisdiction: Final Orders: Appeal and Error.** It is an appellate court's duty to dismiss appeals for lack of jurisdiction and to direct the trial court to expunge from its records actions or orders which are not valid.
8. **Courts: Judgments: Final Orders.** Trial courts must understand that any action purporting to be a judgment, decree, or final order must be rendered and entered to be valid, as provided in Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004).
9. **Judgments: Records: Notice: Fees: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004), a notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.
10. **Judgments: Jurisdiction: Records: Notice: Appeal and Error.** The effect of Neb. Rev. Stat. §§ 25-1912(2) and 25-2729(5) (Cum. Supp. 2004) when the judgment is defective is that the appellate court potentially has jurisdiction because the lower

court's judgment can be made final by rendition by the judge or entry by the clerk of the court, whichever is lacking, long after the notice of appeal is filed.

11. ___: ___: ___: ___: ___. A premature notice of appeal is treated as filed after the proper rendition and entry of the judgment and becomes effective when the defect is cured; thus, the appellate court's "potential" jurisdiction over the appeal "springs" into full jurisdiction.
12. **Courts: Jurisdiction: Appeal and Error.** When the district court acts as an intermediate appellate court and the jurisdictional defect is caused at the county court level, the appeal in the Nebraska Court of Appeals cannot be saved by Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004).
13. **Jurisdiction: Final Orders: Appeal and Error.** When a court lacks jurisdiction and nonetheless enters an order, such order is void.

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Appeal dismissed.

John T. Rogers for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Rosen Auto Leasing, Inc. (Rosen), has attempted to prosecute this appeal from an order of the county court for Douglas County, Nebraska, denying Rosen's request of the county court to issue a capias for the arrest of Michael A. Jordan. Rosen appealed to the district court, which affirmed the county court's denial of Rosen's request. Since the docketing of the case in this court, the case has been under jurisdictional review because the original order of the county court was not properly entered by the clerk of the county court—there was no file stamp placed upon the order. Despite Rosen's attempts to remedy the jurisdictional default, we now conclude that we are without jurisdiction, and we dismiss this appeal.

Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), this case was ordered submitted without oral argument. We write a published opinion in this case to discuss the jurisdictional problems contained herein and to discuss this case's variation of the concept of "springing" jurisdiction previously discussed in *State v. Brown*, 12 Neb. App. 940, 687

N.W.2d 203 (2004). Additionally, we feel compelled to once again emphasize the vital importance of lower courts, clerks of court, counsel, and litigants taking the most basic steps to ensure compliance with Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004). As we iterated in *State v. Brown*, 12 Neb. App. at 940, 687 N.W.2d at 205, "[o]ur hope is that our opinion will provide guidance for the bench and bar, eliminate unnecessary procedural delays for litigants, and make the work of the appellate courts somewhat simpler."

## II. BACKGROUND

On November 27, 2001, Rosen filed a petition in the county court. In the petition, Rosen sought a judgment against Jordan for default under the terms of a lease agreement.

On May 15, 2002, Rosen filed a motion seeking a default judgment because Jordan "failed to timely answer, appear or otherwise plead." On May 16, the county court entered a default judgment in favor of Rosen in the amount of $3,360.11 plus interest and costs. On November 13, Rosen filed a praecipe for execution of the default judgment, but the sheriff was "unable to locate [Jordan] in Douglas County" and Jordan had "no goods, chattels, lands and tenements on which to levy."

On August 26, 2003, Rosen filed a motion seeking an order in aid of execution of the default judgment. Rosen asked the county court to issue an order "requiring [Jordan] to appear and answer questions concerning property of [Jordan]." On August 27, the county court signed an order demanding that Jordan appear and warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. A civil process server was unable to serve the order, however, because Jordan could not be located "after diligent search and inquiry."

On January 20, 2004, Rosen filed another motion seeking an order in aid of execution of the default judgment and asking the county court to issue an order "requiring [Jordan] to appear and answer questions concerning property of [Jordan]." On January 21, the county court signed an order demanding that Jordan appear and again warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. A process server was again unable to serve the order because Jordan could not be located.

On May 6, 2004, Rosen filed another motion seeking an order in aid of execution of the default judgment and asking the county court to issue an order for Jordan's appearance. On May 7, the county court signed an order demanding that Jordan appear and again warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. On May 7, the county court also signed an order authorizing service "by leaving the process at [Jordan's] usual place of residence and mailing a copy by first class mail to [Jordan's] last known address." A process server left the process at Jordan's "usual place of residence," and Rosen served a copy by first-class mail.

A June 29, 2004, county court journal entry indicates the following:

> Plaintiff appeared
> Defendant failed to appear. No Personal Service.
> ~~Order Signed- Pl granted leave to issue Capias. Bond set at $5,000 10%.~~
>
> ERA

This journal entry does not bear any file stamp. It appears that the county court initially intended to journal that Rosen be granted leave to issue an arrest warrant for Jordan's arrest and to set a bond amount for the arrest warrant but then decided not to issue such an order because Jordan had not been personally served with the May 7 order in aid of execution. Nonetheless, because the journal entry does not bear a file stamp, it did not constitute a properly entered order pursuant to § 25-1301.

On July 28, 2004, Rosen filed a notice of appeal in the county court indicating Rosen's intention to appeal "from the order entered . . . on June 29, 2004 wherein the [county c]ourt denied [Rosen's] request for Capias to [i]ssue against [Jordan]." On September 13, Rosen filed a "Statement of Errors" in the district court challenging the county court's failure to issue an arrest warrant without personally serving Jordan. On March 9, 2005, the district court entered an order affirming the county court's "decision."

On April 7, 2005, Rosen filed a notice of appeal in the district court indicating Rosen's intention to appeal the district court's affirmance of "the decision of the Douglas County Court denying [Rosen's] request for Capias to [i]ssue against [Jordan]." On

July 7, this court issued an order to show cause. In the order, this court noted the lack of a "valid signed and file-stamped judgment denying a motion for capias" by the county court. Rosen requested an extension of time and leave of court to cure the jurisdictional defect, in which motion Rosen requested leave of court to obtain a valid judgment in the county court, a modified order in the district court, and a supplemental transcript in this court.

On August 17, 2005, the county court issued an order specifically denying Rosen's request for capias. The county court specifically found that the request was denied "solely on the fact that [Jordan] was not personally served with notice" of the county court's order in aid of execution. This order of the county court was properly signed by the county court judge and was file stamped by the clerk of the county court.

On August 24, 2005, Rosen filed a motion in the district court seeking to modify the district court's March 9 order of affirmance. Rosen requested the district court "to acknowledge the Court's acquisition of full jurisdiction in this appeal and for such other and further relief as is just and equitable." On September 1, the district court entered an order modifying the March 9 order of affirmance. The district court recognized that it had "full and complete jurisdiction" and again affirmed the county court's denial of Rosen's request for issuance of capias.

On December 6, 2005, this court issued an order, sua sponte, directing the parties to file briefs addressing the following issue:

> Assuming that jurisdiction "sprung" to the district court upon the entry of judgment in the county court on August 17, 2005, see *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004); Neb. Rev. Stat. § 25-2729(5) (Cum.Supp. 2004), does the district court's September 1 Order of affirmance confer jurisdiction upon the Court of Appeals, despite the fact that no new notice of appeal from the district court to the Court of Appeals was filed at any time after the jurisdiction of the district court was perfected on August 17?

Rosen filed its brief on appeal and specifically addressed the above issue. Jordan failed to file any brief on appeal.

## III. ASSIGNMENTS OF ERROR

Because we conclude that we are without jurisdiction to hear Rosen's appeal, we need not specifically address Rosen's assignments of error concerning the merits of this case.

## IV. ANALYSIS

### 1. § 25-1301

[1-3] We begin, as we did in *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), with the general proposition that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Further, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). Section 25-1301 sets forth two ministerial requirements for a final judgment: the rendition of a judgment and the entry thereof; both are prerequisites to appellate court jurisdiction.

[4-6] The first ministerial requirement, found at § 25-1301(2), is rendition of a judgment, defined as the act of the court, or a judge thereof, "in making and signing a written notation of the relief granted or denied in an action." The second ministerial requirement, found at § 25-1301(3), is the entry of a judgment, defined as the act of the clerk of the court in placing the file stamp and date upon the judgment. In short, for a final judgment to exist to allow an appellate court to acquire jurisdiction, there must be an order that is both signed by the court as well as file stamped and dated by the clerk of the court. See, § 25-1301; *State v. Brown, supra.*

Since § 25-1301 became effective in August 1999, the appellate courts of this state have been required to deal with many appeals containing nonfinal judgments because the lower court's orders were missing the signature of the court or the file stamp and date of the clerk of the court, or both. *State v. Brown, supra.* See, e.g., *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002) (order missing file stamp); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001) (orders neither signed by judge nor file stamped by clerk); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001)

(order missing file stamp and date); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000) (order not signed by judge). In addition, numerous cases have been disposed of by the appellate courts of this state by way of summary dismissal because of similar failings.

[7,8] This court has previously indicated that "[i]t is our duty to dismiss appeals for lack of jurisdiction and to direct the trial court to expunge from its records actions or orders which are not valid." *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. at 318, 633 N.W.2d at 916. "Trial courts must understand that any action purporting to be a judgment, decree, or final order must be rendered and entered to be valid, as provided in § 25-1301." 10 Neb. App. at 318, 633 N.W.2d at 916.

More than 6 years ago, the Nebraska Supreme Court cautioned the lower courts and the practicing bar of the importance of the legislative enactments which created the current version of § 25-1301, and the Supreme Court "urge[d] both the trial courts and the practicing bar to familiarize themselves with this new legislation as it w[ould] have a substantial impact on future appeals." *Hornig v. Martel Lift Systems*, 258 Neb. 764, 769, 606 N.W.2d 764, 769 (2000). Nonetheless, this court has noted that trial courts were slow to adopt procedures to ensure compliance with § 25-1301, and this court has encouraged lower courts to utilize meaningful file stamps to comply with § 25-1301 and specifically noted that former methods and procedures of rendering judgments are no longer effective without compliance with § 25-1301. See, *State v. Wilcox, supra*; *Mumin v. Hart, supra*.

Unfortunately, although the current version of § 25-1301 has now been in effect for nearly 7 years, too often trial courts and clerks of court continue to disregard the requirements of § 25-1301. Additionally, counsel and litigants continue to prosecute appeals without ensuring that the two simple ministerial steps of rendition of the judgment and entry thereof have been accomplished. We take this opportunity to once again remind trial courts, counsel, and litigants to ensure that a final judgment has been rendered by the court's signing of the order and has been entered by the court clerk's placing a date and file stamp on the order before an appeal is attempted. The failure to do so will continue to cause the appellate courts to "unnecessarily

wrestle with jurisdictional issues created by less than full compliance by court clerks and trial judges with the clear statutory requirements" and will result in continued dismissals for lack of jurisdiction. *State v. Wilcox*, 9 Neb. App. at 936, 623 N.W.2d at 331-32.

### 2. "Springing" Jurisdiction

[9] In *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), this court discussed the interaction between § 25-1301 and either Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004) (when trial court is district court) or Neb. Rev. Stat. § 25-2729(5) (Cum. Supp. 2004) (when trial court is county court) and the concepts of "potential" jurisdiction and "springing" jurisdiction. In *State v. Brown*, we noted that § 25-1912(2) provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

Accord § 25-2729(5). We also noted that "announcement" can come, inter alia, orally from the bench, from trial docket notes, from file-stamped but unsigned journal entries, or from signed but not file-stamped journal entries. *State v. Brown, supra.*

[10,11] As we recognized in *State v. Brown*, § 25-1912(2) and § 25-2729(5) create what we called "potential" jurisdiction and "springing" jurisdiction. These jurisdictional situations occur when the trial court's order which is intended to finally dispose of the matter is announced but not rendered or not entered, but nonetheless a party files a notice of appeal. The effect of §§ 25-1912(2) and 25-2729(5) when the judgment is defective is that the appellate court "potentially" has jurisdiction because the lower court's judgment can be made final by rendition by the judge or entry by the clerk of the court, whichever is lacking, long after the notice of appeal is filed. In such a situation, the premature notice of appeal is treated as filed after the proper rendition and entry of the judgment and becomes effective when the defect is cured. Thus, the appellate court's "potential" jurisdiction over the appeal "springs" into full jurisdiction. This is true whether the appellate court is the district court sitting as an

intermediate appellate court, the Nebraska Court of Appeals, or the Nebraska Supreme Court.

[12] In *State v. Brown*, we also recognized the unique problems that can occur when the district court acts as an intermediate appellate court. Specifically, we recognized that when the district court acts as an intermediate appellate court and the jurisdictional defect is caused at the county court level, the appeal in this court "cannot be saved by § 25-1912(2)." 12 Neb. App. at 942, 687 N.W.2d at 206.

The procedural background of *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), was in many ways substantially comparable to the procedural background of the case at bar. In *State v. Brown*, the county court sentenced the defendant, Scott A. Brown, on February 12, 2004, to a term of imprisonment. The court's sentencing order was rendered by being signed by the sentencing judge, but was not entered due to not being file stamped by the clerk of the court. Brown filed a notice of appeal to the district court, which affirmed the sentence in an order that was both rendered and entered in July. Brown then filed a notice of appeal to this court. This court entered a show cause order on August 11, and Brown responded by filing a supplemental transcript showing that the clerk of the county court had file stamped the county court's February sentencing order on August 17, after this court's show cause order.

This court concluded that when the district court reviewed the county court's action and rendered its order of affirmance, the district court was acting without jurisdiction, because the county court's sentencing order was not final under § 25-1301 until August 17, 2004, when the previously rendered order was entered by the clerk of the court. *State v. Brown, supra.* We concluded that when the district court entered its July order of affirmance, it had only potential jurisdiction which did not "spring" into existence until August 17—meaning that its July order was entered without jurisdiction. We ordered the district court to vacate its July order of affirmance. Because the district court lacked jurisdiction when it entered its July order of affirmance, that order was void and this court acquired no jurisdiction through the notice of appeal filed in the district court. Rather, the case was remanded for the district court to enter a

new order—the implication being that a new notice of appeal from a properly rendered and entered district court order would be required for this court to acquire jurisdiction.

### 3. Application to Case at Bar

The case at bar, although in many ways comparable procedurally to *State v. Brown, supra*, differs from that case because of Rosen's attempts to cure the jurisdictional defect. As such, we discuss the springing jurisdiction problem in this case as it relates to the jurisdiction of the district court and as Rosen's cure of the jurisdictional defect relates to this court's jurisdiction.

#### (a) District Court's Jurisdiction

When Rosen filed its notice of appeal in the county court on July 28, 2004, the district court did not acquire full jurisdiction. Because the county court's order had not been entered by the court clerk's placing a date and file stamp on the order, there was a jurisdictional defect and the district court acquired only potential jurisdiction, subject to § 25-1912. That jurisdiction did not "spring" into full jurisdiction until the defect was cured, which did not occur until the county court rendered and entered its order on August 17, 2005. Thus, when the district court entered its order of affirmance on March 9, 2005, the district court was acting without jurisdiction.

[13] When a court lacks jurisdiction and nonetheless enters an order, such order is void. See, *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001) (where district court lacked jurisdiction over action, further orders were null and void); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001) (district court order void where court lacked jurisdiction); *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005) (order entered by court lacking subject matter jurisdiction was void). As such, the March 9, 2005, order of the district court affirming the county court's decision was void, and we vacate that order. See *State v. Bracey, supra*, and *Wells v. Goodyear Tire & Rubber Co., supra* (appellate court has power and duty to vacate void order). The district court was without jurisdiction to act until its potential jurisdiction "sprang" into full jurisdiction on August 17.

(b) Court of Appeals' Jurisdiction

As we recognized in *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), when the district court acts as an intermediate appellate court and the jurisdictional defect occurs in the county court, simply curing the jurisdictional defect in the county court will not save the appeal in this court. Doing so only remedies the springing jurisdiction problem in the district court, but leaves this court without jurisdiction until the district court has rendered and entered a valid order and an appeal is taken from that order.

In the case at bar, Rosen cured the jurisdictional defect in the county court, allowing the district court's potential jurisdiction to spring into full jurisdiction. Unlike the defendant in *State v. Brown*, however, Rosen further attempted to save this appeal by moving for the district court to enter a new order recognizing its full jurisdiction. The district court rendered and entered an order on September 1, 2005. However, no notice of appeal was filed from that order.

We conclude that we lack jurisdiction to consider the merits of Rosen's appeal, because no notice of appeal was filed from the only valid order rendered and entered by the district court—the September 1, 2005, order of affirmance. The jurisdictional problem with Rosen's appeal to this court from the district court was not, and is not, a problem of springing jurisdiction remedied by Rosen's curing of the county court's defective order.

The jurisdictional problem with Rosen's appeal to the district court from the county court was a problem occasioned by Rosen's filing a notice of appeal before the county court's order had been both rendered and entered. Under § 25-1912 and our decision in *State v. Brown, supra*, Rosen created a potential and springing jurisdiction problem in the district court which could be, and was, remedied by curing the defect with the county court's order.

The jurisdictional problem with Rosen's appeal to this court from the district court, however, was a problem occasioned by Rosen's filing a notice of appeal from a void order. The problem with Rosen's appeal to this court was not that the notice of appeal was filed after the district court had announced a valid decision but before that decision was properly rendered or entered, but,

rather, the problem was that the district court's order was rendered and entered without jurisdiction and was thus void. As a result, Rosen's curing the jurisdictional defect with the county court's order, although providing the district court with jurisdiction to act, in no way made Rosen's notice of appeal to this court valid or effective, because it remained a notice of appeal from a void order.

When Rosen cured the defect with the county court's order by having the county court properly render a judgment and enter an order on August 17, 2005, Rosen's notice of appeal to the district court became effective and the district court acquired jurisdiction to act. No actions by the district court prior to August 17 could be valid, and any prior orders by the district court, including the March 9 order of affirmance, were void. Although the district court's September 1 order of affirmance is a validly rendered and entered order, no notice of appeal was filed from that order. As such, we conclude that we lack jurisdiction, because the only notice of appeal to this court was from a void order.

## V. CONCLUSION

It is well established that an appellate court has the power and the duty to determine whether it has jurisdiction. See *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). It is also well established that the appellate courts in Nebraska engage in a practice of early examination of cases for jurisdictional defects. See *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004). The appellate courts of Nebraska, as discussed earlier herein, have repeatedly attempted to emphasize the importance of proper rendition of judgments by trial judges and proper entry thereof by court clerks, as well as ensuring such by counsel and litigants. As we have repeatedly established, the straightforward requirements of § 25-1301 mandate that the trial court properly render a judgment by signing an order and that the clerk of the court properly enter a judgment by placing a date and file stamp on the order. As we noted in *State v. Brown*, 12 Neb. App. at 944, 687 N.W.2d at 207, "[t]he requirements for rendition and entry of judgments under § 25-1301 have been with us since August 28, 1999, and adherence to the requirements found therein should now be a matter of routine." Had these basic requirements

been complied with in the present case, the complicated jurisdictional morass that we have had to unravel would have been entirely avoided and the merits of Rosen's appeal would have been reviewable. Unfortunately, that was not done.

Despite Rosen's efforts to cure the defect in the county court's order and to cause the district court's potential jurisdiction to spring into full jurisdiction, Rosen failed to properly secure jurisdiction in this court. Because Rosen failed to file a notice of appeal from a properly rendered and entered order of the district court, we are without jurisdiction and are compelled to dismiss the appeal. The district court's March 9, 2005, order of affirmance, being a void order, is vacated.

APPEAL DISMISSED.

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STATE OF NEBRASKA, APPELLEE, V.
GARY S. MUSE, APPELLANT.

721 N.W.2d 661

Filed September 12, 2006. No. A-05-947.

1. **Public Officers and Employees: Records.** It is the duty of the clerk of each of the courts to file together and carefully preserve in his or her office all papers delivered to him or her for that purpose in every action or special proceeding.
2. ____: ____. The clerk of the court shall endorse upon every paper filed with him or her the day of filing it.
3. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
4. **Criminal Law: Motions to Suppress: Appeal and Error.** In criminal cases, a trial court's ruling on a motion to suppress is reviewed for an abuse of discretion.
5. **Trial: Evidence.** The trial court is permitted to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice; the fact that evidence is prejudicial is not enough to merit exclusion, and relevant evidence should be excluded only if it has a tendency to suggest a decision on an improper basis that is unfairly prejudicial.
6. **Trial: Witnesses.** In a jury trial, the credibility of witnesses is an issue to be resolved by the jury, not by the trial court.
7. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence.

8. ____: ____: ____. On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
9. **Habitual Criminals.** Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than 1 year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Stefanie A. Martinez and James Walter Crampton for appellant.

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

IRWIN, MOORE, and CASSEL, Judges.

PER CURIAM.

## I. INTRODUCTION

Gary S. Muse appeals his convictions and sentences on a number of criminal charges. Muse asserts on appeal that the record does not indicate the second amended information, upon which trial proceeded, was ever properly filed and that the trial court erred in granting a motion in limine, in admitting certain evidence, in accepting the verdict, and in finding Muse to be a habitual criminal. We find no merit to these assertions, and we affirm.

## II. BACKGROUND

On May 16, 2005, Muse was arraigned on an amended information. Although the amended information does not appear in the transcript, the arraignment indicates that the amended information charged, and Muse was arraigned on, one count of first degree sexual assault, two counts of robbery, and a charge of being a habitual criminal. Muse was also arraigned on three counts of use of a deadly weapon in the commission of a felony, although, as noted below, the three use counts were apparently not actually included in the amended information. Muse pled not guilty to all charges.

On May 23, 2005, the parties appeared before the district court for trial. The State requested leave to file a second amended information to add three counts of use of a deadly weapon in the

commission of a felony. According to counsel for the State, "[t]he original information had the [use counts] on it." "For some reason," he explained, "they didn't get [included] on [the amended information] and for some ungodly reason I didn't catch it until this weekend when I was going over the information because this is obviously a use case." Muse objected to the request for leave to file a second amended information, indicated that he was ready to proceed with jury selection, and asked the court to deny the request.

At that point, the court asked Muse's counsel if she was "aware the allegation in this case is use of a knife," to which query Muse's counsel responded, "Yes." The court expressed its displeasure with the State's amending "at the last minute" but found, "I do believe there's no notice of [sic] surprise and the knife was involved and the state is entitled to amend and [Muse] is entitled to 24 hours' notice."

The record does not indicate that Muse was served with a copy of the second amended information at this time, and the second amended information was not read aloud in court. The court, however, immediately arraigned Muse on the three counts of use of a deadly weapon in the commission of a felony. The court asked Muse if he "wish[ed] to enter a plea [that day] with respect to those three charges," and Muse responded, "Yes, not guilty."

The court asked counsel for the State, "Do you have a copy of the [second] amended information?" Counsel for the State responded, "This was the original I was going to file." The court then indicated to counsel for the State, "Probably ought to be just left with me and I'll put a note on it to file it." The case proceeded to trial on May 24 through 26, 2005, and the jury returned a verdict on May 26 finding Muse guilty.

On appeal, the transcript to this court, which transcript is duly certified by a deputy clerk of the district court at its conclusion, begins with a recital of the district court's assigned judge, judicial district, county, location, and term, followed by the further recital:

> BE IT REMEMBERED, that in a certain cause lately pending in the District Court of Douglas County, State of Nebraska entitled: State of Nebraska against Gary S. Muse, appearing on Criminal Docket 165 Number 259 there was

> filed in the office of the Clerk of said Court on the 23rd day of May, 2005, a certain Information, which said Information is in the words and following, to-wit:
>
> SECOND AMENDED INFORMATION

The transcript then continues with photocopies of the filings in the district court, including a copy of the second amended information.

The notation of filing on the face of the second amended information does not appear in the frequently observed form of a file stamp. The first page of the second amended information represents a summary or title page and, except as we note below, appears to have been typed by the State. The upper two-thirds of the page includes the case number, the case caption, the title of the document, a summary of the charges, and a list of witnesses. That information is separated from the bottom one-third of the page by a short line, and beneath that line is an area for filing information. In the lower area appear the words "FILED: May 23, 2005," and immediately below those words appears a signature block stating the proper name and abbreviated title of the district court clerk followed below by the word "By:" and a signature line. Under the signature line appears the word "Deputy." Beneath the signature block, the document provides spaces for designating the "Journal" and "Page" at which the second amended information was recorded. The signature line bears a signature from a deputy clerk of the district court; however, the journal and page designations remain blank. Immediately to the right of the deputy clerk's signature, there appears an inexplicable stamp that indicates, "MADE MAY 26 2005."

The last page of the second amended information includes three certificates. The first is a certificate indicating that the contents of the second amended information "are true to the best of my knowledge and belief" and is signed by counsel for the State. That certificate is notarized by a deputy clerk of the court and indicates that the second amended information was sworn to before the deputy clerk on May 23, 2005. The second is a certificate indicating that the second amended information "is a full and true copy of the information in [this] case" and includes blanks to be filled in to designate the case caption, the date, and the signature of a deputy clerk of the court. None of the blanks

in this certificate are filled in. The third is a certificate added to the page by way of a stamp, indicating that "[a] certified copy of the information was delivered or mailed to [Muse] or counsel of record . . . ." This certificate indicates that a certified copy of the second amended information was not served on Muse until May 26, and it includes a signature of a deputy clerk of the court.

On July 6, 2005, Muse appeared for sentencing. At that time, Muse's counsel asked the court to note that he had filed a "motion to arrest judgment"; he argued that the district court lacked jurisdiction because the second amended information was not properly filed with the clerk of the court prior to the verdict's being rendered. The State argued that "[t]he fact that the clerk's office didn't put [its] stamp on [the second amended information]" on May 23, when it was allegedly filed, "does not render anything that [the] Court did ineffective or not valid."

On July 7, 2005, the court filed an order sentencing Muse. The court sentenced Muse to 20 to 30 years' imprisonment for first degree sexual assault, 10 to 20 years' imprisonment for each of the two robbery convictions, and 10 to 20 years' imprisonment for each of the three convictions of use of a deadly weapon in the commission of a felony. This appeal followed.

## III. ASSIGNMENTS OF ERROR

Muse has assigned eight errors on appeal, which we consolidate for discussion to five. First, Muse asserts that the trial court erred in proceeding to trial and convicting him upon a second amended information that the record does not establish was ever properly filed. Second, Muse asserts that the court erred in granting a motion in limine. Third, Muse asserts that the court erred in admitting certain evidence. Fourth, Muse asserts that the court erred in accepting the jury's verdict. Fifth, Muse asserts that the court erred in finding Muse to be a habitual criminal.

## IV. ANALYSIS

### 1. Jurisdiction of District Court

The initial issue presented in this appeal is whether Muse's convictions and sentences can be sustained based on the record

presented. Muse argues that the second amended information, upon which trial proceeded, was never properly filed. The State argues that the second amended information was properly filed. We conclude that the record presented fails to establish the second amended information was not properly filed and that accordingly, the district court had jurisdiction to proceed with trial, conviction, and sentencing of Muse.

We begin by observing that in the introduction to the transcript, the lower court certifies that the second amended information was filed on May 23, 2005. The record presented on appeal also provides a copy of the second amended information to further prove its content and filing. The document shows that it was subscribed and sworn to before a deputy clerk of the district court on May 23. The face of the document shows a notation that the document was "FILED," followed by the purported date of filing, also May 23, 2005, and the signature of a deputy clerk acting in the name of the district court clerk, memorializing that the document was thus filed, albeit without using a file stamp.

When the parties appeared in court, the State was seeking leave to file the second amended information, indicating that such had not yet been done at that time. At the conclusion of the day's proceedings, the court indicated that it would take the second amended information from counsel for the State and "put a note on it to file it." On the second amended information's face, the deputy clerk's notation of filing states that such action occurred on May 23, 2005.

[1,2] Neb. Rev. Stat. § 25-2205 (Reissue 1995) states that "[i]t is the duty of the clerk of each of the courts to file together and carefully preserve in his [or her] office all papers delivered to him [or her] for that purpose in every action or special proceeding." Neb. Rev. Stat. § 25-2206 (Reissue 1995) requires, in relevant part, that "[t]he clerk of the court shall endorse upon every paper filed with him [or her] the day of filing it . . . ."

The duty imposed by § 25-2206 upon the clerk requires that officer to "endorse" the day of filing upon each document. However, except with regard to a final judgment, the parties have not cited, nor have we found, any statute that requires the "endorse[ment]" to be accomplished using a stamp. See *id.* We

recognize that Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2004) requires the clerk to affix a file stamp upon a judgment, decree, or final order as part of the "entry" of such judgment, decree, or final order. While use of a file stamp is an efficient and desirable means to making the endorsement required by § 25-2206, no statute requires use of a file stamp to make the required endorsement upon an information filed in a criminal case. Thus, by the deputy clerk's endorsement, the second amended information itself attests to its filing on May 23, 2005. It makes no difference in our analysis that some other person initially places the date of filing upon the document, so long as it appears that the filing officer has adopted that date.

[3] It has long been held that in the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. See, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Ludwig v. Board of County Commissioners*, 170 Neb. 600, 103 N.W.2d 838 (1960). See, also, e.g., *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993). Such presumptions are applied to the official acts of the clerks of the district courts. *State v. Hess, supra*. See, e.g., *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927). Because the clerk of the district court is required by law to file and endorse the date of filing of all documents filed in the court, the timely filing of such documents is an official act to which the presumption of regularity attaches. *State v. Hess, supra*.

In this case, Muse argues that the record does not indicate that the second amended information, upon which trial proceeded, was ever filed. In this regard, Muse relies primarily upon the absence of a file stamp on the second amended information. While the blanks were not filled in concerning the journal or page at which the second amended information was recorded, we observe that no statute requires the journal and page of recording to be endorsed on the document. Neb. Rev. Stat. § 29-1604 (Reissue 1995) generally applies the laws concerning prosecution upon indictments to prosecutions and proceedings upon informations. Neb. Rev. Stat. § 29-1418(1) (Reissue 1995) requires the court clerk to "endorse" upon an indictment

the "day of [its] filing" and requires the clerk to "enter each case upon the appearance docket, and also upon the trial docket of the term." These specific requirements are wholly consistent with the general requirement of § 25-2206. No statute requires that the location in the appearance docket where that notation is made be endorsed upon the filed document. In other words, while the clerk must record the filing of the information in the appearance docket, the clerk is not required to endorse the information with the journal and page of the appearance docket. Similarly, the typed certificate indicating that the second amended information is a true and accurate copy of the filed document was not completed, but no statute requires any such certificate. While it is apparent, from the discussion at the time the State sought leave to file a second amended information, that the second amended information was being left with the court to "put a note on it to file it," the second amended information bears the signature of a deputy clerk of the district court immediately below a typed indication that the information was filed on "May 23, 2005."

The deputy clerk's signature on the second amended information and the typed date of May 23, 2005, are presumed to be correct until the contrary is shown. See *State v. Hess, supra.* Thus, we must presume, in the absence of affirmative evidence to the contrary, that the deputy clerk performed her duty and endorsed the second amended information with the date it was in fact presented to her for filing—presumably by adopting the date already typed on the instrument. See *id.*

Our approach is also consistent with the decision of the Nebraska Supreme Court in *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). In that case, the record indicated that on April 30, 1999, before the clerk of the district court, the county attorney subscribed and swore to an information charging the defendant. The information, however, was not file stamped until October 5. The defendant had pled not guilty on October 4. On January 20, 2000, the defendant filed a motion to discharge on speedy trial grounds which was denied by the district court. The district court found that the speedy trial period begins to run when an information is filed and found that the information at issue was not filed until it was file stamped on October 5, 1999.

On appeal, this court affirmed the district court's denial of the motion to discharge. *Id.* See, also, *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). This court concluded that the speedy trial period did not begin to run until the information was file stamped on October 5, 1999. *Id.* The Nebraska Supreme Court dismissed a petition for further review as having been improvidently granted and, in a later appeal, held that this court's holding concerning the filing of the information had become the law of the case. *Id.*

The critical determination in our opinion in that case was our refusal to allow, for purposes of the speedy trial statute, the date of subscribing and swearing to the information to contradict the clerk's endorsement of the date of filing, which endorsement was accomplished by use of a file stamp. Neb. Rev. Stat. § 29-1207(2) (Reissue 1995) prescribes that the 6-month speedy trial period commences to run "from the date the indictment is returned or the information [is] filed." The statute does not refer to or require the use of a file stamp. In *Baker*, the date of filing was proven by the clerk's endorsement in the form of a file stamp bearing the date of October 5, 1999. In the case before us, the date of filing is proven by the deputy clerk's endorsement of a typed date by her signature. Thus, consistently with *Baker*, we view the endorsement date, rather than the date of subscribing and swearing, as controlling. In the instant case, unlike in *Baker*, those dates are the same. We recognize that the instant case presents no speedy trial issue; rather, we simply point out that our reliance upon the deputy clerk's endorsement of the filing date in the case before us does not conflict with the analysis in *Baker*. We find Muse's assertions of error concerning the filing of the second amended information to be without merit.

### 2. Motion in Limine

Muse asserts that the district court erred in sustaining the State's motion in limine to preclude testimony concerning a pending felony drug charge against one of the victims and a police search of the victims' residence conducted approximately 2 weeks prior to the incidents in the present case. Muse argues that he was prevented from presenting his "theory of the

defense"—"a drug deal gone bad." Brief for appellant at 9. We find no merit to Muse's assertions.

Although the court prevented Muse from presenting evidence on the matter, the record indicates that the two victims were the subject of an Omaha Police Department drug raid "a couple weeks prior" to the incident in this case, in which raid "$9,000 in cash and drugs were seized." At the time of trial in the present case, the male victim was apparently facing a pending felony drug charge as a result of the raid.

Prior to trial in the present case, the State made an oral motion in limine seeking to prevent Muse from inquiring about the male victim's pending felony charge and the prior drug raid on the victims' home. The State argued that the pending felony charge and the prior drug raid "somewhat [relate] to this case" and noted to the court, "When [Muse and his codefendants in the present] case came to the house, they demanded money, valuables, kept asking where's it at, where's it at. And we could assume that [the drugs and money were] what they're talking about." The State argued that Muse should be prevented from inquiring about the pending felony charge and the prior raid

> because [they] ha[ve] absolutely nothing to do with the facts of this particular case, in that if that was the motive for them coming over there, Your Honor, that has nothing to do with any of the elements. It has nothing to do with proving this case beyond a reasonable doubt. And it's prejudicial.

The court granted the motion in limine concerning the pending felony charge. We find no error in the ruling on this portion of the State's motion in limine.

Concerning the prior drug raid, Muse's counsel argued that the evidence was relevant "to the motive and intent" and that it "certainly could be impeachment material." The State argued that the evidence could not be impeachment material because "[i]mpeachment is when you're impeaching somebody's testimony, prior testimony, memory, knowledge of the event." The court reserved ruling concerning evidence of the prior drug raid and indicated that it would "make a decision at the time" and "[w]ait and see . . . whether [it] deem[ed] it relevant at the time." In effect, the court overruled that part of the State's motion

in limine, and because this part of the ruling was favorable to Muse, it cannot now be asserted as error. We therefore turn to Muse's arguments regarding exclusion of testimony.

During the trial, the male victim testified as a witness for the State. He described in detail what happened in the present case and identified Muse. During cross-examination, Muse's counsel questioned the male victim as follows:

> Q. Okay. And you relate to the [police] officers that the suspects were asking where are the drugs, where the money was; correct?
>
> A. Yes.
>
> Q. And you told the officers then that you did not know what [the suspects] were talking about; is that correct?
>
> A. Yes.
>
> Q. And that wasn't entirely truthful; was it?

At that point, the State objected and, at sidebar, argued, "Now we're getting into the area of the motion in limine when the police were there before talking about drugs and money. There's no relevancy to this line of questioning and I'd ask that we have a ruling on our motion in limine to keep that material out." Muse's counsel argued that if the court continued to allow this line of questioning, the male victim was "going to admit that he lied to the officers about being truthful with them about drugs and money and everything at the house" and that "it goes directly to his credibility." The court then inquired, "How does it go to his credibility? Where is it that you're saying he's been lying?" Muse's counsel responded that if the court continued to allow the questioning, it was "going to come out that [when] the officers asked [the male victim] if he knew any reason that people would be looking for drugs or money there, he said no." Counsel continued:

> And then eventually when pressed with information regarding the fact that his house had been raided a couple weeks prior and that $9,000 in cash and drugs were seized, he then came clean. He admitted lying to [the officers] at first. And that's directly related to his credibility. He's lying to [police] officers.

The State argued, "That has nothing, absolutely nothing to do with what we're doing here . . . it's not relevant and [is]

collateral." Muse's counsel responded, "I think anything involving his proclivity to lie to [police] officers affects his credibility." The court sustained the objection and indicated, "If it was directly in line with respect to some matter pertaining to this case, I'd let you go ahead. But it's highly prejudicial and it's something that occurred before."

Muse's counsel's next question of the male victim was "Sir, you're currently facing criminal charges that have been brought by [the county attorney's] office?" The State immediately objected. The State, in sidebar, argued, "[D]efense counsel intentionally violated [the court's] ruling on the motion in limine regarding pending charges and the state is contemplating moving for a mistrial. That was totally improper and inflammatory in front of the jury." Muse's counsel argued that the question "was a very general question" and explained:

> I was trying to get at the fact that [the male victim] might have motivation, just like any other state's witness that has charges pending, to explore whether or not they're going to be questioning some kind of deal. I kept it general for a very specific reason not to violate the order.

The court overruled the motion for mistrial, instructed the jury to disregard the question, and indicated, "[The question] is in violation of the motion in limine, so I'm going to ask [Muse's counsel] not to [ask] it again."

[4-6] In criminal cases, a trial court's ruling on a motion to suppress is reviewed for an abuse of discretion. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Additionally, the trial court is permitted to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice; the fact that evidence is prejudicial is not enough to merit exclusion, and relevant evidence should be excluded only if it has a tendency to suggest a decision on an improper basis that is unfairly prejudicial. See, *id.*; Neb. Rev. Stat. § 27-403 (Reissue 1995). In a jury trial, the credibility of witnesses is an issue to be resolved by the jury, not by the trial court. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

Muse's arguments at trial were substantially in conformity with his arguments on appeal. Muse asserts the following on appeal:

> [T]he preclusion of the evidence left the jury with a completely distorted impression of the incident and the motives of the victims and [Muse] and the impression of the condition of the residence which was in total disarray from the [previous police search] but photographic evidence was admitted which tended to show that [Muse] had caused the disarray. [Muse] argued that his defense of a drug deal gone bad was prevented by the order in limine. Muse asserts that the trial court denied him his right to a fair trial and violated his constitutional rights in preventing him from presenting his theory of the defense.

Brief for appellant at 9.

We find no abuse of discretion by the district court in excluding this testimony. Muse has not presented any authority, nor are we aware of any, which would indicate that Muse's motive for committing these crimes—a "drug deal gone bad"—would provide any kind of defense to any of the charges. Muse did not assert that this was a case of mistaken identity, but, rather, indicated in arguments to the trial court and this court that his theory of defense was that the entire incident was part of a drug deal. The district court did not abuse its discretion in precluding the testimony.

Although credibility of witnesses is always an issue, and although this evidence was relevant to the male victim's credibility, we also do not find the district court's exclusion of the evidence to be reversible error in this regard. The record in this case contained substantial evidence implicating Muse in these crimes. Not only the male victim's testimony, set forth above and objected to, but also the female victim's testimony, expert DNA evidence, and the testimony of a codefendant who had driven the "getaway" car, all demonstrated Muse's guilt. As such, any error in excluding this evidence was harmless beyond a reasonable doubt. See *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992) (improper admission of evidence is harmless error where evidence overwhelmingly supports conviction). This assignment of error is without merit.

### 3. Admission of Evidence

Muse next assigns as error that the district court "abused its discretion in receiving irrelevant and inflammatory photographic

evidence of knives which were not used in a crime." Muse argues that one photograph received by the district court was "prejudicial" and therefore should not have been received. Brief for appellant at 26. We find no merit to this argument.

The photograph at issue depicts a table in the victims' residence on which rest four knives. It is not clear from the testimony at trial whether any of the four knives are alleged to be the knives used by Muse and the other suspect in perpetrating the crimes. Muse's objections to the photograph at trial were that the photograph was "cumulative" and "prejudicial."

[7,8] On appeal, Muse argues that "[n]o testimony related the knives to any element of the crimes alleged." *Id.* at 25. Additionally, Muse urges this court to construe his "prejudice" objection as a "relevance and materiality" objection. *Id.* at 26. The Nebraska Supreme Court has held that to preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Further, on appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993).

In this case, Muse did not make any objection at trial concerning the foundation, relevance, or materiality of the photograph. Rather, Muse asserted that the photograph was cumulative, an objection he appears to have abandoned on appeal, and that the photograph was prejudicial. We conclude that Muse failed to preserve any issue concerning foundation or relevance of the photograph, and we find no merit to this assignment of error.

### 4. Acceptance of Verdict

Muse next asserts that the district court "erred when it accepted the verdict of eleven jurors polled and discharged the jury." We find this assignment of error to be meritless.

The record indicates that Muse asked the court to poll the jury when it returned the guilty verdicts. The court proceeded to poll the individual jurors, but for some reason, only 11 of them were initially polled. The court then accepted the verdict and found Muse guilty. Shortly thereafter, it was brought to the

attention of the court that one juror had not been polled. The court brought the 12th juror into the courtroom, polled the juror, and discharged him.

Neb. Rev. Stat. § 29-2024 (Reissue 1995) authorizes the polling of the jury "[b]efore the verdict is accepted" if requested by either party. Although Muse is correct in asserting that "[t]here is no provision that permits the court to separately poll a juror" after the verdict is accepted, brief for appellant at 25, neither is there any authority which suggests that doing so results in reversible error. In this case, the record indicates that all 12 jurors were polled and that all 12 jurors confirmed that their verdicts were "guilty" on each count, and Muse has not demonstrated any prejudice resulting from the separate polling of the 12th juror. This assignment of error is without merit.

### 5. Habitual Criminal

Muse next asserts that the district court "erred in receiving a partially authenticated exhibit and in finding [Muse] to be an habitual criminal." We find no merit to Muse's assertions.

At the sentence enhancement hearing, the State presented, without objection, evidence of a 2002 conviction for the crime of delivery of a controlled substance, for which Muse was sentenced to 18 to 24 months' imprisonment; evidence of a 1994 conviction for the crime of possession of a firearm by a felon, for which Muse was sentenced to 15 months' to 3 years' imprisonment; and evidence of a 1984 conviction for the crimes of false imprisonment and use of a deadly weapon in the commission of a felony, for which Muse was sentenced to consecutive terms of 18 months' to 3 years' imprisonment. In addition, the State offered a " 'pen packet' " from the Department of Correctional Services which compiled all three prior convictions, photographs of Muse, and fingerprint records.

The packet contains a cover page, which summarizes what is contained in the packet, and a concluding page, which is a certification from the records manager of the Secretary of State's office. The concluding page certifies that "the (1) photograph(s), (2) fingerprint card(s), (3) commitment, and (4) discharge order attached hereto are copies of the original records of" Muse. Muse objected that the packet should not be received because

the certification refers to only one "commitment" and one "discharge order" and therefore should not be construed as covering all three commitments and all three discharge orders contained within the packet. We find the packet to be sufficiently authenticated to be admissible and find no error by the district court in receiving the exhibit. Additionally, Muse failed to object to the other three exhibits proving his prior convictions and sentences.

In addition, Muse argued to the district court, and argues in his brief to this court, that with respect to one of the prior convictions, he was sentenced to 18 to 24 months' imprisonment with credit for 147 days for time served, but the evidence does not show he was committed to prison for more than 1 year, and as a result, the conviction was not properly used for enhancement. The Nebraska Supreme Court has specifically held that actual time served is not a consideration in determining whether the terms of the enhancement statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), have been satisfied. See, *State v. Wyatt*, 234 Neb. 349, 451 N.W.2d 84 (1990); *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), *overruled on other grounds, State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). Rather, it is the term of a defendant's prior sentences which controls the applicability of the habitual criminal penalty. See *id.*

[9] Section 29-2221(1) provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . .

The State presented evidence of three prior convictions, each of which resulted in a sentence of not less than 1 year in prison, which evidence was not objected to. Additionally, we find that the packet, which further compiled all three prior convictions, was properly authenticated. Muse's final assignment of error is without merit.

## V. CONCLUSION

We find that the record fails to establish the second amended information was not properly filed and that, accordingly, the district court had jurisdiction to proceed with trial, conviction, and

sentencing of Muse. We find no merit to any of Muse's assertions of error concerning his trial or enhancement hearing. The judgment of the district court is affirmed.

AFFIRMED.

IRWIN, Judge, dissenting.

The record presented on appeal fails to demonstrate that the operative information was ever properly filed before Muse's trial was held, and such failure creates a jurisdictional defect which makes the trial court's convictions and sentences void. Additionally, the majority's holding creates potential speedy trial problems. For those reasons, I respectfully dissent and conclude that this court should reverse.

As the majority notes, the issue presented in this appeal is whether Muse's convictions and sentences can be sustained based on the record presented. Muse argues that the second amended information, upon which trial proceeded, was never properly filed. The State argues that the second amended information was properly filed, notwithstanding the absence of any file stamp. The record presented fails to establish that the second amended information was properly filed, and accordingly, the district court was without jurisdiction to proceed with trial, conviction, and sentencing of Muse.

Neb. Rev. Stat. § 29-1602 (Cum. Supp. 2004) provides in part:

> All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. The prosecuting attorney shall subscribe his or her name thereto and endorse thereon the names of the witnesses known to him or her at the time of filing.

As long ago as 1925, the Nebraska Supreme Court held that failure to comply with the mandatory statutory language in the first sentence of the statute quoted above constitutes a jurisdictional defect. *Langford v. State*, 114 Neb. 207, 206 N.W. 756 (1925). In that case, the trial court ruled that the county attorney was not disqualified to file an information, but no information was actually filed in the district court. The defendant was convicted after a trial. On appeal, the Supreme Court held that the county attorney's failure to file the information pursuant to statutory language identical to that quoted above constituted a

jurisdictional defect and the court reversed the conviction and remanded the case.

In this case, Muse argues that the record does not indicate that the second amended information, upon which trial proceeded, was ever filed. As indicated above in the background section of the majority opinion, there is no file stamp on the second amended information, the blanks were not filled in concerning the journal or page at which the second amended information was allegedly filed, and the certificate indicating that the second amended information is a true and accurate copy of the document allegedly filed was never completed. It is apparent from the discussion in the trial court at the time the State sought leave to file a second amended information that the second amended information was being left with the court to "put a note on it to file it." However, it is not clear from the record presented that the second amended information was, in fact, filed. It is this absence in the record which prompts me to disagree with the majority's analysis.

The State argues that we can discern that the second amended information was properly filed because a "transcript certificate" completed by a deputy clerk of the district court states that the second amended information was filed on May 23, 2005, because the first page of the second amended information contains a typed indication that it was filed on May 23, and because the deputy clerk of the court attested to counsel for the State's subscribing and swearing to the second amended information on May 23. Brief for appellee at 27. The majority concludes that the "presumption of regularity" suggests that the information was properly filed.

The question presented to this court is whether we can determine from the record presented that the second amended information was properly filed and, if so, when. In this regard, the lack of any proper file stamp, as well as the other "blanks" left on the second amended information and not filled in by the clerk or a deputy clerk of the district court, demonstrates that the record does not indicate that the second amended information was ever properly filed.

The case *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), is instructive. In that case, the record indicated that on

April 30, 1999, before the clerk of the district court, the county attorney subscribed and swore to an information charging the defendant. The information, however, was not file stamped until October 5. The defendant had pled not guilty on October 4. On January 20, 2000, the defendant filed a motion to discharge on speedy trial grounds which was denied by the district court. The district court found that the speedy trial period begins to run when an information is filed and found that the information at issue was not filed until it was file stamped on October 5, 1999.

On appeal, this court affirmed the district court's denial of the motion to discharge. *Id.* See, also, *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). This court concluded that the speedy trial period did not begin to run until the information was file stamped on October 5, 1999. *Id.* The Nebraska Supreme Court dismissed a petition for further review as having been improvidently granted and, in a later appeal, held that this court's holding concerning the filing of the information had become the law of the case. *Id.*

Although there was a subsequent file stamp in *State v. Baker*, there are meaningful similarities between *State v. Baker* and the present case. In both cases, the record indicates a specific date on which the relevant information was subscribed and sworn to by the county attorney or a deputy county attorney. In both cases, the record indicates that the relevant information was not file stamped on that date. In *State v. Baker*, this court had held that the relevant information should not be considered properly filed for purposes of speedy trial calculations until it was file stamped, despite the detrimental effect such a finding had on the defendant's motion to discharge. According to the record in the present case, the second amended information has yet to be file stamped. As such, this court should conclude that the record presented on appeal does not indicate that the second amended information has yet been properly filed.

The record presented on appeal indicates that the second amended information, although subscribed and sworn to before a deputy clerk of the district court on May 23, 2005, was not file stamped on that date. When the parties appeared in court, the State was seeking leave to file the second amended information,

indicating that such had obviously not been done yet at that time. At the conclusion of the proceedings, the court indicated that it would take the second amended information from counsel for the State and "put a note on it to file it." Unfortunately, there is nothing to indicate that such was ever done. The majority's "presumption of regularity" analysis presupposes that the information was actually presented to the deputy clerk of the court for filing on May 23, such that the deputy clerk's signature can be said to constitute an endorsement on that date and such that the presumption that the deputy clerk properly filed the document on that date can attach.

The majority's analysis potentially creates significant problems for future cases involving such matters as motions to discharge on speedy trial grounds. As the case *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), indicates, the presence of a file stamp to indicate definitively when an information was filed is necessary for courts to properly calculate the running of the speedy trial clock. Neb. Rev. Stat. § 25-2206 (Reissue 1995), relied upon by the majority in concluding that the deputy clerk of the district court's signature on the front of the information indicates compliance with statutory mandates, requires "[t]he clerk of the court [to] endorse upon every paper filed with him, *the day of filing it*; and upon every order for a provisional remedy, and upon every undertaking given under the same, *the day of its return to his office*." (Emphasis supplied.) The plain language of this statute requires the clerk of the court to take some action to indicate the date of filing, such as by file stamping the filed document. Contrary to the majority's conclusion, the signature of the deputy clerk of the district court on the front of the second amended information fails to satisfy this statutory requirement precisely *because* of the lack of a file stamp; the clerk failed to endorse *any* day because the clerk failed to provide a file stamp indicating the date of filing. The only reference to May 23, 2005, is the typing of the county attorney's office, not provided by the clerk of the court, and the only additional date stamped on the information after it left the deputy county attorney's possession in court is a stamp indicating, "MADE MAY 26 2005."

To conclude that the "presumption of regularity" is enough to indicate that the second amended information in this case was

filed on May 23, 2005, despite the lack of any file stamp or other affirmative evidence to indicate that the document has ever been properly filed, leads to the absurd result of allowing convictions on the basis of an information which, as far as we can affirmatively determine, may never have been filed and was apparently not served on Muse until the final day of a 3-day trial. We should not suggest that the important jurisdictional requirement of proper filing of the information can be satisfied on the basis of a presumption which presupposes a fact not demonstrated in our record—that the trial judge actually delivered the second amended information to the clerk on the date pretyped on the information by the county attorney's office.

The only stamps appearing on the second amended information indicate that it was "MADE MAY 26 2005" (a stamp that counsel at oral argument was unable to explain) and that a copy of the second amended information was served on Muse on May 26, 2005, which was actually the final day of a 3-day trial. There is nothing to affirmatively indicate that the information was actually presented to the clerk by the court or actually filed on May 23, prior to the commencement of trial. Because the filing of the operative information is a jurisdictional matter, see *Langford v. State*, 114 Neb. 207, 206 N.W. 756 (1925), the record presented to us fails to establish that the district court had jurisdiction to proceed with the trial or convict and sentence Muse on the charges. As such, we should reverse on the basis of the trial court's lack of jurisdiction to proceed with trial, conviction, and sentencing.

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PAMELA SNOWDEN, WIDOW OF DECEASED EMPLOYEE JEFFREY SNOWDEN, APPELLANT, AND GENEVIEVE SNOWDEN, DEPENDENT OF DECEASED EMPLOYEE, APPELLEE, V. HELGET GAS PRODUCTS, INC., APPELLEE.

721 N.W.2d 362

Filed September 12, 2006. No. A-05-1478.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or

award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
5. **Workers' Compensation: Notice.** The Nebraska Workers' Compensation Act provides that want of written notice shall not be a bar to proceedings under the act, if it be shown that the employer had notice or knowledge of the injury.
6. ____: ____. The purposes of the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004) are to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and to facilitate the earliest possible investigation of the facts surrounding the injury.
7. ____: ____. Neb. Rev. Stat. § 48-133 (Reissue 2004) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that therefore, the employer should investigate the matter further.
8. ____: ____. Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004).
9. ____: ____. In workers' compensation cases, notice to the insured-employer is binding on the insurer.
10. ____: ____. For notice or knowledge purposes under Neb. Rev. Stat. § 48-133 (Reissue 2004), the employer equates to the insurer, and vice versa.
11. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
12. **Workers' Compensation: Liability.** Voluntary payments of workers' compensation benefits do not constitute an admission of liability by an employer.
13. **Workers' Compensation: Notice.** Actual payment of workers' compensation benefits or provision of medical care is usually held to dispense with the necessity of notice of injury.
14. **Workers' Compensation: Final Orders.** An order in a workers' compensation action must satisfy the requirements of Workers' Comp. Ct. R. of Proc. 11 (2006).

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

W. Craig Howell, of Howell, Wilson & Derr, P.C., L.L.O., and Jerold V. Fennell for appellant.

Matthew J. Buckley and William D. Gilner, of Nolan, Olson, Hansen, Lautenbaugh & Buckley, L.L.P., for appellee Helget Gas Products.

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

SIEVERS, Judge.

Pamela Snowden and Genevieve Snowden, the widow and dependent child of Jeffrey Snowden, respectively, brought a workers' compensation action claiming that Jeffrey was injured while working at Helget Gas Products, Inc. (Helget), on February 18, 2002, while lifting gas cylinders. Pamela and Genevieve alleged that as a consequence of the injury, Jeffrey committed suicide on March 13, 2004. Pamela and Genevieve sought temporary disability benefits, payment of medical and funeral expenses, and widow's and dependent's benefits. The trial judge of the Workers' Compensation Court entered an order of dismissal, finding that Jeffrey failed to report his injury to his employer as soon as practicable. Pamela appealed to the review panel of the Workers' Compensation Court, which affirmed the trial judge's decision. Pamela appeals, and we reverse, because after review of the undisputed facts, we find that a reasonable employer had notice or knowledge Jeffrey's injury was potentially compensable and that as a result, the employer should have investigated the matter which satisfies the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004). Additionally, because of the trial judge's failure to render a reasoned decision under Worker's Comp. Ct. R. of Proc. 11 (2006), we vacate the judge's finding that Jeffrey's death by suicide was willful negligence.

## FACTUAL BACKGROUND

Prior to 2002, Jeffrey suffered from various medical difficulties resulting from a car accident occurring in the late 1970's. Jeffrey began working at Helget in 2001. During the interview process, Jeffrey informed Helget that he had previously injured his back but that his doctors had released him to work. While working at Helget, Jeffrey was responsible for loading cylinders filled with gas onto the delivery truck and delivering them to the customers. According to Dale Weidner, Jeffrey's supervisor at Helget, the typical filled gas cylinder stands about 5½ feet tall

and weighs between 145 and 160 pounds, but there are smaller 3-foot cylinders that weigh about 8½ pounds (we assume the reference is to an empty cylinder). Typically, Helget uses a two-wheeler to move the larger cylinders and a four-wheeled cart to move the smaller cylinders. Helget's policy is that its employees are to use the two-wheelers and four-wheeled carts to lift and move the gas cylinders.

During the morning on February 18, 2002, Jeffrey and Weidner loaded Jeffrey's delivery truck with gas cylinders and then Weidner's assistant inventoried Jeffrey's load. As Jeffrey pulled away from the loading dock, some of the cylinders fell over in the truck. According to Weidner's testimony, Jeffrey and Weidner's assistant picked up the cylinders and restrapped them to the truck's wall. Weidner further testified that in the afternoon of the same day, Jeffrey hit a parked car with his truck in a parking lot, and that Weidner came to the scene of the accident. Weidner testified that Jeffrey told him he was "all right." Weidner had Jeffrey take a drug test per company policy and sent him home. The drug test was negative, although we note that the record does not reveal which drugs were screened.

The next day, Jeffrey resumed his regular work schedule. Between February 19 and March 8, 2002, Jeffrey called in sick once. Also between February 19 and March 8, Weidner approached Jeffrey about his job performance, and Weidner testified that Jeffrey explained that he had had a rough couple of weeks with the "accident and everything."

However, Jeffrey had visited his physician, Dr. Kurt V. Gold, on February 21, 2002, and according to Dr. Gold's records, Jeffrey said that he did significant lifting of gas cylinders earlier in the week—which activity required bending, twisting, and lifting—and that he was in a minor car accident. Dr. Gold evaluated Jeffrey and concluded that Jeffrey's then-current back problem was a work-related aggravation of his preexisting low-back condition. Dr. Gold prescribed a fentanyl lozenge and a fentanyl patch for Jeffrey's aggravated back injury.

On February 25, 2002, Weidner observed Jeffrey wearing a back brace at work. According to Weidner's testimony, Jeffrey informed him that his back was a "little tight" and that the back brace had nothing to do with Helget.

Then on March 8, 2002, Weidner met with Jeffrey, but the only account of that meeting is found in Weidner's testimony, which we summarize. Jeffrey decided to resign his position effective March 8. During this meeting, Jeffrey started talking about the events of the previous month and informed Weidner that he had been wearing his back brace under his uniform and that he had been using "morphine suckers" for the pain, which medication other evidence shows to have been fentanyl lozenges. Jeffrey inquired about the possibility of something work-related coming up after his resignation that resulted from his time at Helget, and Weidner stated that "if there was a problem because of his employment here, [Helget] would do what was required." Jeffrey signed a form from Helget which said that he was leaving his employment by mutual agreement because of health concerns as well as productivity issues. Helget offered Jeffrey 2 weeks of severance pay, and the final check was to be issued on April 1.

Later on the same day that Jeffrey resigned, Dr. Gold evaluated him and wrote in his notes that it was unfortunate Jeffrey's employment with Helget had ended and that Dr. Gold would appeal to Jeffrey's employer to "reconsider under these circumstances and to contact [Dr. Gold] personally if [Helget] has any questions or concerns regarding [Jeffrey's] condition." Dr. Gold also wrote that he wanted to see Jeffrey again for a progress review in 4 weeks, which would have been in April 2002.

After resigning, Jeffrey contacted Weidner about job references and the possibility of returning to work at Helget. Approximately 7 days after resigning, Jeffrey met with the owner of Helget in his office. Jeffrey inquired about getting his job back, and the owner said that he asked Jeffrey about his back, to which Jeffrey responded that he could do the job as required.

On April 4, 2002, Dr. Gold evaluated Jeffrey. Dr. Gold noted that Jeffrey had increased pain in his back and that Jeffrey had "attempted to go off" the fentanyl patch, but without success. On April 19, Helget's workers' compensation insurance carrier issued a payment for temporary total disability benefits in the amount of $1,840.02 for 6 weeks (March 22 through May 2, 2002). The temporary total disability payments continued until December 4, 2003. On December 24, Jeffrey filed his petition for temporary and permanent total disability benefits, payment

of medical care expenses, and vocational rehabilitation benefits. Jeffrey continued to see various physicians regarding his back pain who prescribed various pain medicines including OxyContin and Lortab. Jeffrey was also evaluated by a psychiatrist, Dr. Mark J. Diercks, who wrote in his notes that Jeffrey had been treated with antidepressants by his primary care physicians for the past 5 years and was on antidepressants as of February 20, 2003, when Dr. Diercks evaluated Jeffrey. According to Dr. Diercks' notes, Jeffrey experienced seizures because of his antidepressant medication. Dr. Diercks concluded that Jeffrey was depressed. Jeffrey died on March 13, 2004. Jeffrey's surviving wife, Pamela, revived Jeffrey's action. The parties stipulated at trial that Jeffrey died on March 13 as a result of drug toxicity.

## PROCEDURAL BACKGROUND

After the trial on November 29, 2004, the compensation court trial judge found that Jeffrey had suffered an injury on February 18, 2002, arising out of and in the course of his employment but that he failed to give to his employer notice of his injury as soon as practicable and that therefore, his claim was barred under § 48-133. Pamela filed an application for review, and on November 18, 2005, the compensation court three-judge review panel affirmed the trial judge's order of dismissal.

Pamela appealed the decision of the review panel, and at the time that Pamela filed her brief, she failed to file a notice of a constitutional question with respect to § 48-133. On April 17, 2006, she filed a motion for enlargement of time to file the notice of constitutional question. The Supreme Court denied such motion, and accordingly, no issue of the constitutionality of a statute is involved in the appeal. Thus, the case remains on our docket.

## ASSIGNMENTS OF ERROR

Pamela asserts, reordered and restated, that the trial court erred by (1) finding that the deceased failed to report his injury as soon as practicable after the accident, (2) allocating to Pamela the burden of proving that the deceased's fatal ingestion of narcotic drugs was not willful negligence, (3) finding that the deceased's fatal ingestion of narcotics constituted willful negligence, and (4) assuming that as a matter of law, the

intentional ingestion of narcotic drugs by the deceased was willful negligence.

## STANDARD OF REVIEW

[1-3] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

## ANALYSIS

*Notice and Knowledge of Injury.*

[4-10] We first deal with the question of notice under § 48-133. The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). Section 48-133 provides:

> No proceedings for compensation for an injury under the Nebraska Workers' Compensation Act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; *Provided*, that all disputed claims for compensation or benefits shall be first submitted to the Nebraska Workers' Compensation Court. The notice shall be in writing and shall state in ordinary language the time, place, and cause of the injury. . . . *Want of such written notice shall not be a bar to proceedings under the Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury.*

(Emphasis supplied.) "The purposes of the notice requirement are '[f]irst, to enable the employer to provide immediate medical

diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury.' " *Williamson v. Werner Enters.*, 12 Neb. App. 642, 648, 682 N.W.2d 723, 728 (2004), quoting 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2003). Section 48-133 provides an exception to the written notice rule if it can be shown that the employer had notice or knowledge of the injury. The nature and extent of such notice or knowledge has been articulated by the Nebraska Supreme Court as follows: "Section 48-133 contemplates a situation where an employer has *notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable* and that, therefore, the employer should investigate the matter further." (Emphasis supplied.) *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 65, 541 N.W.2d 49, 53 (1995), citing *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985). Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of § 48-133. *Thompson, supra.* Moreover, notice to the insured-employer is binding on the insurer. See, Neb. Rev. Stat. § 48-146 (Supp. 2005); *Miller v. Commercial Contractors Equip.*, 14 Neb. App. 606, 711 N.W.2d 893 (2006). But here, the reverse situation is present, because the evidence shows that the insurer paid temporary total disability benefits within 2 months of the alleged accident, and thus, the insurer obviously had notice and knowledge of a claim within 2 months—and likely less than 2 months, given the need for some amount of "processing time" between notice of a claim and issuance of a first payment of benefits. In any event, we hold that for notice or knowledge purposes under § 48-133, the employer equates to the insurer, and vice versa.

[11] The compensation court found that based upon the testimony of Dr. Gold and the office visit he had with Jeffrey on February 21, 2002, Jeffrey suffered an "injury bending and lifting containers of various gases on February 18, 2002, arising out of and in the course of his employment." Helget does not cross-appeal this finding, and thus it is now the "law of the case." See

*State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999) (law-of-the-case doctrine operates to preclude reconsideration of substantially similar, if not identical, issues at successive stages of same suit).

We examine the information that Helget had between February 18 and April 19, 2002, regarding the incident on February 18 and Jeffrey's accompanying back injury. We use the date of April 19, because on such date, Jeffrey was paid temporary total disability benefits via a check from Helget's insurance carrier. Thus, indisputably, Helget and its insurer had notice of Jeffrey's claim absolutely no later than April 19, and likely sooner, in order to generate the referenced payment. Unfortunately, the evidence does not shed any light on what would be helpful information about how the insurer came to issue the April 19 payment, as well as the crucial dates involved in the issuance of the check.

However, returning to what is in the record, we know from Weidner's testimony that Helget knew that Jeffrey lifted gas cylinders in the morning and was in a car accident in the afternoon on February 18, 2002. Helget also knew that Jeffrey wore a back brace to work on February 25. Less than 3 weeks after the incidents on February 18, the employer understood that Jeffrey was resigning and that health concerns were a reason for such resignation. Helget further knew that during the resignation meeting, Jeffrey talked about the events of the previous month and informed Weidner that Jeffrey had been wearing his back brace under his uniform and had been using "morphine suckers." Additionally, Helget knew that Jeffrey had concerns about the possibility of something work-related coming up after his resignation that resulted from his time at Helget, and in response to Jeffrey's voicing his concerns, Weidner told him that "if there was a problem because of his employment [at Helget], [Helget] would do what was required." Helget also knew that Jeffrey would receive his last paycheck on April 1.

The compensation court found that Jeffrey failed to report to Helget his February 18, 2002, injury as soon as practicable, thus barring the claim under § 48-133. However, neither the trial judge nor the review panel analyzed the notice issue using the rubric, as articulated by the Supreme Court in *Scott v. Pepsi*

*Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995), for determining whether the employer's notice or knowledge was sufficient. Instead, the trial judge and the review panel relied solely on a decision of this court, *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004), a case which is distinguishable in a number of respects, as we shall later discuss. Under *Scott*, the crucial question in the instant case is whether Helget had knowledge sufficient to lead a reasonable person to conclude that Jeffrey's back condition was potentially compensable and that an investigation was required. In *Scott*, the Supreme Court held that when the facts concerning reporting and notice are not disputed, whether such facts constitute sufficient notice to the employer under § 48-133 is a question of law. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Scott, supra.*

The following facts are undisputed: Helget had immediate knowledge of the two incidents on February 18, 2002, plus knowledge within a week thereafter that Jeffrey had begun using a back brace. Furthermore, after the two incidents, Helget knew that Jeffrey worked less than 3 weeks before his resignation, which was in part due to his health concerns, and that he was concerned about what work-related issues might arise after his resignation. Helget's workers' compensation insurance carrier issued a check on April 19 paying Jeffrey temporary total disability benefits for the time period of March 22 through May 2, 2002. This payment must be viewed as if Helget itself issued the check, and of course, knowledge of the claim sufficient to trigger the issuance of the check obviously occurred sometime prior to the date of the check—although the record before us is deficient because it does not disclose how and when the insurer was notified of Jeffrey's claim so as to trigger the issuance of the April 19 check. These core facts are undisputed, but it is noteworthy that because Jeffrey is deceased, we have only the testimony of Helget's employees about what Jeffrey said. Nonetheless, the central fact remains that the workers' compensation insurer for Helget made payment of benefits within 2 months of the claimed accident date.

[12,13] We are aware that voluntary payments of workers' compensation benefits do not constitute an admission of liability

by an employer. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Nonetheless, the fact of such a payment clearly tends to prove that the employer or insurer had knowledge and notice of the claimed compensable injury, a different question than whether the employee sustained a compensable injury. In Professor Larson's treatise, he explains that "actual payment of compensation or provision of medical care is usually held to dispense with the necessity of notice of injury" and that "[t]his result follows naturally from the rule on actual knowledge, since the employer could hardly claim ignorance of the injury toward which it is contributing such payments." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.03[4] (2006). See, also, *Gilbert v. Metropolitan Utilities Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953), citing *Royal Co. v. Industrial Com.*, 88 Colo. 113, 293 P. 342 (1930). Therefore, we consider the April 19, 2002, benefits payment for that limited purpose, noting that no objection was made to such evidence by Helget.

After our independent review of the foregoing undisputed facts, we conclude as a matter of law that a reasonable employer, with the knowledge Helget possessed, would conclude both that a potential workers' compensation claim existed and that it should investigate the matter. It is important to point out that under *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995), the question is not whether Helget had notice or knowledge that Jeffrey's claim was valid or compensable, or even whether Jeffrey thought he had a compensable claim. Instead, the question is whether Helget knew enough that a reasonable employer would conclude, "This employee potentially has a workers' compensation claim and we had better investigate." Given the issuance of the April 19, 2002, check, Jeffrey obviously gave notice and made a claim before that date—although how long before, we cannot know from this record.

Next, we contrast this case with the only reported Nebraska case finding that any claim for benefits was barred for not giving notice "as soon as practicable" under § 48-133. See *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004). In *Williamson*, the compensation court found that the injured employee waited approximately 5 months to give his employer

notice, and our colleagues deferred to the compensation court's factual findings while saying that such delay exceeded "the outer limit of any reasonable delay." *Id.* at 653, 682 N.W.2d at 732. The *Williamson* court discussed the applicable standard of review, referencing the holding of *Scott, supra*, that sufficiency of notice when facts are undisputed becomes a question of law. The *Williamson* court found that the standard was whether the compensation court was clearly wrong because of the presence of a substantial dispute of fact in the evidence—a situation not present here. Additionally, and most importantly, *Williamson* did not involve anything remotely resembling this highly unusual situation where temporary total disability benefits were initially paid within 2 months of the injury and continued for another 84 weeks for a total amount of $30,224.50, plus medical bills were paid in the amount of $27,279.85, and thereafter, the issue of notice was raised. Consequently, for a variety of reasons, we find that *Williamson* is a very different case than the one before us and that it does not control the result here.

In conclusion, we find that the record presents a question of law as to whether § 48-133 bars the claim, because the essential facts are undisputed. As a result, we reach an independent conclusion. In doing so, we rely upon the Nebraska Supreme Court's conceptualization of "notice or knowledge" under § 48-133 as set forth in *Scott, supra*. Therefore, we hold that a reasonable employer would have had sufficient notice and knowledge that Jeffrey's back condition was potentially a compensable injury and that investigation thereof should have been undertaken. Accordingly, we reverse the compensation court's finding that Helget did not have sufficient notice or knowledge and the finding that § 48-133 barred Jeffrey's claim.

*Consequences of Our Reversal.*

Having found that Jeffrey's claim for workers' compensation benefits is not barred, we turn to the matter of what follows from our decision. We begin by noting that the compensation court found that (1) Jeffrey suffered an injury on February 18, 2002, in an accident arising out of and in the course of his employment and (2) Jeffrey failed to give timely notice of his injury to Helget. The compensation court expressly found the remaining issues to be moot. Nevertheless, the compensation court trial

judge's decision says that "the parties may find it helpful to have the Court address the sixth issue," which the pretrial order defined as whether Jeffrey's "death was accidental or an intentional act or the product of willful negligence." The trial judge wrote that Jeffrey "intentionally ingested an overdose of narcotics for the purpose of ending his life," and the judge characterized such act as willful negligence as defined in Neb. Rev. Stat. § 48-151(7) (Reissue 2004), which negligence would bar any recovery of death benefits under the Nebraska Workers' Compensation Act.

On appeal, the review panel affirmed the trial judge's finding as to the lack of notice, but the review panel did not address the cause or legal consequences of the manner of Jeffrey's death and stated that it was "not obligated to engage in an analysis which is not needed to adjudicate the controversy before it," citing *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). The review panel further wrote, "[G]iven the review panel's affirmance of the trial court's finding that [Jeffrey's] claim is barred based upon the absence of notice defense, a discussion of the other alleged errors would be superfluous." Obviously, after our decision on the notice issue, the issues unaddressed by the trial court are not moot; nor can it now be said that the manner and consequences of Jeffrey's death are still "superfluous." On appeal to this court, Pamela assigns as error the trial judge's conclusion that Jeffrey was guilty of willful negligence. However, Helget did not cross-appeal the core finding that Jeffrey had sustained a compensable injury on February 18, 2002. Thus, the questions are whether Jeffrey's injury was a cause of his death and whether his death was caused by willful negligence.

[14] An order in a workers' compensation action must satisfy the requirements of rule 11 of the Workers' Compensation Court, which rule provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which

> the judge relies. The decision shall provide the basis for a meaningful appellate review.

See, also, *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998) (finding that failure of trial judge to clearly determine issue precluded meaningful appellate review and thus remanding cause to trial judge). We find that when the trial court addressed only issues 1, 2, and 6 of the pretrial order, the court failed to address Jeffrey's documented depression and corresponding treatment prior to March 13, 2004, as well as the law set forth in *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983) (reasoning that even though employee knew she was inflicting mortal wound upon herself, this will not, in all cases, constitute willful negligence within meaning of statute barring recovery; thus, when employee's injuries result in becoming devoid of normal judgment and dominated by disturbance of mind directly caused by injuries, suicide is not willful under Nebraska Workers' Compensation Act). Thus, the trial judge rendered an opinion on what he characterized as a moot issue, and moreover, the trial judged failed to analyze the issue in light of the controlling precedent. Such holding in these circumstances does not satisfy the requirements of rule 11. Therefore, we vacate the trial court's decision on issue 6 of the pretrial order—whether Jeffrey's death was accidental or an intentional act or the product of willful negligence—and we remand the question for the entry of an order on the evidence adduced which comports with rule 11 with reference to issues 3 through 8 of the pretrial order. See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996) (remand for new decision by trial judge on evidence adduced when judge did not follow rule 11). The unresolved issues from the pretrial order include the extent of any temporary disability caused by the accident; the liability of Helget for the payment of medical and hospital bills incurred by Jeffrey prior to March 13, 2004; whether the drugs causing the toxicity had been prescribed for a compensable condition; the entitlement of Pamela of any medical bills incurred in connection with the death of Jeffrey on March 13, together with funeral and burial expenses; and whether Genevieve, Jeffrey's child, is and has been actually dependent since March 13. Thus, we remand the cause to the trial court for disposition of all the

issues relating to entitlement to workers' compensation benefits flowing from Jeffrey's work accident on February 18, 2002.

## CONCLUSION

For the foregoing reasons, we reverse the Workers' Compensation Court's dismissal with prejudice, and we remand the cause to the review panel with directions that it remand it to the trial judge for a decision as required by rule 11.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# IN RE INTEREST OF MAXWELL T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LLOYD T., ALSO KNOWN AS B.J. T., APPELLANT.

721 N.W.2d 676

Filed September 19, 2006. No. A-05-1477.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed in part, and in part remanded with directions.

Allan A. Armbruster, Jr., for appellant.

Stuart J. Dornan, Douglas County Attorney, and Chad M. Brown for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

## I. INTRODUCTION

Lloyd T., also known as B.J. T., appeals an order by the separate juvenile court of Douglas County, in which order the court found that it had continuing jurisdiction in the matter and adjudicated Lloyd's son, Maxwell T., as a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). For the reasons set forth herein, we affirm in part, and in part remand with directions.

## II. BACKGROUND

Maxwell was born to Lloyd and Marsha L. on February 3, 2003, in Omaha, Nebraska. Lloyd and Marsha were divorced pursuant to a decree of dissolution entered in Minnehaha County, South Dakota, on July 19, 2004. Marsha was provided notice of the dissolution proceedings, but did not appear personally or by counsel. The decree granted custody of Maxwell to Lloyd, with supervised visitation rights for Marsha. The decree further provided that Marsha could not remove Maxwell from Minnehaha or Lincoln Counties, South Dakota, without the prior written consent of Lloyd or an order of the court.

At some point, Lloyd apparently committed a parole violation and was returned to the South Dakota State Penitentiary. Lloyd was on parole from two convictions he received in 1997, for grand theft by obtaining property or services with a false credit card and being a habitual offender. In late August 2004, Marsha took physical custody of Maxwell and brought him to Bellevue, Nebraska, where Marsha and Maxwell lived with Marsha's aunt.

On January 20, 2005, Marsha was transported by ambulance to a hospital after ingesting a large quantity of vodka. Marsha reported that she regularly consumed as much as 1½ liters of

vodka per day and that she decided to enter an alcohol treatment program. Marsha stated that there was no one who could care for Maxwell. A police officer was called to the hospital and placed Maxwell in an emergency foster home.

The State filed a petition on January 21, 2005, which alleged that Maxwell was within the meaning of § 43-247(3)(a) in that Maxwell was "homeless or destitute, or without proper support through no fault" of Marsha. The petition alleged that Marsha had been hospitalized on or about January 20 for psychiatric treatment and that she had reported that there was no one to care for Maxwell; the petition asserted that this placed Maxwell at risk for harm. A motion for temporary custody was also filed that day, which motion requested that custody of Maxwell be placed with the Department of Health and Human Services (DHHS). The juvenile court granted the motion for temporary custody that same day, placing custody of Maxwell with DHHS.

A detention hearing was held on February 2, 2005. Marsha appeared and was represented by her attorney and a guardian ad litem. Marsha reported that she was no longer hospitalized, but had entered an alcohol treatment program in Omaha. Marsha was advised of her rights in the proceedings and did not contest the continued detention of Maxwell with DHHS. The court order resulting from this hearing reflects that the court found that jurisdiction was proper and continued custody of Maxwell with DHHS, with reasonable rights of supervised visitation granted to "the parents." There was no mention of Lloyd at this hearing, but the court order reflects that Marsha was ordered to complete an affidavit of identification of Maxwell's father.

An adjudication hearing with respect to Marsha was held on May 4, 2005. Marsha admitted to the allegations in the petition, with the language of the petition changed from Marsha's being hospitalized "for psychiatric treatment" to her being hospitalized "for alcoholism & depression." The court order resulting from this hearing indicates that the court found that jurisdiction was proper, and Maxwell was adjudicated under § 43-247(3)(a). Custody of Maxwell was continued with DHHS. No mention of Lloyd was made at the hearing, but the court order reflects that Marsha was again ordered to complete an affidavit of identification of Maxwell's father.

A disposition and permanency planning hearing was held on June 27, 2005. A court report and case plan prepared by Monica Lewis, the DHHS caseworker for the case, was admitted into evidence. The court report, dated June 23, 2005, listed Lloyd as Maxwell's father and provided an Omaha address for Lloyd. The report, together with other evidence, indicated that Marsha was enrolled in a halfway house chemical dependency treatment program and was making good progress. The case plan listed the permanency objective as reunification, with a target date of October 1, 2005.

Also admitted into evidence was a report by Marsha's guardian ad litem. The report indicated that Marsha desired to be reunited with Maxwell and to have "full care, custody, and control" of him. The report also stated the following:

> Finally, Marsha expressed concerns regarding custody of [Maxwell] upon termination of the Juvenile case. Prior to this Court acquiring Jurisdiction, custody of the child was granted by the state of South Dakota to the child's father, Lloyd . . . pursuant to a divorce decree entered on July 19th, 2004. [Lloyd] is currently incarcerated, and Marsha pressed the County Attorney to bring [Lloyd] under this Court's jurisdiction in order not [to] leave a jurisdictional vacuum upon disposition.

One of the recommendations in the guardian ad litem's report was that Lloyd's "incarceration and his status as the default custodian upon termination of jurisdiction be taken into account at the disposition stage of the proceedings."

The guardian ad litem voiced these concerns at the June 27, 2005, hearing, stating to the court:

> [M]y only concern in terms of a review timeline is that custody of [Maxwell] actually belongs to [Lloyd] under the full decree from another state, and that's something that [Marsha] needs to work on. Arturo Perez, the previous county attorney on this case, had expressed his intention to file against [Lloyd], and we kind of don't know where things are at right now, so that's something to keep in mind as we are setting reviews.

The State responded that it understood Lloyd was incarcerated in South Dakota and that the State would look further into the

matter. The court later stated, "I appreciate the State looking into that other matter because I think as we — as you [Marsha] progress, we want to be able to move in that direction, too." In the court order resulting from this hearing, the court found that jurisdiction was proper, continued custody of Maxwell with DHHS, and granted Marsha reasonable rights of semisupervised visitation transitioning into overnights and weekends. The court found that the permanency objective was reunification. There was no reference to Lloyd in the court order.

On June 29, 2005, the State filed a supplemental petition which alleged that Maxwell was within the meaning of § 43-247(3)(a) with respect to Lloyd. Specifically, the supplemental petition alleged that Maxwell was "lacking proper parental care by reason of the faults or habits of" Lloyd, in that Lloyd was currently incarcerated and unable to care for Maxwell, had had no contact with Maxwell for more than 6 months, and had failed to provide proper parental care for Maxwell and in that because of those allegations, Maxwell was at risk for harm. The supplemental petition listed Lloyd's address as the South Dakota State Penitentiary, in Sioux Falls, South Dakota.

A first appearance hearing on the supplemental petition was held on July 14, 2005. The proceedings are not included in the bill of exceptions, but the court order reflecting this hearing indicates that the State, Marsha's guardian ad litem, Maxwell's guardian ad litem, and Marsha were present. The adjudication hearing on the supplemental petition was set for September 22. The court order states that "[n]otice by publication may be considered if a diligent search fails to indicate [the] location of Lloyd . . . ."

An order filed August 18, 2005, indicates that the court appointed counsel for Lloyd and noted that Lloyd's address was the South Dakota State Penitentiary.

On September 14, 2005, the State filed a motion to continue the adjudication on the supplemental petition because, "[t]hrough inadvertence of the County Attorney's Office," Lloyd was served with a summons which indicated an incorrect hearing date. The motion stated that Lloyd's attorney did not object to the motion. In an order filed September 15, the motion was sustained and the adjudication was continued to October 25.

On September 19, 2005, a review and permanency planning hearing was held with respect to Marsha. Lloyd and his attorney did not appear. The State offered into evidence, among other things, a two-page letter from Lloyd to Lewis, the DHHS caseworker. The court did not receive the letter into evidence, stating that it would be inappropriate since the adjudication for Lloyd was pending and Lloyd's attorney was not present. Marsha's attorney reported that Marsha was doing "wonderfully well" and was ready to move into an outpatient program where Maxwell could reside with her. Marsha's attorney then stated, "I hate to open a can of worms, but [Lloyd], who is the father [and] has a case pending, is currently the custodial parent. I think probably we're looking at filing a custody action sometime in the near future." After this comment, the matter was not further discussed.

Several exhibits were admitted into evidence at the hearing, including a court report prepared by Lewis, dated September 14, 2005, which discussed Lloyd in some detail. The report stated that Lloyd was incarcerated and was anticipated to be released in 2009, that Lloyd wrote to Lewis regarding Maxwell, and that Lewis responded to the letter. The report indicated that Lloyd stated he had custody of Maxwell prior to his incarceration, at which time he released the child to Marsha, and that Lloyd stated he would like to see Maxwell return to Marsha's care if Marsha was sober and able to care for him.

A report by the foster care review board was also admitted into evidence. The report stated that Lloyd and Marsha both claimed Lloyd had custody of Maxwell and that Lloyd indicated he allowed Marsha to have custody of Maxwell when Lloyd returned to incarceration for a parole violation, but that Lloyd indicated Marsha "was not to" remove Maxwell from South Dakota. The report also stated that Marsha said that Lloyd wrote a letter giving Marsha custody of Maxwell.

The court order resulting from the September 19, 2005, review and permanency planning hearing indicates that the court found that jurisdiction was proper. Custody of Maxwell was continued with DHHS, but the court stated that Maxwell could be placed with Marsha once she established housing. The court found the permanency objective to be reunification.

On September 19, 2005, the State filed a praecipe, requesting that summons be issued to Lloyd for the October 25 hearing, and Lloyd was personally served with the summons on September 23. The summons requested that Lloyd personally appear at the hearing.

On October 14, 2005, Lloyd filed the following documents with the juvenile court: a motion to dismiss, a motion for pretrial hearing, a motion for telephonic hearing, a request for production of documents, and a "Notice of Intention to Serve Rule [34A] Records Subpoena" with an attached subpoena duces tecum for Marsha's aunt.

The motion to dismiss sought to dismiss the supplemental petition upon the following grounds: (1) lack of subject matter jurisdiction under Nebraska's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), (2) that Maxwell had not been abandoned or subjected to or threatened with mistreatment or abuse within the meaning of the UCCJEA, (3) that an adjudication hearing had not been held within 90 days after the supplemental petition was filed, and (4) that the supplemental petition was so vague and ambiguous that Lloyd was not on notice of the prohibited conduct alleged to have put Maxwell at risk for harm. The motion for pretrial hearing requested a hearing so that the court "hears and enters its orders on pre-trial motions, sets a date for the completion of discovery prior to trial and schedules a date for an adjudication hearing in this cause." The motion for telephonic hearing requested that Lloyd appear by telephone at the adjudication hearing. Lloyd's request for the production of documents requested that Marsha produce, pursuant to Neb. Ct. R. of Discovery 34 (rev. 2000), documents and items related to various communications between and among Lloyd, Marsha, and Maxwell, related to the time period of September 21 to October 13, 2004. The "Notice of Intention to Serve Rule [34A] Records Subpoena" stated that Lloyd would be issuing and serving a subpoena on Marsha's aunt. The attached subpoena duces tecum requested that Marsha's aunt produce, pursuant to Neb. Ct. R. of Discovery 34A (rev. 2004), documents similar to those requested of Marsha.

The adjudication hearing on the supplemental petition was held on October 25, 2005. Present at the hearing were counsel

for the State, counsel for Lloyd, guardian ad litem for Maxwell, counsel for Marsha, guardian ad litem for Marsha, and Marsha. At the start of the hearing, the court addressed Lloyd's motions. The motion to dismiss was discussed, and a transcript of the June 27 proceedings was admitted into evidence for the purpose of demonstrating that the court was placed on notice at that hearing that Lloyd had custody of Maxwell pursuant to the South Dakota divorce decree. Lloyd's counsel stated that under the UCCJEA, the juvenile court should have contacted the South Dakota court to resolve the jurisdictional issue. The court denied the motion to dismiss and stated, "[T]he jurisdiction of this Court, for the safety and the protection of a child either living or to be found in Douglas County, Nebraska, State of Nebraska, temporarily and during the pendency of any proceeding in this Court, trumps, if you will, any custody order from any other Court." The court further stated:

> So the Uniform Child Custody Act that you quote does not apply to this case, and when and if this Court terminates its jurisdiction, presumably the case goes back to the status quo before it was filed, unless another court changes its custody order. So I am not interfering with that except as is provided by the laws of this State.

The motion for pretrial hearing, request for production of documents, and notice of intention to serve a subpoena were next addressed. The court denied these motions, stating, "[W]e had a first appearance, I notified [Lloyd], I appointed [counsel for Lloyd], all in sufficient time to have conducted discovery . . . ." The court stated that the motions were denied because the matter was set for adjudication and there had not been a request for a continuance of the hearing. The court then addressed the motion for telephonic hearing and asked Lloyd's counsel if Lloyd was available that day, to which counsel responded that he did not know. The motion was denied, and the court proceeded with the adjudication.

Lewis, the DHHS worker for the case, testified that at the time the case began, Marsha was caring for Maxwell and had resided in Nebraska for at least 5 months. Lewis then testified regarding Lloyd and her communications with Lloyd. Lewis stated that Lloyd had communicated with Lewis by mail and

that in one of Lloyd's letters, Lloyd stated that he had given Maxwell to Marsha to care for while Lloyd was incarcerated. Lewis testified that Lloyd had not had any contact with Maxwell for the 10 months that she had been the caseworker. Lewis stated that a clerk at the penitentiary told her that Lloyd would be incarcerated until 2009. Lewis stated that because Lloyd was incarcerated, he had not been able to provide for proper care and parental support of Maxwell. Lewis stated that in her opinion, Maxwell was at risk for harm because Lloyd left Maxwell in Marsha's care, at a time when Marsha was unable to care for him, and because Lloyd was unable to care for Maxwell while in the penitentiary.

Upon cross-examination, Lewis stated that one of Lloyd's letters was dated May 25, 2005, and that she responded to that letter in a letter written June 13. Both letters were received into evidence. In summary, Lloyd's letter asked Lewis to provide him with information regarding Maxwell and whether Maxwell was in her care. The letter also listed the various ways that Lloyd had attempted to contact Lewis for information on Maxwell. Lewis' response letter informed Lloyd that Maxwell was in DHHS' care due to Marsha's needing assistance and stated that Maxwell was doing well. Lewis' letter also stated Marsha had indicated that she would be in danger if Lloyd knew her whereabouts and that Lloyd was violating a court order by trying to locate her. Lewis provided contact information for the judge on the case to Lloyd and advised Lloyd that he could intervene if he chose to do so. Lewis testified that she had received one other correspondence from Lloyd within the last 90 days. Lewis was asked if it was her opinion that Lloyd was "uncaring" about Maxwell's care, to which she responded, "No. Any father who — Any father that contacts [DHHS] and questions about in regards to the whereabouts of [his] child has to be caring." Lewis was also asked if she was aware of Marsha's condition at the time Lloyd gave Maxwell to her, to which Lewis responded she did not know.

Lloyd called Marsha to testify. Marsha stated that she received a videotape from Lloyd in October 2004 and that the videotape depicted Lloyd reading two books to Maxwell. Marsha stated that she had received no additional correspondence from Lloyd

and that to her knowledge, her aunt had not received any correspondence from Lloyd to Maxwell. Marsha stated that Lloyd gave her written consent to remove Maxwell from South Dakota.

A report entitled "Initial Assessment Worksheet For Abuse/Neglect" was admitted into evidence, offered by Lloyd's counsel. The report is dated January 25, 2005, and was completed by a DHHS worker other than Lewis. The report indicated that Lloyd had "full custody" of Maxwell and that Lloyd was incarcerated in South Dakota. The report also stated that the worker did not notify Lloyd that Maxwell was in foster care because Lloyd was incarcerated in South Dakota.

The court order reflecting this hearing, filed November 3, 2005, indicates that the court denied the motion to dismiss and the motion for telephonic hearing. The court again found that jurisdiction was proper, Maxwell was adjudicated under § 43-247(3)(a) with respect to Lloyd, and custody of Maxwell was continued with DHHS. It is from this court order that Lloyd appeals.

## III. ASSIGNMENTS OF ERROR

Lloyd asserts eight assignments of error, which can be rephrased and consolidated into the following: (1) The juvenile court erred in finding that it had continuing subject matter jurisdiction in this case, and (2) even if the court did have jurisdiction, it committed several errors in the adjudication of the supplemental petition, including (a) denying Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication, (b) failing to advise Lloyd of his rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2004), (c) denying Lloyd's motion for pretrial hearing, (d) denying Lloyd the use of compulsory discovery proceedings, and (e) finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd.

## IV. STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction

are clearly incorrect. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

## V. ANALYSIS

### 1. JURISDICTION UNDER UCCJEA

#### (a) Application of UCCJEA

Lloyd asserts that the juvenile court erred in finding that the UCCJEA did not apply to the matter. We initially note that the applicable statutory scheme is the UCCJEA, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004), rather than the Nebraska Child Custody Jurisdiction Act (NCCJA), because the first petition in this child custody proceeding was made in January 2005, well after the date the UCCJEA became operative, January 1, 2004. See § 43-1226 (Supp. 2003).

At the adjudication hearing on the supplemental petition, the judge did verbally state that the UCCJEA did not apply to the case; however, this comment was preceded by language which seemed to indicate that the court was exercising temporary emergency jurisdiction under the UCCJEA, which jurisdiction we discuss below. Whatever the effect of the juvenile court's verbal statement, we find that a case brought under § 43-247(3)(a) fits the definition of a "[c]hild custody proceeding" under the UCCJEA, see § 43-1227(4), and that therefore, the UCCJEA is applicable. Section 43-1227(4) of the UCCJEA provides that the term "[c]hild custody proceeding" shall mean "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue" and that the term "includes a proceeding for divorce, separation, neglect, abuse, [or] dependency . . . in which the issue may appear." The supplemental petition was filed under the dependency statute, § 43-247(3)(a), and essentially alleged neglect of Maxwell by Lloyd, and the decisions made by the juvenile court in the course of these proceedings

affected Maxwell's legal and physical custody. Pursuant to § 43-1227(4), the juvenile court was involved in a child custody proceeding, and the UCCJEA was applicable.

(b) Subject Matter Jurisdiction

Lloyd next asserts that the juvenile court, upon being informed that a South Dakota court had made a prior child custody determination, erred in its refusal to contact and communicate with the South Dakota court and in finding that it had subject matter jurisdiction in the matter for purposes other than temporary emergency jurisdiction. Lloyd appears to admit that the juvenile court's initial exercise of jurisdiction over Maxwell was proper, under the temporary emergency jurisdiction granted under § 43-1241 of the UCCJEA, but asserts that once the juvenile court was aware that custody of Maxwell was granted to Lloyd in a South Dakota divorce decree, the court erred in continuing to exercise jurisdiction.

The pertinent portions of the UCCJEA concerning temporary emergency jurisdiction, codified in § 43-1241, provide:

> (a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> . . . .
>
> (c) If there is a previous child custody determination that is entitled to be enforced under the [UCCJEA], or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 43-1238 to 43-1240, any order issued by a court of this state under this section shall specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under such sections. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> (d) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been

> commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under sections 43-1238 to 43-1240, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to such sections, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

In the case before us, the juvenile court, unaware of the South Dakota divorce decree, initially assumed original jurisdiction under Neb. Rev. Stat. § 43-248 (Reissue 2004) when it granted the January 21, 2005, order for temporary custody. The court later adjudicated Maxwell under § 43-247(3)(a), with respect to Marsha, on May 4. It was not until June 27 that the court was informed of the prior out-of-state custody determination. Maxwell was subsequently adjudicated with respect to Lloyd on November 3.

This case is factually similar to *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). Although *In re Interest of L.W.* was decided under the former NCCJA, not the UCCJEA, we find its reasoning to be instructive to the present case. In *In re Interest of L.W.*, the juvenile court, unaware of the existence of a prior Iowa divorce decree granting custody of the child to the mother, initially assumed jurisdiction over the child under § 43-247(3)(a). It was not until nearly 2 years after the initial adjudication of the child that the court was informed of the prior out-of-state custody determination. The Nebraska Supreme Court found that under the NCCJA provision concerning emergency jurisdiction (which is substantially similar to the UCCJEA provision cited above), the juvenile court had temporary emergency jurisdiction to make a temporary custody placement of the child. The court reasoned that it was appropriate for the juvenile court to assume jurisdiction, since the child was physically present in Nebraska and an emergency existed as a result of sexual abuse by the child's stepfather. The court found

that the emergency situation was ongoing; however, it noted that the emergency provision is limited in duration and does not confer jurisdiction to make permanent custody determinations or modify the custody decree. The court determined that pursuant to the NCCJA, the Iowa court retained continuing jurisdiction over the custody determination, and upon remand, it ordered the juvenile court to refrain from modifying the Iowa divorce decree and to communicate with the Iowa court to determine the appropriate forum for the case. See, also, *In re Interest of J.L.H., J.L.H., and R.H.*, 2 Neb. App. 40, 507 N.W.2d 641 (1993) (adjudication affirmed, with (1) instruction to juvenile court to communicate with Missouri court which rendered custody decree to determine more appropriate forum before further adjudicating custody of children and (2) jurisdictional limitation against rendering permanent custody order unless Missouri court affirmatively declines jurisdiction or fails to take appropriate action).

Lloyd argues that at the time the juvenile court was put on notice of the existing South Dakota custody determination, the juvenile court's temporary emergency jurisdiction under § 43-1241 terminated, because an "emergency" no longer existed. Although we agree that emergency jurisdiction is temporary in nature, see *In re Interest of L.W., supra*, we disagree that emergency jurisdiction ceases to exist simply upon notification of another court's custody determination. Notwithstanding the fact that the November 3, 2005, order is a final order adjudicating Maxwell to be a child within the meaning of § 43-247(3)(a), the order does not make a permanent custody disposition of Maxwell. The court's November 3 order merely continues the temporary custody of Maxwell with DHHS. Therefore, so long as an emergency with regard to Maxwell continued to exist, the court retained emergency jurisdiction powers. See *In re Interest of L.W., supra*. Thus, the November 3 adjudication order did not violate the proposition that emergency jurisdiction is temporary in nature, and the question we must now address is whether an emergency situation with Maxwell did in fact continue after the juvenile court became aware of the South Dakota order, so as to support the court's continuing jurisdiction over Maxwell. Clearly, the facts in this case do support such continuing jurisdiction. At the time of the adjudication of the supplemental

petition, Maxwell was in Nebraska, neither Marsha nor Lloyd could assume custody of Maxwell, and there was no evidence that any other person, such as a relative, could do so. Maxwell had no one to care for him, and we find that the emergency situation was ongoing. Therefore, the juvenile court properly exercised jurisdiction under § 43-1241 at the time of the filing and adjudication of the supplemental petition. This holding is subject to the jurisdictional limitation set forth below.

Because the South Dakota court has entered a child custody decree and Lloyd still lives in South Dakota, the South Dakota court retains continuing jurisdiction to make any permanent changes in custody. The juvenile court must immediately communicate with the South Dakota court as required by § 43-1241(d). Further, the juvenile court is without jurisdiction to render a permanent custody order unless the South Dakota court affirmatively declines jurisdiction or fails to take appropriate action.

#### (c) Parties' Failure to Inform Juvenile Court of Prior Child Custody Determination

[3] Finally, Lloyd appears to argue that the juvenile court was deprived of jurisdiction because of the parties' failure to inform the court of the prior child custody determination. However, this argument is not assigned as error in Lloyd's brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

### 2. Adjudication of Maxwell

Lloyd alleges that the juvenile court made several errors regarding Maxwell's adjudication. Specifically, Lloyd alleges that the court erred in (1) denying Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication, (2) failing to advise Lloyd of his rights pursuant to § 43-279.01, (3) denying Lloyd's motion for pretrial hearing, (4) denying Lloyd the use of compulsory discovery proceedings, and (5) finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd.

(a) Speedy Adjudication

Lloyd asserts that the juvenile court erred when it denied Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication. Lloyd claims that pursuant to Neb. Rev. Stat. § 43-278 (Reissue 2004), an adjudication must occur within 90 days of the filing of a petition or the State is required to make a showing of good cause, on the record, for why the petition should not be dismissed. Lloyd claims that because the adjudication on the supplemental petition was not held within 90 days of the filing of the supplemental petition and the State did not make a showing of good cause on the record as to why the supplemental petition should not have been dismissed, the court erred in denying Lloyd's motion to dismiss. Section 43-278 provides as follows, in relevant portion:

> Except as provided in sections 43-254.01 and 43-277.01, 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. Upon a showing of good cause, the court may continue the case beyond the ninety-day period.

In the present case, the supplemental petition was filed on June 29, 2005, and the adjudication hearing was set for September 22. On September 14, the State filed a motion to continue the adjudication on the supplemental petition because, "[t]hrough inadvertence of the County Attorney's Office," Lloyd was served with a summons which indicated an incorrect hearing date. The motion stated that Lloyd's attorney did not object to the motion. The motion was sustained, and the adjudication was continued to October 25. On September 23, Lloyd was served with summons and notice of the October hearing date. The adjudication was held on October 25, more than 90 days after the filing of the supplemental petition.

While § 43-278 provides that an adjudication hearing shall be conducted within 90 days after a petition is filed, this court has held that § 43-278 is directory, not mandatory. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000). As such, the provision does not mandate that a case be dismissed if the adjudication is not completed within 90 days. The facts of the present case indicate that the adjudication was completed approximately 4 months after the supplemental petition

was filed. We note that the passage of some of this time occurred due to a continuance which arose from attempting to properly serve Lloyd and that Lloyd's counsel did not object to the motion for continuance. We do not find an abuse of discretion by the trial court in denying Lloyd's motion to dismiss.

(b) Failure to Advise of Rights Pursuant to § 43-279.01

Lloyd claims that the court erred in failing to advise Lloyd of his rights pursuant to § 43-279.01, including the right to confront and cross-examine witnesses and to compel witnesses to attend and testify. Section 43-279.01 provides, in relevant part, as follows:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) 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 or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295;
>
> (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 as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;
>
> (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.
>
> (2) 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.

This court has found that when a parent appears, with or without counsel, for an adjudication hearing and the parent is not informed of his or her rights pursuant to § 43-279.01, the resulting adjudication order must be reversed. See *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999). The instant case is distinguishable, however, because Lloyd was not present at the adjudication hearing. The question then becomes whether § 43-279.01 is applicable when a parent is not present at the relevant hearing. The parties cited no case law which addresses this issue, and we have found none.

[4,5] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005). Section 43-279.01(1) provides that a juvenile court must inform a parent of the rights listed in the statute when the parent "appears with or without counsel." Our plain reading of the statute indicates that the language "with or without counsel" indicates that the parent must actually be present in court for the statute to apply and that appearance by counsel alone does not trigger the statute. Lloyd was not present in court at the adjudication hearing. Therefore, § 43-279.01 is not applicable to the present situation and the juvenile court did not err in adjudicating Maxwell under the supplemental petition before Lloyd was provided a rights advisory pursuant to § 43-279.01. We note that Lloyd has not assigned as error a denial of due process by the failure to be informed of these rights, compare *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); nor has Lloyd assigned as error the denial of his motion to appear by telephone. Further, Lloyd's counsel did not move for a continuance at the adjudication hearing in order to secure Lloyd's presence. For all of these reasons, this assignment of error has no merit.

(c) Motion for Pretrial Hearing

Lloyd asserts that the court erred in denying his motion for pretrial hearing. The motion for pretrial hearing requested a

hearing so that the court "hears and enters its orders on pre-trial motions, sets a date for the completion of discovery prior to trial and schedules a date for an adjudication hearing in this cause." The court denied this motion at the beginning of the adjudication hearing, stating that Lloyd's counsel had sufficient time to conduct discovery and that Lloyd had not requested a continuance of the hearing. We find no error in the court's denial of the motion for pretrial hearing, particularly in light of Lloyd's assertions concerning a speedy adjudication.

(d) Compulsory Discovery Proceedings

Lloyd claims that the court erred in denying Lloyd the use of compulsory discovery proceedings. Lloyd's motion for the production of documents requested that Marsha produce, pursuant to discovery rule 34, any materials related to communications between Lloyd, Maxwell, and Marsha. Lloyd also filed a "Notice of Intention to Serve Rule [34A] Records Subpoena," which notice stated that Lloyd would be issuing and serving a subpoena on Marsha's aunt. The attached subpoena duces tecum requested that Marsha's aunt produce, pursuant to rule 34A, documents similar to those requested of Marsha. The court denied these motions along with the motion for pretrial hearing, stating that Lloyd's counsel had sufficient time to conduct discovery and that Lloyd had not requested a continuance of the hearing. Again, we find no error in the court's ruling concerning discovery in light of Lloyd's assertions concerning a speedy adjudication.

(e) Adjudication Under § 43-247(3)(a)

Lloyd claims that the court erred in finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd. Lloyd asserts that the court's only basis for the adjudication was the fact that Lloyd was incarcerated, and Lloyd claims that it was error for the court to adjudicate Maxwell on this basis alone. Lloyd cites *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), for the proposition that incarceration alone is insufficient, in the absence of other factors, to warrant the termination of a person's parental rights, and Lloyd asserts that this holding should be applied to an adjudication of a child pursuant

to § 43-247(3)(a). We conclude that there was sufficient evidence to support the court's order of adjudication.

In its supplemental petition, the State alleged that Maxwell was "lacking proper parental care by reason of the faults or habits of" Lloyd, in that Lloyd was currently incarcerated and unable to care for Maxwell, had had no contact with Maxwell for more than 6 months, and had failed to provide proper parental care for Maxwell, and in that because of those allegations, Maxwell was at risk for harm.

[6] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005); *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). See § 43-279.01(3). At the adjudication hearing, the State presented evidence to support the allegations in the supplemental petition. Lewis testified that Lloyd would likely be incarcerated until 2009 and that Lloyd was unable to care for Maxwell while Lloyd was in the penitentiary. Lewis also testified that Lloyd had not had any contact with Maxwell for the 10 months that Lewis had been the caseworker. Lewis stated that in her opinion, Maxwell was at risk for harm because Lloyd left Maxwell in Marsha's care, at a time when Marsha was unable to care for him, and because Lloyd was unable to care for Maxwell while in the penitentiary. Having reviewed the evidence presented at the hearing, we conclude that the State provided sufficient evidence to prove the allegations of the supplemental petition by a preponderance of the evidence. We therefore reject Lloyd's final assignment of error.

## VI. CONCLUSION

We find that the juvenile court properly exercised temporary emergency jurisdiction in this case, but that the court must immediately communicate with the South Dakota court as required by the UCCJEA before proceeding further with this matter. Further, the juvenile court is without jurisdiction to render a permanent custody order unless the South Dakota court affirmatively declines jurisdiction or fails to take appropriate action.

Last, we find that the juvenile court did not err in the adjudication of the supplemental petition.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

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## TODD A. ROBBINS, APPELLANT, V. BEVERLY NETH, DIRECTOR OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

722 N.W.2d 76

Filed September 26, 2006. No. A-04-835.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Venue.** For purposes of Neb. Rev. Stat. § 60-6,205(6)(a) (Cum. Supp. 2002), the administrative license revocation hearing is held at the location of the hearing officer.
6. ____: ____: ____: ____: ____. Under Neb. Rev. Stat. § 60-498.01(6)(a) (Supp. 2003), the administrative license revocation hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director.
7. **Administrative Law.** Properly adopted and filed agency regulations have the effect of statutory law.
8. ____. Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.
9. **Administrative Law: Waiver.** Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force.
10. **Administrative Law: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
11. ____: ____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

12. **Statutes: Time.** Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases.
13. **Administrative Law: Venue.** Under Neb. Rev. Stat. § 84-913.03 (Cum. Supp. 2004), the hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.
14. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
15. ____. There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
16. **Statutes: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
17. ____: ____. As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
18. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.

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

David E. Veath for appellant.

Jon Bruning, Attorney General, and Laura L. Neesen for appellee.

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

SIEVERS, Judge.

## INTRODUCTION

Todd A. Robbins appeals the decision of the Box Butte County District Court affirming the order of Beverly Neth, director of the Nebraska Department of Motor Vehicles (the Department), which order administratively revoked Robbins' driver's license for 90 days. Robbins contends that error is present because the administrative license revocation (ALR) hearing was not held in the county of his arrest, as required by the Department's rules and regulations. We affirm, because the Legislature repealed the statutory requirement that the ALR hearing be held in the county of arrest, which action supersedes the Department's regulation stating otherwise.

## STATEMENT OF FACTS

On October 26, 2003, Box Butte County Deputy Sheriff Mark Lindburg conducted a traffic stop of a vehicle driven by Robbins. Deputy Lindburg detected the odor of alcohol, and Robbins admitted to having consumed alcohol. Robbins exhibited impairment on a number of field sobriety tests. Deputy Lindburg then arrested Robbins for driving under the influence of alcohol and transported him to a hospital. Robbins submitted to a chemical test, which test indicated he had an alcohol concentration of .112 grams of alcohol per 100 milliliters of blood.

Deputy Lindburg completed the "Notice/Sworn Report/Temporary License" form and forwarded it to the Department, which received the report on November 12, 2003. On November 26, Robbins filed a petition for an administrative hearing. The ALR hearing was held on December 15. The hearing officer, located in Lincoln, Nebraska (Lancaster County), conducted the hearing via telephone. Robbins appeared via telephone from a district court jury room in the courthouse in Alliance, Nebraska (Box Butte County), and Box Butte County Deputy Sheriff Lindburg appeared via telephone from the sheriff's department in Alliance. At the start of the hearing, Robbins' attorney objected to venue and also objected that the hearing was not being conducted by videoconference even though it was technically feasible for the hearing to be conducted in such a manner.

Following the ALR hearing, the hearing officer recommended revocation of Robbins' operating privileges, and Neth, the director of the Department (Director), adopted the recommendation. The Department entered an order revoking Robbins' driver's license for 90 days effective December 13, 2003. Robbins filed an appeal to the Box Butte County District Court, and on January 16, 2004, the Department stayed the revocation of Robbins' driver's license. On July 12, the district court affirmed the Department's order of revocation. Robbins has timely appealed to this court.

## ASSIGNMENTS OF ERROR

On appeal, Robbins contends that the district court erred in affirming the Director's 90-day revocation of his driver's license, because the ALR hearing was not held in the county in which the

arrest occurred and because the ALR hearing was not conducted by videoconference, when conducting the hearing in such a manner was technically feasible.

## STANDARD OF REVIEW

[1,2] A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998); *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Miller, supra.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003).

[4] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002).

## ANALYSIS

*Venue for ALR Hearing.*

Robbins contends that his ALR hearing, held on December 15, 2003, was conducted in violation of 247 Neb. Admin. Code, ch. 1, § 022.01 (2001), which at the time of the hearing provided that such "[h]earings shall be held either by telephone, in person, or by video conference if technically feasible at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue."

[5] The language in the Department's foregoing rule and regulation reflected the language of Neb. Rev. Stat. § 60-6,205(6)(a) (Cum. Supp. 2002), which previously required that an ALR hearing "shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." In

*Gracey v. Zwonechek*, 263 Neb. 796, 800, 643 N.W.2d 381, 385 (2002), the Nebraska Supreme Court held that "for purposes of § 60-6,205(6)(a), the hearing is held at the location of the hearing officer." Thus, in this case, the hearing was held in Lincoln because that was the location of the hearing officer.

[6-9] Section 60-6,205 was transferred to Neb. Rev. Stat. § 60-498.01 (Supp. 2003) operative October 1, 2003, and subsection (6)(a) was amended to provide that "[t]he hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director." The language requiring that the hearing be conducted in the county where the arrest occurred was removed from the statute by the Legislature. Thus, at the time of Robbins' December 15, 2003, ALR hearing, the applicable statute did not require the hearing to be conducted in the county in which the arrest occurred, but the Department's rules and regulations still contained such requirement. Robbins argues that the Department was bound to follow its own rule and that thus, venue for his hearing was improper, requiring reversal of the revocation of his driver's license. The following authority at first blush appears to support Robbins' position and is relied upon by the dissent:

> Properly adopted and filed agency regulations have the effect of statutory law. . . . Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary. . . . Regulations governing procedure are just as binding upon both the agency which enacts them and the public, "and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force." . . . "To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken . . . ."

(Citations omitted.) *Schmidt v. State*, 255 Neb. 551, 559, 586 N.W.2d 148, 153-54 (1998). While we cannot disagree with these broad general principles, they do not determine the issue presented in this case. With all due respect, we see the issue

before us differently than does our dissenting colleague. We believe the issue here is whether an administrative regulation has any continuing effect when its statutory underpinning has been explicitly removed by the Legislature. If the Legislature had not expressly spoken on the subject by, in effect, repealing the statutory provision that ALR hearings be held in the county of arrest, we would likely agree with the view taken by the dissent. But, the fact of the matter is that the Legislature has said, by its amendment to the statute, that the hearing need not be in the county of arrest. And, as discussed below, such fact determines the outcome of this appeal.

[10-12] "There is no doubt that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute." *State ex rel. Spire v. Stodola*, 228 Neb. 107, 109, 421 N.W.2d 436, 438 (1988). In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

In *Stansbury, supra*, the Supreme Court dealt with the Workers' Compensation Court's application of rules promulgated for "transitional cases" where the former statute for determining a vocational rehabilitation plan and determining loss of earning power had been replaced with a new and different statute which was effective a month before the trial. The *Stansbury* court found that the compensation court should have used the new statute and also addressed the attempt by the compensation court to adopt rules providing for different treatment of "transitional cases" than that provided for in the new statute. We quote the *Stansbury* court's opinion at some length as follows:

> The second reason HEP urges that the new statute does not apply to this case is that the compensation court promulgated rules evidencing an intention that "transitional" cases be governed by the old statutory framework. HEP cites to Workers' Comp. Ct. R. of Proc. 42E (1995), which provides: "If an employer received notice of injury before

> January 1, 1994, the employee may continue to receive vocational rehabilitation services from the vocational rehabilitation counselor selected prior to that date." *Irrespective of whether this rule evidences an intent on the part of the compensation court to treat transitional cases differently, the legal reality is that while the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act,* see Neb. Rev. Stat. § 48-163 (Reissue 1993), *the rules cannot modify, alter, or enlarge provisions of a statute entrusted to its administration*, see, *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). In short, the compensation court does not have the power to determine when statutes will apply and when their application will be stayed.
>
> Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases that have not been tried. *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990); *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974). See *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985). As the amendments to the statute in question were procedural in nature, the new statute was applicable to this case . . . .

(Emphasis supplied.) *Stansbury*, 248 Neb. at 712-13, 539 N.W.2d at 34-35.

Applying the principles of law we have outlined in our analysis, we find that the Legislature's amendment of the statute that removed the requirement that the ALR hearing take place in the county of arrest, which amendment was effective 26 days prior to Robbins' arrest, controls over the Department's rule to the contrary. Any other result would make the Department's rulemaking authority superior to the Legislature's authority, which it clearly is not—particularly in this instance, where the Legislature has expressly spoken prior to Robbins' arrest by its amendment of

the underlying statute to say that the ALR hearing need not be held in the county of arrest. In short, Robbins was not denied any right guaranteed by law, since the procedure he claims to be due was no longer effective at the time of his arrest because of the Legislature's action. The problem was not that Robbins was denied a procedural right, but, rather, that the Department was remiss in not amending its rules and regulations to conform to the Legislature's mandate. But that does not equate to reversible error. In short, the Department's failure to conform to the Legislature's mandate provides no basis for a finding that Robbins' driver's license revocation is invalid on grounds of improper venue, because the venue was proper under the then-effective Legislative pronouncement.

*Entitlement to Hearing by Videoconference.*

[13] Robbins' final assignment of error is that his ALR hearing was not conducted by videoconference, when conducting the hearing in such manner was technically feasible. Neb. Rev. Stat. § 84-913.03 (Cum. Supp. 2004) provides:

> The hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

The statute uses the word "may," rather than the word "shall," with respect to holding the hearing by videoconference.

[14-18] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Further, as a general rule, in the construction of statutes, the word "shall" is

considered mandatory and inconsistent with the idea of discretion. *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). However, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State ex rel. Shepherd, supra*; *In re Interest of Brandy M. et al., supra.*

Accordingly, keeping in mind the aforementioned well-established tools of statutory interpretation, the statute at hand is clearly permissive with respect to whether a videoconference is conducted. Further, while Robbins objected to the hearing's not being conducted via a videoconference, there is no showing of any particularized need for a videoconference hearing such that we could say that there was an abuse of the hearing officer's discretion in denying what is a permissive method of holding the hearing. This assignment of error is without merit.

## CONCLUSION

Accordingly, we affirm the district court's affirmance of the Department's revocation of Robbins' driver's license.

AFFIRMED.

INBODY, Chief Judge, dissenting.

I must respectfully dissent from the majority's opinion, since Robbins' hearing was invalid because it was not held in accordance with the Department's rules and regulations for the reason that the hearing officer was located in a county other than where the arrest occurred.

The majority relies upon the proposition of law that in order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). However, rather than bolstering the majority's opinion, this proposition simply reaffirms my position. If the statute prohibited an ALR hearing from being held in the county in which the arrest occurred and the Department's rules made such a requirement, then I would agree with the majority that the Department's rule was inconsistent with

the statute, and in that circumstance, clearly the statute would invalidate the Department's rule. However, that is not the case here.

At the time of Robbins' December 15, 2003, ALR hearing, the Department's rule provided: "Hearings shall be held either by telephone, in person, or by video conference if technically feasible at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue." 247 Neb. Admin. Code, ch. 1, § 022.01 (2001). The statute in effect at that time provided: "The hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director." Neb. Rev. Stat. § 60-498.01(6)(a) (Supp. 2003). Thus, at the time of Robbins' December 15 hearing, the applicable statute did not require the hearing to be conducted in the county in which the arrest occurred, but the Department's rules and regulations did so require.

Clearly, the language contained in the Department's rule requiring the ALR hearing to be held in the county in which the arrest occurred is consistent with the language of the statute in effect at that time, even though the statute did not contain the same language. The statute does not prohibit a hearing's being held in the county in which the arrest occurred. The Department's rule requiring the ALR hearing to be held in the county in which the arrest occurred was an additional requirement that the Department imposed on itself, which requirement is not inconsistent with the statute.

I find that the following proposition of law is applicable to this case:

> Properly adopted and filed agency regulations have the effect of statutory law. . . . Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary. . . . Regulations governing procedure are just as binding upon both the agency which enacts them and the public, "and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force." . . . "To

be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken . . . ."

(Citations omitted.) *Schmidt v. State*, 255 Neb. 551, 559, 586 N.W.2d 148, 153-54 (1998).

The Department properly adopted and filed the regulation requiring that an ALR hearing take place in the county in which the arrest occurred, and such regulation has the effect of statutory law. The hearing officer in the instant case was located in Lincoln, Nebraska, within Lancaster County, and the county of arrest was Box Butte County. Since a "hearing is held at the location of the hearing officer," *Gracey v. Zwonechek*, 263 Neb. 796, 800, 643 N.W.2d 381, 385 (2002), Robbins' ALR hearing was not held in accordance with the Department's rules and regulations, because the hearing officer was located in a county other than where the arrest occurred. Thus, I would reverse the decision of the district court and remand this cause with directions to remand Robbins' case to the Department with directions to vacate the order of revocation. Because of this determination, I would not proceed to consider Robbins' remaining assignment of error.

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ALICIA LEAH CONN, APPELLEE, V.
BOBBY JOE CONN, APPELLANT.

722 N.W.2d 507

Filed October 3, 2006. No. A-05-1337.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Child Custody: Parental Rights.** A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
4. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

5. **Parental Rights: Visitation.** Factors to consider in determining reasonable visitation rights include age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent.
6. **Parental Rights: Visitation: Appeal and Error.** When a parent whose visitation rights are at issue has been incarcerated, an appellate court will consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated.

Appeal from the District Court for Sherman County: MARK D. KOZISEK, Judge. Affirmed.

Bobby Joe Conn, pro se.

Daniel O. Mingus for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Bobby Joe Conn, previously convicted of conspiracy to murder Alicia Leah Conn and sentenced to 20 to 30 years' incarceration, appeals from the decree dissolving his marriage to Alicia which awarded Alicia custody of the parties' minor child and denied Bobby visitation with the child. Finding no abuse of discretion, we affirm.

## BACKGROUND

The parties married in January 2000, and a child was born to the marriage in May. The parties separated in mid-February 2001, and Alicia and the child moved out of the home of Bobby's parents. On September 26, 2001, an apparent friend of Bobby attempted to kill Alicia at her apartment, where she was residing with the child. Alicia sought dissolution of her marriage to Bobby upon becoming aware that Bobby had engaged in a conspiracy to have her killed. On October 11, 2002, pursuant to a jury verdict finding Bobby guilty of conspiracy to commit murder in the first degree, the district court for Sherman County sentenced Bobby to imprisonment for 20 to 30 years with credit for time served. Bobby's parents were also convicted of felony charges arising out of the conspiracy. Alicia's petition for dissolution came on for trial on May 14, 2004. On June 14, the district court entered a decree dissolving the marriage, granting Alicia custody of the parties' child, ordering Bobby to pay

minimal child support, and refusing Bobby visitation with the child. Bobby appealed to this court, and we determined that the district court had failed to afford Bobby a reasonable opportunity to defend himself in the dissolution proceeding and had thereby deprived him of procedural due process. *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005). We reversed the district court's dissolution decree and remanded the cause for further proceedings. *Id.*

On September 29, 2005, the district court held a final hearing pursuant to this court's remand. Bobby appeared telephonically. The child was 5 years old at the time of the hearing.

Alicia testified that the child had been in her custody most of the time since the parties' separation. The child stayed with Alicia's sister, Kayla Nilsen, from mid-May 2004 until April 2005. At the beginning of that period of time, Alicia traveled to Lincoln, Nebraska, to "start a new life" and "g[e]t things set up for [the child]." Alicia intended to have the child live with her in Lincoln once she was situated, but that did not occur. Alicia testified that she started a telemarketing job in Lincoln and was informed by an individual on work release from the Nebraska State Penitentiary who was working at the telemarketing firm to "watch [her] back." Alicia testified that the individual, whose name she could not recall, told her that he knew Bobby, that he had "heard stories," and that Alicia should "watch [her] back because it wasn't over." Alicia testified that she became frightened and left Nebraska. When asked why she did not take the child with her, Alicia testified, "She was already growing up seeing me scared, always looking . . . over my shoulder. I didn't want her growing up in that state, always being afraid. And I knew that she was going to be safe with [Nilsen] and my family."

Alicia did not keep in touch with her family after initially leaving the state. Alicia's stepmother testified that she did not know Alicia's whereabouts for 6 to 8 weeks after Alicia left Lincoln. Alicia's father filed a guardianship action on the child's behalf because he "didn't know for sure where Alicia was, and in case anything happened to [the child] or anything, wanted to be legally prepared." Nilsen and her husband were appointed guardians of the child. Nilsen testified that the purpose of the

guardianship was to have power in case of an emergency. During the time that Alicia was absent from the state, Nilsen testified, Alicia would call approximately biweekly to check on the child. Nilsen testified that Alicia did not give her any money for expenses or food for the child but that Nilsen felt she and her husband "were adequate for that job."

Upon her return to Nebraska in October 2004, Alicia resided with her grandmother in Burchard, Nebraska, and had visitation with the child. Alicia testified that she was not financially or emotionally stable enough to support the child at that time. In approximately February 2005, the child began staying with Alicia overnight and for a couple of days at a time before going back to stay with Nilsen and her husband. Nilsen testified that there was a "transition period" in January or February through April 2005 with visitation every 2 weeks. During the transition period, Nilsen observed Alicia's interaction with the child, and Nilsen opined that Alicia was capable of caring for the child. At the end of March or beginning of April, the child began living full time with Alicia in her three-bedroom apartment in Grand Island, Nebraska. We digress to note that following the September 29, 2005, hearing, this court vacated the appointment of Nilsen and her husband as the child's coguardians and remanded the cause for further proceedings. See *In re Guardianship of Breeahana C.*, 14 Neb. App. 182, 706 N.W.2d 66 (2005). In April 2005, Alicia gave birth to another child. Alicia sought custody of the parties' child, testified that she was a fit and proper person to have custody, and believed that it would be in the best interests of the child for the child to be with Alicia. She testified that she and the child were now stable and were both receiving counseling and attending support groups. Alicia's stepmother testified that Alicia's apartment was very clean, that the child has a very close relationship with Alicia, and that Alicia was a fit parent.

Alicia testified that Bobby should not be allowed visitation because he had hired people to kill her and the child was present in the apartment at the time the attempt on Alicia's life occurred. Although Alicia did not believe it was in the child's best interests to be alienated from Bobby, she was concerned that Bobby would be a bad influence on the child and did not believe it was

appropriate for a 5-year-old child to have continual contact and visitation at a prison facility.

Wanda Sierks, Bobby's aunt, testified that she observed Bobby to be a responsible and loving father. Sierks testified that Bobby asked her to act as the child's guardian and that she would be willing to provide the necessary financial and emotional support for the child. Sierks agreed to pick up the child and take the child to visitation with Bobby if the court allowed such visitation. Sierks' husband testified, "I never thought a child should be taken away from its mother or disrupted from a happy home. I was led to believe that she was being abandoned and unloved and going to be up for adoption. But it don't sound like that's the case." Bobby's brother testified that Bobby seemed like a competent father when he observed Bobby's visits with the child. Bobby's brother testified that on numerous occasions, the child had diaper rash and yeast infections when Bobby got the child for visitation. Bobby's brother testified that he had not seen the child in almost 4 years and that he missed her.

On October 12, 2005, the district court filed its decree of dissolution. The court stated that Bobby was incapable of performing his parental obligations due to his incarceration and that Alicia was a fit and proper person to be awarded custody of the child. In denying Bobby visitation, the court found that visitation with Bobby at the time and under the circumstances presented to the court was not in the best interests of the child. The court ordered Bobby to pay child support in the amount of $10 per month. Bobby timely appeals. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Bobby alleges that the district court erred (1) in finding that Alicia was a fit and proper parent for the care and custody of the child and (2) in holding that incarceration was sufficient justification for the denial of visitation.

## STANDARD OF REVIEW

[1] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial

court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

[2] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

## ANALYSIS

*Custody.*

Bobby argues that the district court abused its discretion in awarding Alicia custody of the child because Alicia abandoned the child and neglected to care for the child when Alicia departed Nebraska and left the child with Alicia's relatives. Bobby contends that the court should have appointed Sierks, the child's great aunt, the temporary guardian of the child.

[3,4] Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *Id.*; *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). " 'Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.' " *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992), quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Bobby's argument that Alicia is an unfit mother focuses on the fact that Alicia left the child with relatives when Alicia fled Nebraska after allegedly being threatened. Alicia explained that she was frightened at the time, that she did not want the child to grow up seeing Alicia "always being afraid," and that she knew the child would be safe with Alicia's family. In finding that Alicia was a fit and proper person to be awarded custody, the district

court stated, "The reason for [Alicia's] absence is understandable. The actions of [Alicia] did not indicate an indifference of a parent for a child's welfare over a long period of time. Those actions indicated parental concern for her child." We agree. At the time of the hearing, Alicia was living in a three-bedroom apartment, caring for her two children, and attending a community college. The evidence is insufficient to establish that Alicia was unfit or forfeited her parental rights; therefore, we will not deprive her of custody of the child. This assignment of error is without merit.

*Visitation.*

Bobby argues that the district court abused its discretion by relying solely on his incarceration to deny his request for visitation. He relies upon the principle of law that incarceration alone is not sufficient justification to deny a prisoner's right to visit his children. See *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984). However, the fallacy in Bobby's argument is that his incarceration is not the sole reason, or even the most important reason, to deny visitation. A parent's rights are not absolute and must yield to the best interests of the child. *Id.*

[5] Factors to consider in determining reasonable visitation rights include age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. See *id.* The child was 5 years old at the time of the hearing, was apparently healthy, and was receiving counseling with Alicia. The child was 2 years old when Bobby began serving his sentence of 20 to 30 years' incarceration. The child would need to be transported from Grand Island to Lincoln in order to visit Bobby, and Sierks agreed to provide such transportation. Alicia did not want Bobby to have visitation because he hired people to kill her and the child was present at the time of the attempt. Alicia was concerned that Bobby would be a bad influence on the child, and she did not believe it was appropriate for a 5-year-old child to have visitation at a prison facility. However, Alicia did not believe it was in the child's best interests to be alienated from Bobby. One of Bobby's aunts testified that the child was a

"daddy's girl," but the aunt had last observed Bobby with the child when the child was a little over 1 year old. Although Bobby's first cousin, a correctional officer at the Tecumseh State Correctional Institution, testified that in her employment, she observed fathers with their children, and that the children did not seem scared of their fathers, there was no evidence regarding the procedures for visitation, location, circumstances, or the effect the visitation would have on the child.

[6] In *Bruce v. Bruce*, 11 Neb. App. 548, 656 N.W.2d 281 (2003), this court concluded that the district court's order denying the father visitation based solely on the father's incarceration was an abuse of discretion because the record was devoid of any evidence suggesting that denying such visitation was in the best interests of the children. In the instant case, although the parties did not adduce any expert testimony regarding the impact visitation would have on the child, the district court noted that Bobby last had contact with the child when the child was 16 to 17 months old, nearly 4 years prior to the final dissolution hearing, and that the child had had no contact with her paternal side of the family for almost 4 years. With regard to cases involving termination of parental rights, Nebraska appellate courts have declared that when a parent whose parental rights are at issue has been incarcerated, we consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). See, also, *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). We think it is also proper to consider the nature of the crime committed and the person against whom it is committed in cases such as the one before us.

While it is natural to focus on Alicia as the object of Bobby's crime, the subject child was also a victim of Bobby's scheme. Had Bobby's conspiracy achieved its end, the child would have been forever deprived of her mother. Moreover, the attempt to carry out the killing occurred while the child was present in the next room, placing her in considerable risk of physical harm. These acts in detriment of the child's best interests, and not the

incarceration which flows as a consequence thereof, are the principal reasons for denial of visitation. Bobby's argument that mere incarceration is the reason for denial of visitation highlights his lack of comprehension that his child, as well as his estranged wife, was a victim of his crime.

We agree with the district court that the act for which Bobby was convicted reflected negatively on his character, that Bobby evidenced little regard for his child and the impact that his plan would have had on the child, and that the attempted murder placed the child in danger. We conclude that the district court did not abuse its discretion in denying Bobby visitation rights at this time.

## CONCLUSION

We conclude that the district court did not abuse its discretion in awarding Alicia custody of the child or in denying Bobby visitation with the child.

AFFIRMED.

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STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLEE, V. STEVEN R. KAY ET AL., APPELLEES, AND MARY SCHEINER, APPELLANT.

722 N.W.2d 348

Filed October 10, 2006. No. A-05-130.

1. **Arbitration and Award.** Whether a stay of proceedings should be granted and arbitration required is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.
4. **Arbitration and Award.** A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.
5. **Arbitration and Award: Courts: Actions.** When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration.

6. **Courts: Actions.** Courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court.
7. **Constitutional Law: Courts: Actions: Parties: Proof.** In making its decision to stay proceedings, a trial court is to balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Cathy S. Trent and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Mark I. Wallach and Sharon A. Luarde, of Calfee, Halter & Griswold, L.L.P., and John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

L. Tim Wagner, Director of Insurance of the State of Nebraska, as the liquidator of Amwest Surety Insurance Company (Amwest), filed suit against the former directors and officers of Amwest, including Mary Scheiner, for breaches of certain fiduciary obligations. The district court for Lancaster County considered whether the claims relating to Scheiner should be resolved through binding arbitration. The court denied Scheiner's motion to compel arbitration, and Scheiner appeals. For the reasons set forth herein, we affirm.

## BACKGROUND

Amwest is a wholly owned subsidiary of the Amwest Insurance Group, Inc. (AIG), a Delaware corporation. At all relevant times, Amwest operated as a Nebraska corporation. Amwest's main product lines included contract performance and payment bonds, commercial bonds, court bonds, and Small

Business Administration bonds. In 1999, Amwest began experiencing financial difficulties that resulted in downgraded ratings from A.M. Best Company, Inc. In June 2001, the district court adjudged that Amwest was insolvent and ordered the company to be liquidated.

Scheiner was an executive employee and officer of Amwest. Prior to the termination of Scheiner's employment due to a "reduction in force," she entered into two agreements that are relevant to our consideration of the present matter. In November 2000, Scheiner entered into a Key Employee Severance Agreement (Key Employee Agreement) with AIG. The Key Employee Agreement contained an arbitration clause, which provides in relevant part:

> Any and all disputes, controversies or claims arising under or in connection with this Agreement, including without limitation, fraud in the inducement of this Agreement, or the general validity or enforceability of this Agreement, shall be governed by the laws of the State of California, without giving effect to its conflict of laws provisions and shall be submitted to binding arbitration before one arbitrator of the American Arbitration Association conducted in Los Angeles County under the laws of the State of California.

In March 2001, Scheiner also entered into a Separation Agreement and General and Special Release of Claims (Separation Agreement) with AIG "and all of its subsidiaries." The Separation Agreement concerned "the termination of [Scheiner's] employment with [AIG and its subsidiaries]" and also contained an arbitration clause, which clause provides in relevant part:

> As a material part of this Agreement, [Scheiner] and [AIG and its subsidiaries] expressly agree that any and all disputes, controversies or claims arising out of or concerning this Agreement, any alleged breach of this Agreement, or the matters resolved and settled by this Agreement, including but not limited to disputes, controversies or claims arising out of [Scheiner's] employment by [AIG and its subsidiaries] or its termination, or this Agreement, whether arising under theories of liability or damages based on

> contract, tort or statute, shall be determined exclusively by final and binding arbitration before a single arbitrator in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association, unless other rules are provided in this paragraph, that judgment upon the award rendered by the arbitrator may be rendered in any court of competent jurisdiction.

The Separation Agreement contains an integration clause, which provides that "[this] Agreement constitutes a single integrated contract expressing the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes all prior understandings, negotiations or agreements, written or oral, express or implied." Wagner (hereinafter the Liquidator) has expressly disavowed these agreements pursuant to Neb. Rev. Stat. § 44-4821(1)(m) (Reissue 2004).

On June 6, 2003, the Liquidator filed a complaint against several former directors and officers of Amwest, including Scheiner, seeking damages for their acts and omissions while serving in those capacities. The Liquidator filed an amended complaint on January 7, 2004. In the operative complaint, the Liquidator alleged that the defendants, as officers of Amwest and/or as members of the board of directors of Amwest, were aware or should have been aware of Amwest's financial and managerial difficulties and had a heightened duty to take action with respect to the financial and managerial difficulties occurring at Amwest. The Liquidator asserted that the defendants breached this fiduciary duty. The Liquidator also asserted that certain officers of Amwest, including Scheiner, entered into separation agreements that were not properly approved or submitted to the Nebraska Department of Insurance. The Liquidator alleged that these separation agreements allowed these officers to obtain a greater percentage of their debt from Amwest than other creditors of the same class would receive. The Liquidator sought to recover these transfers and sought damages for the alleged breach of fiduciary duties.

On December 15, 2003, Scheiner filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003) on the basis that the district court lacked personal jurisdiction

over her person. The district court denied Scheiner's motion on June 30, 2004.

On August 26, 2004, Scheiner filed a motion to compel arbitration in accordance with the arbitration provisions of the Key Employee Agreement and the Separation Agreement she had entered into with AIG and its subsidiaries. The district court heard Scheiner's motion on September 22. The court received copies of the agreements into evidence at the hearing.

On December 28, 2004, the district court entered an order denying Scheiner's motion to compel arbitration. The court observed that the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act, Neb. Rev. Stat. § 44-4801 et seq. (Reissue 2004), vests extensive authority in the Liquidator in the administration of an insolvent insurance company. The court quoted § 44-4801 in part, which specifically provides that "[t]he act shall be liberally construed to effect the purposes enumerated in this section and shall not be interpreted to limit the powers granted the director by other provisions of the law." The court observed that the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is replete with features designed to give broad powers to the appointed liquidator, and the court stated that it would therefore construe the act in favor of its declared purpose.

The district court agreed with certain holdings made by the Ohio Court of Appeals in the case of *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), which case and holdings we discuss in detail in the analysis section below. The district court found that the Liquidator in the present case was not seeking to enforce the agreements in question, but was instead seeking to disavow them, per the Liquidator's power under § 44-4821(1)(m). The court found nothing to indicate that the Liquidator adopted any of the agreements or expressly assumed the liabilities contained therein. The court, again referring to a similar holding in *Benjamin v. Pipoly, supra*, held that to permit Scheiner to have her action decided privately and separately from her fellow officers when the Liquidator had disavowed the contract was contrary to the interests of the insureds, claimants, creditors, and the public generally. Accordingly, the

court found that the arbitration agreements were not binding on the Liquidator.

In addition, the district court held that Scheiner had waived her right to compel arbitration. The court, citing several cases from the U.S. Court of Appeals for the Eighth Circuit, stated that a party seeking arbitration may have waived its right to arbitration if it (1) knew of an existing right to arbitration, (2) acted inconsistently with that right, and (3) prejudiced the other party by these inconsistent acts. The court reasoned that Scheiner executed the agreements in question and, thus, must have been aware of the right to arbitrate laid out in those agreements. The court stated that Scheiner acted inconsistently with that right by failing to raise the matter of arbitration during her motion to dismiss for lack of personal jurisdiction. The court stated further:

> It has been more than one year after the lawsuit was filed that . . . Scheiner brought the matter of arbitration before the court and during the process, [Scheiner] has pursued discovery and responded to the [Liquidator's] discovery. The [Liquidator] has incurred expense and devoted time prosecuting this action against . . . Scheiner and would be prejudiced if this action were to be submitted to arbitration.

On January 7, 2005, Scheiner filed with this court a notice of appeal from the district court's December 2004 order. Scheiner subsequently moved for certification pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). An off-the-record hearing was held on January 13 to address the effect of the notice of appeal on the underlying proceedings. During the hearing, the district court entertained the parties' respective arguments regarding whether certification was required under § 25-1315 in order for Scheiner to appeal the order denying Scheiner's motion to compel arbitration. Pursuant to the parties' stipulation to dismiss Scheiner's original appeal, this court issued on January 25 a mandate dismissing the appeal.

On January 26, 2005, the district court entered an order granting Scheiner's motion to certify. The court stated that under Neb. Rev. Stat. § 25-2620(a)(1) (Reissue 1995), an order denying an application to compel arbitration is appealable. The court found that the claims against Scheiner were sufficiently separate and distinct so that an appeal of the order denying her motion to

compel would neither prejudice the balance of the case nor prevent the underlying case from proceeding. The court also found that there was no just reason for delaying appeal in Scheiner's case. Finally, the court reaffirmed its previous findings regarding Scheiner's motion to compel arbitration, again setting forth the findings that were initially set forth in the December 27, 2004, order. Scheiner subsequently perfected her appeal to this court.

## ASSIGNMENTS OF ERROR

We initially note that Scheiner's brief does not contain a separate "assignments of error" section stating the assigned errors completely apart from the arguments in her brief. Neb. Ct. R. of Prac. 9D(1)e (rev. 2001) requires a "separate, concise statement of each error a party contends was made by the trial court . . . . Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed." Scheiner's brief marginally complies with these requirements, since on the table of contents page of her brief, under the heading "ARGUMENT," Scheiner sets forth two statements concerning errors made by the district court. Scheiner again sets forth a statement of alleged error before each of two detailed arguments in her brief. Scheiner has clearly intended these statements to be her assignments of error, and accordingly, we treat them as assignments of error. While we ultimately consider Scheiner's "assignments of error" in this case, closer adherence to the above rule (and to long-established briefing practice) is preferable.

Scheiner asserts that the district court erred in (1) holding that the Liquidator was not bound by the arbitration agreements and (2) finding that Scheiner waived her right to compel arbitration.

## STANDARD OF REVIEW

[1,2] Although Scheiner suggests that neither this court nor the Nebraska Supreme Court has addressed the appropriate appellate standard for review of an order denying a motion to compel arbitration, the Supreme Court has stated that whether a stay of proceedings should be granted and arbitration required is a question of law. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33

(2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

## ANALYSIS

Scheiner first asserts that the district court erred in holding that the Liquidator was not bound by the arbitration agreements. The present case is similar to *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), cited by the district court. In *Benjamin*, the Ohio Court of Appeals considered whether the liquidator of an insolvent insurance company had the power to avoid enforcement of certain arbitration agreements. The Ohio court held that the broad powers conferred to a liquidator under Ohio statutes allowed a liquidator to affirm or disavow any contracts made by insolvent insurance companies, including provisions for arbitration of disputes. The facts and holdings of the *Benjamin* case were very effectively summarized in a recent article in the Journal of Dispute Resolution, and we set forth that summary as follows:

> Ann H. Womer Benjamin appealed the decision of the Franklin County Court of Common Pleas to stay her action against the appellees and order that the case proceed to arbitration. Appellant Benjamin is the Superintendent of the Ohio Department of Insurance and acted as the liquidator of two insolvent companies, Credit General Insurance Company (CGIC) and Credit General Indemnity Company (CGIND). Benjamin continued the claims brought by the former Superintendent of the Ohio Department of Insurance, J. Lee Covington II. The appellees, Michael J. Saxon, Laura B. Darcy, John H. Fehler, Richard J. Babel, Bryan K. Griffin, and Ronald E. Pipoly (collectively, Pipoly) served as officers and directors of CGIC and CGIND prior to the institution of liquidation proceedings.
>
> Benjamin's original suits against Pipoly were tort claims for alleged breaches of fiduciary duties, which were realized while Pipoly held positions as officers and directors in the two insolvent insurance companies, CGIC and CGIND. The alleged breaches were founded on Pipoly's

alleged knowledge and concealment of serious financial and operational problems with CGIC and CGIND and the subsequent failure to correct those problems.

As an officer or director of CGIC and GCIND [sic], Pipoly entered into employment agreements with Phoenix Management Enterprises, Inc., which later became known as PRS Management Group, Inc. (PRS). Each of the employment agreements contained an arbitration provision stating that disputes related to the employment agreement should first be settled between the parties informally. If that failed, disputes would be subjected to binding arbitration in Cleveland, Ohio, subject to the rules of the American Arbitration Association.

In her capacity as the liquidator of the two companies, Benjamin disavowed all agreements to arbitrate and all of Pipoly's employment agreements. The Ohio code permits the liquidator of an insolvent insurance company to enter into new contracts and affirm or disavow contracts made by the insolvent insurance company.

Benjamin challenged each of the findings of the trial court. Benjamin argued that the arbitration clauses contained in the employment agreements were unenforceable against her because she was not a party to the employment agreements and because she expressly disavowed them. Benjamin argued that the strong policies embodied within Ohio's insurance liquidation statutes outweighed the general policy favoring arbitration.

Pipoly argued that Benjamin "stands in the shoes" of the two companies and is, therefore, bound by all provisions in the employment agreements. Appellee contended that Benjamin should be bound by all agreements mandating arbitration. It was further argued by Pipoly that Benjamin should be bound by the terms of the employment agreements and should be estopped from disavowing them. Pipoly stated that Benjamin must enforce the arbitration agreements contained in the employment agreements and other documents.

The trial court agreed with Pipoly and stayed the liquidation proceedings and compelled arbitration. The court

> found that although section 3903.21 of the Ohio Revised Code authorized the appellant to disavow certain contracts, it relied on *Fabe v. Columbus Ins. Co.*[, 68 Ohio App. 3d 226, 587 N.E.2d 966 (1990),] for the proposition that consideration should be given to both the liquidation statutes and the arbitration clause. The trial court found that the companies were bound by the employment agreement and other agreements and were required to send all disputes to arbitration.
>
> On appeal, the Ohio Court of Appeals found that Benjamin's claim should not be forced into arbitration. The appellate court rejected Pipoly's argument that the refusal to compel arbitration violated the Federal Arbitration Act (FAA) because arbitration agreements are unenforceable if there are valid grounds to not enforce an arbitration agreement "at law or in equity for the revocation of any contract." The appellate court relied on the broad power Ohio's legislature had conferred to liquidators to affirm or disavow contracts created by the insolvent company in order to find that failure to compel arbitration was not violative of the FAA.

Frank C. Koranda, Jr., Notes, *On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements*, 2 J. Disp. Resol. 493, 493-95 (2004).

Summarizing further, the article stated:

> In *Benjamin v. Pipoly*, the Ohio Court of Appeals had to decide whether it was proper for a liquidator's claims against employees of an insolvent insurance company to be stayed pending arbitration when the liquidator was not a party to the arbitration agreements. The court held that Benjamin's claims against the defendants would not be stayed pending arbitration. The court reasoned that because the liquidator was not a party to the arbitration agreement, she was not bound by any of its provisions. The court further reasoned that Ohio provided liquidators of insurance companies with broad powers to conduct liquidation proceedings and that compelling arbitration agreements impinges on these powers and violates public policy.

In order to resolve the issue, the court first recited the broad powers given to liquidators in insurance liquidation proceedings. The court noted that Ohio's insurance-liquidation scheme has many "features designed to vest within the liquidator broad and largely unfettered powers, under the supervision of the courts, to maximize the assets available to her in discharging her duties to claimants, shareholders, and creditors of the insolvent insurance company." The court also noted the code sections that govern arbitration. It then established the basis of its holding that only parties to an arbitration agreement may invoke the arbitration agreement.

The decision recognized that a party can only be required to arbitrate if that party agreed in writing to arbitrate those disputes. Noting that arbitration is a matter of contract, the court stated that a presumption against arbitration arises when a party has not agreed to submit to arbitration.

The decision noted that the appellant never signed either the employment agreement or the mutual agreements to arbitrate raising the presumption against arbitration. The court found that appellees cannot rebut this presumption against arbitration. The court then held that "when a liquidator is appointed by court order . . . she is not automatically bound by the pre-appointment contractual obligations of the insurer." The court held that a liquidator would only be bound if she affirmatively elected to be bound by prior obligations. Because Benjamin was not party to the original agreements, and did not indicate that she wished to be bound by those agreements, the arbitration agreements would not be enforced against her.

Following this holding, the court continued to discuss arbitration agreements in insurance liquidation proceedings and their relationship with prior case law. The court made an effort to expressly overrule *Fabe v. Columbus Ins. Co.*, a case on which Pipoly heavily relied. The decision held that "where . . . private arbitration impinges upon a broad statutory scheme that invests sweeping powers in a state official, enforcement of arbitration ipso facto violates public policy." The decision focused on the policy

> that insurance liquidators should be able to act without interference from other agencies. The court found that the public policy regarding a liquidator's broad power "defeats any general attitude of the courts favoring arbitration." The court found that a liquidator should never be compelled to arbitration against her will because that would interfere with the liquidator's powers and would adversely affect the insolvent insurer's assets.
>
> The court also rejected an argument that the liquidator should be estopped from disavowing the arbitration agreements because the disavowal came too late. The decision refused to recognize the argument that a liquidator is subject to temporal limitations as to when she can disavow a contract. The decision also rejected the argument that the liquidator was seeking a declaration of her rights because the claims in Benjamin's lawsuit are not related to failures under the employment contracts, but rather breaches of fiduciary and statutory duties. Finally, the court reasoned that its decision is not violative of the FAA, contrary to the appellees' arguments, because the liquidators possessed the power to disavow any contract.

Frank C. Koranda, Jr., Notes, *On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements*, 2 J. Disp. Resol. 493, 499-501 (2004).

In Nebraska, as in Ohio, a liquidator is granted broad statutory powers, including the power "[t]o enter into such contracts as are necessary to carry out the order to liquidate and to affirm or disavow any contracts to which the insurer is a party." § 44-4821(1)(m). Compare Ohio Rev. Code Ann. § 3903.21 (Anderson 2002) (employing essentially identical language). Section 44-4821 provides further, in subsection (3):

> The enumeration in this section of the powers and authority of the liquidator shall not be construed as a limitation upon him or her nor shall it exclude in any manner his or her right to do such other acts not in this section specifically enumerated or otherwise provided for as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

"The purpose of the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is to protect the interests of insureds, claimants, creditors, and the public with minimum interference with the normal prerogatives of the owners and managers of insurers," and the act "shall be liberally construed to effect the purposes enumerated . . . and shall not be interpreted to limit the powers granted the director by other provisions of the law." § 44-4801.

[3-7] With regard to arbitration, Nebraska statutes provide that "[a] written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract." Neb. Rev. Stat. § 25-2602.01 (Supp. 2005). The Nebraska Supreme Court has held that arbitration is purely a matter of contract. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002). The Supreme Court has further held that a party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration. *Id.* Courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court. *Id.* In making its decision to stay proceedings, a trial court is to balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof. *Id.*

In *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), the Ohio Court of Appeals concluded that in a case in which the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises. In that case, the court concluded that because neither

the appellant nor her predecessor signed the agreements relied upon by the appellees, a presumption against arbitration existed. The court further concluded that the appellees had not and could not sufficiently rebut the presumption, especially in light of the policy considerations contained within the Ohio statutes, which vested broad powers in both liquidators and the courts. The *Benjamin* court stated:

> A liquidator emanates from an order of the court and acts as an arm or extension of the court. A liquidator is appointed to perform specific functions, including preserving and maximizing the value of the insolvent insurer and protecting the interests of both those with direct pecuniary connections to the insurer and the general public. The liquidator must have freedom of action to do those acts most beneficial in achieving her objectives. Within this demesne, the liquidator may affirm or disavow the rights and obligations of the interest with which she is charged, and it would be inconsistent to compel arbitration against her when such an obligation predates her appointment.
>
> Thus we hold that when a liquidator is appointed by court order, as in the instant case, she is not automatically bound by the pre-appointment contractual obligations of the insurer. To be so bound, the liquidator must affirmatively indicate her election to be responsible for the prior obligations of the former operators. Since appellant was not a party to appellees' employment agreements or the assignment thereof and was not a party to any of the mutual agreements to arbitrate, and because there is nothing in the record to demonstrate that she adopted any of these agreements and expressly assumed the liabilities contained therein, the arbitration provisions within these agreements may not be enforced against her.

155 Ohio App. 3d at 182-83, 800 N.E.2d at 58-59.

In the present case, we agree, as did the district court, with the *Benjamin* court's holding that when a liquidator is appointed by court order, such liquidator is not automatically bound by the preappointment contractual obligations of the insurer. Section 44-4821(1)(m) provides that a liquidator shall have the power "to affirm or disavow any contracts to which the insurer is a

party." The Liquidator in the present case is not seeking to enforce the agreements; but instead, he is disavowing them, which is one of his express powers. There is nothing in the record to indicate that the Liquidator adopted any of the agreements or expressly assumed the liabilities contained therein. To allow Scheiner to have her action " 'decided privately and separately from [her] fellow officers when the [L]iquidator has disavowed the [agreements] is contrary to the interests of insureds, claimants, creditors, and the public generally.' " See *Benjamin v. Pipoly*, 155 Ohio App. 3d at 61, 800 N.E.2d at 185, citing *Covington v. Lucia*, 151 Ohio App. 3d 409, 784 N.E.2d 186 (2003). We conclude, as did the district court, that the arbitration agreements at issue are not binding on the Liquidator. We further conclude that the district court properly denied Scheiner's motion to compel arbitration. The district court clearly balanced the competing needs of the parties and took into account the interest of the courts, the presence or absence of hardship on the parties, and other factors. See *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). The decision to deny Scheiner's motion to compel arbitration was well within the district court's discretion. Scheiner's assignment of error is without merit.

[8] Scheiner also asserts that the district court erred in finding that she waived her right to compel arbitration. Given our resolution of Scheiner's first assignment of error, we need not consider Scheiner's second error, since its resolution is not necessary to adjudicate the case and controversy before us. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

## CONCLUSION

The district court did not err in holding that the Liquidator was not bound by the arbitration agreements or in denying Scheiner's motion to compel arbitration.

AFFIRMED.

# STATE OF NEBRASKA, APPELLANT, V. RICHARD HISEY, APPELLEE.

723 N.W.2d 99

Filed October 17, 2006. No. A-05-1138.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
3. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests: Probable Cause.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigative stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards but, because of its less intrusive character, requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
5. **Search and Seizure.** A person has been seized only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.
6. **Constitutional Law: Warrantless Searches.** Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions.
7. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
8. **Warrantless Searches: Proof.** The State has the burden to prove that one of the circumstances substantiating the reasonableness of a warrantless search was present during a warrantless search.

9. **Criminal Law: Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
10. **Constitutional Law: Police Officers and Sheriffs: Evidence.** Whether the exclusionary rule's remedy is appropriate in a particular context is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.
11. **Search and Seizure: Police Officers and Sheriffs.** A good faith exception to the exclusionary rule may apply when an officer's actions are objectively reasonable.
12. **Constitutional Law: Warrantless Searches: Proof.** The State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search.
13. **Constitutional Law: Police Officers and Sheriffs: Evidence.** The purpose of the exclusionary rule is to deter police and adjuncts of law enforcement from conduct that will result in a denial of rights to people.

Appeal from the District Court for Kimball County, KRISTINE R. CECAVA, Judge, on appeal thereto from the County Court for Kimball County, KENT D. TURNBULL, Judge. Judgment of District Court affirmed.

Paul B. Schaub, Special Prosecuting Attorney, for appellant.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Richard Hisey was convicted of operating a motor vehicle while under the influence of alcohol, and of possessing an open alcoholic beverage container while doing so, by the county court for Kimball County. Hisey appealed to the district court for Kimball County, which vacated the convictions and held that evidence obtained after police stopped Hisey should be suppressed. The State appeals. We conclude that because the arresting officer relied on erroneous information contained in Nebraska's Department of Motor Vehicles (DMV) records, the officer did not have probable cause to arrest Hisey. We therefore affirm.

## BACKGROUND

On May 1, 2004, Officer Sharon Lewis of the Kimball Police Department arrested Hisey for driving with a suspended license,

driving under the influence, and driving with an open container in his vehicle. At the time of the arrest, Lewis was on duty, in uniform, and on patrol in Kimball, Nebraska, in a marked patrol car. Prior to the arrest, Lewis observed Hisey drive his pickup truck by her patrol car. She watched as Hisey stopped his vehicle in front of his house and exited the vehicle. Lewis then drove her patrol car toward Hisey's parked vehicle because she was "under the impression that . . . Hisey's license was still impounded" and "called to confirm that [impression] with dispatch." Lewis later testified that at the time of the arrest, she had this belief because at an earlier date, she had attended a trial at which Hisey had been convicted of driving under the influence of alcohol and refusal to submit to an alcohol test and his license had been impounded.

Before initiating contact with Hisey, Lewis called the dispatcher for the Kimball County sheriff's office and asked the dispatcher to check the status of Hisey's operator's license. She then pulled her patrol car to a stop next to Hisey, who was standing near the driver's side of his pickup truck. She asked Hisey whether he "[got his] license back." Hisey responded that he did. After Hisey's response, Lewis received a call on her cellular telephone from the dispatcher, who informed Lewis that Hisey's license was currently impounded. Lewis testified that when she received this information, Hisey was not free to leave, and that soon after she received this information, she arrested Hisey for driving with a suspended license.

Lewis informed Hisey he was under arrest. She allowed Hisey to take his dog into his house and then escorted him to her patrol car. She drove him to the Kimball County sheriff's office, and she performed a series of sobriety tests on him. Lewis testified that she performed the sobriety tests because, "[a]t the time [she] had original contact with him, his eyes were bloodshot and watery." She continued, "His face was very red and he was slurring his words. When he walked to the house, he was unsteady and he was walking very, very slow." She testified further that Hisey smelled of alcohol. She also testified that when she pulled up next to Hisey, both of his pickup's doors were open and she was able to see "a container of beer" and an open "12-pack of beer" in the cab of the pickup. She removed multiple cans of beer, at least

one of them open, from the pickup after she arrested Hisey and kept them as evidence. After Hisey performed the sobriety tests, Lewis arrested Hisey for driving under the influence of alcohol and driving with an open container of alcohol in his vehicle.

After Hisey's arrest, but before disposition of the charges against him, it was discovered that his license was not under impoundment at the time of arrest. The information the dispatcher conveyed to Lewis regarding the status of Hisey's license was erroneous. The dispatcher received this erroneous information from the DMV's driver and vehicle records division's records, which mistakenly indicated that Hisey was not eligible to get his impounded license back until May 2, 2004. However, after his prior convictions for driving under the influence and refusal to submit to an alcohol test, the county court ordered Hisey not to drive for a period of 60 days, beginning on March 3, 2004, on each of the two counts, but also directed credit to be given on each count for 32 days served and impoundment for the two charges to be served concurrently. Therefore, Hisey's license was not under impoundment on May 1.

On May 24, 2004, in the county court for Kimball County, Hisey was charged with, inter alia, driving under the influence of alcoholic liquor, second offense, in violation of Neb. Rev. Stat. § 60-6,196(1)(a)(c) (Supp. 2003), and driving with an open container of alcohol in his vehicle, in violation of Neb. Rev. Stat. § 60-6,211.08(2) (Reissue 2004). Hisey filed a motion to suppress all evidence obtained from the stop, search, and arrest. On September 14, the county court for Kimball County overruled Hisey's motion to suppress, opining that Lewis' conduct before and during the arrest was not unlawful. At trial on October 29, a jury found Hisey guilty of driving under the influence of alcoholic liquor and the court found him guilty of driving with an open container of alcohol in his vehicle. Thereafter, the county court sentenced Hisey on the open container conviction and held an enhancement hearing at which the court determined that the conviction for driving under the influence was Hisey's second conviction of this crime and sentenced him accordingly.

Hisey appealed to the district court for Kimball County. He claimed, inter alia, that the trial court erred in failing to sustain his motion to suppress. On August 26, 2005, the district court heard

his appeal. Hisey argued that his Fourth Amendment rights were violated and that evidence discovered as a result of the stop and detention should have been excluded from evidence at trial because the stop was illegal. The district court found that "[Lewis] contacted [Hisey] before she had current independent information about [Hisey's] license status." Because her memory proved to be wrong and the facts she articulated were false, it found, "the initial stop violated the Fourth Amendment of the United States Constitution." The district court further reasoned that Lewis made an "investigatory stop prior to receiving the information from dispatch" and that at that time, "[t]he illegal seizure had already occurred." Therefore, the district court held that "the information and evidence received by [Lewis] after the illegal stop should be suppressed from use in this case," vacated the convictions and sentences, and remanded the cause to county court for a new trial. The State timely appeals.

## ASSIGNMENTS OF ERROR

The State alleges that the district court, acting as an intermediate appellate court, erred (1) in finding that there was an illegal stop and (2) in suppressing information and evidence received by Lewis following her contact with Hisey.

## STANDARD OF REVIEW

[1,2] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Sparr*, 13 Neb. App. 144, 688 N.W.2d 913 (2004).

[3] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving

due weight to the inferences drawn from those facts by the trial judge. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

## ANALYSIS

[4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect citizens against unreasonable seizures by police officers. To determine whether a seizure has occurred in a particular situation, the first step is to categorize the police-citizen encounter. There are three levels of police-citizen encounters:

> "The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of fourth amendment protection. . . . The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a 'seizure' sufficient to invoke fourth amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. . . . The third type of police-citizen encounters, arrests, [is] characterized by highly intrusive or lengthy search or detention. The fourth amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime."

(Citations omitted.) *State v. Van Ackeren*, 242 Neb. 479, 486-87, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

[5] If there is no seizure, then no Fourth Amendment protection is available.

> "[A] person has been 'seized' . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of

> a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

*State v. Twohig*, 238 Neb. 92, 99, 469 N.W.2d 344, 350 (1991), quoting *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

In *Twohig*, the Nebraska Supreme Court further clarified what constitutes a seizure, explaining:

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . ."

238 Neb. at 100, 469 N.W.2d at 350, quoting *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

Thus, when a police-citizen encounter involves the voluntary cooperation of the citizen and noncoercive questioning by an officer, there is not a seizure. See *id.* A seizure requires that either an officer asserts physical force to restrain the individual or an individual submits to an assertion of authority. See *State v. Van Ackeren, supra.*

In the instant case, we determine that Hisey was not seized during his initial encounter with Lewis on May 1, 2004, prior to when Lewis received information from the dispatcher about the status of Hisey's license and placed him under arrest.

There is little dispute over the facts of the initial encounter between Hisey and Lewis on May 1, 2004. Lewis was on patrol in her police car shortly before she encountered Hisey. She observed Hisey drive by in his pickup truck and park in front of his house. Because Lewis was under the impression that Hisey's license was still impounded, she called dispatch to confirm her suspicion and pulled up next to Hisey to speak with him about his license.

When Lewis pulled up next to Hisey, Hisey was already out of his vehicle. She parked in such a way that Hisey was not blocked in. Lewis did not impede Hisey's movement by making a traffic stop. At no time did Lewis activate the emergency lights on her patrol car. Hisey was free to walk away from Lewis at this time.

When Lewis first spoke with Hisey as she rolled to a stop, she inquired, "Hey, did you . . . get your license back?" This inquiry, as far as the record reflects, was not intense or threatening. Lewis was alone, and there is nothing in the record suggesting that her demeanor was in any way intimidating. We find nothing in the record which indicates that a reasonable person in Hisey's situation would believe that he was not free to leave when Lewis began questioning him about his license. Therefore, in the initial encounter, before Lewis stated that Hisey was under arrest, Hisey was not seized. We disagree with the district court that this initial encounter constituted an illegal stop and find that this encounter did not violate the Fourth Amendment. Because we disagree with the district court's reasoning, we do not stop our analysis at this point as the district court did, but continue to determine whether the evidence should be suppressed based on circumstances which occurred after the initial encounter.

After the initial encounter with Hisey, Lewis received a call on her cellular telephone from the dispatcher, informing her that Hisey's license was under impoundment on the relevant date. Lewis testified that when she received this information, Hisey was not free to leave. Soon after receiving this information, she arrested Hisey for driving with a suspended license. This constituted a seizure and falls under the third level of police-citizen encounters. See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[6-8] Acting without a warrant, Lewis arrested Hisey and gathered evidence later used to convict him. Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3)

inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.* The State has the burden to prove that one of these circumstances was present during a warrantless search. See *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). In this case, the State argues that Lewis had probable cause to arrest Hisey without a warrant.

We digress at this point to note that the State argues, despite the penalty handed down in the sentencing order by the county court for Hisey's March 3, 2004, driving under the influence and refusal to submit to an alcohol test convictions, that Hisey's license was impounded until May 2, 2004. We disagree. Our reading of the sentence imposed by the county court indicates that his driving privileges were restored prior to May 1. The information contained in the DMV records was inconsistent with the sentencing judgment of the county court. We therefore consider whether Lewis had probable cause, based upon erroneous information originating from the DMV records, to arrest Hisey.

[9] "The concept of probable cause is not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 931, 492 N.W.2d at 30. "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *Id.* at 929, 492 N.W.2d at 30. Probable cause is determined by an objective standard of reasonableness: "whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found." *State v. Voichahoske*, 271 Neb. at 75, 709 N.W.2d at 670.

We must determine whether Lewis' reliance on erroneous information contained in DMV records was reasonable under the circumstances. No Nebraska court has addressed the precise issue of whether it is reasonable for a police officer to rely on erroneous information resulting from a mistake made by the DMV. However, the Nebraska Supreme Court did consider a similar issue in *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). The *Allen* court considered whether "evidence obtained as a result of a warrantless investigative traffic stop, conducted solely on the basis of inaccurate vehicle registration information

transmitted to police by their dispatcher, should have been suppressed as the fruit of an unreasonable seizure which violated the Fourth amendment." 269 Neb. at 71, 690 N.W.2d at 586. In *Allen*, a police officer requested the police department's dispatcher to check the registration on a minivan. The dispatcher did not repeat the license number before running the check and mistakenly ran a check on the wrong license number. As a result of this mistake, the officer pulled over the driver of the minivan and discovered that the driver was operating the minivan on a suspended license. The driver argued that the evidence discovered pursuant to the stop should have been suppressed.

The *Allen* court held that there was an unreasonable seizure in violation of the Fourth Amendment, explaining:

> This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to [the officer], as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. [The officer] had no other reason for initiating the stop. Thus, the record reflects that neither [the officer] nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

*Id.* at 77-78, 690 N.W.2d at 590.

The case before us is similar to *Allen*. Once again, this is not a case in which police possessed factual information supporting reasonable suspicion, much less probable cause, of criminal activity. Neither Lewis nor the dispatcher possessed any *true* fact that would support probable cause. The "fact" forming the basis for probable cause—that Hisey's license was under impoundment—was false. Therefore, Lewis' arrest of Hisey was not based on any reasonably trustworthy information and there was no probable cause for the arrest.

[10] However, " ' "whether the exclusionary rule's remedy is appropriate in a particular context [is] an issue separate from the

question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."' " *Id.* at 78, 690 N.W.2d at 590, quoting *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Therefore, we must determine whether the district court was correct in ordering suppression of the evidence. The State argues that the exclusionary rule should not apply because Lewis' conduct was neither willful nor negligent.

[11,12] A good faith exception to the exclusionary rule may apply when an officer's actions are objectively reasonable. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). The good faith exception has been developed in several U.S. Supreme Court cases. See, *Arizona v. Evans, supra* (evidence seized in violation of Fourth Amendment due to error by court employees fell within good faith exception to exclusionary rule); *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (evidence obtained by police officers reasonably relying on search warrant issued by detached and neutral magistrate should not be suppressed even though warrant is later found to be unsupported by probable cause). The State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search. *State v. Allen, supra.*

In *Arizona v. Evans, supra*, the U.S. Supreme Court determined that if erroneous information is supplied by a court employee to police and an officer makes an arrest based on such information, the good faith exception to the exclusionary rule applies. In *Evans*, a police officer arrested the respondent based upon a computer inquiry that mistakenly indicated that there was an outstanding warrant for the respondent's arrest. The mistake was caused by a court employee who failed to keep the respondent's status current. The Court held that evidence obtained as the result of clerical errors by court employees was an exception to the exclusionary rule. The Court reasoned that "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime . . . they have no stake in the outcome of particular criminal prosecutions." *Id.* at 15. The Court therefore concluded that application of the exclusionary rule would have little effect on the conduct of court employees.

The court in *State v. Allen, supra*, determined that the situation is different when police, not court clerks, are responsible for errors. The *Allen* court held that the good faith exception does not categorically apply when law enforcement personnel are responsible for the erroneous information upon which police officers rely. The *Allen* court reasoned that "the exclusionary rule will have a significant effect on those responsible for seeking and transmitting vehicle registration information which can be used as a basis for an investigative stop." 269 Neb. at 81, 690 N.W.2d at 593. In the case before us, however, neither a court employee nor a police official was responsible for the mistake; rather, the mistake occurred in the records of the DMV.

We conclude that the rationale in *Allen* controls the result in the instant case. The critical question is whether DMV employees, unlike the court employees in *Arizona v. Evans, supra*, may be fairly characterized as "'adjuncts to the law enforcement team.'" *Shadler v. State*, 761 So. 2d 279, 285 (Fla. 2000). The DMV is a component department of Nebraska's executive branch. Neb. Rev. Stat. § 81-101 (Reissue 2003). On its Internet Web page, the DMV proclaims: "The mission of [the DMV] is to promote safety through education and regulation of drivers and motor vehicles and to collect revenues that provide resources for state and local government operations." Nebraska Department of Motor Vehicles, http://www.dmv.state.ne.us (last visited Sept. 7, 2005). The DMV is composed of several divisions designed to effectuate its mission, one of which is the driver and vehicle records division. *Id.*

Several statutes also govern the duties of the DMV. One provides that when a judge orders license revocation or impoundment, the director of the DMV "shall immediately revoke the license and make available to the Superintendent of Law Enforcement and Public Safety an updated record of such revocation," after which it will be "the duty of the Nebraska State Patrol to enforce the conditions of such revocation . . . ." Neb. Rev. Stat. § 60-496 (Reissue 2004). Another states that a peace officer may revoke a party's operator's license for refusal to submit to a chemical test to determine whether the party is under the influence of alcohol or for a positive test of being under the influence of alcohol and that when the peace officer so acts, he

does so as an "agent for the Director of Motor Vehicles." Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003). The DMV is also responsible for administrative license revocations, which are intended to protect the public from the health and safety hazards of drunk driving and deter drunk driving. See *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

The Nebraska State Patrol and other state law enforcement agencies have duties related to those of the DMV. It is the duty of the Nebraska State Patrol to ensure that drivers do not violate the rules and regulations promulgated by the director of the DMV. See Neb. Rev. Stat. § 81-2005 (Supp. 2005). It is also the duty of the Nebraska State Patrol, along with other law enforcement officers in the State of Nebraska, to enforce "the laws regulating the registration, operation, and use of vehicles upon the highway." Neb. Rev. Stat. § 81-2006 (Reissue 1999).

This analysis demonstrates that the DMV is closely related to law enforcement in the State of Nebraska and is integral to enforcement of the laws concerning motor vehicles and persons who operate vehicles. The duties of the DMV are clearly interrelated with law enforcement duties. The DMV helps regulate and enforce the laws pertaining to licensing and driving in Nebraska.

We also find instructive the decision of the Supreme Court of Florida in *Shadler v. State*, 761 So. 2d 279 (Fla. 2000). In *Shadler*, the court held that "the exclusionary rule applies to an error committed by the Florida Department of Highway Safety and Motor Vehicles through its Division of Driver Licenses." 761 So. 2d at 280. In *Shadler*, a police officer received information from a fellow officer and a dispatcher that the defendant's license was suspended. The officer who received the information then stopped the defendant and, at that time, performed a computerized check of his license through the Florida "Department of Highway Safety and Motor Vehicles, Division of Driver Licenses," which verified that the defendant's license was suspended. *Id.* The officer arrested the defendant based on this information and discovered contraband during a search incident to the arrest. On appeal, the issue was whether the contraband should be suppressed because the information upon which the officer acted was erroneous.

In reviewing the issue, the *Shadler* court analyzed the duties of Florida's Department of Highway Safety and Motor Vehicles. The court found that the department was "a vital part of the law enforcement infrastructure" of the state, *id.* at 284, and was "essentially a law enforcement agency," *id.* at 285. The court further found that error by the department in maintaining licensing status records "puts thousands of Florida's citizens at risk of unlawful arrests and subsequent seizures" and that "exclusion of evidence in cases such as the one at bar will surely serve to encourage accurate record-keeping of driver's license information." *Id.* at 285. Therefore, the court held that an error made by the department was basically a law enforcement error, and it therefore found that "the trial court correctly excluded the evidence obtained during the unlawful search." *Id.* at 286.

[13] We similarly find that the evidence obtained during Hisey's arrest should be suppressed. The purpose of the exclusionary rule is to deter police and adjuncts of law enforcement from conduct that will result in a denial of rights to people. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). We find that the threat of exclusion of evidence will likely encourage DMV employees charged with recording and transmitting information on license impoundments to exercise greater caution. The purpose of the exclusionary rule will therefore be served if the evidence from the arrest in this case is suppressed. While our analysis differs from that of the district court, we conclude that the court's judgment was correct. See *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

## CONCLUSION

We find that while the initial stop of Hisey was not unlawful, the subsequent arrest of Hisey was made without probable cause and was unlawful. The evidence obtained during Hisey's arrest should be suppressed. We therefore affirm the judgment of the district court.

AFFIRMED.

# ASHLAND-GREENWOOD PUBLIC SCHOOLS, APPELLANT, V. DEWAYNE L. THORELL AND NEBRASKA WORKERS' COMPENSATION TRUST FUND, APPELLEES.

723 N.W.2d 506

Filed October 17, 2006. No. A-05-1446.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
5. **Workers' Compensation: Trust Funds: Records.** In the case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability, such as an amputated arm, the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) may be dispensed with.
6. ____: ____: ____. The actual knowledge exception to the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) because of the loss of a limb has never been extended to back injuries.
7. ____: ____: ____. In order to qualify under Neb. Rev. Stat. § 48-128(1)(b) (Reissue 2004), the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.
8. **Workers' Compensation: Trust Funds: Liability: Records.** The purpose of the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) is to put in place a strictly limited method of proving a predicate fact before liability for benefits may be shifted to the Workers' Compensation Trust Fund.
9. **Workers' Compensation: Trust Funds.** The purpose of Neb. Rev. Stat. § 48-128 (Reissue 2004) is to provide employers with an incentive to hire those who suffer from permanent disability, but the statute restricts the benefits to those employers who consciously hire those they know to be suffering from prior permanent disabilities.
10. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true.
11. **Pleadings: Evidence.** Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned.

12. **Workers' Compensation: Trust Funds: Records.** The written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) is merely evidentiary and must be sensibly construed so as not to defeat the statute's larger remedial purpose.
13. **Attorney and Client: Compromise and Settlement.** A lawyer cannot settle a client's claim without express authority from the client.
14. **Workers' Compensation.** The Nebraska Workers' Compensation Act is to be liberally construed for the benefit of claimants.
15. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

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

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Jon Bruning, Attorney General, Lisa Martin-Price, and Chris Seifert, Senior Certified Law Student, for appellee Nebraska Workers' Compensation Trust Fund.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

DeWayne L. Thorell's former employer, Ashland-Greenwood Public Schools (Ashland-Greenwood), has filed this action seeking to shift part of the burden of paying Thorell's weekly permanent total disability benefits to Nebraska's Workers' Compensation Trust Fund (Trust Fund), formerly known as the Second Injury Fund. Ashland-Greenwood asserts that because it retained Thorell in its employment after having knowledge of his preexisting permanent disability, the Trust Fund bears part of the responsibility for such permanent total disability payments under Neb. Rev. Stat. § 48-128 (Reissue 2004). The Nebraska Workers' Compensation Court trial judge found that although the basic requirements of § 48-128 for such contribution by the Trust Fund were satisfied, the provision of such statute that "the employer must establish by written records that [it] had knowledge of the preexisting permanent partial disability . . . at the time the employee was retained in employment" was not proved. Ashland-Greenwood now appeals to this court the affirmance of the trial judge's decision by the Workers' Compensation Court

review panel. We hold that the trial judge erred as a matter of law in rejecting Ashland-Greenwood's claim for contribution from the Trust Fund by imposing upon Ashland-Greenwood a requirement of current possession of the written records and by failing to consider the import of the 1987 "[J]oint Application for Approval of Final Lump Sum Settlement" and the order of the district court of Douglas County approving such settlement between Thorell and Ashland-Greenwood. We reverse the decision of the review panel and direct the review panel to remand the matter to the trial judge with directions to determine the nature and extent of the Trust Fund's contribution to Thorell's permanent total disability payments.

## FACTUAL AND PROCEDURAL BACKGROUND

Although we are presented with a record containing voluminous exhibits concerning Thorell's medical history over an extended period of time, as well as numerous evaluations of his resulting disability by various counselors, we largely dispense with recitation thereof, because the core facts necessary to resolve this appeal were largely stipulated to by the parties or there is no meaningful dispute about them. Additionally, the decision of the trial judge was detailed, comprehensive, and well organized, and thus provides a convenient backdrop for our review and analysis.

Thorell worked as a teacher for Ashland-Greenwood from 1972 until early in 1998. He suffered a serious back injury arising out of and in the course of such employment in 1979, after which he ultimately underwent three lumbar spine operations. Although he returned to work, he continued to experience residual pain and cramping, and he received intermittent temporary total disability payments for 50⅔ weeks at the rate of $153.02 per week, together with nearly $32,000 in medical expenses from the 1979 accident and injury.

On November 2, 1987, a "[J]oint Application for Approval of Final Lump Sum Settlement" was filed and approved by the then presiding judge of the Nebraska Workers' Compensation Court. The settlement application named Ashland-Greenwood and its insurer as defendants and Thorell as plaintiff. The settlement provided for a lump-sum payment of $9,554.07, calculated on

the basis of "permanent partial disability of 25% to the body as a whole," together with "[a]dditional consideration" of $9,500, for a total settlement of $19,054.07. The record shows that such settlement was also filed in the district court for Douglas County and approved by a judge of that court.

Thereafter, on January 5, 1995, Thorell suffered another injury arising out of and in the course of his employment with Ashland-Greenwood, when he tripped over a student's bookbag, which injury resulted in lumbar spine surgery in March 1998 and cervical spine surgery in October 1998. Thorell has not worked since early 1998 and testified that his condition prevents him from ever returning to work. The January 1995 accident and injury is the subject of this litigation.

On July 23, 2003, Ashland-Greenwood filed its petition in the Workers' Compensation Court against Thorell and the Trust Fund. Ashland-Greenwood alleged that Thorell had suffered injuries to his back in the course of his employment as a result of an accident on January 5, 1995, and that prior to such accident, Thorell had sustained "a significant back injury which resulted in a 25% permanent partial disability to the body as a whole." Ashland-Greenwood further alleged in its petition that it had "specific knowledge of said prior injury throughout the term [of Thorell's] employment, and retained . . . Thorell in [its] employ with full knowledge of the preexisting back injury," and that it retained written records documenting the prior injury. Ashland-Greenwood then alleged the statutory prerequisites of § 48-128, which provides for a shifting of a portion of the liability for the workers' compensation benefits from the employer to the Trust Fund. We summarize § 48-128 as follows: If an employee has a preexisting permanent partial disability, which is likely to be a hindrance or an obstacle to his or her obtaining employment and which was known to the employer prior to the occurrence of any subsequent compensable injury, and such employee receives a subsequent compensable injury resulting in additional permanent partial disability or permanent total disability so that the degree or percentage of disability caused by the combined injuries is substantially greater than that which would have resulted from the last injury considered alone, then the employer at the time of the last injury shall be liable only for

the degree or percentage of disability that had resulted from the last injury, and the additional disability shall be compensated out of the Trust Fund.

Thorell's answer to the petition alleged that he is permanently and totally disabled, and we note that § 48-128 does not affect Thorell's payments other than who pays what portion of the benefits. The Trust Fund filed a general denial and prayed that Thorell be awarded benefits from the Trust Fund "only after due proof of all elements set forth in Neb. Rev. Stat. § 48-128 (1993)." Additional facts from the trial evidence will be discussed either in our summary of the trial judge's decision or in our analysis of the issues presented on appeal.

## TRIAL JUDGE'S DECISION

The trial judge's decision began by noting that the parties initially stipulated that Thorell was employed by Ashland-Greenwood on January 5, 1995, at which time he sustained an injury in an accident arising out of and in the course of his employment, and that he gave proper notice of the accident and injury to Ashland-Greenwood. The trial judge found that on January 5, Thorell was earning an average weekly wage of $525 and that he had incurred periods of temporary partial disability and temporary total disability thereafter.

The trial judge first decided the question of the nature and extent of Thorell's injury and its causal nexus to the accident, which the parties had stipulated Thorell suffered. The judge found that Thorell had proved the nature and extent of his injury, as well as the necessary causal connection to his employment. The trial judge then turned to the matter of disability, finding that "the legitimacy of the defendant Thorell's assertion that he was rendered permanently and totally disabled as a result of the stipulated accident does not appear to be in serious contention." Even so, the judge, after referring to specific medical and vocational rehabilitation opinions, which we do not detail, concluded that Thorell was in fact rendered permanently and totally disabled as a result of the January 5, 1995, accident. The judge also found that Thorell was temporarily totally disabled from February 5, 1998, through November 1, 1999, entitling him to temporary total disability payments for such period in the amount of $350 per week and a like amount for permanent and total disability from and

after November 1, 1999. Although the trial judge made specific findings and an award with respect to medical benefits, such are not an issue in this appeal, and we discuss that matter no further. The judge made no provision for vocational rehabilitation, citing Thorell's injuries, limitations, and age.

The trial judge then turned to the seminal issue in the case, which he described as "whether or not [Ashland-Greenwood] has sufficiently proven or otherwise established its entitlement to shift liability for the payment of certain [permanent total disability] benefits to the defendant Thorell to the . . . Trust Fund." In the trial judge's discussion of the key issue, he concluded that under § 48-128(1)(b), Ashland-Greenwood must establish by written records that it had knowledge of Thorell's preexisting permanent partial disability at the time Thorell was retained in employment. The trial judge noted the Trust Fund's strenuous objection that "no written records have been produced" by Ashland-Greenwood. The trial judge concluded that "the evidence submitted does indicate that no such written record is to be found." The trial judge found that Ashland-Greenwood "essentially concedes that it lacks the necessary 'written record' but argues that it had actual knowledge of [Thorell's] disability." The judge further found that at one time in the past, Ashland-Greenwood possessed the required written records memorializing its actual knowledge of Thorell's preexisting permanent disability.

While the evidentiary record certainly contains evidence allowing the conclusion that Ashland-Greenwood had actual knowledge of Thorell's preexisting injury when retaining him in its employment after the 1979 injury, we do not recite that evidence, because as discussed more fully in our analysis section, actual knowledge in a case such as this is simply insufficient as a matter of law to trigger the provisions of § 48-128 under established precedent.

The evidence with respect to written records comes from several sources, including Craig Pease, the superintendent of schools for Ashland-Greenwood from 1988 through the time of trial. In his testimony, Pease discussed the matter of storage of certain documents between 1979 and 1995. Pease testified that the old records were stored in the basement of the school facility but that

in 1988, there was an asbestos cleanup, during which "a lot of things . . . were removed and destroyed by the asbestos company because of asbestos materials, and there would have been . . . some old paperwork, and that would have been down there." Pease also discussed a reconstruction project involving the basement in approximately 1996 or 1997 when the basement was renovated by taking the roof off the building and placing an addition on top thereof, which resulted in disruption of the contents of the basement because the basement did not have a roof throughout the winter.

Additionally, Ann Taylor testified that she worked at Ashland-Greenwood continuously for 23 years, first as secretary to the superintendent and then as business manager beginning in approximately 1982 or 1983. Taylor testified that she retired in 1994. Taylor stated that she prepared and signed the first report of injury concerning Thorell's January 10, 1979, injury. Taylor also testified about two other first reports of other unrelated injuries of Thorell. Taylor testified that all three such first reports would have been stored in the office vault but that "every five or ten years," such documents would be "pack[ed] in boxes, label[ed,] and store[d] in the basement of the school building." Taylor also testified that "workers' comp claims . . . would be in the personnel files for a while," but that they would be cleaned out after a year or two and stored in the basement. Taylor admitted that she did not know which documents may or may not have been destroyed. When shown a copy of the "[J]oint Application for Approval of Final Lump Sum Settlement" previously referenced herein, Taylor testified that it would have been a document retained by Ashland-Greenwood and placed in storage in the basement, but she acknowledged that she did not "know one way or the other where those documents may have gone."

The trial judge cited this court's decision in *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998), as precedent he was bound to follow, and he concluded:

> This Court like the court in Baughman has no doubt that [Ashland-Greenwood] had actual knowledge of the defendant Thorell's preexisting permanent disability as well as possession of a written record at some point in the past memorializing that actual knowledge. Yet, neither circumstance is

> sufficient. Fair or unfair, the Legislature has mandated that a strictly limited method of proving an employer's knowledge must be established. [Ashland-Greenwood] simply has not met that requirement. Hence, [Ashland-Greenwood's] claim against the . . . Trust Fund must be denied as one of the requisite elements for the shifting of liability has not been met.

Ashland-Greenwood sought review by a three-judge review panel of the Workers' Compensation Court, which affirmed the trial judge's decision in a brief opinion. Ashland-Greenwood now appeals to this court.

## ASSIGNMENTS OF ERROR

Ashland-Greenwood presents two assignments of error, which we restate as follows: (1) The review panel erred as a matter of law in not accepting the factual finding by the trial judge that Ashland-Greenwood had possession of a written record in the past memorializing its knowledge of Thorell's preexisting permanent disability, given that there was sufficient competent evidence in the record to support such a factual determination, and (2) the review panel erred as a matter of law in affirming the trial judge's dismissal of Ashland-Greenwood's action against the Trust Fund, because the trial judge erred as a matter of law in finding that Ashland-Greenwood had failed to satisfy the written records requirement of § 48-128(1)(b).

## STANDARD OF REVIEW

[1-3] The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

## ANALYSIS

*Change by Review Panel of Trial Judge's Factual Determination.*

[4] Ashland-Greenwood's first assignment of error is that the review panel made a different factual determination about the written records kept by Ashland-Greenwood than did the trial judge, but the review panel did so without finding the trial judge's factual conclusions clearly wrong. The trial judge's key finding on the crucial facts was that Ashland-Greenwood had knowledge of Thorell's preexisting disability, as well as "possession of a written record at some point in the past memorializing that actual knowledge. Yet neither circumstance [was] sufficient." The review panel's decision is more specific in that it said that according to Taylor, the "[J]oint Application for Approval of Final Lump Sum Settlement" and other such records " 'would have been' " retained by Ashland-Greenwood, but that Taylor "had no knowledge regarding the present location of [Thorell's] records." The review panel's decision further stated that "[w]hile the customary business practices of the school district would indicate the necessary [Thorell] records were retained by the district, exactly what record was retained and when it was lost or destroyed is unknown." The review panel then concluded that the "facts of the case do not easily encourage an exception to the statutory written record requirement." We are not convinced that the review panel made a different factual determination than did the trial judge, but even if it did, it is clear that the determinative matter for both the trial judge and the review panel was the "current possession" of the written records. As discussed in detail below, such focus of the trial judge and the review panel is incorrect. In conclusion, any difference in factual findings between the trial judge and the review panel is not material to our decision. Thus, we discuss this assignment no further. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

*Effect of Lump-Sum Settlement and Location of Written Records.*

[5,6] Initially, we deal with the fact that the trial judge found that Ashland-Greenwood had "actual knowledge" of Thorell's preexisting disability yet retained him as an employee after his 1979 accident and the resulting disability. It is true that in the

case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability, such as an amputated arm, the written records requirement may be dispensed with. See *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981), supplemented by *Akins v. Happy Hour, Inc.*, 209 Neb. 748, 311 N.W.2d 518 (1981). However, we have said that the actual knowledge exception to the written records requirement because of the loss of a limb has never been extended to back injuries. See *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998). We hold to that position, and to the extent it was proved that Ashland-Greenwood possessed actual knowledge of Thorell's preexisting permanent partial disability, such is insufficient as a matter of law to shift any of the burden for permanent total disability payments under § 48-128.

[7,8] The key statute in this case, § 48-128(1)(b), provides as follows:

> In order to qualify under this subsection, the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.

When reduced to its essence, the purpose of the written records requirement is to put in place a strictly limited method of proving a predicate fact before liability for benefits may be shifted to the Trust Fund. See *Baughman v. United-A.G. Co-op, supra.*

[9] In *Baughman*, we defined the purpose of § 48-128 as providing employers an incentive to hire those who suffer from permanent disability, but we acknowledged that the statute restricts the benefits to those employers who do so "with knowledge that they are doing [so]." 7 Neb. App. at 949, 586 N.W.2d at 845. In *Baughman*, we said:

> [T]he hiring of the permanently disabled is to be a very purposeful thing before the employer gets the benefit of shifting liability. The purposefulness is insured, at least in theory, by the written records requirement. To impute knowledge where it did not actually exist would frustrate the policy that the benefit of the [Trust] Fund (the shifting

> of liability for benefits for a subsequent injury) goes only to those employers who consciously hire those they know to be suffering from prior permanent disabilities.

7 Neb. App. at 949-50, 586 N.W.2d at 845.

With this framework in place, we turn to the trial judge's premise for his refusal to shift to the Trust Fund any of the liability for benefits attributable to Thorell's subsequent 1995 injury. The judge's premise was that although Ashland-Greenwood at one time had records memorializing its knowledge of Thorell's permanent disability, Ashland-Greenwood was unable to prove what we shall call "current possession" of such written records, and that therefore its proof was insufficient. In support of that conclusion, the trial judge cited our decision in *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998). However, *Baughman*, when closely examined, does not address the issue of whether, when the claim is advanced against the Trust Fund, the employer's "current possession" of the written records is required before the employer can receive the benefits provided by § 48-128. Instead, *Baughman* focuses extensively on the employer's decision to hire the disabled or retain a disabled person in his or her employment. The claim in *Baughman* was that the crucial information from written records about the employee's preexisting disability was in the possession of the employer's insurer and that such information should be imputed to the employer so as to satisfy the written records requirement—there was no evidence or factual finding, as is true here, that sufficient written records were in the employer's possession at some point in time, just not at the time of the claim and trial against the Trust Fund. We rejected the imputation from insurer to employer proposition in *Baughman*, citing *Alaska Intern. v. Second Injury Fund*, 755 P.2d 1090 (Alaska 1988), where the Supreme Court of Alaska refused to impute the knowledge held by the workers' union, as evidenced by the union's written records to the employer, so as to satisfy the written records requirement of Alaska's second injury fund statute. In other words, our focus in *Baughman* was on the fact that it is the employer, rather than the insurer, who makes the hiring decision, remembering that § 48-128 requires that the employer do so with knowledge of the preexisting disability as proved by written records. Thus, the fact

that the insurer has the written records, which could be sufficient, does not satisfy the requirement of § 48-128, because it is the employer's knowledge which is crucial. *Baughman* does not address the issue of whether current possession of the necessary written records is required under § 48-128, and we have found no Nebraska case which directly does so.

The instant case presents a different issue than did *Baughman.* Here, Thorell sustained an injury in 1979 with resulting permanent partial disability of at least 25 percent, which is the level of preexisting disability required by § 48-128(1)(c) in order to trigger the benefit provided for in § 48-128 to the employer. The undisputed evidence is that as a result of the 1979 injury, a "[J]oint Application for Approval of Final Lump Sum Settlement" between Thorell, Ashland-Greenwood, and its insurer was entered into on the basis of payment for the remaining weeks of permanent partial disability attributable to a 25-percent disability, plus additional compensation. Under the law as it then existed, such a settlement had to be filed with and approved by the Workers' Compensation Court, and then filed in and approved by the district court. See Neb. Rev. Stat. § 48-139 (Reissue 1988). The evidence shows that such an application was filed in the Workers' Compensation Court on November 2, 1987, and the application is in our record as an exhibit to the Taylor deposition. Additionally, another exhibit, a records search request submitted to the clerk of the Nebraska Workers' Compensation Court, produced an order and decree from the district court for Douglas County approving the lump-sum settlement for Thorell from Ashland-Greenwood and its insurer "by reason of a permanent partial disability of 25% to the body as a whole," according to such decree. The district court order was file stamped as "received and filed" November 10, 1987, by the Nebraska Workers' Compensation Court. Those two exhibits standing alone establish that Ashland-Greenwood had knowledge of Thorell's preexisting 25-percent disability to the body as a whole—and the evidence is undisputed that Thorell thereafter remained an employee of Ashland-Greenwood. Such documents, and no one disputes their authenticity, were filed in the Nebraska Workers' Compensation Court and, according to Taylor's testimony, were retained in Ashland-Greenwood's records. The fact that nearly

20 years later, Ashland-Greenwood cannot find these documents in its possession is not the determinative fact that the trial judge and the review panel concluded it was.

[10,11] This brings us to the matter of "judicial admissions." A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true. *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992), citing *Johns v. Carr*, 167 Neb. 545, 93 N.W.2d 831 (1958). Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned. See *Nichols Media Consultants v. Ken Morehead Inv. Co., supra.*

The joint application and the district court order filed in the Nebraska Workers' Compensation Court in November 1987 as part of the judicial proceeding to complete the "[J]oint Application for Approval of Final Lump Sum Settlement" are admissions by Ashland-Greenwood, a party to such proceeding, as well as a judicial determination, which conclusively establish Ashland-Greenwood's knowledge of Thorell's permanent partial disability of 25 percent of the body as a whole by virtue of the January 1979 work injury.

Without doubt, the lump-sum settlement documents are "written records" which establish Ashland-Greenwood's knowledge of Thorell's preexisting disability. The Trust Fund brief does not argue otherwise; rather, the Trust Fund asserts that § 48-128 "requires an employer to produce at trial actual written records *in its possession* to prove the proposition that the employer had knowledge of the employee's permanent preexisting disability." (Emphasis supplied.) Brief for appellee at 27.

[12] However, contrary to the Trust Fund's assertion quoted above, there is nothing in the language of § 48-128 that requires possession of the written records at the time of the subsequent injury or at the time the claim for contribution from the Trust Fund is made. We have found no Nebraska authority to support the Trust Fund's assertion. It seems that "current possession" of

the written records by the employer was assumed by the trial judge and the review panel to be part of the § 48-128 requirements. But, the reality is that the "written records" requirement is nothing more than a statutorily mandated method of proving a specific fact—that the employer had knowledge of the employee's preexisting disability at the time the employee was hired or was retained in employment. As emphasized by the Supreme Court of Arizona in discussing its written records requirement under Arizona's second injury fund statute, "the 'writing requirement is merely evidentiary, and must be sensibly construed so as not to defeat the statute's larger remedial purpose.' " (Emphasis omitted). See *Special Fund Div. v. Industrial Com'n*, 191 Ariz. 149, 153, 953 P.2d 541, 545 (1998), quoting *Special Fund Div. v. Industrial Com'n*, 189 Ariz. 162, 939 P.2d 795 (Ariz. App. 1997) (Fidel, J., dissenting). We hold that the written records requirement of § 48-128 is merely an evidentiary rule that must be sensibly construed.

Therefore, the crucial question here is not whether there is "current possession" of the written records (although such could be crucial in some factual patterns); rather, the question is whether the written records offered by the employer tend to prove the predicate fact: Did the employer have knowledge of the employee's preexisting disability when hiring the worker or when retaining him or her in employment? To answer our own question, we suggest that there could hardly be better written records to prove the predicate fact of the employer's knowledge of the preexisting disability than documents, drawn from the records of two courts which memorialize a statutory judicial proceeding, to which the employer was a party, for a settlement of a previous workers' compensation claim based on a 25-percent permanent disability of the body as a whole.

[13] The "[J]oint Application for Approval of Final Lump Sum Settlement" is unique, because it is a pleading containing admissions of Ashland-Greenwood of the central predicate fact in the present case—that Thorell claimed to have sustained a 25-percent permanent partial disability of the body as a whole from the 1979 work accident. Further, the district court's order approving the settlement "by reason of [the claim of] permanent partial disability of 25% to the body as a whole" is even more powerful

proof of Ashland-Greenwood's knowledge of Thorell's preexisting disability. Ashland-Greenwood was a named party to that district court proceeding and is bound by the court's findings. At oral argument, counsel for the Trust Fund argued that the settlement documents do not establish Ashland-Greenwood's knowledge, because (and we paraphrase) the settlement was prepared by the insurer and its lawyer, and was likely done so without the knowledge of Ashland-Greenwood. This argument ignores several key points. The application names Ashland-Greenwood as a party (as well as its insurer), and the lawyer clearly signed for both of such parties. Additionally, the law is clear that although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client. *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002). This record does not contain even a hint that the settlement was not authorized by Ashland-Greenwood. In fact, the then business manager for Ashland-Greenwood, Taylor, testified that "[Thorell] did settle a lump sum settlement." And, in response to questioning by Ashland-Greenwood's counsel, she testified that the application would have been retained by Ashland-Greenwood and would have gone into the storage room in the basement.

[14,15] The fact that nearly 20 years later, Ashland-Greenwood cannot produce a copy of such documents from its records repository is really immaterial to the fact that must be proved. To hold that at the time the claim against the Trust Fund is tried, the written records must be in the "current possession" of the employer is to exalt form over substance, as well as impose a requirement not found in § 48-128. Moreover, to so hold would also ignore the policy that the Nebraska Workers' Compensation Act is to be liberally construed for the benefit of claimants. See *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). To graft onto § 48-128 a requirement that the written records need to be in the current

possession of the employer frustrates the purpose of § 48-128, which provides an incentive to employers to hire those who have preexisting disabilities, and, at the same time, to do so would be to ignore the function of the written records requirement, which is merely to establish a method of proof of a fact. In the final analysis, a requirement that the employer have "current possession" of the written records, particularly when the records are of a lump-sum settlement based on a claim of 25-percent permanent partial disability, imposes an artificial and arbitrary element of proof not found in § 48-128.

## RESOLUTION

Because the trial judge imposed upon Ashland-Greenwood a requirement of current possession of the written records and did not consider the import of the "[J]oint Application for Approval of Final Lump Sum Settlement" proceeding as evidenced by the written records thereof, remembering their status as official court records and admissions of Ashland-Greenwood, we hold that the trial judge erred as a matter of law in rejecting Ashland-Greenwood's claim for contribution from the Trust Fund. Thus, the review panel erred in affirming the decision of the trial judge. Accordingly, we reverse the decision of the review panel and direct that the review panel shall remand the matter to the trial judge with directions for him to determine the nature and extent of the Trust Fund's contribution to Thorell's permanent total disability payments.

REVERSED AND REMANDED WITH DIRECTIONS.

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# GEM HUBBART, APPELLEE, V. HORMEL FOODS CORPORATION, APPELLANT.

723 N.W.2d 350

Filed October 24, 2006. No. A-06-096.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of

the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
4. ____. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
5. **Workers' Compensation: Proof.** To obtain a modification of a workers' compensation award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident.
6. ____: ____. An applicant seeking modification of a workers' compensation award must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

James L. Quinlan, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

## INTRODUCTION

Hormel Foods Corporation (Hormel) appeals from the judgment of the review panel of the Nebraska Workers' Compensation Court affirming in part and in part reversing the award of the trial court and remanding the cause. For the reasons set forth in this opinion, the judgment of the review panel is affirmed in part and in part reversed, and the cause is remanded with directions.

## PROCEDURAL HISTORY

On May 17, 2001, Gem Hubbart filed an amended petition in the Nebraska Workers' Compensation Court, alleging that "on or about February 8, 2001, [Hubbart] sustained injuries to her bilateral upper extremities in an accident arising out of and in

the course of her employment with [Hormel]." Hubbart asserted that her

> accident and injury occurred as a result of cumulative trauma when [she] was required to engage in the excessive use of her hands in a repetitive fashion during the performance of her work . . . causing her hands to [become] symptomatic and disabl[ed], requiring her to cease employment and seek medical care . . . .

Hubbart indicated that she "was restricted from returning to work until she received carpal tunnel release . . . which surgery [was] set for 3/20/01" and that she had "become depressed secondary to her work related injuries."

On October 25, 2001, Hubbart and Hormel entered into a "Joint Stipulation for Dismissal." In the joint stipulation, the parties agreed that on February 8, Hubbart "sustained injuries to her right and left upper extremities in the nature of carpal tunnel syndrome arising out of and in the course of her employment with [Hormel]"; that "all reasonable and necessary medical expenses incurred by [Hubbart] as a result of the accident have been paid or will be paid by [Hormel]"; and that an agreed-upon vocational rehabilitation counselor should be appointed. On November 2, the compensation court entered its "Order of Dismissal Without Prejudice," generally approving of the parties' joint stipulation and noting that "there exist no present controversies between the parties."

On August 8, 2002, Hubbart filed a "Motion for Approval of Medical Care." In the motion, Hubbart claimed that her "treating physician has opined that she is in need of a repeat right carpal tunnel release which [Hormel] has failed and refused to pay for." Accordingly, Hubbart asked that the court "determine [Hubbart's] entitlement to further care and treatment in the form of the repeat right carpal tunnel surgery." On October 1, the compensation court entered an order, providing the following:

> On the stipulation of the parties, an order of dismissal without prejudice was entered November 2, 2001 which made certain limited findings and dismissed [Hubbart's] petition without prejudice. Neither the stipulation of the parties nor the order of the Court made any findings regarding [Hubbart's] entitlement, if any, to future medical care.

> A dispute now exists regarding the necessity for a repeat carpal tunnel surgery, which if approved, will involve not only the cost of surgery, but liability for payment of temporary total disability, possible additional member impairment and a claim for vocational rehabilitation services, all without entry of an award. Having been previously dismissed without prejudice, the proper procedure is to refile a petition. [Hubbart's] motion is denied without prejudice . . . .

On October 30, 2002, Hubbart filed an amended petition. In the amended petition, Hubbart noted the parties' prior joint stipulation and claimed that "subsequent thereto issues arose concerning [Hubbart's] need for additional medical care and treatment associated with her bilateral carpal tunnel syndrome in the form of a repeat right carpal tunnel release." Hubbart further claimed that "a vocational rehabilitation plan [had been proposed] in the form of a GED program as proposed by an agreed upon vocational expert which [Hormel] has failed and refused to approve absent a reasonable controversy." Hubbart alleged that

> the outstanding issue to be addressed by the Court in connection with this Petition is the compensability of [Hubbart's] need for a repeat right carpal tunnel surgery to address her work related injuries, and her entitlement to the vocational rehabilitation plan as set forth by the agreed upon vocational expert

in addition to any temporary total and permanent partial disability benefits, as well as any "temporary indemnity benefits," which we infer to mean temporary partial disability benefits, arising from her surgery. Hormel filed its answer on November 5, generally denying Hubbart's allegations and stating that it "approved the original vocational rehabilitation plan but has refused to date to approve an extension of said plan" and that it had paid any and all benefits to which Hubbart was entitled.

After a hearing was had on December 23, 2002, the trial court entered its award on April 30, 2003. In its award, the court held that on January 8, 2001—a month earlier than the date originally pled and stipulated to—Hubbart "was in the employ of [Hormel] as a laborer, and while so employed and on said date and while engaged in the duties of her employment, she suffered bilateral carpal tunnel syndrome as a result of an accident arising out of

and in the course of her employment." The court found that Hubbart was entitled to benefits and awarded temporary total and permanent partial disability benefits. The court further held as follows:

> The parties disputed the necessity of a repeat carpal tunnel release on the right hand as recommended by Dr. Bergstrom. I have reviewed the reports of Dr. Bergstrom and Dr. Teideman and find the recommended surgery reasonably necessary to relieve [Hubbart's] continuing symptoms. [Hormel] shall pay the expense associated with the repeat surgery and future medical expenses reasonably necessary for treatment of [Hubbart's] right carpal tunnel syndrome. There will obviously also be a future period of temporary total disability. [Hormel] is entitled to credit for medical expenses paid.
>
> . . . .
>
> [Hubbart] is entitled to vocational rehabilitation services to restore her to suitable employment within the permanent physical restrictions identified by Drs. Pitz and Bergstrom. If [Hubbart] desires to be evaluated as to her suitability for rehabilitation services, she should contact the Court either by letter, telephone, or in person at the Capitol Building in Lincoln, Nebraska, within 30 days after the date of this Award. . . . If [Hubbart] fails or declines without reasonable cause to indicate her desire for rehabilitation services in the manner and within the time above specified, she shall be deemed to have waived any and all right to such services.

On August 14, 2003, Hubbart filed a motion for vocational services. In her motion, Hubbart asserted that the "nature and extent of [Hubbart's] injuries and her financial circumstances resulted in [Hubbart's] becoming destitute causing, in part, loss of her home during which time she fell out of touch with [her] counsel following the time and entry of this award, and was residing in a homeless shelter." Hubbart claimed that her attorney "made efforts to locate [her] through her last known address, probation officer, and friends" and that she "had eventually reestablished a new home at which time [her] counsel was able to contact her and asked her to come in to retrieve her worker's [sic]

compensation check." Hubbart suggested that "[t]he delay in [her] request for vocational rehabilitation services was directly impacted by her financial circumstances as a direct result of her injuries," and she prayed "for consideration of leave to allow her to seek vocational rehabilitation services."

After a hearing on August 21, 2003, the compensation court entered an order finding "good cause for [Hubbart's] failure to contact her counsel and the Court regarding an evaluation for vocational rehabilitation, which was due primarily to her homelessness and related circumstances." The court essentially gave Hubbart an additional 30-day period in which to indicate that she desired to be evaluated as to her suitability for rehabilitation services.

On February 17, 2004, Hubbart filed an "Application to Modify." In her application, Hubbart claimed that she "requested further medical care and treatment in the form of a repeat left carpal tunnel surgery" and that "[Hormel] has failed and refused to pay for the cost of additional surgery which . . . was eventually performed on November 21, 2003." Hubbart alleged that Hormel "has failed and refused to pay for temporary total disability benefits following the time of [Hubbart's] surgery" and that Hubbart "has developed mental overlays secondary to her work-related injuries which [have] rendered her totally disabled at present." She further claimed that the "matters in dispute are payment of [Hubbart's] medical care [and] temporary total disability benefits, together with waiting penalties and attorney fees due to [Hormel's] failure and refusal to pay for accrued medical and indemnity benefits absent a reasonable controversy."

On May 25, 2004, Hormel filed an amended answer to Hubbart's application to modify. In its amended answer, Hormel "admit[ted] that it has not paid for the cost of left carpal tunnel surgery nor any temporary total disability benefits associated with such surgery for the reason that the condition is not related to or caused by [Hubbart's] employment with Hormel." Hormel generally denied Hubbart's claims and listed two affirmative defenses to the application: that "[Hubbart's] claim for benefits related to 'mental overlay secondary to her work related injuries' is barred by the statute of limitations" and that

"[the same] claim . . . is barred by the doctrine of res judicata." Therefore, Hormel asked that Hubbart's application be dismissed with prejudice.

A hearing was had on Hubbart's application to modify on June 2, 2004. Both parties entered numerous exhibits into evidence, and the contents of these exhibits will be discussed as necessary in the analysis section of this opinion. Hubbart testified in her own behalf. Hubbart said that she came to the United States from Thailand 30 years earlier. Hubbart testified that since the initial litigation began with Hormel, she had not worked anywhere else. She said that she worked for Hormel for 5 years 7 months and that during the course of her employment with Hormel, her work required her to use both hands all day long. Hubbart testified that she first sought medical attention for her hands in February 2001. Hubbart said that she saw a nurse at Hormel and complained of pain in her hands and that the nurse gave her aspirin for the pain. After she had been in pain for 2 weeks, she was sent to see a doctor. Hubbart said that she also saw two other doctors and that all three doctors "agreed that the problems with [her] hands were related to [her] work." Hubbart testified that at the time of trial, she was being treated by Dr. Richard Bergstrom.

Hubbart testified that when she filed her first suit against Hormel in 2001, she had been fired by Hormel; that she was unemployed and without an income; and that subsequently, she became depressed. Hubbart said she had thoughts of suicide. She began to consult with Dr. Thomas McKnight. However, her depression lessened when she began to see a "job expert," "[b]ecause [she] had something [she] looked forward to, and [she] knew [she could] get a job or get [an] education." Hubbart testified that she had surgery on her right hand in March 2001, but that she continued to have problems with her hands after the surgery. She said that doctors recommended that she have a second surgery done on her right hand, which she eventually had on January 30, 2003. Hubbart testified that she did not have any way to pay for that surgery; however, Hubbart said that her doctor performed the surgery because "he [felt] sorry for [her] because [her] hand really hurt" and that "he agreed that [she could] make . . . payment[s] on the surgery."

Hubbart testified that after her second surgery on her right hand, her vocational rehabilitation benefits ceased. She was without an income, so she rented her house to some illegal aliens, who had marijuana in the house. Hubbart testified that "the police put [her] in jail because it was [her] house [and that] when [she went] to the court, the judge [gave her] one year probation." Hubbart testified that she eventually moved into a homeless shelter because her electric utility service was shut off and she had to "move to [the] shelter to get warm." Hubbart testified that she and her attorney "lost communication between one another for a period of time." On April 30, 2003, the compensation court entered an order awarding Hubbart medical expenses and vocational rehabilitation benefits.

Hubbart testified that after she had the second surgery on her right hand in January 2003, she began to use her left hand more. She began to have increasing problems with her left hand, and she explained the problems to Dr. Bergstrom; in the fall of 2003, Dr. Bergstrom suggested that she have surgery on her left hand. Hubbart testified that she asked Hormel to pay for the surgery on her left hand, but that Hormel refused. When asked how the refusal made her feel, Hubbart said, "Hurt, . . . angry, . . . hopeless." Hubbart said that she discussed her depressed thoughts and feelings of hopelessness with Dr. Eugene Oliveto, a psychiatrist, and with a counselor for Lutheran Family Services. Hubbart said that at the time of trial, she was still being treated by Dr. Oliveto and taking medication for her depression. Hubbart said that she wanted Hormel to pay for her ongoing treatment with Dr. Oliveto or with a counselor for Lutheran Family Services.

Hubbart testified that Dr. Bergstrom performed surgery on her left hand on December 9, 2003, but that she had not been able to pay him for performing the surgery. She then described the current state of her hands:

> Both of my hands hurt, [they are] swollen, but I have to take medication for that. I need to take the medication to keep from swelling . . . . It's really hard for me to do anything, any work. I have to ask my husband to help me. He [does] everything for me.

Hubbart said that mentally, she felt "[k]ind of . . . depressed and kind of . . . hopeless" and that she did not "know what's going to happen in [her] future." She admitted that she got divorced in 1996 and that she became depressed as a result, but said that she did "get over that." Hubbart testified, "I've been through it with Hormel, I've been through what they [have] done to me. I've been through the gentleman over there fir[ing] me without no reason . . . . And my hand[s] hurt right now, and I cannot do what I used to do." At the conclusion of Hubbart's testimony, she rested. At the conclusion of all evidence, the trial court took the matter under advisement.

On November 5, 2004, the trial court filed a "Further Award." In its further award, the trial court found and held as follows:

> The Court has previously determined that on January 8, 2001, [Hubbart] suffered bilateral carpal tunnel syndrome as a result of an accident arising out of and in the course of her employment by [Hormel]. [Hubbart] previously underwent bilateral surgeries but on December 9, 2003, underwent a second procedure on her left hand by Dr. . . . Bergstrom after experiencing increasing recurrent symptoms. . . . Dr. Bergstrom provided a sufficient medical causation opinion and opined the second procedure was reasonably necessary . . . . The records indicate the second procedure was effective in reducing [Hubbart's] left hand symptoms. [Hubbart] further argued that secondary to her physical injuries, loss of function and pain syndrome she became disabled due to depression. The evidence is uncontroverted that [Hubbart] has in the past and currently suffers depression, but causation is disputed between the parties. [Hubbart] was referred to Lutheran Family Services for evaluation and treatment. Her family physician, the Lutheran Family Services psychologist and [the] psychiatrist all attribute her depression to her physical injuries, loss of function and pain syndrome, although acknowledging other stressors are contributory . . . . Drs. Terry Davis and Jones-Thurman, who examined [Hubbart] at [Hormel's] direction, likewise diagnosed her depression and indicated it was due in part to her injuries but emphasized other situational factors such as unemployment, drug

> use and a recent criminal arrest and conviction. Dr. Jones-Thurman reported, "she does appear to have some depression and anxiety and these may be related to various factors including her medical condition . . . she appears to have several situational factors which have probably contributed to her anxiety and depression." . . . It is not necessary [Hubbart] establish that her depression was caused solely or exclusively by her physical injuries, loss of function and pain syndrome. The evidence does establish her injuries to be a significant, contributing cause of her depression which at present renders her temporarily totally disabled. At the time of her accident and injury [Hubbart] was receiving an average weekly wage of $341.20 being sufficient to . . . entitle her to benefits of $227.47 per week for temporary total disability regarding her left hand from December 9, 2003, through May 20, 2004, a period of 23 2/7 weeks and thereafter and in addition thereto the sum of $227.47 per week for a 12 percent permanent functional impairment of her left upper extremity.

The trial court further found that Hubbart was "entitled to temporary total indemnity of $227.47 per week from and after May 25, 2004, through the date of trial for so long thereafter as [Hubbart] shall remain temporarily totally disabled due to her depression." The court ordered Hormel to pay Hubbart's current medical bills as well as "future medical expenses reasonably necessary for treatment of [Hubbart's] carpal tunnel syndrome and counseling for her depression as recommended by Dr. . . . Oliveto." The court also noted that it made "no finding regarding [Hubbart's] entitlement to vocational rehabilitation services as she has not reached maximum medical improvement regarding her depressive symptoms."

On November 18, 2004, Hormel filed an application for review with the review panel of the Nebraska Workers' Compensation Court. After a hearing, the review panel entered its order of affirmance in part and reversal and remand in part. The review panel first found that "[t]he trial court's finding that [Hubbart's] depression was related to the accident and injury of January 8, 2001, is not clearly wrong and is supported by the record." The review panel noted that "[t]here are sufficient expert medical

opinions from the physicians and psychologists at Lutheran Family Services that [Hubbart's] depression is related to her physical injuries from the accident."

The review panel further found that the trial court erred in failing to evaluate or mention Hormel's affirmative defenses of res judicata and the statute of limitations:

> The further award . . . of the trial court entered on November 5, 2004, found that [Hubbart's] mental stresses were work related and put [Hubbart] on a running award for temporary total disability benefits due to depression. The trial court made no mention of [Hormel's] affirmative defenses that the mental overlay was barred by the statute of limitations or the doctrine of *res judicata*.
>
> A review of the record shows that [Hubbart] had a prior claim in this case for psychological injuries. This is borne out by [Hubbart's] Amended Petition . . . filed May 17, 2001, where [Hubbart] made a specific request . . . for damages due to depression secondary to work related injuries. The request in the petition of May 17, 2001, for psychological injuries is supported by the facts in this case wherein [Hubbart] sought treatment in June of 2001, by her family physician Dr. McKnight . . . and Dr. McKnight treated [Hubbart] for anxiety and prescribed anti-depressants . . . . [Hubbart] was further treated by Dr. McKnight on August 7, 2001, . . . again for anxiety and depression. Dr. McKnight confirmed that his treatment for depression and psychiatric injury was specifically related to [Hubbart's] work related injuries in his report dated August 8, 2001 . . . .
>
> The record shows that there [were] more than two years before the next claim for depression was made in the [Application to Modify] of [February] 17, 2004. Depending on how the evidence is viewed, this may or may not be outside the statute of limitations and the claim for psychiatric injuries may or may not be barred by the doctrine of *res judicata* even though the issue had been previously raised. The issues of the statute of limitations and *res judicata* were not specifically discussed by the trial court even though [Hormel] specifically pled the affirmative defenses

> and there is evidence in the record that may or may not support [Hormel's] position as indicated above.
>
> [Hormel] is entitled to a reasoned decision by the trial court pursuant to Rule 11 of the Rules of Procedure of the Nebraska Workers' Compensation Court. The review panel will therefore reverse and remand the issue of whether or not [Hubbart's] claim for indemnity for psychiatric injury is compensable pending resolution of the issues of the statute of limitations and *res judicata* by the trial court pursuant to Rule 11. Rule 11 requires that all parties are entitled to a reasoned decision which contains findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rational[e] for the decision so that all interested parties can determine how and why a particular result was reached. Rule 11 requires the judge to specify the evidence upon which the decision is based. Such findings provide the basis for a meaningful appellate review and should be undertaken by the trial court concerning the affirmative defenses of the statute of limitations and *res judicata* as they may pertain to a running award for psychiatric injury.

The review panel further found that although the trial court had mistakenly stated Hubbart " 'underwent a second procedure on her left hand,' " this error was harmless, and that "there is support in the record for the trial court's finding that [Hubbart's] left hand carp[a]l tunnel syndrome surgery and resulting impairment [were] related to the accident and injury of January 8, 2001." Hormel has timely appealed to this court.

## ASSIGNMENTS OF ERROR

Hormel alleges, restated, that the trial court (and, later, the review panel) erred when it failed to conclude that Hubbart's claim for depression was barred by the doctrine of res judicata, that the trial court (and, later, the review panel) erred when it failed to dismiss Hubbart's claim for depression because Hubbart failed to meet her burden of proof, and that the review panel was clearly wrong when it found that the record contained sufficient evidence to support a causal relationship between Hubbart's December 2003 surgery and her January 2001 accident.

## STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

## ANALYSIS

*Doctrine of Res Judicata.*

Hormel alleges that the trial court erred when it failed to find that Hubbart's compensation claim for depression was barred by the doctrine of res judicata. Further, Hormel asserts that the review panel erred when it failed to dismiss Hubbart's claim for her depression based on the doctrine of res judicata. We address these two assignments of error together.

In its order, the review panel concluded that the trial court did in fact err when it failed to address Hormel's affirmative defenses, one of which was the doctrine of res judicata. Specifically, the review panel held:

> The issues of the statute of limitations and *res judicata* were not specifically discussed by the trial court even though [Hormel] specifically pled the affirmative defenses and there is evidence in the record that may or may not support [Hormel's] position as indicated above.
>
> [Hormel] is entitled to a reasoned decision by the trial court pursuant to Rule 11 of the Rules of Procedure of the Nebraska Workers' Compensation Court. The review panel will therefore reverse and remand the issue of whether or not [Hubbart's] claim for indemnity for psychiatric injury is compensable pending resolution of the issues of the statute of limitations and *res judicata* by the trial court pursuant to Rule 11. Rule 11 requires that all parties are entitled

> to a reasoned decision which contains findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rational[e] for the decision so that all interested parties can determine how and why a particular result was reached. Rule 11 requires the judge to specify the evidence upon which the decision is based. Such findings provide the basis for a meaningful appellate review and should be undertaken by the trial court concerning the affirmative defenses of the statute of limitations and *res judicata* as they may pertain to a running award for psychiatric injury.

[3,4] An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Id.* The review panel concluded, and we agree, that the trial court failed to address the affirmative defenses raised by Hormel regarding Hubbart's claims for depression. The review panel found that remand was necessary for the trial court to specifically address these issues. Since the trial court did not address the issues of res judicata or the statute of limitations, we will not address these issues. We therefore find that the review panel's conclusion that remand was required for the trial court to address these issues was proper and affirm that part of the review panel's order.

*Burden of Proof Regarding Depression.*

Hormel next alleges that the trial court (and, later, the review panel) erred when it failed to dismiss Hubbart's compensation claim for depression, because Hubbart failed to meet her burden of proof under Neb. Rev. Stat. § 48-141 (Reissue 2004).

Section 48-141 provides, in relevant part:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to section 48-139, shall be final, but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court;

or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage or by reason of the death of the dependent.

[5,6] To obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

We find that the trial court evaluated Hubbart's application to modify based on her depression using an incorrect standard. In its November 5, 2004, award, the trial court noted the following: "It is not necessary [Hubbart] establish that her depression was caused solely or exclusively by her physical injuries, loss of function and pain syndrome. The evidence does establish her injuries to be a significant, contributing cause of her depression which at present renders her temporarily totally disabled." However, as noted above, in order to obtain a modification to a prior award, an applicant must prove that the increase in his or her incapacity was due *solely* to the injury resulting from the original accident. Therefore, we find that the portion of the trial court's award finding Hubbart to be temporarily totally disabled as a result of her depression must be reversed and that the cause must be remanded to the review panel for remand to the trial court for evaluation of the claim using the proper standard.

*Sufficient Evidence.*

Finally, Hormel contends that the review panel was clearly wrong in finding that sufficient evidence existed in the record to support the trial court's finding of a causal connection between Hubbart's December 2003 surgery and her January 2001 injury. Hormel also contends that the review panel erred in finding that the trial court committed harmless error when it relied on an erroneous expert opinion.

The trial court held that Hubbart's December 2003 surgery was a result of her previous carpal tunnel injury suffered during her employment with Hormel. Specifically, the trial court noted:

> The Court has previously determined that on January 8, 2001, [Hubbart] suffered bilateral carpal tunnel syndrome as a result of an accident arising out of and in the course of her employment by [Hormel]. [Hubbart] previously underwent bilateral surgeries but on December 9, 2003, underwent a second procedure on her left hand by Dr. . . . Bergstrom after experiencing increasing recurrent symptoms. . . . Dr. Bergstrom provided a sufficient medical causation opinion and opined the second procedure was reasonably necessary . . . .
>
> . . . .
>
> . . . [Hubbart] is entitled to [have her] medical expenses paid. [Hormel] shall pay future medical expenses reasonably necessary for treatment of [Hubbart's] carpal tunnel syndrome . . . .

In affirming the trial court's findings regarding the causal connection between Hubbart's December 2003 surgery and her January 2001 injuries, the review panel provided:

> [Hormel] alleges the evidence fails to show [Hubbart's] December, 2003, left hand carp[a]l tunnel surgery was caused by the accident and injury of January 8, 2001.
>
> The primary basis for [Hormel's] contention that the left hand carp[a]l tunnel surgery was not work related is that the trial court erred in making the statement . . . that the surgery to the left hand was recurrent because the surgery was "a second procedure on her left hand." [Hormel] is correct in its assertion that this is an incorrect factual statement by the trial court. [Hubbart] did not undergo a second procedure on her left hand. Although this is error, the Court finds that it is harmless error which does not affect the compensability of [Hubbart's] left hand carp[a]l tunnel surgery claim. The mistake in the alleged "second procedure on her left hand" was due to the fact that Dr. Bergstrom was reading prior medical records that could be interpreted as a second surgery having been done on the left hand and Dr. Bergstrom interpreted it to [be] the left

hand. In fact, the second surgery was to the right hand. Be that as it may, the trial court's finding is still accurate based upon the medical records before the Court. The basis of the trial court's finding that the left hand is work related is in reliance on Dr. Bergstrom's opinion that it is recurrent because this was a second surgical event. Even though it was not a second surgical event, the medical evidence still shows that the left hand carp[a]l tunnel was recurrent.

The parties had originally agreed that both the left and right hand carp[a]l tunnel syndrome [was] work related as set forth in the Order of Dismissal of November 2, 2001 . . . . At that time, [Hormel] is correct in its argument that Dr. Pitz found that the left carp[a]l tunnel had resolved and there was no permanent impairment associated with the left hand as set forth in [Hormel's] brief . . . . However, a reading of Dr. Pitz's report of August 13, 2001, . . . shows that Dr. Pitz believes there is a good chance that the carp[a]l tunnel syndrome to the left hand will recur. A complete reading of Dr. Pitz's statement . . . concerning the left hand is as follows: "As for the left carp[a]l tunnel syndrome, at the present time that is resolved. I do not believe that there is any impairment associated with the left hand or upper extremity. It should be noted, however, that it is possible for carp[a]l tunnel syndrome to recur later or slowly progress over time to the point where significant compression of the median nerve could occur that would require surgical intervention. I do not believe that there is any way to predict with any certainty whether or not . . . Hubbart's left hand will eventually develop carp[a]l tunnel syndrome that requires surgical intervention." The prophecy that Dr. Pitz stated in his August 13, 2001, report comes to fruition when Dr. Bergstrom operates on the left hand for carp[a]l tunnel syndrome on December 9, 2003. Since [Hormel] originally stipulated that [Hubbart] had left hand carp[a]l tunnel syndrome, the fact that it did recur finds support in the report of Dr. Pitz . . . and also in the reports of Dr. Bergstrom . . . . Dr. Bergstrom also corrects his misconception of the number of surgical procedures on [Hubbart's] left hand and also discusses that [Hubbart] had

> overuse syndrome to the left hand due to the prior right hand surgery . . . .
>
> The review panel finds that the incorrect statement by the trial court that [Hubbart] "underwent a second procedure on her left hand" is harmless error and that there is support in the record for the trial court's finding that [Hubbart's] left hand carp[a]l tunnel syndrome surgery and resulting impairment [were] related to the accident and injury of January 8, 2001.

In June 2001, Dr. Kenneth Pitz opined that while Hubbart did have carpal tunnel syndrome in her left hand, "it is only very mild . . . and therefore surgery is not indicated." However, he did note that "[t]here is no way to predict whether or not she will require carpal tunnel release in the future." Later, in a report dated August 13, 2001, Dr. Pitz noted, "At the present time with no ability to advance any further with [Hubbart's] rehab I believe with reasonable medi[c]al certainty that she has reached maximum medical improvement." He opined, "As for the left carpal tunnel syndrome, at the present time that is resolved. I do not believe that there is any impairment associated with the left hand or upper extremity." However, Dr. Pitz again noted that a worsening of Hubbart's left carpal tunnel syndrome was possible in the future: "[I]t is possible for carpal tunnel syndrome to recur later or slowly progress over time to the point where significant compression of the median nerve could occur that would require surgical intervention." Dr. Pitz again opined that it was impossible to predict whether or not Hubbart would require carpal tunnel surgery on her left hand.

Dr. Bergstrom, in a report dated November 18, 2003, noted:

> [Hubbart] is requesting that a repeat surgery be carried out on the left carpal tunnel. From the history, which is present in my notes and those of Dr. Pitz, I feel . . . with a reasonable degree of [medical] certainty that the aggravating and precipitating factor in the development of . . . Hubbart's symptoms of bilateral carpal tunnel syndrome was her employment at . . . Hormel . . . .

Dr. Bergstrom, in a letter dated December 18, 2003, noted that "Dr. Pitz had also done a left carpal tunnel release in March 2001. I did a repeat left carpal tunnel release 9 December 2003 . . . ."

As noted earlier by the review panel, Dr. Bergstrom incorrectly noted that prior to December 2003, Hubbart had received carpal tunnel surgery on her left hand. However, on May 14, 2004, Dr. Bergstrom was deposed, and in his deposition, this error was brought to his attention. Dr. Bergstrom stated that his opinion remained "with a reasonable degree of medical certainty or probability that [his] ongoing treatment of . . . Hubbart, including the left carpal tunnel release, was reasonable and necessary as a result of the cumulative trauma she sustained during the course of her employment with Hormel." Further, on May 20, Dr. Bergstrom filled out a questionnaire in which he opined that "Hubbart's bilateral carpal tunnel syndrome arose as a result of cumulative trauma sustained during the course of her employment at Hormel"; that "Hubbart's bilateral carpal tunnel syndrome has made her susceptible to physical aggravations, from ordinary activities of daily life, which activities would not have otherwise affected her but for the underlying injury"; and that "the aforementioned work-related injuries and aggravations arising secondary thereto necessitated the performance of [Hubbart's] left carpal tunnel release performed on December 9, 2003."

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Based on the opinions given by Drs. Pitz and Bergstrom, it is apparent to this court that the review panel did not err in affirming the trial court's determination that Hubbart's need for left carpal tunnel surgery resulted from the injuries she sustained while working for Hormel. Clearly, there is evidence to support the trial court's finding. While it is true that the trial court erroneously noted that Hubbart had two left carpal tunnel surgeries, it is clear that the trial court relied on the opinion of Dr. Bergstrom regarding causation and that Dr. Bergstrom's opinion regarding causation did not change even after he became aware that Hubbart had not had left carpal tunnel surgery before December 9, 2003. Therefore, this error was harmless, as the review panel properly held. We find that the trial court's finding that Hubbart's need for left carpal tunnel surgery was caused by her employment with Hormel was not clearly wrong, and the review panel properly

affirmed this portion of the trial court's award. This assignment of error is without merit.

## CONCLUSION

We find that the trial court evaluated Hubbart's application to modify based on her depression using an incorrect standard, and we accordingly reverse the portion of the review panel's order that affirmed the trial court's award finding Hubbart to be temporarily totally disabled as a result of her depression. The cause is remanded to the review panel for remand back to the trial court for an evaluation of Hubbart's claim using the proper standard and to address the issue of res judicata. Finding no other error in the review panel's order, we affirm the remainder of the review panel's order in its entirety.

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

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# IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DANIEL M., APPELLANT, AND THERESA S., APPELLEE.

# IN RE INTEREST OF CHLOE H. AND KATRINA H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. AMANDA H., APPELLANT, AND JAMES N. AND STANLEY H., APPELLEES.

723 N.W.2d 363

Filed October 31, 2006. Nos. A-06-179 through A-06-181.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Parent and Child.** Under Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

3. ____: ____. Under Neb. Rev. Stat. § 43-283.01(4)(b)(iv) (Reissue 2004), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent of the juvenile has committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent.
4. ____: ____. Neb. Rev. Stat. § 43-283.01 (Reissue 2004) addresses when efforts at reunification of the family are required, but makes such efforts dependent on the conduct of the parent of the juvenile toward either the juvenile or another minor child of the parent.
5. **Parent and Child: Words and Phrases.** Under Neb. Rev. Stat. § 43-245(11) (Reissue 2004), parent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition.
6. **Parental Rights: Proof.** The determination to excuse reasonable efforts at reunification under Neb. Rev. Stat. § 43-283.01(4) (Reissue 2004) should be supported by clear and convincing evidence.
7. **Parental Rights: Minors: Statutes: Words and Phrases.** The term "aggravated circumstances," as used in Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be reabused.
8. **Parental Rights: Circumstantial Evidence: Proof.** Circumstantial evidence may be used to establish child neglect or child abuse.
9. ____: ____: ____. Circumstantial evidence may be used in a disposition proceeding in which the burden of proof is "clear and convincing."
10. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.
11. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
12. **Parental Rights: Proof.** A finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.

Appeal from the District Court for Sherman County: GARY G. WASHBURN, County Judge. Judgment in No. A-06-179 reversed, and cause remanded with directions. Judgments in Nos. A-06-180 and A-06-181 affirmed.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, for appellant Daniel M.

Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, P.C., L.L.O., for appellant Amanda H.

Jon Bruning, Attorney General, Monika E. Anderson, Special Assistant Attorney General, and Mark Eurek, Sherman County Attorney, for appellee State of Nebraska.

Jason S. White for appellee Theresa S.

Gregory G. Jensen for appellees James N. and Stanley H.

William J. Erickson, guardian ad litem.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Daniel M. appeals the disposition order of the Sherman County Court, sitting as a juvenile court, regarding Daniel's son, Ethan M. Amanda H. appeals the disposition order of the Sherman County Court, sitting as a juvenile court, regarding Amanda's daughters, Chloe H. and Katrina H. While these three appeals are separately docketed, they have been consolidated for briefing and argument, and we find it most efficient to write one opinion, given that Daniel and Amanda are now married and were living together with the three children at the time of the events involved in this case—even though Daniel is the natural father of only one of the three children and Amanda is the natural mother of only the other two of the three children.

## I. FACTUAL BACKGROUND

Ethan, born January 18, 2000, is the biological child of Daniel and Theresa M., now known as Theresa S. due to her remarriage. Daniel and Theresa were divorced in January 2002, and Daniel received primary physical custody of Ethan.

Amanda is the biological mother of Chloe, born August 9, 2000, and Katrina, born March 27, 2004. Chloe's biological father is James N., and Katrina's biological father is Stanley H. Amanda was never married to either James or Stanley.

Daniel and Amanda, along with Ethan, Chloe, and Katrina, began living together in September 2004. Daniel and Amanda were married on February 15, 2005 (after the juvenile petitions herein were filed). In January, Chloe sustained bruises on her body, scratches about her face and neck, and a black eye. Although Amanda initially blamed Ethan for Chloe's injuries and

maintained that story for several months, Amanda ultimately admitted that she caused Chloe's injuries. Daniel also came to admit that he was aware that Chloe's injuries were caused by Amanda, but he, too, let the blame lie with Ethan for several months.

Katrina suffered a fractured elbow diagnosed on December 22, 2004, and a fractured skull diagnosed on January 26, 2005. Daniel and Amanda deny inflicting such injuries. The skull fracture and a subdural hematoma were diagnosed after Katrina suffered two seizures. Ethan sustained no injuries. On January 27, all three children were removed from the home and placed into emergency foster care.

## II. PROCEDURAL BACKGROUND

At the outset, it is important to point out that there was some confusion as to whether the exhibits and testimony would be offered and considered in only a particular child's case or in all three cases collectively. The bill of exceptions reveals that all exhibits and testimony apparently would be considered in all three cases collectively. Upon inquiry at oral argument, counsel agreed that such was the procedure followed, and as a result, we consider all the exhibits and testimony as being admitted in all three cases.

### 1. ETHAN

On April 19, 2005, the amended juvenile petition for Ethan was filed, alleging that he was "in a situation dangerous to life or limb or injurious to the health or morals of such juvenile" pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), because other children residing within the family structure had suffered injuries, including a black eye, bruises, scratches, a fractured arm, and a subdural hematoma. Daniel pled "no contest" to the allegations, and Ethan was adjudicated accordingly.

On July 5, 2005, the guardian ad litem filed his objection to the case plan and court report filed on May 31 and alleged that reunification of Ethan with Daniel and Amanda is not in Ethan's best interests and that such reunification is "unnecessary and unwise under the provisions of [Neb. Rev. Stat.] § 43-283.01(4) [(Reissue 2004)]." On July 14, Daniel filed his amended objection to the May 31 case plan. In Daniel's objection, he alleges

that (1) the case plan fails to establish as a priority the reunification of Ethan with Daniel, from whose home Ethan was removed; (2) the case plan fails to establish a reasonable and timely date for reunification of Ethan with Daniel; (3) the goals of the case plan are not specific enough to allow for the successful reunification of Ethan with Daniel; (4) the case plan purports to provide to the Nebraska Department of Health and Human Services (DHHS) the authority to add new tasks to such plan at the discretion of DHHS and without court approval; (5) the case plan includes tasks which duplicate tasks that have been completed by Daniel; (6) the case plan requires Daniel to complete tasks that are not reasonably related to correcting or ameliorating the conditions leading to the adjudication of Ethan; and (7) immediate reunification of Ethan with Daniel is in Ethan's best interests and is not contrary to his welfare.

On September 16, 2005, DHHS sent a letter informing the court that beginning October 17, Ethan was being placed with his biological mother, Theresa. On September 19, Daniel filed his "Objection to Change of Placement and Application for Stay," and a stay of the placement with Theresa was granted by the juvenile court via a journal entry filed on December 29.

After a hearing, the juvenile court rendered its decision on January 26, 2006. The juvenile court (1) approved and adopted the case plan and court report; (2) sustained the guardian ad litem's objection to the case plan and court report, finding by clear and convincing evidence that Daniel and Amanda have subjected Ethan to aggravated circumstances, including but not limited to chronic abuse, and finding that DHHS thus is not required to make reasonable efforts to reunify Ethan with Daniel and Amanda; (3) committed Ethan to the care, custody, and control of DHHS; (4) approved the immediate change of placement of Ethan from the home of his paternal grandparents to the home of his biological mother, Theresa; and (5) ordered Daniel and Amanda to comply with specific goals of the case plan which relate to continued visitation but not reunification, said conditions to remain in effect for a period of 1 year. On January 18, 2006, DHHS sent a letter informing the court that effective January 28, Ethan was being placed with his biological mother, Theresa.

Daniel timely appeals from that portion of the juvenile court's order of January 26, 2006, concerning Ethan.

2. CHLOE AND KATRINA

On January 28, 2005, the juvenile petition for Chloe was filed, and on April 19, the amended juvenile petition for Katrina was filed. The petitions alleged that they were minor children as defined by § 43-247(3)(a). Specifically, the petitions alleged that Chloe sustained intentional injuries while in the care and custody of a parent or caretaker while she was in "the family home or shop," that Katrina sustained unexplained injuries while in the care and custody of the parent or caretaker through neglect while she was in "the family home or shop," and that there were injuries to other children in the family, which injuries were caused by Amanda's neglect or may have been caused by actions of Amanda or other persons residing in "the family home or at the shop." Amanda admitted the allegations in Chloe's petition and pled "no contest" to the allegations in Katrina's petition. Chloe and Katrina were adjudicated accordingly.

On June 20, 2005, Amanda filed her objections to the May 31 case plan. In Amanda's objections, she alleged that (1) the case plan fails to establish as a priority the reunification of Chloe and Katrina with Amanda, from whose home the girls were removed; (2) the case plan fails to establish a reasonable and timely date for reunification of Chloe and Katrina with Amanda; and (3) the goals of the case plan are not specific enough to allow for the successful reunification of Chloe and Katrina with Amanda. On July 5, the guardian ad litem filed his objections to the May 31 case plan and court report, alleging that reunification of Chloe and Katrina with Daniel and Amanda is not in the girls' best interests and that such reunification is "unnecessary and unwise under the provisions of [Neb. Rev. Stat.] § 43-283.01(4) [(Reissue 2004)]."

After a hearing, the juvenile court rendered its decision on January 26, 2006. The juvenile court (1) approved and adopted the case plan and court report; (2) sustained the guardian ad litem's objection to the case plan and court report, finding by clear and convincing evidence that Daniel and Amanda have subjected Chloe and Katrina to aggravated circumstances, including but not limited to chronic abuse, and finding that DHHS thus is not

required to make reasonable efforts to reunify Chloe and Katrina with Daniel and Amanda; (3) committed Chloe and Katrina to the care, custody, and control of DHHS; (4) found that physical placement of Chloe with her biological father, James, and Katrina with her biological father, Stanley, appears appropriate; and (5) ordered Daniel and Amanda to comply with specific goals of the case plan which relate to continued visitation but not reunification, said conditions to remain in effect for a period of 1 year.

Amanda timely appeals from that portion of the juvenile court's orders of January 26, 2006, affecting Chloe and Katrina.

## III. ASSIGNMENTS OF ERROR

Daniel alleges that the trial court erred in (1) finding that the existence of aggravated circumstances eliminated the need for reasonable efforts to reunify Ethan with Daniel, (2) failing to consider and determine whether Ethan's best interests required reasonable efforts at reunification with Daniel, (3) finding that continuation of Ethan in Daniel's home is not in Ethan's best interests, (4) finding that reasonable efforts have failed to prevent or eliminate the need for removal of Ethan from the home or make it possible for Ethan to safely return to the home of Daniel and Amanda, (5) approving the change of placement of Ethan from the home of his grandparents to the home of Theresa, and (6) ordering a final disposition that is not in the best interests of Ethan.

Amanda alleges that the trial court erred in (1) finding that the guardian ad litem proved by clear and convincing evidence that Daniel and Amanda have subjected the juveniles to aggravated circumstances, including but not limited to chronic abuse; (2) finding that DHHS is not required to make reasonable efforts to reunify the juveniles with Amanda; (3) finding that Amanda failed to prove by a reasonable preponderance of the evidence that the case plan and court report are not in the best interests of Chloe and Katrina; and (4) finding that the reasonable efforts made by DHHS have failed to prevent or eliminate the need for removal from the home or make it possible for the juveniles to safely return home.

## IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of

the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

## V. ANALYSIS

### 1. Who Is the Parent of Whom?

[2,3] This case involves the fundamental question of whether DHHS must make reasonable efforts to reunify the "family." Before that question can be answered with respect to any of the three children involved in these cases, there is a predicate question: "Who is the parent of whom?" The question arises by virtue of the language of Neb. Rev. Stat. § 43-283.01 (Reissue 2004), which states in relevant part:

> (4) Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

[4,5] Section 43-283.01 addresses when efforts at reunification of the "family" are required, but makes such efforts dependent on the conduct of "[t]he parent of the juvenile [toward either] the juvenile or another minor child of the parent." These cases involve multiple children with differing biological parents. For purposes of our analysis of these cases, the answer is provided by Neb. Rev. Stat. § 43-245(11) (Reissue 2004), which

says that "[p]arent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition."

Therefore, given that Daniel and Amanda were not married when the petitions were filed, Amanda is deemed to be the parent of Chloe and Katrina but not of Ethan, and Daniel is the parent of Ethan but not of Chloe and Katrina. During oral argument of these cases, there were numerous suggestions that we decide the cases by considering the "whole family" or the "family unit" composed of Daniel, Amanda, Ethan, Chloe, and Katrina, but § 43-245(11) does not allow us to do so. Thus, there are two family units: one consisting of Amanda, Chloe, and Katrina and another one consisting of Daniel and Ethan.

(a) Ethan

[6] Daniel argues that the juvenile court erred in finding that the existence of aggravated circumstances eliminated the need for reasonable efforts to reunify Ethan with Daniel. In *In re Interest of Jac'Quez N.*, 266 Neb. 782, 789-90, 669 N.W.2d 429, 435 (2003), the Nebraska Supreme Court said:

> Upon due consideration, we hold that a finding of a fact, such as aggravated circumstances under § 43-283.01(4)(a), that excuses the requirement of reasonable efforts at reunification under § 43-283.01(4) must be based on clear and convincing evidence. In connection with our ruling, we note that dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights. It follows that the requisite standard of proof for such determination should be at the level required for a termination of parental rights, and therefore the determination to excuse reasonable efforts at reunification under § 43-283.01(4) should be supported by clear and convincing evidence.

As outlined above, because Daniel became a stepparent of Chloe and Katrina after the petitions in these cases were filed, he is not their "parent" for purposes of determining the necessity of reasonable efforts at reunification with Ethan under § 43-283.01. Thus, whatever his actions or shortcomings may have been with respect to Chloe and Katrina, the fact is that our analysis in Ethan's case excludes consideration of what happened to Chloe

and Katrina because Daniel was not their "parent." And, because Amanda is likewise not a parent of Ethan, her actions toward Chloe and Katrina are not material when determining whether DHHS must make reasonable efforts to reunify Daniel and Ethan.

[7] The record is clear that Ethan sustained no physical injuries while living with Daniel (and Amanda), nor is there evidence of any other type of abuse or neglect. In *In re Interest of Jac'Quez N., supra*, the Nebraska Supreme Court relied upon *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 77, 824 A.2d 213, 233 (2003), in which the Superior Court of New Jersey concluded that

> the term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.

Given that our Supreme Court embraced this definition of aggravated circumstances, we find that with respect to Ethan, there was no clear and convincing evidence of aggravated circumstances on the part of Daniel which would eliminate the requirement that reasonable efforts be made to preserve and reunify the family composed of Daniel and Ethan. As a result, in case No. A-06-179, we reverse the trial court's finding that such efforts need not be made with respect to Daniel. However, we are careful to point out that in our view, a child could be found to have been chronically abused by virtue of being present when his or her parent subjected a sibling or siblings to chronic abuse. But, again, as a matter of law under § 43-245(11), Daniel was not Chloe's or Katrina's parent, nor were the girls Ethan's siblings.

(b) Placement of Ethan With Theresa

Daniel next argues that the juvenile court erred in approving the change of placement of Ethan from the home of his paternal grandparents to the home of Ethan's biological mother, Theresa, in California. When the juvenile court approved the placement of Ethan with Theresa in California, such action would obviously flow from the finding that the State did not have to make reasonable efforts to reunify Ethan with Daniel. However, given our finding that reasonable efforts to reunify Ethan and Daniel must be made, a placement of Ethan with Theresa in California

poses a substantial and unnecessary hindrance to efforts of reunification of Ethan with Daniel. Additionally, Daniel was awarded physical custody of Ethan at the time of Theresa and Daniel's California divorce—although the record before us is unclear as to whether this result derived from the parties' agreement or from a court decision after a custody contest. Nevertheless, the record before us contains substantial information about Theresa which reveals that she has mental illnesses of consequence, as well as a history of periodically leaving the marital home for significant timeframes, leaving Daniel to care for Ethan. We recognize that Theresa attributes such behavior to Daniel's abuse of her and Ethan, which assertion Daniel denies. Nonetheless, the fact is that by virtue of the California divorce decree, Daniel is Ethan's custodial parent.

Therefore, after consideration of these circumstances, and given our reversal of the trial court's finding that reasonable efforts to reunify Ethan with Daniel need not be made, we are compelled to conclude that Ethan should not be placed in California with Theresa (and must be returned if so placed) and that Ethan should be placed in a situation in Nebraska that is conducive to reunification with Daniel, be that in a foster care placement with his paternal grandparents or some other placement.

Additionally, as is evident from our discussion of Daniel's next assignment of error, Ethan's placement naturally includes consideration of immediate reunification with Daniel, but such is obviously dependent on the circumstances which exist at the time this matter is returned to the jurisdiction of the Sherman County Court, sitting as a juvenile court. Accordingly we sustain Daniel's second assignment of error.

(c) Ethan's Best Interests

Daniel also argues that the juvenile court erred in finding that continuation of Ethan in Daniel's home is not in Ethan's best interests. We have already reversed portions of the disposition order, which reversal means that DHHS must make reasonable efforts to reunify Ethan with Daniel, and we have reversed the placement of Ethan in California with Theresa.

As to whether Ethan should be placed in Daniel's home, it is significant that Daniel has complied with all tasks required by the case plan and all recommendations made to him by the DHHS

caseworker. Daniel has attended parenting classes, completed a psychological evaluation, participated in therapy sessions, and attended all visitations with Ethan. The visitation reports show that Daniel and Ethan have a positive relationship and that all visits ended in hugs and kisses. Ethan's therapist testified that Ethan wants to go back home with Daniel. Daniel's therapist testified that he is amazed by Daniel's ability to handle stress in an appropriate manner, and he cannot identify anything where Daniel needs improvement. Despite all of Daniel's positive efforts, his visitation with Ethan (which initially was essentially unlimited and could be supervised by the paternal grandparents) has been inexplicably reduced by DHHS, such that all visits must now be supervised by an agency retained by DHHS. Given our conclusions detailed above and Daniel's complete and successful cooperation with the case plan, the visitation limitations imposed by DHHS are overly strict and unreasonable. Yet, given that our perspective is that of an appellate court, we are unwilling to order that Ethan be immediately returned to Daniel's custody, because such determination is best made by the trial court, given the passage of time during the appeal process. Equally important is that the best interests calculus for Ethan now clearly includes two important facts: First, Daniel and Amanda are now married, and second, our conclusions concerning Amanda's conduct as to Chloe and Katrina require that caution be exercised in returning Ethan to Daniel's custody, because Amanda, as Ethan's stepparent, is now obviously implicated when considering Ethan's best interests.

### 2. Chloe and Katrina

Amanda argues that the juvenile court erred in finding the existence of aggravated circumstances and thereby eliminating the need for reasonable efforts to reunify Chloe and Katrina with Amanda. As stated previously, a finding of a fact, such as aggravated circumstances under § 43-283.01(4)(a), that excuses the requirement of reasonable efforts at reunification under § 43-283.01(4) must be based on clear and convincing evidence. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003).

Amanda admits to one incident in which she inflicted bruising, scratches, and a black eye on Chloe. Amanda said she was under

stress due to Katrina's seizures and took out her frustrations on Chloe. Even if frustration was the reason for such conduct, it is certainly no excuse for abusing a child. We note that Amanda blamed Chloe's injuries on Ethan for 2 months before admitting her culpability. The photographs of Chloe's injuries are disconcerting to say the least, because they reveal a frightening level of abuse; although fortunately, Chloe did not sustain serious physical injuries.

[8-12] Katrina, while an infant of 9 and then 10 months, sustained a fractured elbow and then a skull fracture with a subdural hematoma. There is no direct evidence of how these injuries were suffered, but neither Daniel nor Amanda, who were then living in the household, assign blame to each other or to any other person. Nor does either of them offer any plausible explanation which would eliminate human action as the cause of the infant's injuries. In *In re Interest of McCauley H.*, 3 Neb. App. 474, 529 N.W.2d 77 (1995), this court adopted the proposition that circumstantial evidence may be used to establish child neglect or child abuse. Although *In re Interest of McCauley H.* was an adjudication case—in which cases the burden of proof is "preponderance of the evidence"—circumstantial evidence may also be used in a disposition proceeding in which the burden of proof is "clear and convincing." A fact proved by circumstantial evidence is nonetheless a proven fact. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). Circumstantial evidence is not inherently less probative than direct evidence. *Id.* While the trial court did not make a specific finding of who inflicted such injuries on Katrina, its finding of "aggravated circumstances" which eliminated the need for DHHS to make reasonable efforts to reunify Amanda with her daughters at least implicitly suggests that the court considered Amanda to be culpable. After our de novo review of the record, we affirm the trial court's conclusion. It is important to recall what this court has stated in an earlier case:

> In endorsing the use of circumstantial evidence to establish child neglect or child abuse, it has been stated that "[l]earned commentators have pointed out that in many such cases the only proof available is circumstantial evidence since abusive actions usually occur within the privacy of the

> home, the child is either intimidated or too young to testify, and the parents tend to protect each other." *Higgins*[ *v. Dallas Cty. Child Welfare Unit*], 544 S.W.2d [745,] 750 [(Tex. Civ. App. 1976), *overruled on other grounds, In re Interest of S.H.A.*, 728 S.W.2d 73 (Tex. App. 1987)]. See, also, Rowine H. Brown et al., *Medical and Legal Aspects of the Battered Child Syndrome*, 50 Chi.-Kent L. Rev. 45 (1973).

*In re Interest of McCauley H.*, 3 Neb. App. at 480-81, 529 N.W.2d at 82.

> [A] finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.

*Id.* at 480, 529 N.W.2d at 82.

Amanda had control over Katrina when Katrina sustained her elbow and skull fractures. Although there was some evidence that Katrina was in daycare during the time in which the skull fracture could have occurred, there have been no charges filed against the daycare provider and the provider testified that neither Daniel nor Amanda accused her of causing Katrina's injuries. We have previously held that when parents offer no explanation as to a child's injuries and have no suspicions about the daycare providers or the other individuals who cared for the child previous to the injuries, and when the child's injuries would not have ordinarily occurred in the absence of abuse or neglect, expert testimony is not necessary to establish abuse. See *In re Interest of Sarah C. & Jason C.*, 10 Neb. App. 184, 626 N.W.2d 637 (2001). It is unnecessary for the State to prove the identity of the individual who inflicted a child's injuries. See *id.*

However, in this case, there is convincing expert medical evidence that Katrina's injuries were such that they would not ordinarily occur in the absence of abuse or neglect and that they were inflicted by human agency. In reaching this conclusion, we find the testimony of Dr. Jeffrey DeMare and his reports to be persuasive, given his established expertise with respect to child abuse and resulting injuries to small children. We briefly summarize Dr. DeMare's opinions as follows: He opined that the skull fracture

and hematoma were not caused by the seizures, but, rather, that Katrina's head injury was inflicted by "someone with a significant amount of strength and force to cause this injury. [A] fall from a couple of stories or a high-speed car accident . . . is an accurate comparison." Dr. DeMare said that while a fall from 3 to 6 feet can cause a skull fracture, Katrina's symptoms indicated that far more force was used, and that the symptoms would have manifested almost immediately and certainly within 20 minutes. Katrina suffered two seizures between January 20 and 25, and on each occasion, she was at home with Amanda in the 20 minutes prior to the seizures.

Dr. DeMare testified that the elbow injury was a "bucket-handle" fracture, which is rarely seen and occurs only when an adult pulls on a baby's limb hard enough to break the bone apart, because in a small child, the tendons in the joint are stronger than the bone at the joint, so "you've got two pieces [of bone] and you pull them apart, instead of the connective tissue breaking, you actually break the bone." Dr. DeMare said that this is a "very specific . . . injury in kids and it implies a specific mechanism as to how it happens." He further said that this injury is very painful until the bone is immobilized, because the bone grinds against itself. Given that a child of Katrina's age lacks mobility and requires constant care and monitoring, the absence of a parental explanation was characterized as a further sign of abuse. With respect to Chloe, Dr. DeMare said that the number, location, and placement of the injuries indicated adult infliction on multiple occasions. After thoroughly reviewing the record, we find clear and convincing evidence that Amanda—as Katrina's parent, caregiver, and custodian—was responsible for Katrina's injuries by either inflicting them herself or by failing to protect Katrina from abuse by Daniel, the only two realistic causative agents shown by the evidence. However, we find it much more likely that Katrina was abused by Amanda, given her admitted brutalization of Chloe.

We now turn to the question of whether "aggravated circumstances" have been proved. We recall the definition of that concept earlier set forth in this opinion: The nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the

child, and would pose an unreasonable risk that the child would be reabused. See *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). We are convinced that both Chloe and Katrina have been abused on multiple occasions while in Amanda's control, and thus, each child has been chronically abused and is at risk for additional abuse. The nature of the previous abuse is such that under the above definition, "aggravated circumstances" have been proved and reasonable efforts to reunify Amanda with her daughters Chloe and Katrina need not be undertaken. We affirm the trial court's finding in this regard.

## VI. CONCLUSION

For the reasons stated above, we find that DHHS must make reasonable efforts to reunify Ethan with Daniel. We further find that Ethan should not be placed with Theresa in California and that if Ethan is so placed, he must be returned to Nebraska. Thus, Ethan's case is reversed and remanded for further proceedings consistent with our opinion.

We find that there is clear and convincing evidence that Chloe and Katrina were chronically abused by Amanda and that DHHS therefore does not need to make reasonable efforts to reunify Chloe and Katrina with Amanda, and thus, the lower court's decision is affirmed.

Clearly, the result in these cases is driven by the statutory definition of "parent" in § 43-245(11), coupled with the fact that Daniel and Amanda did not marry until after the juvenile petitions were filed, which fact could potentially have the paradoxical consequence that Ethan resides with Amanda, whom we have found has chronically abused Chloe and Katrina. To the extent that a shortcoming in the statutory definition of "parent" is thereby revealed, the remedy is by legislative action, since we cannot rewrite the statute.

JUDGMENT IN NO. A-06-179 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENTS IN NOS. A-06-180 AND A-06-181 AFFIRMED.

# BARBARA L. POPPE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEATHER A. POPPE, DECEASED, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

723 N.W.2d 661

Filed November 14, 2006. No. A-05-289.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Negligence.** There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection.
3. ____. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
4. ____. No special relationship imposing a duty arises out of either an investigatory traffic stop or its resulting brief detention.
5. **Courts.** The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Robert R. Moodie, of Friedman Law Offices, for appellant.

Dana Roper, Lincoln City Attorney, and Joseph J. Rupp for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

A police officer seeking Robin Siefker briefly detained Siefker after stopping Siefker's automobile, but the officer failed to identify Siefker. Siefker later drove in the wrong direction and collided with another vehicle, killing Heather A. Poppe (Poppe). The personal representative of Poppe's estate, Barbara L. Poppe (appellant), sued the City of Lincoln (the City), alleging negligence. The district court dismissed the action, concluding that

no duty existed, because the complaint did not show that a special relationship existed between Poppe and the police or that a custodial relationship existed between the police and Siefker. We affirm.

## BACKGROUND

Appellant's complaint alleged that at approximately 10:18 p.m. on November 27, 2002, employees of the Lincoln Police Department received a call from a concerned citizen reporting that Siefker had come to the citizen's house, given her a briefcase which Siefker said contained his will, and told her to give it to Siefker's attorney if anything happened to Siefker. The citizen reported Siefker was driving a blue or green 1998 Dodge pickup. Employees of the Lincoln Police Department logged the call as a possible threat of suicide and issued a dispatch assigning an officer to locate Siefker and check on his welfare.

Between 10:20 and 11:30 p.m., the officer conducted investigative activities designed to locate Siefker and did, in fact, stop and interview Siefker at approximately the 900 block of Gaslight Lane in Lincoln, but failed to identify the individual as Siefker. Appellant alleged in the complaint that the officer negligently performed his duties by failing to require the individual stopped to produce a driver's license or other form of identification, by failing to note the license plate and identify the registered owner of said vehicle, and by failing to detain Siefker and check on his welfare.

At approximately 12:40 a.m. on November 28, 2002, a collision occurred between a vehicle driven westbound by Poppe on Interstate 80 and a 1998 Dodge pickup truck driven eastbound by Siefker in the westbound lanes of Interstate 80. Poppe sustained injuries in the collision which caused her death.

The complaint alleged that negligence of the City's police officer directly and proximately caused the accident, and the complaint set forth two causes of action: for wrongful death and for Poppe's conscious pain and suffering after the collision but prior to death. The complaint also alleged that in compliance with Nebraska's Political Subdivisions Tort Claims Act, appellant timely served a tort claim on the City, and that the City denied the claim.

In response to appellant's complaint, the City filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), asserting that the complaint failed to state a claim upon which relief could be granted. The district court sustained the City's motion to dismiss. The court stated that appellant had not alleged facts to establish that the City owed a duty to Poppe. The court stated that the police did not take charge of Siefker sufficiently to establish a custodial relationship. The court found that the City did not owe a duty to Poppe to control the conduct of Siefker and determined that the complaint could not be amended to cure the defect. The court dismissed the complaint with prejudice. This appeal timely follows.

## ASSIGNMENT OF ERROR

Appellant alleges that the court erred in granting the City's motion to dismiss.

## STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

## ANALYSIS

To recover under the Political Subdivisions Tort Claims Act, a claimant must prove all four of the basic elements of negligence: duty, breach of duty, proximate causation, and damages. See *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006). In the case before us, we must determine whether the complaint alleges facts sufficient to establish a legal duty.

[2] The Nebraska Supreme Court has adopted Restatement (Second) of Torts § 315 at 122 (1965), which states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See, *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). Comment *c.* to § 315 of the Restatement provides that the relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316 through 319 of the Restatement.

### SPECIAL RELATIONSHIP BETWEEN POLICE OFFICER AND POPPE—§ 315(b)

Liability of police officers for failing to protect a citizen from harm caused by criminal conduct is established if the police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). Such a duty arises when a "special relationship" exists between the police department and the victim that sets the victim apart from the general public and there are explicit assurances of protection that give rise to reliance on the part of the victim. See, *Bartunek v. State, supra*; *Brandon v. County of Richardson, supra*. The complaint did not allege facts to establish that the police had a special relationship with Poppe, and appellant effectively concedes the same in her brief.

### SPECIAL RELATIONSHIP BETWEEN POLICE OFFICER AND SIEFKER—§§ 315(a) AND 319

[3] Appellant argues that the police had a special relationship with Siefker because the officer had physically stopped Siefker and had a duty to control him. Applying § 315(a) of the Restatement to the facts of this case, we acknowledge the police would have a duty to control the conduct of Siefker in such a manner as to prevent him from causing physical harm to another if a special relationship existed between the police and Siefker. In *Bartunek v. State, supra*, the Nebraska Supreme Court recognized that the parameters of § 315(a) of the Restatement are further defined by § 319. That section provides, "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a

duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.* at 129. The illustrations provided for § 319 are (1) the escape of a delirious smallpox patient from a hospital for contagious diseases and (2) the escape of a "homicidal maniac" from a sanitarium for the insane. See *id.* at 130. The Supreme Court stated that "the illustrations to this section make plain that the phrase 'takes charge' is intended to refer to a custodial relationship." *Bartunek v. State*, 266 Neb. at 462, 666 N.W.2d at 441.

In the instant case, appellant alleged that the police officer stopped Siefker's vehicle but failed to identify and detain Siefker. The allegations of the complaint imply that the officer was negligent because he failed to "take charge" of Siefker. However, under § 319 no duty arises from failing to take charge of the third person; rather, the duty to exercise reasonable care to control the third person to prevent harm to another arises only after one has taken charge of the third person. Thus, § 319 requires that we determine whether the traffic stop and brief detention constituted "taking charge" of Siefker.

[4] In *Jones v. Maryland-National Capital*, 82 Md. App. 314, 571 A.2d 859 (1990), a Maryland appellate court held that no "special relationship" arises out of either an investigatory traffic stop or its resulting brief detention. We are unable to find a Nebraska appellate case addressing the issue, but the Nebraska Supreme Court has held that persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda* rights or warnings. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). We conclude that the police officer's temporary stop of Siefker did not create a custodial relationship which imposed a duty on the officer to control Siefker's subsequent behavior.

### FORESEEABILITY

[5] In urging this court to find liability, appellant relies on a concurring opinion in *Jean W. v. Commonwealth*, 414 Mass. 496, 514, 610 N.E.2d 305, 315 (1993) (Wilkins, J., concurring; Abrams, J., joins), which announced an intention to abolish the "public duty rule." Appellant argues that the police officer in the instant case was in a position to prevent foreseeable harm and

had a duty to all foreseeable victims. Adopting a position finding liability based upon a duty owed to the public at large and not based on special relationships would be contrary to the current state of the law in Nebraska. The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court. *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

## CONCLUSION

Because appellant failed to plead the existence of facts sufficient to establish that the City—by and through its agents and employees—owed a special duty to protect Poppe from the harm caused by Siefker, we conclude upon our de novo review that the district court did not err in sustaining the City's motion to dismiss pursuant to rule 12(b)(6). We therefore affirm the judgment of the district court which granted the City's motion and dismissed appellant's complaint with prejudice.

AFFIRMED.

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# STATE OF NEBRASKA, APPELLEE, V. RASHAD A. McKAY, APPELLANT.

723 N.W.2d 644

Filed March 28, 2006. No. A-05-558.

This opinion has been ordered permanently published by order of the Court of Appeals dated May 2, 2006.

1. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
2. **Lesser-Included Offenses: Jury Instructions: Evidence.** The test adopted by the Nebraska Supreme Court to determine whether a lesser-included offense instruction should be given involves two parts: First, the court must determine whether the alleged offense is a lesser-included offense of another, and second, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense.
3. **Lesser-Included Offenses.** In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense.

4. **Assault: Lesser-Included Offenses.** Third degree assault is a lesser-included offense of assault by a confined person.
5. **Prisoners: Proof: Words and Phrases.** "Legal" confinement, as required by Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004), requires a showing that the defendant was technically in actual custody in a correctional facility and not that his confinement was substantively lawful.
6. **Words and Phrases.** Although the distinction between the terms "legal" and "lawful" is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some importance.
7. ____. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden, by law.
8. ____. To say of an act that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner.
9. **Evidence: Proof: Words and Phrases.** Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004) does not require the State to demonstrate "lawful" confinement, substantively, but, rather, requires the State to show only "legal" confinement, technically.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

W. Patrick Dunn for appellant.

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

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

IRWIN, Judge.

## I. INTRODUCTION

Rashad A. McKay appeals his conviction on a charge of assault by a confined person. On appeal, McKay challenges the district court's allowing the State to reopen its case after resting and the court's refusal to give the jury a lesser-included offense instruction on third degree assault. We find no abuse of discretion by the court in allowing the State to reopen its case, and we conclude that a lesser-included offense instruction was not warranted, because there was no rational basis for the jury to acquit McKay of the greater offense and convict him of the lesser offense. Accordingly, we affirm.

## II. BACKGROUND

The events giving rise to this case occurred at the Douglas County Correctional Facility in Omaha, Nebraska, on June 2, 2004. On that date, McKay and two other men, Sterling McKoy

and Barry Swindle, were in the bullpen area of the correctional facility waiting to be transported back to the housing units after separate court appearances. The three were escorted from the bullpen area to the housing units by a correctional officer, Joyce Brooks. Brooks testified that the three were walking "single file, one behind the other"; that Swindle was in front of McKoy, who was in front of McKay; and that Brooks was walking behind McKay.

According to Brooks, the group had to climb stairs to get to the third floor of the housing unit. Brooks testified: "Once we reached the third floor, me and . . . McKay were still on the stairwell and . . . Swindle was hit by . . . McKoy. At this time . . . McKay came up the stairs and he proceeded to assist . . . McKoy in hitting Inmate Swindle." Brooks further testified that McKay struck Swindle with a closed fist "several times," that Swindle fell to the ground, and that while Swindle was on the ground, McKay "continued to hit him" and kicked him. Brooks testified that she "pulled [McKay] off" Swindle but that when she attempted to get control of McKoy, McKay "went back over to Inmate Swindle" and continued "hitting him."

On September 22, 2004, an information was filed charging McKay with assault by a confined person, a violation of Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004). On October 12, McKay filed a written waiver of appearance and plea of not guilty. The case was tried before a jury on February 28 and March 1, 2005.

After presenting testimony from Brooks and Swindle, the State rested its case. McKay moved for discharge, arguing that the State failed to present any evidence that he was "legally" confined at the time of the incident—an element of the offense. See § 28-932(1). The court commented that the State needed to show "how he's there, how it is not by mistake or some other process that he is there." The court further commented that "[t]o say that a correctional guard can testify to the legality of his detainment is a stretch" and that the State had not carried its burden. Nonetheless, the court granted the State leave to research the issue overnight and adjourned for the day.

The next day, the State argued that the testimony of Brooks was sufficient to demonstrate McKay was legally confined at the

time of the incident, that the issue of "legal" confinement was a question for the jury, and that in the alternative, the court should either allow the State to reopen its case and present additional evidence on the issue or give the jury an instruction on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. The court again commented that the State had "wholly failed to show legal confinement," but the court granted the State leave to reopen its case on the issue.

The State then reopened its case and offered a certified copy of a judgment from the U.S. District Court for the District of Nebraska showing that on June 2, 2004, the date of the incident herein, McKay was found guilty in federal court of conspiracy to possess with intent to distribute crack cocaine. The State then rested its case again.

The court held a jury instruction conference prior to McKay's presenting his defense. Before McKay called his first witness, he requested that the court add a lesser-included offense instruction which would instruct the jury that third degree assault is a lesser-included offense to the charged offense of assault by a confined person. McKay argued that the jury could find him guilty of third degree assault "if they cannot find the element of legally confined." The court at that time stated, "I agree with you. It would be a lesser-included [offense]." The court indicated that the issue would be discussed further.

McKay presented testimony by both McKoy and himself suggesting that McKay did not strike Swindle and that McKay only attempted to break up the fight between McKoy and Swindle. McKoy testified that Swindle had elbowed McKoy to start the altercation, that McKoy had punched Swindle, and that McKay had tried to break up the fight. McKoy testified that he never saw McKay hit or kick Swindle. McKay testified that he tried to break up the fight and that he tried to help Brooks stop the fight because she was not able to stop the fight by herself. McKay testified that he never struck or kicked Swindle. McKay then rested his case.

The court held another jury instruction conference after the close of all evidence. McKay again requested an instruction on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. The State objected to

the request and argued that because of the certified copy of McKay's federal court conviction, there was no rational basis for the jury to acquit McKay of the greater offense but convict him of the lesser offense. The State further pointed out McKay had testified that prior to the incident, he had just returned from court and had been convicted. The court denied McKay's request for the instruction.

On March 2, 2005, the court entered an order reflecting that the jury had returned a unanimous verdict of guilty. On April 1, the court sentenced McKay to 3 to 5 years' imprisonment, to be served consecutively to any other term being served. This appeal followed.

## III. ASSIGNMENTS OF ERROR

McKay's two assignments of error on appeal are that the district court erred in allowing the State to reopen its case and in refusing to instruct the jury on third degree assault as a lesser-included offense to the charged offense of assault by a confined person.

## IV. ANALYSIS

### 1. Reopening Case

McKay challenges the district court's granting of the State's motion to withdraw its rest and introduce additional evidence on the issue of whether McKay was legally confined at the time of the incident. McKay argues that it was an abuse of discretion for the court to allow the State to adduce additional evidence on an issue which the court had concluded the State had failed to prove in its case prior to resting. We conclude that on the facts of this case, it was not an abuse of discretion for the court to allow the State to withdraw its rest.

[1] The Nebraska Supreme Court has held: " 'Even in criminal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.' " *State v. Thomas*, 236 Neb. 84, 94, 459 N.W.2d 204, 211 (1990) (quoting *State v. Putnam*, 178 Neb. 445, 133 N.W.2d 605 (1965)), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). Accord *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). In *State v. Thomas, supra*, the State adduced testimony

from witnesses and documentary evidence and rested its case. The defendant then moved for a directed verdict on the issue of the statute of limitations, because the State had not adduced any evidence demonstrating that any exception to the otherwise applicable statute applied. The court granted the State's motion to withdraw its rest and permitted the State to adduce evidence on whether the defendant fit within an exception to the otherwise applicable statute of limitations. On appeal, the Supreme Court found no abuse of discretion by the trial court in permitting the State to withdraw its rest.

In *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001), this court found an abuse of discretion by the district court in allowing the State to withdraw its rest and adduce additional evidence. Important to this court's decision in *State v. Gray*, however, was the fact that after the State had rested its case in an enhancement proceeding, the district court, on its own motion, assessed the State's evidence and then notified both the State and a judge presiding over a different enhancement proceeding involving the same defendant that the State's evidence appeared to be insufficient. The district court, in both cases, then allowed the State to withdraw its rest and adduce additional evidence. This court, in finding an abuse of discretion, specifically noted that the district court had advised the State of insufficiencies in its proof and "allowed the State to put in more evidence to attempt to plug the gaps in its proof." *Id.* at 993, 606 N.W.2d at 495. This court's finding of an abuse of discretion demonstrated concern about the district court's failure to maintain an appearance of impartiality and becoming "an advocate for the State's need to put in more and better evidence, rather than simply deciding whether the evidence adduced" was sufficient. *Id.* at 995, 606 N.W.2d at 497. Also important was the underlying conclusion that the evidence adduced by the State prior to resting was, in fact, insufficient.

We find the facts of the present case to be more comparable to the facts in *State v. Thomas, supra*, and to be distinguishable from the facts in *State v. Gray, supra*. In the present case, the district court did not become an advocate for the State, did not raise on the court's own motion any alleged insufficiency of the

State's evidence, and did not raise on the court's own motion the issue of the sufficiency of the evidence. Rather, the court was presented with the issue as raised by McKay, and the court decided that issue. Further, as our analysis below demonstrates, the evidence adduced by the State prior to resting was not clearly insufficient to demonstrate legal confinement; the district court's suggestions to the contrary appeared to be based on the court's misunderstanding of the legal requirements for a showing of legal confinement—a matter we further discuss below. As such, the present case is not even a case where allowing the State to withdraw its rest actually resulted in allowing the State to fill gaps in its proof; as our analysis below demonstrates, the State's proof of legal confinement was sufficient prior to its initial rest. For these reasons, we do not find an abuse of discretion by the district court in allowing the State to withdraw its rest. This assigned error is without merit.

### 2. Lesser-Included Offense Instruction

McKay also asserts that the district court erred in refusing to instruct the jury on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. McKay argues both that third degree assault is a lesser-included offense and that the evidence was such that the jury could rationally have acquitted him of the greater offense and convicted him of the lesser offense. We disagree.

[2,3] The test adopted by the Nebraska Supreme Court to determine whether a lesser-included offense instruction should be given involves two parts. See, *State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). The court must first determine whether the alleged offense is a lesser-included offense of another. See *id.* The test for making this determination is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case. *State v. Smith, supra.* See *State v. Williams, supra.* In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense. *Id.* Otherwise stated, a lesser-included offense is one which is fully

embraced in the higher offense. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *Id.*

[4] There is no dispute in this case that the first part of the test is satisfied. The elements of assault by a confined person, the greater offense, and third degree assault, the lesser offense, are such that it is impossible to commit the greater offense without at the same time having committed the lesser offense. See Neb. Rev. Stat. § 28-310 (Reissue 1995) and § 28-932(1). The elements of the two offenses are identical, see *id.*, except that assault by a confined person has the additional requirement that the defendant be "legally confined," § 28-932(1).

As such, the real issue in this case is whether the evidence produces a rational basis for a verdict acquitting McKay of the offense charged, assault by a confined person, and convicting him of the lesser offense, third degree assault. Stated differently, the issue is whether the evidence produces a rational basis for the jury to conclude that McKay, while committing an assault, was not legally confined at the time of the incident. We determine that the district court correctly found that there is not a rational basis for such a conclusion.

[5] McKay argues to this court, as he argued to the district court and as the district court apparently agreed, that the State was required to prove that his confinement at the time of the incident "had some legal basis - for instance, that it was the result of some order lawfully entered by a court of competent jurisdiction." Brief for appellant at 6. Although the district court apparently agreed with this assertion, we find that "legal" confinement, as required by § 28-932(1), requires a showing that the defendant was technically in actual custody in a correctional facility and not that his confinement was substantively lawful.

As both parties note on appeal, the term "legally confined" is not defined in the statute. We agree with the State, however, that prior Nebraska Supreme Court interpretations of the meaning of legal confinement, as opposed to lawful confinement, are instructive and guide the outcome in this case. To that end, the

Nebraska Supreme Court's analysis in *State v. Reeves*, 199 Neb. 725, 261 N.W.2d 110 (1978), is most illustrative. In *State v. Reeves*, the court was presented with the meaning of the term "legal custody" in Neb. Rev. Stat. § 28-736 (Reissue 1975), concerning escape from custody. The question presented was whether the defendant had been in legal custody when placed under arrest pursuant to a search warrant that was subsequently suppressed. The defendant argued that because the warrant was suppressed, his arrest and law enforcement's custody of him were not "legal."

[6-8] The Nebraska Supreme Court explicitly recognized the difference between the terms "legal" and "lawful." In interpreting § 28-736, the court noted that the statute did not require "lawful" custody or a "lawful" arrest, but, rather, required only that the defendant be in "legal" custody. The court noted:

> Although the distinction between the terms "legal" and "lawful" is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some importance. This distinction is set forth in the narrative following the definition of "lawful" as stated in Black's Law Dictionary (4th Ed.), p. 1032. It reads as follows: "The principal distinction between the terms 'lawful' and 'legal' is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is 'lawful' implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is 'legal' implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner."

*State v. Reeves*, 199 Neb. at 727-28, 261 N.W.2d at 112-13.

The Nebraska Supreme Court concluded that the term "legal custody" in § 28-736 concerned only whether the defendant was, technically, placed under arrest and in the custody of law enforcement. See *State v. Reeves, supra*. The defendant's guilt or innocence of the charge for which he was being held, substantively speaking, was immaterial. See *id*. See, also, *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 713, 618 N.W.2d 715, 719 (2000) (quoting Black's Law Dictionary (7th ed. 1999), which defined arrest as including " 'lawful arrest' " where person is taken into " 'legal custody' "). This distinction

is important even though the terms have, on occasion, been unclearly used interchangeably. See, e.g., *State v. Auman*, 232 Neb. 341, 344, 440 N.W.2d 254, 257 (1989) (suggesting that § 28-932 is intended to discourage "lawfully" confined person from injuring another).

[9] In light of the Nebraska Supreme Court's discussion in *State v. Reeves, supra*, of the important distinction between the terms "legal" and "lawful" in statutes, we are obliged to conclude that § 28-932(1) does not require the State to demonstrate "lawful" confinement, substantively, but, rather, requires the State to show only "legal" confinement, technically. The State's evidence adduced prior to its initial rest clearly demonstrated that at the time of the incident, McKay was in custody at the Douglas County Correctional Center, was being transported from a bullpen area to a housing area, and was being escorted by a corrections officer. This evidence was clearly sufficient to demonstrate that McKay was, technically, in custody of law enforcement at the time of the incident. The State was not required to show that this custody was pursuant to any valid court order or judgment. The evidence adduced after the State withdrew its rest only further supported the fact that McKay was in legal custody at the time of the incident.

Turning, then, to the question of whether the evidence presented a rational basis for the jury to acquit McKay of the greater offense of assault by a confined person and to convict McKay of the lesser offense of third degree assault, we must determine whether there was any rational basis for the jury to conclude that McKay was not legally confined at the time of the incident. McKay's arguments on this issue, both before this court and in the district court, all turn on the substantive issue of whether the jury might have concluded that the State did not sufficiently prove that his confinement was lawful or pursuant to a valid court order or judgment. As noted, the State was not required to prove that.

Our review of the evidence leads us to determine that the district court properly concluded that there was no rational basis for the jury to find that McKay was not in legal custody. The evidence presented by the State showed that the incident occurred in a correctional facility while McKay, McKoy, and Swindle

were being transported back to their housing units after they had made court appearances and while being escorted by a corrections officer. McKay, McKoy, and Swindle each similarly testified that they were being transported from the bullpen area to their housing units. There was absolutely no evidence presented upon which the jury might have concluded that McKay was not in legal custody at the time of the incident. There was no rational basis for the jury to find that the additional element of legal confinement was not present. As such, there was no rational basis for a finding acquitting McKay of the greater offense but convicting him of the lesser offense. This assignment of error is without merit.

## V. CONCLUSION

We find no merit to McKay's assignments of error. The district court did not abuse its discretion in allowing the State to withdraw its rest and adduce additional evidence, and the district court correctly denied McKay's request for a lesser-included offense instruction. As such, the judgment of the district court is affirmed.

AFFIRMED.

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# IN RE INTEREST OF DEZTINY C., A CHILD UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLANT, V. CHRISTOPHER C., APPELLEE.

723 N.W.2d 652

Filed November 14, 2006. No. A-06-242.

1. **Juvenile Courts: Parent and Child.** Pursuant to Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), reasonable efforts to preserve and reunify the family are not necessary if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Stuart J. Dornan, Douglas County Attorney, and Eric D. Strovers for appellant.

Brandie M. Fowler for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

## I. INTRODUCTION

The State of Nebraska appeals an order finding that termination of Christopher C.'s parental rights would not be in the best interests of his minor child, Deztiny C. On appeal, the State asserts that the juvenile court erred in finding the State failed to prove that (1) Christopher abandoned Deztiny, (2) Christopher neglected Deztiny, (3) termination of Christopher's parental rights would be in Deztiny's best interests, and (4) reasonable efforts were not required to preserve and reunify the family. We affirm the juvenile court's order.

## II. BACKGROUND

### 1. CHRISTOPHER AND ANDREA'S RELATIONSHIP

Deztiny was born on March 4, 1998, to Andrea B. and Christopher. Christopher characterized his relationship with Andrea as "volatile." He claimed Andrea was "suicidal" and an "alcoholic."

During Christopher and Andrea's relationship, Christopher was convicted of criminal charges on three separate occasions. In 1998, Christopher was convicted of third degree assault, willful reckless driving, and operating a motor vehicle to avoid arrest. A child neglect charge stemming from the incident was later dropped. Christopher was sentenced to 18 months of probation. In 1999, he was convicted of misdemeanor assault on Andrea. Later, in 1999, he violated probation and was sentenced to serve 90 days in jail. In 2000, Christopher was charged with misdemeanor child abuse and fined $50 after Deztiny wandered away from the house through an open garage door.

Christopher and Andrea ended their relationship in 2000, and Andrea retained custody of Deztiny. According to Christopher's testimony, a district court judge entered a paternity order in 2001 which established that Christopher is Deztiny's father and granted him visitation. Christopher testified that after the court granted visitation, his visits with Deztiny "became sporadic," because he "just couldn't get ahold of Andrea." Christopher

testified he called the judge's secretary and was told that he "should seek counsel."

The evidence shows that in 2002, the district court for Douglas County entered a paternity order, which established that Christopher is Deztiny's father and ordered him to pay monthly child support of $50 beginning April 1, 2002.

On January 27, 2004, the State removed Deztiny and her half brother from Andrea's custody. The State alleged the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The parental rights of Andrea are not at issue in this appeal because the record reveals she died on January 18, 2005.

### 2. Christopher's Contact With DHHS

On February 11, 2004, Christopher met with Andrea Bigham, Deztiny's initial Nebraska Department of Health and Human Services (DHHS) caseworker, to discuss how to obtain custody of Deztiny. Bigham testified she told Christopher that "if he wanted to be a party to this case, he would need to show up to court [on February 25, 2004,] and ask to formally intervene." She told Christopher that he needed to complete a background check and provide DHHS with a copy of his paternity decree. Christopher complied with both requirements.

Regarding visitation, both Bigham and Christopher testified she told him that she would send a "referral" to Visinet and that "[Visinet] would be contacting him for visitation, but it would have to be supervised." Bigham testified that she sent the referral but that she did not conduct any followup.

On February 25, 2004, the juvenile court ordered that Deztiny remain in DHHS' custody. Although Christopher was not a party to the hearing, he did attend.

At the hearing, Bigham informed the juvenile court that Christopher would "like to have visits" with Deztiny. The court asked Christopher if he had a copy of the order granting visitation, and Christopher stated he gave a copy to Bigham and did not have an additional copy with him. Christopher told the court he intended to intervene and that he was "in the steps of hiring [an attorney]" and was "trying to find the right one." The juvenile court stated that it could not grant Christopher visitation until Christopher provided proof that he is Deztiny's father.

The court "highly recommend[ed]" that Christopher contact an attorney.

In February 2004, Deztiny's case was transferred to a new DHHS caseworker, Nicole Nietfeld. Nietfeld testified that Christopher "may not have been aware that [she was his] case worker" between February 2004 and May 2005 and that Christopher was not given any information of how to contact her in order for him to intervene. He eventually spoke to Nietfeld on May 16, 2005, and told her he wanted custody of Deztiny but would be willing to "start out with visitation first."

Nietfeld testified that Christopher told her he had not contacted DHHS between February 2004 and May 2005 because he was "scared of Court" and "didn't know what to expect." Christopher testified that he had been afraid but that he had been "waiting by the telephone for someone from [DHHS] to call," because Bigham said she "set [him] up visits with 'Omni Visit.' " He testified that when no one called, he called DHHS probably a "couple dozen" times. When Nietfeld was asked about DHHS' procedure with regard to telephone messages, she testified, "I don't think we have a procedure in regards to phone messages." She stated that although those with DHHS try to return telephone calls to the "best of our ability," she did not think there is "actually a policy."

Nietfeld testified that in general, when fathers have expressed an interest in intervening, DHHS "does attempt to make contact with the fathers." She testified that she did not attempt to make any contact with Christopher, because Bigham "had made the [initial] contact." Nietfeld testified that the initial conversation between Bigham and Christopher was the only contact DHHS had with Christopher in regard to intervening.

### 3. Supplemental Petition

On August 16, 2005, the juvenile court granted Christopher supervised visitation with Deztiny. On August 18, the State filed a seven-count supplemental petition asserting that Christopher's lack of parenting caused Deztiny to come within the meaning of § 43-247(3)(a). The State sought to terminate Christopher's parental rights pursuant to Neb. Rev. Stat. § 43-292(1), (2), and (7) (Reissue 2004). The State also asserted that termination of Christopher's parental rights was in Deztiny's best interests and

that reasonable efforts to reunify the family were unnecessary pursuant to Neb. Rev. Stat. § 43-283.01 (Reissue 2004). The hearing on the supplemental petition took place on December 15, 2005, and was continued on February 15, 2006.

### 4. Testimony at Termination Hearing

Nietfeld testified that Christopher began supervised visits with Deztiny in October 2005 and brought meals, games, and crafts that were "age appropriate." Between October 2005 and February 2006, Christopher missed four of the twice-a-week visits. According to Nietfeld, in the first few visits, Christopher told Deztiny he wanted to provide for her. DHHS told Christopher that he should not "talk about the nature of this case" to Deztiny. Nietfeld testified that since then, the visits were going "better." Nietfeld also testified to one incident where, because the visiting room had been overbooked, Christopher raised his voice and "slammed [two bags of games] down."

Nietfeld testified that she was unaware of any contact between Christopher and Deztiny prior to May 2005, when Christopher initially contacted Nietfeld. Contradicting Nietfeld's testimony, Christopher stated that he saw Deztiny on March 4, 2005. He testified that he went to her school and gave her a card, stuffed rabbit, and television for her birthday.

While Nietfeld testified to her concerns regarding Christopher as a parent, which we have discussed above, when asked about her professional opinion, she testified that terminating Christopher's parental rights would be in Deztiny's best interests, based on Christopher's criminal history. Nietfeld also testified that it would be in Deztiny's best interests to remain with her maternal grandmother, because Deztiny needed "permanency" and the grandmother was willing to adopt Deztiny. Deztiny had been placed with her grandmother after being moved from her foster home in September 2004.

According to Christopher's testimony, he no longer had "a problem controlling [his] temper." When describing his current situation, Christopher testified that he was in a 10-week parenting class at Child Saving Institute and had already completed 2 weeks. He testified that he physically saw Deztiny "all the time"—at the grocery store, riding in her grandmother's car, and at church. He testified that he is currently paying child

support by having it automatically withdrawn from his paycheck. Between April 2002 and December 2005, Christopher paid $1,822.03 in child support and had an arrears balance of $394.06, plus interest.

At the termination hearing, the juvenile court found by a preponderance of the evidence that Deztiny came within the meaning of § 43-247(3)(a). The court also found by clear and convincing evidence that Deztiny came within the meaning of § 43-292(7). The court dismissed the termination of parental rights claim under § 43-292(1) and (2) for lack of clear and convincing evidence. Additionally, the court concluded that termination of Christopher's parental rights was not in Deztiny's best interests and that the State was required to make reasonable efforts to reunify Christopher and Deztiny. The State timely filed this appeal.

## III. ASSIGNMENTS OF ERROR

On appeal, the State has assigned four errors. First, the State asserts that the juvenile court erred in finding that Christopher had not abandoned Deztiny pursuant to § 43-292(1). Second, the State asserts that the juvenile court erred in finding that Christopher had not neglected Deztiny pursuant to § 43-292(2). Third, the State asserts that the juvenile court erred in finding that termination of Christopher's parental rights was not in Deztiny's best interests. Fourth, the State asserts that the juvenile court erred in finding that reasonable efforts to preserve and reunify the family were required pursuant to § 43-283.01.

## IV. ANALYSIS

### 1. Standard of Review

In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

### 2. Termination of Parental Rights

Natural parents have a fundamental liberty interest in the care, custody, and management of their child. See *In re Interest of Mainor T. & Estela T., supra.* That interest is a natural right, subject only to the paramount concern of the public in protecting the rights of the child. See *id.* In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

In the present case, the juvenile court held that the State failed to prove, by clear and convincing evidence, the grounds for parental termination enumerated in § 43-292(1) and (2). The juvenile court also held that termination of Christopher's parental rights was not in Deztiny's best interests and that the State was required to make reasonable efforts to reunify Christopher and Deztiny. We conclude that Christopher's parental rights should not be terminated.

#### (a) Abandonment Under § 43-292(1)

The State asserts that the juvenile court erred in failing to find that Christopher abandoned Deztiny pursuant to § 43-292(1). At the 2006 hearing, the State argued that Christopher failed to show a continuing parental interest, that Christopher failed to timely intervene and secure visitation, and that Christopher failed to support Deztiny. We affirm the juvenile court's finding that Christopher did not abandon Deztiny.

Pursuant to § 43-292(1), a court may terminate parental rights between the parents and juvenile when the court finds such action to be in the best interests of the juvenile and when parents have abandoned the juvenile for 6 or more months immediately prior to the filing of the petition.

For purposes of § 43-292(1), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Dylan Z., supra.* See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Under § 43-292(1), parental intent is a question of fact and may

be determined by circumstantial evidence. See *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). When analyzing a parent's intent to abandon, § 43-292(1) requires us to direct our inquiry to the 6 months immediately preceding the filing of the petition. See *In re Interest of Crystal C., supra* (defendant did not abandon his child despite being absent for approximately 5 months).

In the present case, the crucial 6-month period runs from February to August 2005. When Christopher spoke with Nietfeld, a DHHS caseworker, on May 16, Christopher inquired about visitation and custody. On June 30, he signed an affidavit acknowledging that he had adequate means and housing in which to provide for Deztiny. On August 16, the court granted Christopher supervised visitation with Deztiny.

The record also supports the juvenile court's finding that Christopher did not act with an intent to abandon Deztiny even though he failed to intervene between February 2004 and May 2005. In *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), we held that the father's lack of contact with his minor child was directly attributable to his lack of knowledge that he was the child's father. Because "DHHS and the protection safety worker made no attempts to contact [the father] in the relevant 6-month time period," we concluded that the father's failure to connect with his child was "due to just cause and excuse and not to indifference or intentional abandonment." *Id.* at 598, 697 N.W.2d at 719.

In the present case, Christopher did not contact DHHS between the months of February 2004 and May 2005. When asked why he did not actively pursue contact with Deztiny during that time, Christopher testified that he was told the visitation agency would contact him. He testified that when no one did so, he left messages at DHHS but his calls went unreturned. Nietfeld testified that it was possible DHHS had received, but failed to respond to, Christopher's messages. She stated that she did not think DHHS had a procedure in regard to telephone messages. She testified that although those with DHHS "try to return phone calls to the best of our ability," she did not think there is "actually a policy." The record also indicates that no one informed Christopher that Deztiny's case had been transferred

to Nietfeld, nor did anyone provide Christopher with any information of how to contact Nietfeld. Similar to the situation in *In re Interest of Dylan Z., supra*, in the present case, Christopher's lack of contact was based on his lack of knowledge. As such, because DHHS failed to contact Christopher, his lack of action does not indicate indifference or intentional abandonment.

Furthermore, the record shows that DHHS did not provide Christopher with the customary information on how to intervene. Contrary to standard DHHS practice, Bigham engaged Christopher in only one conversation concerning intervention, and Nietfeld did not provide followup information. We will not excuse a parent's unnecessary or unreasonable delay in intervening; however, Christopher's failure to intervene, when he was provided with substandard information, does not constitute abandonment.

Finally, Christopher's providing child support between February and August 2005 shows he did not intend to abandon Deztiny. Although Christopher has a history of irregular child support payments, the record indicates that during the 6 months immediately preceding the filing of the petition, Christopher exceeded his child support obligation of $50 per month and paid $372.48.

The State argues that Christopher's implementation of an automatic withdrawal payment process for child support constitutes a token effort that "should not change the fact that he abandoned [Deztiny]." Brief for appellant at 23. We disagree. Christopher's availing himself to an efficient and effective procedure such as this does not constitute a token effort, nor does it somehow negatively impact his act of supporting his daughter. See *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

We conclude that the State failed to show clear and convincing evidence that Christopher intended to abandon Deztiny in the 6 months preceding August 18, 2005. Christopher actively sought custody and paid child support during the crucial 6 months. Additionally, his failure to immediately seek intervention was due to just cause. As such, we affirm the juvenile court's finding that Christopher's parental rights should not be terminated pursuant to § 43-292(1).

(b) Neglect Under § 43-292(2)

The State argues that Christopher neglected Deztiny because he failed to provide continual parental care and because he had a history of criminal convictions. We find that the juvenile court did not err in failing to terminate Christopher's parental rights under § 43-292(2).

Under § 43-292(2), the court may terminate the rights between a parent and juvenile when the court finds such action to be in the best interests of the juvenile and when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile necessary parental care and protection. The Nebraska Supreme Court has held that a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

Christopher's history of criminal conduct does not rise to the level of neglect, because Andrea cared for Deztiny during Christopher's incarceration and because there was no evidence that the convictions adversely affected Deztiny. In *In re Interest of Kalie W., supra*, the court sentenced the father to a jail term of 5 to 8 years. After examining how the incarceration affected the father's ability to provide for his child, the court concluded that the incarceration constituted neglect, because the father was unable to provide for his child's needs.

Unlike the factual background of *In re Interest of Kalie W.*, in the present case, Christopher served only 4 months in jail, and during that time, Andrea provided adequate care for Deztiny. Additionally, since 2000, no criminal or child neglect charges have been filed against Christopher. At the time of the 2006 termination hearing, Christopher had lived with his fiance and her children in the household for 6 years without any reported problems. We conclude that Christopher's criminal history does not constitute neglect.

Additionally, Christopher has not refused to provide parental care and has improved his parenting skills. This court has held that "the law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child." *In*

*re Interest of Crystal C.*, 12 Neb. App. 458, 465, 676 N.W.2d 378, 384 (2004).

In the present case, Christopher has shown continual care for Deztiny. Christopher testified that he was present for her birth, baptism, and confirmation. After his relationship with Andrea ended, he cared for Deztiny when Andrea temporarily left her with him. In 2001, he sought court-ordered visitation. In 2002, he was ordered to pay child support, and he began paying his obligation in 2003. Although at the time of the 2006 termination hearing Christopher had an arrears balance of $394.06 plus interest, he had paid a total of $1,822.03 and was continuing to pay child support. In 2004, Christopher contacted DHHS upon learning of the removal of Deztiny from Andrea's custody, and on that same day, Christopher provided the requisite paperwork to DHHS. He attended the February 2004 hearing and informed the judge he intended to intervene. He attempted to contact DHHS between 2004 and 2005, and after he spoke with DHHS caseworker Nietfeld in May 2005, he immediately began the process for obtaining visitation. Since May 2005, Christopher has obtained supervised visitation, has regularly visited and provided Deztiny with age-appropriate games, and has missed only four visits.

Christopher's history does not establish a pattern of abuse, nor does the record show that Christopher refused to provide parental care. We affirm the juvenile court's finding that Christopher did not neglect Deztiny pursuant to § 43-292(2).

(c) Best Interests

The State asserts that terminating Christopher's parental rights would be in Deztiny's best interests. Although the State failed to prove that Deztiny comes within the meaning of § 43-292(1) or (2), it did successfully prove she came within the meaning of § 43-292(7). We must now turn to whether terminating Christopher's parental rights is in Deztiny's best interests.

Under § 43-292, in order to terminate a parent's natural rights to the custody of his or her child, the State first must prove by clear and convincing evidence that at least 1 of the 10 subsections in that statute applies. Next, the State must prove by clear and convincing evidence that termination of parental rights would be

in the child's best interests. See *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991). As we stated in *In re Interest of Crystal C.*, 12 Neb. App. at 465, 676 N.W.2d at 384, "we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child."

Termination of Christopher's parental rights is not in Deztiny's best interests. First, Christopher is working to improve his parenting skills. At the time of the 2006 termination hearing, he was enrolled in parenting classes and had completed 2 weeks of the program. His fiance testified that she and Christopher have "a co-parenting arrangement" and that she has no concerns at all in regard to him parenting her children. She described Christopher's parenting as "very patient, very loving," "very connected with the children," and "hands on." She testified that Christopher is a Cub Scout leader, assists with the children's homework, and is involved in "all of their activities."

Second, Christopher is working to improve his relationship with Deztiny. Since his contact with DHHS in May 2005, he has regularly visited Deztiny. Additionally, Christopher is currently paying child support.

Third, Christopher is working to integrate Deztiny into his and his fiance's family. Christopher's fiance testified that Deztiny "fits right in" with her children. Her twin boys and Deztiny are the same age and have come to "know each other very well over the years." She testified that they "consider themselves brothers and sisters." Deztiny and Christopher's fiance's children are in religious education classes together and see each other every week.

A parent's fundamental liberty interest in their children is subject only to the public's paramount concern in protecting that child's rights. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). In the present case, we find no paramount concern that outweighs Christopher's fundamental interest in parenting. We affirm the juvenile court's finding that terminating Christopher's parental rights is not in Deztiny's best interests.

(d) Reasonable Efforts Under § 43-283.01

[1] The State asserts that the juvenile court erred in requiring reasonable efforts to reunify and preserve the family, because

Christopher "abandoned" Deztiny. Pursuant to § 43-283.01(4)(a), reasonable efforts to preserve and reunify the family *are not necessary* if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. Because we have already concluded in our discussion above that Christopher did not abandon Deztiny, we find the State's final assertion of error to be without merit.

## V. CONCLUSION

We conclude that the juvenile court did not err in failing to terminate Christopher's parental rights under § 43-292(1) and (2), because the State failed to prove that Christopher abandoned or neglected Deztiny. We conclude that the juvenile court did not err in finding that termination of Christopher's parental rights is not in Deztiny's best interests or in determining that the State failed to prove that reasonable efforts were not necessary.

AFFIRMED.

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# LYLE A. FORGEY, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

724 N.W.2d 828

Filed August 29, 2006. No. A-04-1088.

This opinion has been ordered permanently published by order of the Court of Appeals dated October 12, 2006.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate

court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

5. **Statutes.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
6. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
7. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The time limitation in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is not essential to the main objective of the administrative license revocation statutes, which objective is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road.
9. ____: ____: ____: ____: ____. The time limitation in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) ensures order and promptness in administrative license revocation proceedings, and the failure to strictly abide by the 10-day time limit does not interfere with the principal purpose of the administrative license revocation statutes.
10. ____: ____: ____: ____: ____. The 10-day time limit set forth in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is directory rather than mandatory, and thus, a violation of such time limit does not invalidate administrative license revocation proceedings.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Court of Appeals Judge, Retired. Affirmed.

Rodney J. Palmer, of Palmer & Flynn, P.C., for appellant.

Jon Bruning, Attorney General, Laura L. Neesen, and Milissa Johnson-Wiles for appellee.

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

CARLSON, Judge.

## INTRODUCTION

Lyle A. Forgey appeals from the judgment of the district court for Brown County affirming a 1-year driver's license revocation imposed by the Department of Motor Vehicles (Department). Based on the reasons that follow, we affirm.

## BACKGROUND

On December 20, 2003, at approximately 1 a.m., Brown County Deputy Sheriff Sean Carson was on duty and started to follow a vehicle after he clocked the vehicle by radar traveling 51 miles per hour in a 65-mile-per-hour zone. As Carson

followed the vehicle for several miles on a highway, he observed the vehicle weaving in the traffic lane. Carson stopped the vehicle, which was operated by Forgey. Carson asked Forgey to exit his vehicle and to sit in the passenger's seat of Carson's patrol unit. Once Forgey was inside the unit, Carson detected an odor of alcohol coming from Forgey's person. Carson asked Forgey if he had drunk any alcoholic beverages that night, and Forgey advised that he "had a couple." Carson administered field sobriety tests and asked Forgey to take a preliminary breath test, which Forgey refused to do. Upon his refusal, Carson arrested Forgey for driving under the influence and took him to the Brown County sheriff's office. At the sheriff's office, a postarrest chemical advisement was read to Forgey and he refused to submit to any chemical tests. Carson testified that he recorded Forgey's refusal on a "Notice/Sworn Report/Temporary License" (sworn report) form, completed the form, and signed it in the presence of a notary. The Department received the sworn report on December 31, 2003.

Forgey filed a petition for administrative hearing with the Department, requesting a hearing to contest the revocation of his driver's license. On February 27, 2004, an administrative license revocation (ALR) hearing was held by telephone before a hearing officer for the Department. Carson testified for the Department, describing the events leading to and subsequent to Forgey's arrest, as previously set forth. The Department also offered the sworn report prepared by Carson, and it was received into evidence over Forgey's objection. Forgey testified in his own behalf and also called as a witness the dispatcher from the sheriff's office who was on duty the night Forgey was arrested.

On March 4, 2004, the hearing officer issued an order finding that Carson had probable cause to believe Forgey was operating a motor vehicle under the influence of alcohol and that Forgey had refused to submit to a chemical test. On March 5, the director of the Department formally adopted the order of the hearing officer and Forgey's license was revoked for a period of 1 year. See Neb. Rev. Stat. § 60-498.02 (Supp. 2003). Forgey appealed to the district court for Brown County, which affirmed the Department's order of revocation. Forgey now appeals to this court.

## ASSIGNMENTS OF ERROR

Forgey assigns that the district court erred in (1) finding that the 10-day time limit for filing the sworn report found in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is directory rather than mandatory and (2) failing to find that § 60-498.01(6)(c)(i) violates his right to due process by excluding Fourth Amendment issues from the ALR proceedings.

## STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[4] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005); *Central States Tire Recycling of Neb. v. State*, 268 Neb. 712, 687 N.W.2d 681 (2004).

## ANALYSIS

Forgey first argues that the sworn report prepared by Carson was invalid because it was received 1 day late by the Department. Forgey was arrested on December 20, 2003, and the Department received the sworn report on December 31, 11 days after his arrest. Section 60-498.01(2) provides that "[t]he arresting peace officer *shall within ten days* forward to the director a sworn report . . . ." (Emphasis supplied.) Forgey argues that the 10-day time limit set forth in § 60-498.01(2) is mandatory, rather than directory as the district court concluded. Thus, he contends that

because the time limit was violated, the ALR proceedings should have been dismissed.

[5-7] There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *In re Interest of E.M.*, 13 Neb. App. 287, 691 N.W.2d 550 (2005); *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001). As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Id.* Nonetheless, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id.* The Nebraska Supreme Court has addressed mandatory versus directory legislation in relation to time periods defined in statutes, although not in the context of ALR proceedings, and it has found on many occasions that time limitation language in statutes is directory rather than mandatory, despite the use of the word "shall." See, *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990); *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987); *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977).

One test relied on by the Nebraska Supreme Court to determine whether a statutory provision containing the word "shall" is mandatory or directory is as follows:

> " 'If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.' "

*State v. $1,947*, 255 Neb. at 297, 583 N.W.2d at 616-17, quoting *Matter of Sopoci*, 467 N.W.2d 799 (Iowa 1991).

In *Randall v. Department of Motor Vehicles, supra*, this court addressed whether a time limitation in a regulation governing

continuances of an ALR hearing was directory or mandatory. Specifically, the regulation at issue, 247 Neb. Admin. Code, ch. 1, § 010.04 (1998), stated: " 'Continuances granted on the Director's own motion shall in no event continue the hearing beyond forty-five (45) days from the date of arrest.' " 10 Neb. App. at 473, 632 N.W.2d at 803. Relying on the test used by the Nebraska Supreme Court in *State v. $1,947, supra*, set forth above, the *Randall* court concluded that the time limitation in the regulation was not "essential to the main objective" of the ALR statutes. The court recognized: " '[T]he purpose of ALR is to protect the public from the health and safety hazards of drunk driving by quickly getting [driving while under the influence] offenders off the road. At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk." *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 477, 632 N.W.2d 799, 806 (2001), quoting *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996). The *Randall* court concluded that the time limitation in the regulation was not essential to the purpose of the ALR statutes, but, rather, that the time limitation ensured order and promptness in ALR proceedings. The court stated: "The failure to strictly abide by the time limitation in [the regulation] does not interfere with the fundamental purpose of the ALR statutes. The main goal of removing drunk drivers off the roads can still be attained when hearings are held past the 45-day time limitation." 10 Neb. App. at 478, 632 N.W.2d at 806. The court further stated that any violation of the regulation which occurred did not invalidate the ALR proceedings unless the motorist could show that he was prejudiced by the delay in the ALR hearing, and the motorist did not argue that he was prejudiced.

In addition, the *Randall* court relied on *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), in which the Nebraska Supreme Court held that a legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory. The *Randall* court noted that the Nebraska Administrative Code did not contain any sanctions for noncompliance with the 45-day limitation under the regulation. The *Randall* court concluded that the regulation at issue was directory

rather than mandatory and that any violation of such time limit did not invalidate the ALR proceedings.

[8,9] In the instant case, we conclude that the time limitation in § 60-498.01(2) is not "essential to the main objective" of the ALR statutes, which objective, as previously stated, is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. As in *Randall v. Department of Motor Vehicles, supra*, the time limitation in the present case ensures order and promptness in ALR proceedings and the failure to strictly abide by the 10-day time limit does not interfere with the principal purpose of the ALR statutes. Further, Forgey does not allege that he was prejudiced by the late filing and there is no indication in the record that he suffered any prejudice as a result of the untimely filing. The sworn report was filed late by only 1 day and did not result in a delayed hearing or in any other consequence adverse to Forgey. Further, it is apparent that the time limitation in § 60-498.01(2) should be considered directory and not mandatory, because there is no sanction attached to an officer's failure to file the sworn report with the Department within 10 days.

[10] We conclude that the 10-day time limit set forth in § 60-498.01(2) is directory rather than mandatory and that thus, the violation of such time limit did not invalidate Forgey's ALR proceedings. Forgey's first assignment of error is without merit.

Forgey next assigns that the district court erred in failing to find that § 60-498.01(6)(c)(i) violates his right to due process under the 14th Amendment by excluding 4th Amendment issues from the ALR proceedings. Section 60-498.01(6)(c)(i) limits the issues under dispute at an ALR hearing in the case of a refusal to submit to a chemical test to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . ; and
>
> (B) Did the person refuse to submit to or fail to complete a chemical test after being requested to do so by the peace officer[.]

As a result of an amendment to § 60-498.01 which became operative on October 1, 2003, the statute no longer requires the State to establish the validity of the arrest.

Forgey contends that it is a due process violation to not permit a motorist who refuses to submit to a chemical test to challenge the validity of the arrest on Fourth Amendment grounds at the ALR hearing. The Nebraska Supreme Court in *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), addressed the same issue that Forgey presents. In *Chase*, the motorist was arrested for driving under the influence and refused to submit to a chemical test. Following an ALR hearing, the motorist's license was revoked for 1 year. The motorist appealed to the district court, which reversed the revocation based upon its determination that the motorist's right to due process was violated because the ALR statutes did not permit her to directly or indirectly challenge the validity of her arrest. The Department appealed, assigning that the district court erred in finding § 60-498.01 unconstitutional as it applies to cases where the motorist refuses to submit to a chemical test.

The *Chase* court reversed the judgment of the district court and remanded the cause for further proceedings. The *Chase* court held that the absence of a statutory procedure to challenge the validity of the traffic stop on Fourth Amendment grounds in an ALR proceeding does not constitute a denial of due process as applied to motorists who refuse to submit to a chemical test of alcohol concentration. The court further concluded that the administrative hearing and judicial review provisions of § 60-498.01 provide motorists with meaningful notice and an opportunity to be heard and, thus, fully comport with due process.

Based on the holding in *Chase v. Neth, supra*, Forgey's right to due process was not violated by § 60-498.01, which excluded him from challenging the validity of his arrest, and the applicable ALR statutes satisfied his right to due process. Accordingly, Forgey's second assignment of error is without merit.

## CONCLUSION

For the reasons set forth above, the judgment of the district court affirming the order of revocation by the Department is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. TAMI L. KEHM, APPELLANT.

724 N.W.2d 88

Filed November 21, 2006. No. A-06-123.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Police Officers and Sheriffs.** While officers must use the least intrusive methods reasonably available to rapidly dispel or verify their suspicions during an investigatory stop, they are not held to this standard prior to conducting an investigatory stop.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
5. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
6. **Police Officers and Sheriffs.** To determine whether a law enforcement officer had reasonable suspicion, a court must look at the totality of the circumstances.
7. **Investigative Stops.** A series of acts that appear innocent, when viewed separately, may warrant further investigation when viewed together.
8. **Investigative Stops: Time.** The length of an investigative stop must be no greater than is necessary to effectuate the purpose of the stop.

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

Eric J. Williams, York County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Tami L. Kehm appeals from a conviction and sentence for possession of methamphetamine. The district court for York County

denied Kehm's motion to suppress and subsequently found her guilty after a bench trial. Because we find that the arresting officer had a reasonable suspicion to detain Kehm after the purpose of the traffic stop was completed and the length of the detention was reasonable, we affirm.

## BACKGROUND

In an information filed on December 6, 2004, the State charged Kehm with possession of methamphetamine with intent to distribute, deliver, or dispense, in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2004). After Kehm pleaded not guilty, she filed a motion to suppress the evidence seized at the time of her detention and subsequent arrest. At the hearing conducted by the district court on April 12, 2005, only one witness, Officer Eric Jones, the arresting officer, testified. On July 12, the district court denied the motion, setting forth detailed findings of fact, which we quote at length as follows:

> Jones of the Nebraska State Patrol . . . has extensive training and experience in drug investigations. His experience includes a number of arrests of suspects in possession of controlled substances, including methamphetamine. On November 1, 2004, at approximately 11:45 p.m., while working as a Nebraska State Patrol road trooper, Jones stopped at [a truckstop] at the York I-80 interchange. Jones saw a vehicle which attracted his attention because of the area in which it was parked. The location of the vehicle was noteworthy to Jones because the vehicle had Hall County plates and seemed out of place in the area in which it was parked that late at night. . . . Jones then did a radio check on the registration of the vehicle and was advised that it was registered to . . . Kehm. This information was important to Jones because he had information that Kehm had been arrested previously for possession of a controlled substance. The identity of the registered owner also rang a bell in [Jones'] mind because Jones had arrested for possession of methamphetamine in Hall County, Nebraska, a person driving another vehicle registered to . . . Kehm approximately eleven months earlier.

Jones also received a physical description of . . . Kehm from the Nebraska State Patrol dispatcher and learned that she did not have a current Nebraska motor vehicle operator's license. . . .

Jones spotted an individual inside the [truckstop] building who matched the physical description of . . . Kehm. As he walked to the . . . building entrance, Jones walked by the [vehicle registered to Kehm] and made no investigation or examination of the [vehicle] even though he thought [it] was suspicious. Jones entered [the] building and continued watching this person. Jones watched [this person] leave the . . . building, enter the [vehicle] registered to . . . Kehm and drive away. . . . Jones had also left the building, re-entered his patrol vehicle, and followed the Kehm vehicle. Jones then conducted a traffic stop on the [vehicle] by activating his emergency lights. Kehm pulled over to the shoulder and stopped her vehicle on the I-80 eastbound entrance ramp. The vehicle stop occurred at approximately 11:55 p.m. Jones approached Kehm. Kehm asked Jones what she did wrong. Jones explained that he stopped Kehm because she was driving on an expired operator's license. Kehm acknowledged that she was driving on an expired operator's license. Jones had . . . Kehm get out of her vehicle and enter the patrol vehicle.

During the contact with Kehm in his vehicle, Jones smelled a chemical odor which, through his past experience, he associated with drug use. Jones had smelled this odor on prior occasions and had smelled a similar odor when examining confiscated methamphetamine. Jones asked Kehm about her destination that night. Kehm answered that she was on her way to visit her brother in Omaha, Nebraska. This meant that she would not have arrived at her brother's residence for at least another 1 ½, and more likely, another 2 hours or longer. During this conversation, Kehm told Jones that she was self-employed doing painting, cleaning, and odds and ends. Jones believed that during his conversation with Kehm she was talking faster than normal. Jones associated faster than normal speech with nervousness.

Initially, the Nebraska State Patrol dispatcher told Jones that Kehm had been arrested for possession of methamphetamine. In a later telephone conversation during the period Jones detained Kehm, another state patrol officer told Jones that Kehm was suspected of trafficking in methamphetamine or transporting methamphetamine for others, but that she had not been arrested for meth trafficking or possession. No factual basis or foundation for these conflicting statements was given nor did Jones request any factual information or foundation to support either of these statements.

At approximately 12:02 a.m., Jones completed the traffic stop and issued . . . Kehm a citation for no operator's license and returned her personal property to her. Kehm wished Jones a good night and was beginning to exit the patrol unit when Jones asked Kehm if she had ever been arrested for anything. Kehm stated she had been arrested previously for failure to appear and domestic violence. Jones asked . . . Kehm if she had ever been arrested for drugs and . . . Kehm said no. Jones again asked . . . Kehm if she had been arrested for anything like that and she again said no. Jones then asked . . . Kehm if she had any marijuana, methamphetamine or paraphernalia in [her vehicle]. Kehm said no to each question. . . .

Combining his [sic] observed, perceived, and inferred factors in his analysis at the scene, coupled with the fact that Jones was aware of previous criminal activity at the [truckstop], he asked Kehm's permission to search Kehm's vehicle. Kehm declined permission to search. On that, Jones advised . . . Kehm that he was going to have a drug detecting dog dispatched to the scene to examine . . . Kehm's automobile. The dog and handler were located in Grand Island, Nebraska, which necessitated a delay before the dog and handler arrived. Jones explained to Kehm the reason for the delay, indicating that there was no longer a drug detecting dog in York County.

The time period from the completion of the initial reason for the stop of . . . Kehm's vehicle for driving without a license until the drug detecting dog arrived was approximately 52 minutes. During th[ose] 52 minutes, Jones and

> Kehm engaged in some conversation. Jones permitted Kehm to retrieve get [sic] from her [vehicle] the drink she purchased from the [truckstop] and smoke outside the patrol unit.
>
> At approximately 12:54 a.m., Trooper Korte and Maximus, Korte's canine partner, arrived. The canine was not requested to do a sniff of Kehm's person and did not do so. The canine did not alert to any odor coming from . . . Kehm. Trooper Korte and Maximus conducted a sniff of the area around [Kehm's vehicle] at approximately 1:01 a.m. Trooper Korte notified Jones that Maximus alerted to the odor of drugs emanating from [Kehm's vehicle]. At approximately 1:05 a.m. Jones and Trooper Korte began a search of the vehicle, and, at approximately 1:15 a.m., Trooper Korte found crystal methamphetamine in various containers inside the [vehicle]. Kehm was then formally arrested.

The district court recognized that the decision by Jones to conduct an investigatory detention required "only reasonable suspicion based on articulable facts" and determined:

> After the reason for the initial stop was concluded, Jones had a right to broaden his inquiry based on: [Kehm's] more rapid than normal speech pattern; her claim that she was driving to Omaha to meet her brother at a truly unusual hour, which, true or not, remained a truly unusual hour; the chemical odor emanating from [Kehm's] person; the fact that [Kehm] either had been arrested for possession of methamphetamine or was suspected of being involved in drug trafficking; the fact that [Kehm's] vehicle was parked in an unusual location at a place where significant drug activity had previously taken place; and, the fact that another person had been arrested by the same trooper in another of [Kehm's] vehicles while in possession of a controlled substance. . . . Jones, considering the totality of the circumstances, had accumulated more than sufficient articulable facts upon which to base his post-citation detention decision.

The district court also articulated an alternative basis for denying the motion, reasoning that because Jones could have made a custodial arrest, rather than issuing a citation, for the offense

of operating a motor vehicle without an operator's license, the search could be sustained as one made incident to an arrest.

A bench trial was held on October 12, 2005. On December 13, the court entered a verdict and order finding Kehm guilty of possession of a controlled substance, a lesser-included offense of the original charge. On January 23, 2006, the court sentenced Kehm to 20 months' to 3 years' imprisonment. Kehm timely appeals.

## ASSIGNMENTS OF ERROR

Under a general assignment that the district court erred in denying the motion to suppress, Kehm specifically assigns that the court erred in (1) failing to rule that the methods employed to investigate her offense of driving on an expired license were not the least intrusive available, (2) ruling that Jones had reasonable suspicion to detain her while awaiting a dog to conduct a sniff of the vehicle, (3) failing to rule that her continued detention while awaiting a drug dog was unreasonable, and (4) ruling that there was an alternative ground to deny her motion to suppress.

## STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

## ANALYSIS

*Least Intrusive Means.*

Kehm first contends that the district court erred in failing to rule that the methods employed by Jones to investigate Kehm's offense of driving on an expired license were not the least intrusive available. Kehm begins this argument by correctly reciting the rule that one type of police-citizen encounter is an investigatory stop, where the officer uses the least intrusive methods reasonably available to rapidly dispel or verify his suspicions. See *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). Kehm then argues, "Here, because Jones could have more easily

and less intrusively investigated [Kehm's] expired license offense inside the [truckstop], or in the parking lot, his decision to wait until she drove away so he could conduct a traffic stop was improper, unreasonable, and contrary to the Fourth Amendment." Brief for appellant at 16-17. Kehm also argues that Jones could have conducted his investigation in a less intrusive manner by allowing Kehm to remain in her vehicle during the traffic stop, rather than requiring her to sit in his patrol car.

[2] We find both arguments unpersuasive. While officers must use the least intrusive methods reasonably available to rapidly dispel or verify their suspicions during an investigatory stop, see *State v. Chronister, supra*, they are not held to this standard prior to conducting an investigatory stop. In the instant case, because the investigation prior to the traffic stop did not include any detention or investigatory stop, Jones had no duty to use the least intrusive means available. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005) (no detention or seizure when police officer requested registration check of vehicle). Jones did not act inappropriately by waiting for Kehm to commit a traffic violation before initiating contact with her.

We also find nothing unreasonable in Jones' request that Kehm sit in his patrol car during the stop. Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Voichahoske, supra*. The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* Jones acted within the scope of the circumstances when he requested that Kehm sit in his patrol car. We reject this assignment of error.

*Reasonable Suspicion for Continued Detention.*

We also find no merit to Kehm's second argument, that Jones did not have reasonable suspicion to detain her after he issued her a citation. Upon our review of the trial court's record, we conclude that the findings of historical fact are not clearly wrong. We proceed with our de novo review of reasonable suspicion.

[3,4] Jones initially stopped Kehm because she was driving with an expired license. A traffic violation, no matter how minor,

creates probable cause to stop the driver of a vehicle. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The original purpose of the traffic stop was completed when Jones issued Kehm a citation for driving with an expired license. In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id.*

[5,6] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* Reasonable suspicion must be determined on a case-by-case basis. *Id.* To determine whether Jones had reasonable suspicion, we must look at the totality of the circumstances. See *id.*

When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *Id.* In the instant case, several factors considered collectively lead us to conclude that Jones had reasonable suspicion to believe that Kehm was engaged in criminal activity.

First, Jones testified that he became suspicious when he noticed Kehm's car parked in an unusual location in the truckstop's parking lot late at night. Kehm's car attracted his attention because he had never before seen it at that truckstop and because it had Hall County license plates but was parked in an area of the parking lot where typically only local vehicles would be found. He testified that typically when persons with out-of-state or out-of-county vehicles are doing business at the truckstop, they park close to the building rather than in the middle of the parking lot, where Kehm's car was parked. Jones testified that he was aware of typical parking patterns there because for the past 4 years, whenever he was on duty he had routinely stopped there for a break between 11:30 p.m. and midnight. He also testified that he was "aware . . . through intelligence that large amounts of drugs are deposited or transferred at [that] truck stop" and that he also was aware through personal experience that criminal activity had taken place at that location in the past.

Jones also testified that approximately 11 months earlier, he had arrested another individual for possession of methamphetamine who had been driving a vehicle registered to Kehm. When he was informed that the vehicle in the instant case belonged to Kehm, it aroused further suspicion. Although the individual in the earlier incident ultimately was not prosecuted for possession of methamphetamine, Jones testified that in his experience, people involved with drugs tend to associate together.

Jones also testified that he was suspicious of the midnight hour at which Kehm was purportedly traveling to Omaha to visit her brother. As the district court noted, Kehm still had a significant distance to travel, which would have resulted in her arrival at an even more unusual hour. In *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000), we noted that although unusual or suspicious travel plans may give rise to reasonable suspicion, such a determination is fact based, and where a reasonable explanation for the travel exists, courts have not relied upon this factor as support for reasonable suspicion. Despite the fact that Kehm offered an explanation for why she was traveling at a late hour, the district court concluded that regardless of whether the explanation was true or not, the time at which Kehm was traveling was still suspicious. We find no clear error in this factual determination.

Other factors that made Jones suspicious were the fact that Kehm was self-employed and the chemical smell that emanated from Kehm's person while she sat in Jones' patrol car. Jones testified that through his experience, he had learned a large number of the people he arrested for drugs were either self-employed or between jobs. And while Jones conceded the possibility that the odor he noticed could have been from something other than methamphetamine, he testified that he had smelled a similar odor on several occasions where large amounts of methamphetamine and cocaine were found. See *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996) (smell of laundry detergent, which officer knew was commonly used to mask smell of narcotics, contributed to finding of reasonable suspicion).

Finally, Jones testified, based upon his personal experience, that Kehm was speaking faster than most people speak during routine traffic stops and seemed overly nervous. Relying upon

authority from another jurisdiction applying de novo review to a video recording, Kehm urges us on appeal to review this finding of fact de novo on the record. However, that argument is inconsistent with our clear error standard of review for findings of historical fact by the trial court, see *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006), and we reject Kehm's invitation to deviate from the controlling precedent.

We determine that the trial court did not commit clear error when it concluded that Kehm was speaking fast and seemed nervous. Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention. *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). We recognize the district court's finding that Jones was an experienced officer whose experience included making a number of arrests for possession of drugs. While we conclude that none of the above factors alone is sufficient to find that Jones had a reasonable, articulable suspicion that criminal activity was afoot, we consider all of them in our de novo review.

We will not consider Jones' reliance upon allegations that Kehm transported methamphetamine or was arrested for possession of methamphetamine. While we recognize that an individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual, see *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003), the information must be reliable before we consider it in our analysis.

We disregard Jones' initial reliance upon information that Kehm had previously been arrested for possession of methamphetamine because this information was erroneous. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005) (information transmitted from dispatcher to police officer did not provide reasonable suspicion for stop where information was false due to dispatcher's mistake). We also disregard any reliance Jones placed

upon information that Kehm was suspected of trafficking methamphetamine. In *State v. Lee, supra*, the Nebraska Supreme Court disregarded evidence showing that officers received information that the area where they initially noticed the offender was used for drug transactions. The *Lee* court did not consider this information in its reasonable suspicion analysis, because it consisted of "little more than conclusory assertions" and nothing in the record indicated where the information came from, whether the source of the information was reliable, and whether the arresting officers had the information at the time they detained the offender. 265 Neb. at 670, 658 N.W.2d at 678. We do not consider similar information in the instant case because the source of the information was proved to be unreliable and no facts were given to support the conclusory assertion.

Based upon the record, the factors that are appropriately within the "totality of the circumstances" for consideration in our de novo review are as follows: (1) Kehm's vehicle was parked in an unusual location at a place where significant drug activity had previously taken place, (2) 11 months earlier Jones had arrested another individual for possession of methamphetamine driving a vehicle registered to Kehm, (3) the chemical odor emanating from Kehm, (4) the unusual hour when Kehm was purportedly traveling to visit her brother, (5) Kehm was self-employed, and (6) Kehm's nervousness, although we give this factor limited weight.

[7] We recognize that a series of acts that appear innocent, when viewed separately, may warrant further investigation when viewed together. *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994). The acts in the instant case, considered separately, may appear innocent. However, when considered together, they are consistent with acts of one who is engaged in illegal activity. Upon our de novo review, we determine that Jones had reasonable suspicion to suspect that Kehm was engaged in transporting illegal drugs.

*Reasonableness of Continued Detention.*

Kehm contends in her third assignment of error that her continued detention while awaiting the arrival of a drug detecting dog was unreasonable. We disagree. To evaluate the reasonableness of Kehm's detention, we must consider both the length

of the continued detention and the investigative methods employed, see *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006), which we address in turn.

[8] The length of an investigative stop must be no greater than is necessary to effectuate the purpose of the stop. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). The U.S. Supreme Court held that an investigative stop that lasted 90 minutes, where the police did not diligently pursue the investigation, was not reasonable, but declined to establish a strict time limitation on what is reasonable. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). Likewise, this court has held that " 'rigid time limitation[s]' or ' "bright line" ' rules are not determinative of [the] legality [of investigative stops]." *State v. Chronister*, 3 Neb. App. 281, 288, 526 N.W.2d 98, 104 (1995), quoting *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

In State v. *Soukharith, supra*, the Nebraska Supreme Court found that an investigatory stop lasting 34 to 45 minutes was reasonable. While *Soukharith* is helpful to our analysis, because the detention in *Soukharith* was shorter than the detention in the instant case we look to cases from other jurisdictions to determine how other courts have treated detentions as long as or longer than the detention in this case. Our research reveals that investigatory stops lasting 50 minutes or longer have been upheld in several federal appellate decisions. See, e.g., *U.S. v. White*, 42 F.3d 457 (8th Cir. 1994) (80-minute detention reasonable); *U.S. v. Bloomfield, supra* (60-minute detention reasonable); *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988) (50-minute detention reasonable).

To evaluate whether the investigative methods employed during the detention were reasonable, we consider several factors, including law enforcement purposes served by the detention, the diligence with which the police pursued the investigation, and the scope and intrusiveness of the detention. See *State v. Soukharith, supra*. The U.S. Court of Appeals for the 11th Circuit analyzed very similar factors in *U.S. v. Hardy, supra*. In *Hardy*, the police detained an individual after a routine traffic stop for approximately 50 minutes while awaiting the arrival of

a drug detecting dog. While the *Hardy* court expressed "some unease on encountering a *Terry* stop lasting as long as fifty minutes," because the "other aspects to the stop demonstrat[ed] that the police acted with propriety . . . and [because of] the expedition with which the police arranged for a narcotics dog, the doubts raised by the length of the detention are not sufficient for us to find that the stop violated the fourth amendment." 855 F.2d at 761. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The "other aspects to the stop" in *Hardy* included the intrusiveness of the canine sniff, the diligence with which the police conducted the stop, and the scope and intensity of the intrusion. The court held that a canine sniff is the kind of brief, minimally intrusive investigation technique that may justify a *Terry* stop. *U.S. v. Hardy, supra*. See, also, *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). The court determined that the police search was diligent because the arresting officer called for a drug detecting dog immediately upon deciding a canine sniff was warranted and the canine officer immediately left for the scene upon being called. The court then concluded that the scope and intensity of the intrusion were reasonable because the offenders were not removed to an office or police station, the arresting officer did not question the offenders while awaiting the drug dog, and the offenders were not placed in the back of the patrol car during the wait, but were allowed to wait in their own car. *U.S. v. Hardy, supra*.

In the instant case, it took approximately 52 minutes for the canine unit to arrive after Jones requested the unit's assistance. However, the officers acted diligently to conduct the canine sniff in a reasonable amount of time. Jones called for the canine unit approximately 8 minutes after he stopped Kehm, and the canine officer left for the scene within minutes of receiving the call.

The scope and intrusiveness of the detention were reasonable. While waiting for the dog to arrive, Kehm sat in the front seat of Jones' patrol car and Jones allowed Kehm to go back to her vehicle to retrieve and finish her drink and also allowed her to smoke a cigarette. Jones did not interrogate Kehm throughout the detention, but instead engaged in conversation unrelated to

the events. When the drug dog arrived, it conducted an exterior sniff of Kehm's vehicle. We conclude that the detention of Kehm was reasonable in both time and scope.

*District Court's Alternate Basis.*

In light of our conclusion that Jones had reasonable suspicion to detain Kehm and the detention was reasonable, we do not address Kehm's argument that the district court erred in articulating an alternative basis to deny Kehm's motion to suppress, as it is unnecessary to the disposition of this case. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

## CONCLUSION

We determine that the district court did not err in denying Kehm's motion to suppress. We conclude that Jones had reasonable suspicion to detain Kehm and that the detention was reasonable. We therefore affirm.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. ALLEN J. WILSON, ALSO KNOWN AS ALFRED J. WILLIAMS, APPELLANT.

724 N.W.2d 99

Filed November 21, 2006. No. A-06-154.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.
4. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, the judgment is the sentence.

6. **Convictions: Sentences: Final Orders.** The trial court must pronounce sentence before a criminal conviction is a final judgment.
7. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
8. **Final Orders: Speedy Trial: Appeal and Error.** The denial of a motion to discharge based upon statutory speedy trial grounds is a final, appealable order, because it is an order affecting a substantial right made during a special proceeding.
9. **Final Orders: Appeal and Error.** An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal.
10. **Actions: Words and Phrases.** A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.
11. ____: ____. Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding."
12. ____: ____. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not.
13. ____: ____. A special proceeding may be said to include every statutory remedy which is not in itself an action.
14. **Constitutional Law: Speedy Trial: Statutes: Immunity.** The constitutional right to a speedy trial is not a statutory remedy and does not authorize a special application to the court to enforce it.
15. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
16. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
17. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Appeal dismissed.

Michael J. Decker, of Decker Law Offices, for appellant.

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

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Prior to trial, the district court for Douglas County denied the motion of Allen J. Wilson, also known as Alfred J. Williams,

seeking discharge based upon an alleged violation of his statutory and constitutional rights to a speedy trial. After being convicted by a jury but prior to sentencing, Wilson filed this appeal from the court's order overruling his motion for discharge, alleging only that he was denied his constitutional right to a speedy trial. Because we conclude that Wilson's appeal was interlocutory, we dismiss the appeal for lack of jurisdiction.

## BACKGROUND

On February 12, 1999, the affidavit of an Omaha police officer set forth grounds for issuance of an arrest warrant for Wilson. According to the affidavit, a man identified as James E. Williams and an accomplice forced their way into Thomas Johnson's residence on February 3, 1998, and robbed Johnson and Tanyel Smith. Williams was later arrested and incarcerated for the crimes. A police officer interviewed Williams on February 3, 1999, at which time Williams identified his accomplice as his uncle, "Alfred Williams" (Wilson). According to Williams, Wilson had been arrested in California, transferred to Nebraska, and paroled out of the Lincoln Correctional Center. The affiant spoke with the supervisor of discharged inmate records at the Department of Correctional Services in Lincoln, asking the supervisor to check on an "Alfred Williams" who would have been released in 1997 or 1998 on a charge from California. The supervisor found a party matching the description under the name "Allen J. Wilson" and sent the affiant a release photograph of Wilson. The affiant showed the photograph to Williams, and Williams stated that the photograph depicted his uncle, "Alfred Williams," who had assisted Williams in the 1998 robbery. On February 12, 1999, the county court for Douglas County issued a warrant for Wilson's arrest, and the State filed in the county court four one-count complaints based on the above-described acts. The complaints charged Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony.

On June 9, 2005, Wilson made his first appearance in county court. On July 15, the county court held a preliminary hearing, and the matter was bound over to the district court. On July 19, the State filed an information charging Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony, all counts arising out of acts committed on February 3,

1998, against Johnson and Smith. On December 30, 2005, the State filed an amended information charging Wilson with two counts of robbery, six counts of use of a deadly weapon to commit a felony, and four counts of false imprisonment in the first degree, as well as with being a habitual criminal. Pursuant to Wilson's motion to quash, the court subsequently struck from the amended information two counts of false imprisonment in the first degree and four counts of use of a deadly weapon to commit a felony.

On January 20, 2006, Wilson filed a motion for discharge. The motion alleged that the failure to prosecute the matter within 6 months of filing the original action in the county court and within 6 months of the filing of the information denied him his statutory right to a speedy trial and that the failure to prosecute the matter for 7 years denied him his federal and state constitutional rights to a speedy trial.

During the hearing on Wilson's motion for discharge, the court inquired whether there was any information regarding Wilson's whereabouts post-February 3, 1998. The State responded that at the time the warrant was drafted, the State had information indicating Wilson might have left for California, that officers checked with "the jurisdiction in California" but were unable to locate Wilson, and that on June 7, 2005, Wilson was arrested in Omaha on unrelated charges. Wilson's counsel conceded that the statutory speedy trial time had not run, based on the time the information was filed in district court.

With respect to the constitutional speedy trial right, Wilson's counsel argued that Wilson's defense would suffer prejudice by the delay, because "if and when alibi witnesses are called, we believe the State is going to attack the witnesses's credibility based on the length of time it's been since the incident occurred and remembering back as far as when . . . Williams was in California, et cetera." The State asserted that the officers performed a diligent search for Wilson, that the warrant remained active until Wilson was arrested in the Douglas County area, and that the time for a speedy trial did not begin to run until the information was filed on July 19, 2005.

The court ruled that the statutory speedy trial right had not been violated and that Wilson had not been prejudiced by the

delay. In an order filed January 25, 2006, the court overruled the motion for discharge. However, Wilson did not perfect an appeal before a jury trial commenced. An order filed February 2 stated that a jury unanimously found Wilson guilty of two counts of robbery, two counts of use of a deadly weapon to commit a felony, and two counts of false imprisonment in the first degree. The court adjudged Wilson guilty pursuant to the jury's verdict and, prior to sentencing, scheduled a hearing on whether Wilson should be determined to be a habitual criminal. On February 6, after the trial and before sentencing, Wilson filed his notice of appeal and poverty affidavit.

## ASSIGNMENT OF ERROR

Wilson alleges, restated, that the district court was clearly wrong in finding that he was not denied his constitutional right to a speedy trial.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

## ANALYSIS

[2,3] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. *Id.*

[4-6] A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. *Id.* In a criminal case, the judgment is the sentence. *Id.* The trial court must pronounce sentence before a criminal conviction is a final judgment. *Id.* In this case, a final judgment has not been entered, because Wilson filed his notice of appeal after being convicted but prior to sentencing. If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted

in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

[7] Jurisdiction in this court depends on whether Wilson's appeal—filed within 30 days of the entry of the order denying his motion for discharge—was taken from a final order. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See, *State v. Meese, supra*; *State v. Jacques, supra.* The order denying Wilson's motion for discharge did not determine the action and prevent a judgment, nor was it made on summary application after a judgment was rendered. We examine whether the order was made during a special proceeding and affected a substantial right.

[8-10] Wilson claimed in his motion for discharge that he had been denied his statutory and constitutional rights to a speedy trial, and the district court overruled the motion. The Nebraska Supreme Court has held that the denial of a motion to discharge based upon statutory speedy trial grounds is a final, appealable order, because it is an order affecting a substantial right made during a special proceeding. See, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Jacques, supra.* An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. *State v. Loyd, supra.* Thus, the overruling of a motion alleging the denial of a speedy trial based upon constitutional grounds pendent to a nonfrivolous statutory claim may be reviewed upon appeal from that order. However, Wilson's counsel conceded during the hearing on the motion for discharge that the statutory right to a speedy trial had not been violated, and this appeal is based solely on an alleged denial of Wilson's right to a speedy trial guaranteed by U.S. Const. amend. VI. We determine that Wilson's concession renders his statutory speedy trial claim legally frivolous. See *Cole*

*v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002) (frivolous legal position is one wholly without merit, that is, without rational argument based on law or on evidence). The issue in this case is whether the denial of the motion for discharge, based upon a constitutional right and in the absence of a nonfrivolous statutory claim, is a final, appealable order or is interlocutory.

In *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978), the U.S. Supreme Court held that a defendant may not, before trial, appeal from an order denying a motion to dismiss on constitutional speedy trial grounds. The Court stated that "[t]he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case" and that such claims "are best considered only after the relevant facts have been developed at trial." 435 U.S. at 858. The Court reasoned that "[t]he essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed." 435 U.S. at 860. In discussing the four factors enunciated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which factors are to be weighed in determining whether a deprivation of the Sixth Amendment right to a speedy trial has occurred, the *MacDonald* Court stated: "If the factors outlined in *Barker v. Wingo, supra*, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered." 435 U.S. at 861.

*Special Proceeding.*

[11,12] Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). A special proceeding is, by definition, not part of an action. *Id.* An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id.*

[13,14] In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), the Nebraska Supreme Court reasoned that a ruling on a motion for discharge was made during a special proceeding

because Neb. Rev. Stat. § 29-1207 (Reissue 1995) conferred a right to a speedy trial and Neb. Rev. Stat. § 29-1208 (Reissue 1995) authorized a special application to a court to enforce the right. A special proceeding may be said to include every statutory remedy which is not in itself an action. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). However, the constitutional right to a speedy trial is not a statutory remedy and does not authorize a special application to the court to enforce it. We conclude that a pretrial ruling based on a constitutional right to a speedy trial, unaccompanied by a nonfrivolous claim based upon the statutory right to speedy trial, is not an order made during a special proceeding.

*Substantial Right.*

[15,16] A substantial right is an essential legal right, not a mere technical right. *State v. Vela, supra.* A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* A substantial right can be affected by an order if the right is irrevocably lost by operation of the order, while a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. *Id.*

In *State v. Gibbs*, 253 Neb. at 245, 570 N.W.2d at 330, the court stated that a ruling "based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated" affected a substantial right because "the rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." As discussed above, there is no nonfrivolous statutory speedy trial claim at issue in the instant case. In *State v. Jacques, supra*, the Nebraska Supreme Court determined that the denial of a motion to discharge affected a substantial right because it effectively denied a defendant's speedy trial rights. However, as the U.S. Supreme Court stated in *United States v. MacDonald*, 435 U.S. 850, 861, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978):

> Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a

> "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial.

Further, the right to a speedy trial is different from other constitutional rights in that deprivation of the right may work to the accused's advantage and does not per se prejudice the accused's ability to defend himself or herself. See *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[17] The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis, utilizing the factors set forth in *Barker v. Wingo, supra*. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). On the other hand, to obtain absolute discharge under the statutory right enforced by § 29-1208, a defendant must show that he or she was not brought to trial before the running of the time for trial, as extended by excluded periods. A defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with § 29-1207(2). *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). Thus, speedy trial claims based on statutory grounds are more amenable to resolution prior to trial than are those claims based on constitutional grounds.

Because Congress was dissatisfied with the test to determine if an accused's speedy trial rights have been violated, Congress passed the Speedy Trial Act of 1974. 22A C.J.S. *Criminal Law* § 591 (1989). Certain states, including Nebraska, have speedy trial statutes which pertain to an accused's speedy trial rights and give substance to, and implement, the constitutional protection. *Id.* at § 599. The decisions recognizing the right to an interlocutory appeal from a denial of the statutory right to a speedy trial implement the legislative intent demonstrated in the adoption of the separate statutory right. However, the U.S. Supreme Court has expressly held that no interlocutory appeal lies from a denial

of relief based upon the constitutional rights to speedy trial. See *United States v. MacDonald, supra*. Similarly, the Nebraska Supreme Court has never recognized a right to interlocutory appeal solely concerning the constitutional right to speedy trial. We conclude that the constitutional right to a speedy trial can be effectively vindicated in an appeal after judgment. Wilson's claim that he was denied a speedy trial would not be diminished, and any prejudice resulting from an erroneous denial of his motion for discharge could be remedied by an appeal from the judgment which would become final after sentencing.

## CONCLUSION

We conclude that Wilson's appeal, based on the alleged denial of only his constitutional right to a speedy trial, was not taken from either a final judgment or a final, appealable order. Accordingly, we are without jurisdiction to act and must dismiss the appeal.

APPEAL DISMISSED.

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PATRICK RONALD RUSSELL, APPELLANT, V.
HAROLD CLARKE ET AL., APPELLEES.

724 N.W.2d 840

Filed December 5, 2006. No. A-04-1319.

1. **Mandamus.** A grant or denial of mandamus is within the trial court's discretion.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Pleadings: Judgments: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Pleadings: Words and Phrases.** Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses.
6. **Pleadings: Summary Judgment.** A motion for summary judgment is not a pleading.
7. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
8. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom

the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

9. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
10. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
11. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2004), and must seek substantive alteration of the judgment.

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

Patrick Ronald Russell, pro se.

Jon Bruning, Attorney General, and Maureen Hannon for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Patrick Ronald Russell appeals from the judgment of the district court for Johnson County, Nebraska, as amended in response to the appellees' motion to alter or amend judgment, effectively denying Russell relief upon his petition for writ of mandamus seeking to compel the appellees to provide public records. We determine that (1) a motion for summary judgment is permissible in a mandamus action, (2) the appellees produced evidence sufficient to disprove an element of mandamus and Russell failed to adduce contrary evidence, (3) the Nebraska Department of Correctional Services (DCS) had no obligation to transport Russell to the office where a record he sought was located, and (4) granting the motion to alter or amend judgment

to correctly reflect the original evidence was not an abuse of discretion. We therefore affirm.

## BACKGROUND

Russell is an inmate in the custody of DCS and is presently incarcerated within the Tecumseh State Correctional Institution (TSCI). Russell submitted requests based upon Neb. Rev. Stat. §§ 84-712 to 84-712.09 (Reissue 1999 & Cum. Supp. 2002) (the public records statutes). Russell addressed the requests to the appellees in this action, namely Harold Clarke, then director of DCS; Mary Carmichael, the contract monitor at TSCI; and Jerry Bryan, a unit manager at TSCI.

Russell divided his requests into two categories, one seeking "[r]ecord[s]" and the other seeking "[i]nformation." (Emphasis omitted.) Russell's requests for records sought:

> (1) Medically Prescribed Bland Diet Menu currently being used by Aramark at [TSCI].
>
> (2) Any and all contracts in exist[e]nce between [DCS] and Aramark Corporation, for the Food Service being provided at [TSCI].
>
> (3) Any and all audit reports conducted on the Food Service provided by Aramark comp[il]ed by either [DCS] or Aramark.
>
> (4) Any and all recipes being used to prepare the food provided in the medically prescribed bland diet tray.
>
> (5) Any and all licen[s]es on Aramark showing [it is] licensed to provide food service.
>
> (6) Any and all food handler certificates and licen[s]es on all employees of Aramark and on all inmates working in the food service area.

Russell also sought information as follows:

> (1) Complete listing of the first and last names of all Aramark employees working at the Food Service Department within [TSCI].
>
> (2) Complete name and address of Aramark General Manager who is responsible for the staff at [TSCI].
>
> (3) Name and address of the Chief Exec[u]tive Officer . . . of Aramark.
>
> (4) Name and address of Aramark's general legal counsel.

(5) Name and address of Aramark employee responsible to receive court service for this area.

(6) Name and address of the current dietician for [DCS].

(7) Address and position for Ron Fisher.

An attorney for the appellees initially responded to Russell's requests, asserting that the appellees were unable to provide copies of the requested public records within 4 business days and providing Russell with a specific date by which further response would be made. Approximately 3 days later, the attorney submitted the appellees' final response, which we summarize:

As to Russell's first records request, the appellees would provide copies of five pages of bland diet menus, which constituted all of the relevant menus, upon payment of the cost of copying at 10 cents per page. The items requested in Russell's second records request included a contract contained in three three-ring binders and estimated to be between 1,200 and 1,500 pages in length. The appellees offered to provide the full contract at 10 cents per page or to provide specific parts of the contract if Russell desired to limit his request. The response claimed that Russell's third, fourth, and fifth records requests did not describe any public record belonging to DCS. Regarding Russell's sixth records request, the response stated that inmates do not have food handler licenses or certificates and that Russell's request for licenses of Aramark employees did not describe any public record belonging to DCS.

As to Russell's requests for information, the response claimed that each request did not describe a public record belonging to DCS. The response to the seventh request did, in addition, identify the position, workplace facility, and address of Ron Fisher.

On March 3, 2004, Russell commenced this action in the district court, seeking a writ of mandamus. On April 29, the appellees filed an answer admitting the content of Russell's requests and alleging the content of the responses submitted by the attorney for DCS on behalf of the appellees.

Prior to the filing of the answer on behalf of the appellees, the district court had taken no action on Russell's petition for writ of mandamus. On August 9, 2004, Russell filed a written motion for an evidentiary hearing. By order entered on September 2, the court scheduled such a hearing for October 25. On October 4, the

appellees filed a motion for summary judgment, which was also scheduled for hearing on October 25. The appellees also filed a motion to continue the evidentiary hearing until after a disposition of the motion for summary judgment. On October 25, the court sustained the motion for continuance of the evidentiary hearing pending ruling on the motion for summary judgment and received documentary evidence on the summary judgment motion. We summarize that evidence in the analysis section of this opinion.

By order entered on October 28, 2004, the district court granted the appellees' motion for summary judgment in part and also ordered issuance of a peremptory writ of mandamus to Clarke as to the first six of Russell's requests for information. The court found that there was no genuine issue as to any material fact and granted relief against both Russell and the appellees. The court determined that Russell's first request for records was satisfied by the appellees' response. The court did not expressly rule on Russell's second request for records, but implicitly determined that the appellees' response also satisfied that request. The court determined that there was no evidence that any records specified by Russell's third, fourth, fifth, and sixth requests for records existed as public records. The court granted summary judgment in favor of the appellees with respect to those items. With respect to Russell's first six requests for information, the court determined that the appellees possessed the information and that the information was a public record within the meaning of § 84-712.01 and accordingly granted Russell's request for a peremptory writ of mandamus as to those items. Russell's petition did not address his seventh request for information, and we do not address it further in this opinion.

On November 3, 2004, the appellees timely filed a motion to alter or amend the judgment, asserting that Russell had not filed a motion for summary judgment and arguing that the court erred in granting affirmative relief against the appellees in the absence of such motion. The appellees' motion also argued that the Nebraska statutes do not require state agencies to answer general questions which seek information that has never been put into document form, especially where the information concerns general information about a private corporation.

On November 15, 2004, the district court conducted a hearing on the appellees' motion to alter or amend judgment. Both Russell and counsel for the appellees appeared by telephone. No additional evidence was offered or received at this hearing, which consisted only of discussion between the court, Russell, and counsel for the appellees. By order entered on November 22, the court granted the appellees' motion with respect to Russell's third, fourth, fifth, and sixth requests for information. With respect to the third, fourth, and fifth requests, the court found no evidence contradicting the appellees' evidence that the information is not contained in any public record. The court also found that the appellees had supplied Russell with the information in his first request for information, that Russell had obtained the information sought in his second request for information as demonstrated by his successful service of a subpoena on Aramark's general manager, and that the evidence showed that there is no current dietician for DCS, whose name and address were the subject of Russell's sixth request for information. Accordingly, the court determined that "no further action on behalf of the [appellees] is required." The court's order stated that the appellees' motion to alter or amend judgment was granted and that the earlier order was amended "to only require that the information in the first request for information be provided."

Russell timely appeals.

## ASSIGNMENTS OF ERROR

Russell assigns, restated, that (1) the district court erred in (a) entertaining the appellees' motion for summary judgment and (b) finding that some of the documents sought were not public records and (2) the district court abused its discretion in (a) granting the motion to alter or amend judgment where no evidence was provided to show that the information sought was not a part of the contract and (b) not ordering the production of the contract sought "which is still being denied" to Russell.

Russell also assigns, but does not argue, error in the district court's granting a continuance of the trial of the mandamus action for the purpose of hearing the motion for summary judgment, in its granting motions to quash subpoenas for relevant trial witnesses, and in its denying Russell out-of-pocket costs for the action. Errors that are assigned but not argued will not be

addressed by an appellate court. See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). We will not further address the errors which Russell has assigned but not argued.

## STANDARD OF REVIEW

[1] A grant or denial of mandamus is within the trial court's discretion. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

[4] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. See *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

## ANALYSIS

*Propriety of Summary Judgment.*

Russell argues that because Neb. Rev. Stat. § 25-2164 (Reissue 1995) provides that "[n]o other pleading or written allegation is allowed than the writ and answer," summary judgment is unauthorized in a mandamus proceeding. However, this argument ignores other language in the same statute, which provides:

> These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action.

§ 25-2164.

[5,6] Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). A motion for summary judgment

is not a pleading. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). It is fundamental that the primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

The only case cited by Russell in support of this proposition is *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 105 N.W.2d 721 (1960). However, that case does not support Russell's argument; rather, it addressed whether the trial court improperly entertained a motion to make more definite and certain and, upon overruling that motion, improperly granted the respondent additional time to answer. The Nebraska Supreme Court found no abuse of discretion in the trial court's procedure, stating that the ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus. In *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990), the Nebraska Supreme Court affirmed an order of the district court granting the defendants' motion for summary judgment in an action for mandamus. While the court did not specifically address the propriety of summary judgment in a mandamus action, the court's opinion suggests that it is appropriate. Moreover, the language of the statute upon which Russell relies contemplates "further proceedings . . . in the same manner as in a civil action." § 25-2164. Clearly, the summary judgment procedure is applicable to a civil action. See Neb. Rev. Stat. § 25-1330 (Cum. Supp. 2004). We reject Russell's argument that the summary judgment procedure cannot be used in an action for writ of mandamus.

[7] Russell also argues that the district court abused its discretion in not allowing him to "argue against the motion" for summary judgment and that "it was understood from what the court stated that all that [the] court was considering was the motion to strike, and not the motion for summary judgement." Brief for appellant at 8. However, Russell does not assign these matters as error. Errors argued but not assigned will not be considered on appeal. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

*Evidence on Summary Judgment.*

[8] Russell contends that the trial court erred in granting summary judgment for the appellees because "all of the documents and information sought were in [the] appellees['] custody." Brief for appellant at 4-5. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[9] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[10] Before turning to the evidence in the instant case, we note that mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006). In order to establish a prima facie case for summary judgment, the appellees were required to produce enough evidence to disprove one or more of the elements of mandamus if the evidence were uncontroverted at trial.

In the instant case, we focus upon the second element, i.e., the existence of a clear duty on the part of the appellees to perform the act. In this action based upon the public records statutes, the appellees were clearly required to allow Russell to examine and

make or obtain copies of public records on the premises of the custodian of the records during the hours the custodian's office may be kept open for the ordinary transaction of business. See § 84-712. The primary issues, however, were whether the records existed and whether they constituted records of DCS. This obviously depends upon the definition of a "public record," which includes "all records and documents, regardless of physical form, of or belonging to this state . . . or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." § 84-712.01(1).

At the hearing on the appellees' motion for summary judgment, the appellees' evidence included affidavits from all three appellees. The affidavit of Clarke stated that as director of DCS, he was responsible for the total administration of DCS; that DCS employed Jan Lehmkuhl as contract administrator; and that she was delegated the duty to maintain the physical contracts entered into by DCS. The affidavit further states that the contract was physically maintained at the DCS central office in Lincoln, Nebraska, and consisted of three binders. The affidavit of Bryan, a unit manager at TSCI, stated that Bryan had never been responsible for maintaining any part of the contract between Aramark and DCS and that he had never been responsible for maintaining any of the information or records requested by Russell.

The affidavit of Carmichael stated that she was employed as the contract manager for DCS and that as part of her employment, she had what she described as a " 'working copy' " of the contract. The affidavit stated that the " 'working copy' " was for reference and was not an official or complete document and that a member of the public requesting to see a copy of the contract between DCS and Aramark would be directed to contact Lehmkuhl at the DCS central office. Carmichael also stated in the affidavit that Aramark follows the DCS master menu and must follow guidelines established by the dietician, but uses its own recipes to prepare the actual meals. She further stated that the recipes do not belong to DCS. She added that DCS has access to a list of Aramark employees, but the list is maintained by Aramark and often changes, and that DCS does not maintain a list of its own. Carmichael further noted that she had never

received a request from Russell designating which portions of the contract he sought to have copied, that she had only received money sufficient to cover a single set of copies of the bland diet, and that she had provided Russell with the copies of the bland diet.

An affidavit of Lehmkuhl stated that she was employed as the materiel administrator for DCS, that she maintained the only complete and official copy of the contract between DCS and Aramark for food services at TSCI, and that the contract was kept in three binders at the purchasing office in the DCS central office in Lincoln. Her affidavit maintained that the contract stated the "bland diets exists [sic]" but that the contract did not specifically address bland diets. The affidavit added that the contract did not "require DCS to prepare reports entitled 'audit reports' of the food service offered by Aramark" and that DCS had not been "audited by the State Auditor since the Aramark contract came into effect." Lehmkuhl's affidavit also stated that DCS had no reports "dealing [with] bland diets." The affidavit further stated that the State of Nebraska did not require food handler permits or licenses within the correctional setting. Lehmkuhl asserted in the affidavit that she had never received any request from Russell for copies of the contract, a portion of the contract, or any other public record.

In response to the appellees' evidence, the evidence submitted by Russell consisted of a copy of his initial request to Clarke; a copy of a "kite" showing the transmittal by mail of the request to Clarke; a copy of the original request to Carmichael; a copy of a "kite" to Carmichael including Carmichael's response, in which she referred to the memorandum from the appellees' legal counsel formally responding to the records request; a copy of the original request to Bryan; a copy of the initial response of the appellees' legal counsel advising that additional time was required to respond to Russell's request; a copy of the subsequent formal response by appellees' legal counsel; a copy of a "kite" transmitting an institutional check for 50 cents for the cost of copying the bland diet menu and including a response of Bryan showing that copies had already been made; and a copy of the appellees' answers to Russell's requests for admissions. None of the admissions made pursuant to the requests contradicts the evidence adduced by the appellees.

The evidence adduced by the appellees established a prima facie case that there were no public records maintained by DCS other than those of which copies were provided or of which the appellees offered to provide copies upon payment of the reasonable expense of copying. Russell failed to adduce evidence to the contrary, and we find that the ultimate decision of the district court, after consideration of the appellees' motion to alter or amend judgment, correctly determined, as a matter of law, that there was no genuine issue or dispute of fact and that the appellees were entitled to judgment as a matter of law.

*Failure to Order Production of Contract.*

As part of his argument that he was entitled to public records, Russell argues that Carmichael "refused to provide access to review or the requested photocopies" of the contract with Aramark. Brief for appellant at 6. The substantive formal response by the appellees' legal counsel clearly offers to provide a copy of the contract upon payment of the expense of copying or to copy specific portions designated by Russell as to subject matter. The evidence clearly establishes that no request for a copy of the full contract accompanied by payment was ever received. The evidence also shows that Russell never made a subsequent request to designate a particular portion or portions by subject matter. While Russell appears to argue that he should have been allowed to travel to the location of the contract, he cites no authority for this claim. Russell is a prisoner in custody of DCS at Tecumseh, Nebraska. Section 84-712(1) authorizes "examination [at] the respective offices" of DCS. In the instant case, the evidence is undisputed that the location of the contract is DCS' offices in Lincoln, Nebraska. Russell cites no authority for the proposition that DCS is required to transport Russell to the offices in Lincoln for the purpose of examining that public record. Russell also complains that "as the [DCS] Contract Monitor [Carmichael] sho[u]ld have a complete copy of all contracts, which does not appear to be the case." Brief for appellant at 7. Thus, in Russell's brief to this court, he acknowledges that Carmichael did not have the contract which Russell sought to examine. We find no error in the ruling of the district court on this matter.

*Motion to Alter or Amend Judgment.*

Although Russell argues that he was denied the right to be heard upon the appellees' motion to alter or amend judgment, the record reflects that he was present for the telephonic hearing. While during the hearing Russell did not argue regarding the specific merits of the motion, the record does show that Russell spoke up and participated in the discussions with the court in the first portion of the hearing regarding scheduling of hearings on other motions. Later in the hearing, Russell remained silent while the district court and the appellees' counsel engaged in a discussion regarding the merits of the motion. We have carefully examined the record and find no suggestion that Russell attempted to make any such argument or that the district court or anyone else prevented him from doing so. We find no merit in this argument.

[11] Russell also argues that "there was no evidence provided to the court to justify . . . altering or amending the judgement." Brief for appellant at 8-9. He argues that the information sought was "apart [sic] of the contract and this is why the contract has not been provided and was not ordered produced by the court." *Id.* at 9. While there was no new evidence adduced at the hearing on the motion to alter or amend judgment, through the arguments of their counsel the appellees succeeded in persuading the district court that the court's original view of the evidence was in part incorrect. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2004), and must seek substantive alteration of the judgment. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). In the instant case, the appellees' motion was filed within 10 days after the entry of the initial judgment and clearly sought substantive alteration of that judgment. Contrary to Russell's argument, the trial court had the authority to consider the appellees' motion, and we find no abuse of discretion in the court's ruling.

## CONCLUSION

A motion for summary judgment is a proper procedural device in an action for a writ of mandamus. The appellees produced

evidence sufficient to disprove the element of mandamus of the existence of a clear duty on the part of the appellees to perform the act, and Russell failed to adduce contrary evidence, thereby entitling the appellees to summary judgment. DCS had no obligation to transport Russell to the office where a particular record was located. The district court did not abuse its discretion in granting the appellees' motion to alter or amend judgment, where the effect of the action was to correctly reflect the original evidence. We affirm the judgment of the district court.

AFFIRMED.

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KIM REED, INDIVIDUALLY AND AS PERSONAL ADMINISTRATOR OF THE ESTATE OF ROBIN ABRAHAM, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

724 N.W.2d 834

Filed December 5, 2006. No. A-05-206.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 13-911(1) (Reissue 1997), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
4. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** A passenger is not an innocent third party under Neb. Rev. Stat. § 13-911 (Reissue 1997) if the passenger either (1) has promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel or (2) is sought to be apprehended in the fleeing vehicle.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John H. Kellogg, Jr., of Kellogg & Palzer, P.C., for appellant.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Kim Reed, individually and as personal administrator of the estate of Robin Abraham, appeals from the decision of the district court for Douglas County which dismissed her wrongful death claim against the City of Omaha (the City). This appeal involves a case in which a police pursuit resulted in a traffic accident wherein two passengers were killed and whether one of them, Robin Abraham, was an "innocent third party," thus entitling her estate to recover under Neb. Rev. Stat. § 13-911 (Reissue 1997). We affirm the trial court's decision that Abraham was not an innocent third party.

## FACTUAL BACKGROUND

At approximately 4 a.m. on December 8, 2002, in Omaha, Nebraska, Abraham was a back seat passenger in a stolen Lincoln Town Car (Lincoln) driven by Jacob Witt, although it does not appear that Abraham knew the Lincoln was stolen. Also in the Lincoln were Tiffany Bruce, in the front passenger seat, and Amanda Jura, also in the back seat. Abraham, Witt, Bruce, and Jura left a party at a private residence and took the Lincoln to "get more dope." Abraham and Jura were introduced to Witt approximately a half hour before leaving with him in the Lincoln. While in the Lincoln, they drove past a police cruiser driven by Omaha police officer Thomas Deignan. Officer Deignan began to follow the Lincoln, but he did not turn on the cruiser's lights or sirens. Officer Deignan admitted that no traffic violations were committed, but he thought it was strange that young people would be out in an expensive car at 4 o'clock in the morning. Officer Deignan called the police dispatcher to check the Lincoln's license plates, and the dispatcher informed Officer Deignan that the Lincoln was reported stolen. The Lincoln "started to take off," and Officer Deignan declared "pursuit" and turned on the cruiser's lights and sirens. Officer Deignan also radioed for other officers to help in the pursuit. During the pursuit, the Lincoln missed a curve, went over an embankment, and crashed into a tree. Abraham and Jura

died as a result of their injuries. Additional facts will be set forth as necessary in our analysis section.

## PROCEDURAL BACKGROUND

Reed filed a complaint on February 19, 2004. The parties stipulated that Reed satisfied the requirements of the Political Subdivisions Tort Claims Act. Reed's complaint alleged that on December 8, 2002, Abraham was a passenger in a 2001 Lincoln driven by Witt; that Witt was attempting to evade vehicular pursuit by one of the City's law enforcement officers; that as a direct result of Witt's attempt to avoid vehicular pursuit, he lost control of the Lincoln and struck a tree, causing Abraham severe personal injuries and ultimately her death and resulting in damages, both special and general; and that the City is liable under § 13-911, the strict liability statute for injuries or death to innocent third parties caused by police motor vehicle pursuits. The complaint sought judgment against the City for medical expenses incurred prior to Abraham's death; funeral expenses; Abraham's pain and suffering prior to her death; damage suffered by Reed, individually, for the loss of care, comfort, society, and companionship of Abraham; Reed's pecuniary loss; the costs of the action; and all other damages as shown by the evidence.

The City filed an answer on March 9, 2004, denying that Abraham was an innocent third party under § 13-911. The City also alleged that (1) the direct proximate cause of any damage or injury to Abraham and/or her next of kin was the active contributory negligence and/or intentional actions of Witt, over whom the City had no control, and (2) Abraham assumed the risk of sustaining any injuries she suffered by knowingly and voluntarily becoming and remaining a passenger in a stolen Lincoln driven by Witt while he was known to her to be under the influence of and impaired by a drug.

The district court granted the City's motion to bifurcate liability and damages. A trial was held on October 13 and 19, 2004, regarding the liability issue. For purposes of such trial, Reed's case was consolidated with cases brought by or on behalf of the other two passengers, although such cases are not involved in this appeal.

In an order filed January 19, 2005, the trial court found that Abraham was not an "'innocent third part[y]' within the

contemplation of . . . § 13-911(1)." The trial court found, inter alia, that on the evening of December 7, Abraham and Jura appeared at Bruce's house, where Witt was present; that the four individuals smoked methamphetamine and marijuana and collectively decided that they were going out to buy more drugs; that they left Bruce's house in Witt's stolen Lincoln; that Officer Deignan ran a check on the Lincoln's license plates and found there were no warrants, but that the Lincoln was stolen; that Witt started to " 'take off' " and Officer Deignan began a pursuit; and that the high speed pursuit led to its terminus in a park in Omaha.

The trial court also found that Witt gave inconsistent accounts of the chase. Witt's first statement (and a letter he wrote to Bruce) made no mention of the girls' requesting him to stop, but, rather, Witt said that someone tried to give him directions not to hit a curb. Witt further stated that the girls made comments regarding the license plate check and outstanding warrants. Witt told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Witt's later testimony, as well as Bruce's testimony, was that after the police started the pursuit, the passengers all sought to dissuade Witt from fleeing. The district court said:

> To the extent that their accounts are inconsistent, the Court concludes that Witt's custodial statement is the most credible version of these events. It was given within hours of the events themselves. It was given by a person who did not know or wasn't focusing on the civil aspects of the case. It was given to interrogators who were concentrating on the criminal side of the case. In sum, it was the most candid, reliable account of those few minutes.

The district court found:

> Abraham was the passenger who told Witt that she had an arrest warrant outstanding. She had charges pending in Douglas County for: failure to appear; driving under suspension; and leaving the scene of a property damage accident. Her statement to Witt conveyed during the time that they were being followed by the police, with knowledge that the police were "running the plates", in light of the facts

> recited above, supports an inference that Abraham provoked or advocated Witt to start or to continue his flight.

The district court held that Abraham fell within the category of individuals " 'sought to be apprehended in the fleeing vehicle' " and, thus, was not an innocent third party entitled to recovery under § 13-911(1). The district court dismissed Reed's case with prejudice.

Reed timely appeals the order of the district court.

## ASSIGNMENTS OF ERROR

Reed asserts that the district court erred in (1) finding that Abraham was not an innocent third party protected under the provision of § 13-911(1); (2) finding that the evidence was sufficient to deny Abraham of innocent third party status; (3) finding that Abraham lost her innocent third party status because she was in a stolen vehicle and therefore being pursued, because there is no exception in the statute regarding third parties in stolen vehicles; and (4) interpreting the term "innocent third parties" differently from the Supreme Court's previous interpretation of the term, because the Legislature amended § 13-911 subsequent to this interpretation and did not alter in any way the definition of innocent third party.

## STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

## ANALYSIS

[3,4] Reed argues that the district court erred in finding that Abraham was not an innocent third party pursuant to § 13-911(1),

which states: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." In *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002), the Nebraska Supreme Court set out to define the term "innocent third party," because such is not defined by § 13-911. The *Henery* court said:

> We conclude that by its use of the phrase "innocent third party" in § 13-911, the Legislature was concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. "Innocent" as used in the statute describes an individual who is a "third party" under § 13-911. An "innocent third party" under § 13-911 is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

263 Neb. at 707, 641 N.W.2d at 649. Thus, to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle. Either circumstance prevents a finding that a claimant in a police pursuit case was an innocent third party. Thus, a passenger is not an innocent third party if the passenger either (1) has promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel or (2) is sought to be apprehended in the fleeing vehicle. See *Henery v. City of Omaha, supra.*

We note that the district court in the instant case said:

> [O]ddly, the conjunctive definition [in *Henery*] of an "innocent third party" would presumably allow a person to recover damages against the City when that person had promoted, provoked, or persuaded the driver to flee, if the evidence also showed that person was not "sought to be apprehended in the fleeing vehicle."

We disagree with such reading of *Henery v. City of Omaha, supra*, because in the final analysis, irrespective of whether the *Henery* court used conjunctive or disjunctive wording, we think

it is clear and logical that the Supreme Court was articulating the two following circumstances under § 13-911 which deprive a passenger of innocent third party status: (1) if the passenger promoted, provoked, or persuaded the driver to engage in flight from law enforcement or (2) if the police sought to apprehend the passenger claimant. Any other reading of § 13-911 and *Henery v. City of Omaha, supra*, would produce an illogical result and frustrate the obvious intent of the statute that those who encourage the driver to flee or are themselves being sought by the police not be rewarded for their behavior. See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005) (in construing statute, court must look at statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on statute reasonable construction which best achieves purpose of statute, rather than construction defeating statutory purpose). We now examine the district court's finding that Abraham was not an innocent third party under the two-prong test set forth in *Henery v. City of Omaha, supra*.

Whether Abraham promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel is clearly a finding of fact to be made by the trial court and will not be disturbed on appeal unless clearly wrong. See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). The district court found:

> Abraham was the passenger who told Witt that she had an arrest warrant outstanding. She had charges pending in Douglas County for: failure to appear; driving under suspension; and leaving the scene of a property damage accident. Her statement to Witt conveyed during the time that they were being followed by the police, with knowledge that the police were "running the plates", in light of the facts recited above, supports an inference that Abraham provoked or advocated Witt to start or to continue his flight.

As stated previously, the trial court acknowledged that Witt gave inconsistent accounts of the chase but found Witt's custodial statement to be the most credible version of events, because it was given within hours of the events themselves. During Witt's police interview on December 8, 2002, he told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got

a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Also admitted into evidence were a Douglas County bench warrant for Abraham for failure to appear and complaints charging Abraham with driving under suspension, leaving the scene of a property damage accident, and improper lane change—which evidence circumstantially supports the veracity of Witt's original statement to police that Abraham promoted, provoked, or persuaded Witt to flee. Therefore, with this evidence, we affirm the district court's finding that "Abraham provoked or advocated Witt to start or continue his flight," because such finding is not clearly wrong. Thus, Abraham lost her innocent third party status, and her estate is barred from recovering under § 13-911.

We note that there was considerable testimony that police officers routinely seek to apprehend all occupants of a stolen vehicle for a number of reasons—although, there was no evidence that the officers were aware that Abraham was in the Lincoln and was wanted on outstanding warrants. Because we have already found that Abraham was not an innocent third party, we need not address whether this evidence establishes that she was a person who was sought to be apprehended in the fleeing Lincoln. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

## CONCLUSION

For the reasons discussed above, we affirm the trial court's decision.

AFFIRMED.

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JOHN DAVIS, APPELLEE AND CROSS-APPELLANT, V. CRETE CARRIER CORPORATION AND TRANSPORTATION CLAIMS, INC., ITS WORKERS' COMPENSATION INSURER, APPELLANTS AND CROSS-APPELLEES.

725 N.W.2d 562

Filed December 12, 2006. No. A-05-1328.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers'

Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
5. ____: ____. In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
6. **Workers' Compensation: Waiver: Appeal and Error.** A party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review.
7. **Judgments.** The meaning of a judgment is determined, as a matter of law, by its contents.
8. ____. In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used.
9. ____. If the language of a judgment is ambiguous, there is room for construction.
10. ____. In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record.
11. **Judgments: Words and Phrases.** A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. However, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
13. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.
14. **Workers' Compensation.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 2004) is a question of fact.
15. ____. A reasonable controversy under Neb. Rev. Stat. § 48-125 (Reissue 2004) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

16. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Reissue 2004), an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
17. **Workers' Compensation: Attorney Fees.** Where there is no reasonable controversy, Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes the award of attorney fees.
18. **Workers' Compensation: Attorney Fees: Interest.** An award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under Neb. Rev. Stat. § 48-125(2) (Reissue 2004).

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Raymond P. Atwood, Jr., and Eric B. Brown, of Atwood, Holsten & Brown, P.C., L.L.O., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

John Davis filed a motion in the Nebraska Workers' Compensation Court against Crete Carrier Corporation and its workers' compensation insurer, Transportation Claims, Inc. (collectively the Appellants), seeking to assess waiting-time penalties, interest, and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). Davis alleged that the Appellants unilaterally stopped paying temporary total disability benefits which he was awarded under a February 2, 1993, award on rehearing. Davis asserted entitlement to ongoing temporary total disability benefits from October 1994, when his indemnity benefits for temporary total disability stopped, until the hearing on the motion, or at least October 2, 2003, when he filed the motion. Davis also claimed there was no reasonable controversy regarding the Appellants' liability. The trial judge denied Davis' motion. Davis appealed and the Appellants cross-appealed to a Nebraska Workers' Compensation Court three-judge review panel. The Appellants have appealed to this court from the review panel's order of reversal and remand on review, and Davis has cross-appealed. For the reasons set forth herein, we affirm in part, and in part reverse.

## BACKGROUND

Davis sustained a compensable back injury on March 26, 1989, while employed by Crete Carrier Corporation. On February 2, 1993, after other proceedings not relevant to the present appeal, the compensation court entered an award on rehearing. With regard to disability, the court determined, in paragraph III of the award, as follows:

> At the time of said accident and injury [Davis] was receiving an average weekly wage of $501.52 being sufficient to entitle him to benefits of $245.00 per week for a period of 105-1/7 weeks for temporary total disability compensation and thereafter and in addition thereto the sum of $117.02 per week for 10 weeks of permanent partial disability compensation and thereafter and in addition thereto the sum of $245.00 per week from and including June 15, 1991 to and including the date of this rehearing on September 28, 1992 for total disability compensation and thereafter and in addition thereto the sum of $245.00 per week for so long in the future as [Davis] shall remain totally disabled as a result of said accident and injury. When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury.

The court awarded certain medical and hospital expenses, including future medical and hospital services and such treatment "as may be reasonably necessary as a result of said accident and injury." In paragraph IX of the award, the court stated, "[Davis] is still entitled to vocational rehabilitation services at such time as he is able to participate in said services. If the parties are unable to eventually agree on the nature and/or extent of said vocational rehabilitation services, either party may request a hearing on this issue." In paragraph XII of the award, the court stated, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

In November 1993, the compensation court entered an order, stating that "[p]ursuant to the stipulation of [Davis] and [the Appellants], received November 18, 1993, [the Appellants are]

hereby ordered to pay to [Davis] temporary disability compensation while [Davis] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan of which the stipulation is a part." The order is dated November 23, 1993, but is file stamped November 18. The record shows that Davis participated in a training program at a motorcycle mechanics' institute in Phoenix, Arizona, from December 13, 1993, through October 28, 1994.

The Appellants began paying Davis permanent partial disability benefits on October 29, 1994. On December 29, the Appellants stopped all disability payments to Davis after they had paid 300 weeks of benefits.

On October 2, 2003, Davis filed a motion seeking an order to assess waiting-time penalties, interest, and attorney fees pursuant to § 48-125. Davis alleged that on February 2, 1993, he received a running award of temporary total disability benefits, and that in 1994, the Appellants unilaterally stopped paying such benefits to Davis. Davis alleged that the Appellants were in arrears and liable to him for such delinquent benefits from the date of termination of payment to the date of the hearing on his motion. Davis further alleged that there was no reasonable controversy regarding the Appellants' liability to him and that the Appellants were thus also liable to him for waiting time, interest, and attorney fees for all delinquent payments due. Davis asked the court to sustain his motion, determine the delinquencies of the Appellants, and order the Appellants to pay waiting-time penalties, interest, and attorney fees.

The Appellants filed a motion for summary judgment on August 31, 2004. The Appellants alleged that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. The Appellants alleged that they paid to Davis the benefits ordered by the court on February 2 and November 23, 1993, and that the November 23 order superseded or modified the February 2 award on rehearing. The Appellants also asserted that Davis' claim for further benefits was barred by the statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 2004), the law-of-the-case doctrine, the doctrine of res judicata, the doctrine of issue preclusion, the doctrine of laches, and the doctrine of unclean hands. The

Appellants asserted that the compensation court had jurisdiction pursuant to Neb. Rev. Stat. § 48-161 (Reissue 2004) to decide any issue ancillary to the resolution of Davis' right to compensation benefits, including the issues raised by the Appellants in their motion for summary judgment.

Following an evidentiary hearing, the compensation court entered an order overruling the Appellants' motion for summary judgment on September 29, 2004. The court concluded that the 2-year statute of limitations does not apply to a case where a petition has been filed and an award entered. The court found that the doctrines of issue preclusion, res judicata, and the law of the case did not act to bar Davis' claim. The court observed that it was not a court of equity and had no equitable powers, thus concluding that it was unable to apply the equitable doctrines of laches and unclean hands. Finally, with regard to whether there was a reasonable controversy concerning Davis' right to relief, the court found that it must make a factual determination.

The compensation court heard Davis' motion for waiting-time penalties, interest, and attorney fees on September 30, 2004. In addition to receiving various exhibits offered by the parties, the court heard testimony from Davis. Davis testified that he received certain benefits from the Appellants due to a work-related injury he sustained in 1989 and that those benefits ceased around the end of November 1994. Davis testified that from the end of November 1994 until September 2003, he neither received nor requested any further benefits from the Appellants. Davis testified that he did not contact any representative of the Appellants during that time because he was told by his attorney in approximately 1993 or 1994 that he had "X number of weeks of benefits and that would be it." When he stopped receiving indemnity checks, Davis assumed, based on what his attorney had told him, that that was "the end of the number of weeks that [he was] entitled to" receive.

Davis testified that he sought employment in the field of motorcycle mechanics after completing his vocational rehabilitation training but was unable to locate employment with a motorcycle dealership. The record shows that after December 1994, Davis was employed as a taxi driver by, or leased a vehicle to,

various cab companies for certain periods between approximately 1995 and 2000. Under the lease agreements, Davis had other individuals available to drive the cabs and only drove occasionally himself because of his back injury. At the time of the hearing on Davis' motion, Davis was not employed or operating under any type of lease agreement with any cab company. Davis testified that he lost money in his endeavors as a cab-driver/lessor, eventually filing for bankruptcy in September 2000. Davis testified that he did not disclose all of the information regarding the cab company leases in certain interrogatories from the Appellants because he thought the questions were asking whether he was actually employed by someone.

One exhibit received by the court was a letter, dated November 23, 1993, from Dr. William Fulcher, one of Davis' treating physicians, to a rehabilitation services professional. In the letter, Dr. Fulcher stated that Davis had reached maximum medical improvement and had a 25-percent medical impairment rating of the body as a whole.

The compensation court entered an order on May 5, 2005, overruling Davis' motion. The court outlined Davis' claim and found the evidence uncontradicted that the Appellants stopped all payments to Davis on December 29, 1994, after having paid 300 weeks of benefits. The court observed that Davis' position assumed a running obligation on the part of the Appellants to make those payments, making the following findings in that regard:

> 1. On February 2, 1993, an Award on Rehearing was entered which provided that [Davis] was entitled to receive weekly benefits through the date of rehearing (September 28, 1992) for a total of 182 and 4/7 weeks. For 10 weeks, in the middle part of this 182 and 4/7 week period, [Davis] was found to be permanently partially disabled. For the remainder of the time the reviewing panel found, in Paragraph II of the Award on Rehearing, that [Davis] was temporarily partially disabled. It is significant that the last part of Paragraph II stated that [Davis] was temporarily totally disabled "to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time." . . .

2. References to "total disability" or "totally disabled" in later portions of the Award on Rehearing, when viewed in the entire context of the document, are references to the periods of temporary total disability as discussed in Paragraph 1, above. As a result, when [Davis] reached maximum medical improvement as established by Dr. Fulcher on November 23, 1993, [Davis] was no longer "temporarily totally disabled", but became permanently disabled. The extent and nature of the permanent disability would, of course, be an issue to be decided in the future by the Nebraska Workers' Compensation Court, if necessary. That was the reason for the language by the review panel which allowed for further hearing on the application of either party. This finding was further buttressed by the review panel[']s finding that "[w]hen [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury." The order entered on November 18, 1993, pursuant to stipulation by the parties, did nothing to change the analysis set forth above except for continuing temporary disability payments until [Davis] finished the agreed upon and Court ordered vocational retraining.

3. [Davis] argues that in the cases of Sheldon-Zimbelman v. Bryan Mem. Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000) and Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998), it is required that the [Appellants] file an application to modify the Award on Rehearing before terminating benefits. However, both those cases dealt with awards of permanent disability, not temporary disability as found in Paragraph II of the Award on Rehearing[,] and do not apply to the circumstances of this case. Such a result would leave this Court subjected to hundreds, if not thousands, of potential modification actions which would need to be filed before various plaintiffs attained maximum medical improvement in order to change the benefit amounts on the date of maximum medical improvement. Such an interpretation is simply not a feasible interpretation of Sheldon-[Z]imbelman and Starks,

*supra*[,] and has never been applied by this Court for running awards of temporary total disability. When a running award of temporary total disability is entered, a hearing is not necessary unless the parties disagree about the extent and nature of any permanent partial disability. When the subsequent hearing takes place, if requested, the decision retroactively applies back to the point in time when the plaintiff was no longer temporarily totally disabled.

4. Neb. Rev. Stat. § [48-121(2)] establishes that, unless an injured employee is permanently and totally disabled, the employee's entitlement to benefits for partial disability is limited to a total of 300 weeks, less any weeks of total disability indemnification received. Under this statutory regime, the [Appellants] fulfilled their statutory obligation under the language of the Award on Rehearing as interpreted above. It is clear from the evidence that, when [Davis] attained maximum medical improvement on November 23, 1993, he was not permanently and totally disabled. In fact, he was able to successfully complete his vocational retraining program, and although it does not appear that he was financially successful with some of his business endeavors, he worked for many years prior to his filing of the present motion which is at issue in this case. It is the finding of this Court that such work involved "suitable gainful employment" as those words are meant to be interpreted pursuant to Neb. Rev. Stat. § 48-162.01. [Davis] is entitled to no additional benefits from the [Appellants]. That is evidently what he and counsel thought for the good many years that passed from the date of last payment to the date of filing of the pending motion.

With regard to Davis' claim for waiting-time penalties and attorney fees, the compensation court determined there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnification benefits to Davis after 300 weeks' payments were made. The court stated that even if it was assumed for the purpose of argument that those added payments were owed to Davis, there was certainly a reasonable controversy with respect to that obligation. The court stated that it was aware of no case law addressing factual circumstances

similar to those of the present case, stating further, "It is, at best, only an open legal question with respect to whether or not added payments were owed. However, as set forth above, no such obligation existed." The court again stated its findings as set forth in the ruling on the Appellants' motion for summary judgment with regard to the various affirmative defenses asserted by the Appellants. The court overruled Davis' motion in its entirety.

Davis filed an application for review on May 18, 2005, asserting that the compensation court erred in making certain factual and legal findings. The record before us includes the briefs filed by the parties before the review panel and shows that the Appellants assigned and argued certain errors on cross-appeal.

The three-judge review panel of the compensation court entered an order of reversal and remand on September 30, 2005. The review panel stated:

> The [Appellants] maintain that they are only required to pay 300 weeks of benefits and that the effective method to terminate a running award of benefits pursuant to Neb. Rev. Stat. § 48-141 has been satisfied by the stipulation and order of the parties entered November 23, 1993 . . . . The [Appellants] argue this order and stipulation satisf[y] the requirement of an "agreement of the parties with the approval of the Nebraska Workers' Compensation Court" pursuant to § 48-141 to terminate a running award of benefits.
>
> Interpretation of a stipulation and an order is a question of law. The review panel finds that the stipulation of the parties . . . and the Order of the Workers' Compensation Court [do] not act as an "agreement of the parties" to terminate benefits for a running award pursuant to § 48-141. Rather the stipulation and order [go] to paragraph IX of the award on rehearing dated February 2, 1993, . . . which allows [Davis] to receive indemnity benefits while undergoing vocational rehabilitation.
>
> The law in Nebraska is that a workers' compensation award remains in full force and effect, as originally entered[,] until the award is modified pursuant to the procedures set forth in § 48-141. The correct procedure to modify an award is set forth in the cases of ITT Hartford v.

Rodriguez, 249 Neb. 445, 543 N.W.2d 740 (1996); Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998) and Hagelstein v. Swift-Eckrich Div. of ConAgra, 261 Neb. 305, 622 N.W.2d 663 (2001). Those cases hold that there must be a hearing to terminate benefits. Benefits may not be summarily terminated as was done in this case.

A review of the record by the review panel shows that to date no party has filed a motion to modify the award on rehearing of February 2, 1993, nor is there an agreement by the parties with Court approval pursuant to § 48-141 assessing and determining [Davis'] loss of earning capacity. Those procedures must be undertaken pursuant to § 48-141 and the above case law before benefits can be terminated. Benefits cannot be retroactively terminated prior to the date of the filing of the petition to modify. See Starks, *supra*.

The review panel finds that the trial court misstated the law in the state of Nebraska to be that an application to modify is not required when terminating temporary disability benefits. The review panel finds that whether a party is terminating "temporary total disability benefits" or "permanent total disability benefits," it is a distinction without a difference. The correct statement of the law specifically requiring a modification application to terminate payment of benefits under an award is set forth in Sheldon-Zimbelman v. Bryan Mem. Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000) and Starks, *supra*. The review panel finds that the trial court was incorrect in its application of the law concerning modification proceedings of a running award and that the matter should be reversed and remanded to the trial court for a determination as to the amount due [Davis] for enforcement of the award on rehearing dated February 2, 1993 for outstanding indemnity benefits, and for a determination as to penalties, if any, due and owing.

With regard to the Appellants' cross-appeal, the review panel found that the trial court was correct in its interpretation of the law concerning the issue of the statute of limitations in this case. Citing *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), the review panel stated that once a petition has been filed within the appropriate period of time, no further statute of

limitations issue can arise during the pendency of the action. The review panel awarded Davis a $500 attorney fee together with interest as allowed by law for defending against the cross-appeal.

The Appellants subsequently perfected their appeal to this court, and Davis has cross-appealed.

## ASSIGNMENTS OF ERROR

The Appellants assert, consolidated and restated, that the review panel erred in (1) reversing the trial court's order overruling Davis' motion to assess waiting-time penalties, interest, and attorney fees and (2) failing to apply the 2-year statute of limitations.

On cross-appeal, Davis asserts, consolidated and restated, that the review panel erred in (1) failing to find that no reasonable controversy existed and to remand with directions to determine the amount of waiting-time penalties due under § 48-125, (2) failing to award Davis attorney fees and interest for proceedings before the review panel and to remand with directions to award attorney fees and interest for proceedings before the trial court, and (3) failing to address and reverse certain findings made by the trial court and assigned as error to the review panel by Davis.

## STANDARD OF REVIEW

[1-4] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

## ANALYSIS

*Errors Preserved for Appeal.*

We first address Davis' argument that the Appellants have preserved only the statute of limitations issue for appeal to this court because additional issues raised by the Appellants on appeal to this court were not raised by the Appellants in their cross-appeal to the review panel.

[5,6] It is true that in reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal. *Dietz v. Yellow Freight Sys.*, 269 Neb. 990, 697 N.W.2d 693 (2005). It is also true that a party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review. *Id.* The issue of the trial court's ruling on Davis' motion for waiting-time penalties, attorney fees, and interest, while not raised by the Appellants in their cross-appeal to the review panel, was clearly raised by Davis in his application for review and was considered by the review panel. Because the issue of the trial court's ruling on Davis' motion was raised before and ruled on by the review panel, the Appellants are entitled to raise on appeal to this court the review panel's reversal of the trial court's ruling. See *id.* Davis' arguments to the contrary are without merit.

*Necessity of Application to Modify.*

The Appellants assert that the review panel erred in reversing the trial court's order overruling Davis' motion to assess waiting-time penalties, interest, and attorney fees. The Appellants argue that they acted in compliance with the February and November 1993 orders when they paid temporary total disability benefits to Davis during his vocational rehabilitation plan and then converted their payments to permanent partial disability benefits after Davis successfully completed his retraining. In other words, the Appellants assert that the review panel was incorrect in finding that an application to modify the award was necessary to terminate Davis' prior award of temporary total disability benefits.

We conclude that the November 1993 order reflected an agreement of the parties concerning the duration of Davis' temporary total disability award, and we therefore reverse the ruling of the review panel.

Neb. Rev. Stat. § 48-141 (Reissue 2004) provides, in relevant part:

> [T]he amount of any agreement or [workers' compensation] award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .

There is no assertion in the present case that an application to modify was ever filed by any of the parties. As a result, the issue presented is whether the November 1993 order satisfied § 48-141 (Cum. Supp. 1992) as an agreement of the parties with the approval of the compensation court concerning Davis' temporary total disability benefits, as the trial court concluded, or whether the November 1993 order dealt solely with vocational rehabilitation, as the review panel concluded.

[7-11] Resolution of this issue requires us to determine the meaning of the November 1993 order. The meaning of a judgment is determined, as a matter of law, by its contents. See *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used. *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996). If the language of a judgment is ambiguous, there is room for construction. *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record. *Id.* A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. See, *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Kerndt v. Ronan, supra.* However, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the

conclusion that the instrument is ambiguous. *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000). We find it necessary to review the entire record to determine the meaning of the November 1993 order.

It is important to note that in the present case, Davis' award of temporary disability benefits in the February 1993 order was an award of temporary total disability benefits. That order provided that Davis was entitled to temporary total disability benefits "for so long in the future as [Davis] shall remain totally disabled as a result of [this] accident and injury." In November 1993, the parties filed a vocational rehabilitation plan that included a stipulation. The stipulation specifically provided that Davis and the Appellants "do agree to the above [vocational rehabilitation] plan and hereby stipulate to the entry of an Order requiring the payment of temporary disability compensation to [Davis] *while [he] is undergoing the vocational rehabilitation plan*." (Emphasis supplied.) "Pursuant to [this] stipulation," the trial court entered an order which provided only that the Appellants were "hereby ordered to pay to [Davis] temporary [total] disability compensation *while [he] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan*." (Emphasis supplied.)

The effect of the November 1993 order, and the underlying stipulation of the parties, was solely to modify the duration of Davis' temporary total disability award. Under the terms of the February 1993 order, Davis was entitled to receive temporary total disability benefits and was entitled to receive vocational rehabilitation, and no further court order was necessary to accomplish either, so long as the parties were able to reach an agreement. The parties did reach an agreement, and the November order did not provide Davis any additional rights or benefits not already provided in the February order. Had the November order never been entered, Davis would still have been entitled to temporary total disability benefits and vocational rehabilitation. The only effect of the November order is that the trial court specifically changed the duration of Davis' temporary total disability award from "for so long in the future as [Davis] shall remain totally disabled" to "while [Davis] is undergoing vocational rehabilitation."

The present case differs from cases such as *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996), precisely because of the language of the trial court's November 1993 order and the underlying stipulation of the parties. In *ITT Hartford*, the employee received an award of temporary total disability benefits " 'for so long in the future as [the employee] shall remain temporarily totally disabled as a result of [the] accident.' " 249 Neb. at 446, 543 N.W.2d at 741. The employee's treating physician later informed the employer that the employee had reached maximum medical improvement, whereon the employer stopped paying temporary total disability benefits and began making permanent partial disability payments. The Nebraska Supreme Court ultimately held that the original award had never been modified by the compensation court pursuant to § 48-141 (Reissue 1993) and that the original award remained in full force and effect. The Supreme Court also held that the employer was not free to unilaterally determine, based on information received from the physician, that the employee was no longer temporarily totally disabled.

In the present case, we find as a matter of law that the November 1993 order modified the duration of the prior award of temporary total disability benefits. We conclude that the review panel erred in reversing the trial court's conclusion that a specific application to modify was not necessary in this case, because § 48-141 (Cum. Supp. 1992) specifically provided that a periodic award may be modified by agreement of the parties approved by the court and because the November 1993 order and underlying stipulation satisfied the statute. As such, we reverse the review panel's determination that this issue be remanded to the trial court for a determination as to the amount due Davis for enforcement of the award and for a determination as to penalties due and owing.

*Application of Statute of Limitations.*

[12] The Appellants assert that the review panel erred in failing to apply the 2-year statute of limitations in § 48-137 to bar Davis' enforcement motion for penalties, interest, and attorney fees. Given the result reached above, we need not consider this assignment of error. An appellate court is not obligated to

engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

*Failure to Award Waiting-Time Penalties.*

[13-16] In his cross-appeal to this court, Davis asserts that the review panel erred in failing to find that no reasonable controversy existed and to remand with directions to determine the amount of waiting-time penalties due under § 48-125. Section 48-125 authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. Whether a reasonable controversy exists under § 48-125 is a question of fact. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

The trial court in this case determined that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnification benefits to Davis after 300 weeks' payments were made. This finding was assigned as error by Davis in his application for review. The review panel did

not explicitly address the trial court's finding of a reasonable controversy, but it did reverse the order overruling Davis' motion and remand the matter to the trial court to determine the amount of benefits due and owing for indemnity as a result of the award on rehearing and to determine the amount of penalties, if any, due and owing pursuant to § 48-125. We have reversed this determination by the review panel. Accordingly, we find no error in the review panel's failure to find that no reasonable controversy exists, and we find that the trial court was correct in finding that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnity benefits.

*Failure to Award Attorney Fees and Interest.*

Davis asserts that the review panel erred in failing to award Davis attorney fees and interest for proceedings before the review panel and to remand with directions to award attorney fees and interest for proceedings before the trial court.

We first observe that the review panel did award an attorney fee of $500 for Davis' defense against the Appellants' cross-appeal to the review panel. Davis argues, however, that the review panel should have also awarded him an attorney fee for his successful appeal of the trial court's denial of his motion, not just for his defense against the cross-appeal. With regard to an employee's appeal to the review panel, § 48-125(1) provides, in relevant part:

> If the employee files an application for a review before the compensation court from an order of a judge of the compensation court denying an award and obtains an award or if the employee files an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Court of Appeals or Supreme Court.

The present case does not involve a situation where an "employee file[d] an application for a review before the compensation court from an order of a judge of the compensation court denying an award and obtain[ed] an award." See *id.* Nor does the present case involve a situation where an "employee file[d] an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due [was] disputed and obtain[ed] an increase in the amount of such award." See *id.* Instead, Davis brought the present motion as a proceeding for enforcement of the award obtained by Davis in February 1993. Davis has not obtained a new award of benefits by virtue of the present motion. In fact, we have determined, as a matter of law, that the November 1993 order modified the duration of the prior award of temporary total disability benefits. It cannot be said that Davis has "obtained an award" or "obtained an increase" in an award. Accordingly, Davis was not entitled to an attorney fee for his appeal of the trial court's denial of his motion.

[17,18] With regard to Davis' assertion that the review panel erred in failing to award him attorney fees at the trial court level (or to direct the trial judge to do so on remand), we observe that where there is no reasonable controversy, § 48-125 authorizes the award of attorney fees. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). We further observe that an award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under § 48-125(2). *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001). We have already determined that the trial court was correct in finding that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnity benefits. Because there was a reasonable controversy, Davis was entitled to neither an award of attorney fees nor interest at the trial court level.

*Failure to Address Assigned Errors About Evidentiary Matters.*

Finally, Davis asserts that the review panel erred in failing to address and reverse certain findings made by the trial court and assigned as error to the review panel by Davis. The findings assailed by Davis include the trial court's finding that Davis

reached maximum medical improvement on November 23, 1993. Essentially, Davis argues that the trial court received certain evidence and made certain findings amounting to a modification of the award on rehearing, when, in fact, the proceeding before the trial court was not one for modification. Davis argues that the review panel should have reversed the specific findings of the trial court that amounted to a modification of the award on rehearing and found that the trial court's receipt of the evidence relating to modification issues was in error.

The findings and evidence which Davis attacks were not relevant or considered by this court in reaching our conclusion that the November 1993 order modified the duration of the prior award of temporary total disability benefits. Accordingly, we need not address this assignment of error further on appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

## CONCLUSION

For the foregoing reasons, the determination of the review panel is hereby affirmed in part and in part reversed as set forth above.

AFFIRMED IN PART, AND IN PART REVERSED.

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STATE OF NEBRASKA, APPELLEE, V.
JODY LYNN WIEMER, APPELLANT.

725 N.W.2d 416

Filed December 12, 2006. No. A-06-367.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
3. **Pleas: Words and Phrases.** The terms "no contest" and "nolo contendere" have the same meaning, with no difference in their connotation, and both terms are regularly used to convey the same concept.
4. **Pleas.** For practical purposes, a plea of nolo contendere is a plea of guilty, or the functional or substantive equivalent of such a plea. In other words, a plea of nolo contendere has the same effect as a plea of guilty with regard to the case in which it is entered.

5. ____. To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
6. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
7. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
8. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

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

Alan G. Stoler, of Law Office of Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Jody Lynn Wiemer appeals from the sentence imposed, pursuant to a plea of no contest, for theft by unlawful taking. Because the district court's colloquy in the proceeding did not require Wiemer to make admissions beyond her no contest plea, we reject her claim that the plea was not voluntarily, intelligently, and knowingly made. We also find no abuse of discretion in the sentence imposed. Accordingly, we affirm.

## BACKGROUND

While employed as a clerical worker for Batterton Waterproofing from January 2003 through October 2004, Wiemer unlawfully diverted approximately $23,558. The State commenced a prosecution for theft by unlawful taking, a Class III felony, in the district court for York County. On January 9, 2006, Wiemer entered a plea of no contest. In the course of the proceedings regarding that plea, the trial court inquired:

> Now that plea admits that you were in York County, Nebraska, during the period on or about February 4th, 2003, to on or about October 1st of 2004. That you took or exercised control of movable property of another, that you intended to deprive the owner of that property thereof, and the other person involved — the owner is Batterton Waterproofing, all according to one scheme or course of conduct, and that the property involved had a value of more than $1,500. Now you're admitting all of that's true for purposes of allowing me to find you guilty without a trial but not for any other purpose. Do you understand that?

Wiemer responded affirmatively.

After an extensive colloquy, the district court accepted Wiemer's plea of no contest and adjudged Wiemer guilty as charged. The court ordered a presentence investigation. After a later sentencing hearing, the court sentenced Wiemer to 5 to 8 years' imprisonment with credit for 1 day served and ordered her to pay the costs of prosecution. Other facts relating to the sentence imposed by the court below will be set forth in the analysis section where appropriate.

Wiemer timely appeals.

## ASSIGNMENTS OF ERROR

Wiemer asserts that her plea was not voluntarily, intelligently, and knowingly made. Wiemer also claims that the district court abused its discretion in imposing an excessive sentence.

## STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[2] When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

## ANALYSIS

*No Contest Plea.*

Although Wiemer generally assigned that her plea was not made voluntarily, intelligently, and knowingly, her argument is more narrowly focused. She implicitly concedes that the trial court performed all of the functions required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and subsequent cases. Indeed, she contends that the trial court went too far and "required [her] to admit to the incriminating facts before accepting the no contest plea." Brief for appellant at 8. She argues that requiring a defendant to admit to a factual basis affirmatively on the record defeats the purpose of a no contest plea and that as a result, the plea was not voluntarily, intelligently, and knowingly made. Wiemer relies on *State v. Irish, supra*, as an accurate statement of the law concerning what a record must show to support a finding that a plea of no contest has been entered freely, intelligently, voluntarily, and understandingly. She provides no other authority for the proposition that the district court's inquiry in the instant case actually required her to admit to incriminating facts.

The State responds that when read in the context of the entire plea hearing, the district court, in the passage attacked by Wiemer, was simply ensuring both that Wiemer knowingly and intelligently understood the charge against her and that she voluntarily assented to it. We agree.

[3,4] As we have said before, the terms "no contest" and "nolo contendere" have the same meaning, with no difference in their connotation, and both terms are regularly used to convey the same concept. *State v. Obst*, 12 Neb. App. 189, 669 N.W.2d 688 (2003). For practical purposes, a plea of nolo contendere is a plea of guilty, or the functional or substantive equivalent of such a plea. In other words, a plea of nolo contendere has the same effect as a plea of guilty with regard to the case in which it is entered. *Id.* The difference between a plea of nolo contendere and a plea of guilty appears simply to be that while the

latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case. *Id.*

[5] A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him or her, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

In the case before us, the question was framed not as to specific facts, but, rather, addressing the elements of the crime using only words essentially equivalent to the language of the statute creating the offense. The district court carefully explained to Wiemer that her no contest plea was admitting the allegations "for purposes of allowing [the court] to find [Wiemer] guilty without a trial *but not for any other purpose*." (Emphasis supplied.) When read in context, it is clear that the district court was simply examining Wiemer to ensure that she understood the charge against her and understood the effect of the plea of no contest.

Our view of the court's question is also supported by the fact that later in the plea colloquy, the court requested a factual basis from the prosecutor. The prosecutor responded with a lengthy exposition of the specific facts concerning the offense. Although the court offered both Wiemer and her counsel the opportunity

to comment on the factual basis provided by the prosecutor, they declined, and the court did not insist upon any comment from Wiemer regarding the specific facts. This bolsters our view that the question upon which Wiemer focuses on appeal was not intended to provide the factual basis for the plea.

We reject Wiemer's argument that her affirmative response to the court's question constituted an admission to any specific facts beyond her understanding both of the nature of the charge against her and of the effect of the plea of no contest.

*Excessive Sentence.*

In regard to Wiemer's assignment that the sentence imposed was excessive, she argues that the district court failed to make specific findings regarding the statutory sentencing factors and abused its discretion in imposing a sentence of imprisonment rather than probation. In the alternative, Wiemer argues that the court abused its discretion concerning the length of the sentence.

[6] Wiemer fails to cite, nor have we found, any authority for the proposition that a sentencing court is required to make specific findings in determining the sentence to be imposed. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). We find Wiemer's argument on this issue to lack merit.

[7,8] We next turn to Wiemer's arguments that she should have been sentenced to probation or that the length of her sentence of imprisonment was too long. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an

abuse of discretion. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

While Wiemer implicitly concedes that her sentence was within the statutory limits, she nonetheless argues that it was excessive, relying upon information from the presentence report. The report showed that Wiemer was a 36-year-old single mother caring for a 15-year-old child, that she had been receiving ongoing counseling, that she had been prescribed various medications and had been diagnosed as suffering from dissociative amnesia and major depression, that she had gained new employers who wanted her to continue in their employ, that she had been twice divorced, that she had obtained a diploma through the GED program, that both her parents had recently died, that she was in a stable relationship with a man whom she hoped to marry in the near future, and that she had previously been convicted of misdemeanor fraud, for which she paid a fine, and had been convicted of misdemeanor theft, for which she satisfactorily completed probation.

In response, the State focuses on Wiemer's previous conviction for theft by deception and notes that she was only a few months into her probationary period when she began to steal from the victim in the instant case. The State also argues that the crime in the instant case substantially affected the victim by resulting in a considerable drop in the company's credit rating, numerous late fees, and significant charges on the company's credit cards. The State also notes that Wiemer's actions have caused her former employer's personnel to reduce the area served by the company and to spend many months working evenings and weekends to find and rectify Wiemer's errors and that her actions have placed the ultimate existence of the company in jeopardy.

Wiemer's elaborate scheme required considerable effort to hide the transactions, contradicting Wiemer's claim that her thought processes were "significantly [a]ffected by her mental health condition." Brief for appellant at 11. The record demonstrates that the district court considered the full range of factors required by the controlling law. We find no abuse of discretion in the district court's refusal to utilize a sentence of probation or in the length of the imprisonment imposed.

## CONCLUSION

We find that in the proceedings to determine whether to accept Wiemer's plea of no contest, the trial court's question regarding Wiemer's understanding of the nature of the crime and the effect of the plea did not require Wiemer to make an admission contrary to the nature of such a plea. We find no abuse of discretion in the imposition of imprisonment rather than probation or in the length of imprisonment imposed. We therefore affirm the judgment of the district court.

AFFIRMED.

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## R & S INVESTMENTS, A PARTNERSHIP, APPELLANT, V. AUTO AUCTIONS, LTD., A NEBRASKA CORPORATION, APPELLEE.

725 N.W.2d 871

Filed December 19, 2006. No. A-04-1098.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Easements.** The owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.
5. ____. An owner whose land is burdened with a right-of-way, unless he or she has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way. The use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him or her to extra labor and expense in keeping it in repair, and the owner of the way may restrict such use by the owner of the servient tenement as is inconsistent with the enjoyment of the easement.
6. **Easements: Conveyances.** The extent of an easement created by a specific grant is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances.

7. ____: ____. The possessor of land subject to an easement created by a conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.
8. **Easements: Words and Phrases.** An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself.
9. **Easements.** A servient owner of land subject to an easement may make such use of it as he or she sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose.
10. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
11. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
12. **Equity: Costs.** In equity actions, taxation of costs rests in the discretion of the trial court.
13. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Terry K. Barber for appellant.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

R & S Investments (R&S) holds an easement on the property of Auto Auctions, Ltd., for the use of two sanitary sewer lagoons and all necessary piping and connections to the lagoons. After acquiring the property on which R&S' easement lies, Auto Auctions relocated the easement by filling one of the original lagoons with dirt, constructing a new lagoon for use by both property owners, and providing R&S with the necessary connections to the new lagoon. R&S filed suit against Auto Auctions and Phil B. Durst, the president of Auto Auctions, in the district

court for Lancaster County, Nebraska, seeking a declaration of the parties' rights with respect to the easement, restoration of the original lagoon to its condition prior to being filled with dirt, and an injunction enjoining the defendants from interfering with R&S' use of the easement. George R. Day and Barbara D. Day, predecessors in interest to both R&S and Auto Auctions, were later named as third-party defendants. During trial, Durst was dismissed as an individual defendant. The district court entered judgment in favor of R&S, but it found that R&S was not entitled to the relief it sought. The court found R&S was entitled to have the relocated easement set forth in a new conveyance from Auto Auctions and ordered Auto Auctions to execute such new conveyance. The court subsequently dismissed the third-party complaint. For the reasons set forth herein, we affirm.

## BACKGROUND

R&S and Auto Auctions are the owners of certain adjacent tracts of real property located in Lancaster County. Both tracts were originally owned by the Days. The property was then partitioned by the Days and sold. The Days sold the tract currently owned by R&S (Lot 32) to Skelly Oil Company in 1966. R&S acquired title to Lot 32 in 1983. The Days sold the other tract (Lot 31) to Auto Auctions in 2001.

At the time of their conveyance of Lot 32 to Skelly Oil, the Days executed an agreement granting an easement across Lot 31 to Skelly Oil "for a sanitary sewer lagoon and all necessary piping and connections thereto and [agreeing] to construct said lagoon for [Skelly Oil]." The agreement provided:

> 1. [The Days agree] to construct a sanitary sewer lagoon system on property owned by [the Days], said lagoon to be located no more than 500 feet from the south or east property lines of the parcel . . . conveyed to [Skelly Oil].
>
> 2. [The Days agree] that [Skelly Oil], its agents or employees, or any persons or entities under contract with it may enter onto said premises for the maintenance of said lagoon and for the purpose of constructing all portions thereof not agreed to be constructed by [the Days].
>
> 3. [Skelly Oil] agrees to provide its own piping from said lagoon to be constructed by [the Days] to the property line of [Skelly Oil].

> 4. [The Days agree] that said sanitary sewer lagoon to be constructed by [the Days] shall be constructed and built in accordance with the plans and specifications prepared and approved by [Skelly Oil] and presented to [the Days] for said purpose. [The Days agree] to begin said construction within ten (10) days after said plans and specifications are so presented by [Skelly Oil].
>
> 5. [The Days agree] to grant a permanent easement no less than 15 feet in width across [the Days'] property for the location, installation, maintenance and repair of the necessary pipes and fittings from [Skelly Oil's] property . . . to the location of said sanitary sewer lagoon, as well as an easement covering the property owned by [the Days] where said lagoon is located, authorizing [Skelly Oil's] continued use of said property for the maintenance and operation of a sanitary sewer lagoon.
>
> [6]. The legal description of the property to be covered by said easements shall be prepared by [Skelly Oil] at its sole expense.

The lagoon, consisting of two separate cells, was constructed per the agreement between the Days and Skelly Oil sometime in the late 1960's and was in use by R&S at the time of Auto Auctions' purchase of Lot 31.

In October 2001, counsel for the Days corresponded with R&S, indicating the pending purchase of Lot 31 by Auto Auctions and the Days' intent to close the lagoon based upon alleged concerns of the Nebraska Department of Environmental Quality (DEQ). The sale of Lot 31 to Auto Auctions took place in November 2001. A condition of the purchase agreement between the Days and Auto Auctions was that the Days were to relocate the lagoon and remove the easement from Lot 31 at the Days' expense. Although the Days did not remove the old lagoon or the easement, Auto Auctions proceeded with the purchase of Lot 31.

The south cell of the old lagoon was filled in with dirt in approximately March 2002. In April, a sewerline was installed running from the old lagoon to the new lagoon. During its construction, the new line was plugged and the sewage from Lot 32 continued to flow into the north cell of the old lagoon. Later in

2002, the plug was removed from the new sewerline, at which time the sanitary waste from Lot 32 began flowing to the new lagoon. The construction of the new lagoon and sewerline was completed at the expense of Auto Auctions. The new lagoon is located approximately 900 to 1,000 feet from the nearest corner of Lot 32.

R&S filed the present action against Auto Auctions and Durst on June 6, 2002. R&S alleged that the defendants, knowing that R&S had an easement expressly granted by deed, had interfered with R&S' use of such easement by filling part of the old sanitary sewage lagoon with dirt, reducing the capacity of the lagoon, and hindering R&S from full enjoyment of the lagoon as originally constructed. R&S sought an order declaring its rights as owner of the dominant estate to an easement for use of, access to, and maintenance of the lagoon which existed at the time R&S acquired title to the dominant estate and declaring Auto Auctions' land servient to R&S' estate. R&S also sought an order requiring the defendants to restore the lagoon to its condition prior to the time the defendants began filling the lagoon with dirt. Additionally, R&S sought an order enjoining the defendants from interfering with R&S' enjoyment of the easement for access to and use and maintenance of the old lagoon. R&S also asked for reimbursement of costs and such other relief as the court deemed just.

At some point prior to trial, the Days were named as third-party defendants in the case. The matter was bifurcated, and trial was held before the district court on December 9 and 10, 2003, with respect to the petition filed by R&S.

Evidence was presented at trial concerning the use and maintenance of the old lagoon and the construction and capacity of the new lagoon. Evidence was also presented concerning a meeting between Durst, the president of Auto Auctions, and a partner in R&S to discuss the old lagoon. The record shows that Durst proposed the construction of a new lagoon on Lot 31 for the disposal of waste from both Lots 31 and 32. The evidence is conflicting as to whether the partner in R&S "voiced no opposition or objection to this plan." There is nothing in the record to suggest that the disposal of waste from Lot 32 was interrupted in any way by the construction of the new lagoon or that, as of

the time of trial, the new lagoon had proved in any way to be inadequate for the disposal of waste from either lot.

The district court heard testimony from Jeremy Williams, an employee of Design Associates, the firm employed by Auto Auctions to design and construct the new lagoon. Williams testified that typically a lagoon is designed for a maximum "life" of 20 years, after which time liquid would need to be pumped from the lagoon and the sludge disposed of before continued use. Williams testified that considerations in designing the new lagoon included the flow rate of water coming into the lagoon from the contributing source or sources, as well as rates of precipitation, seepage of water from the bottom of the lagoon, and evaporation. Williams testified that there are restrictions on the allowable rate of seepage because of the danger of ground water contamination. Williams testified that one-eighth of an inch per day is the "maximum speed" allowed at which wastewater can leave a lagoon.

Williams testified that in the original calculations by Design Associates, a zero seepage rate was used because Design Associates did not receive clarification from the DEQ as to the particular seepage rate that the DEQ would require on the project. The original calculation also contemplated a waterflow rate into the new lagoon of 825 gallons per day and considered that the new lagoon would be used only by Auto Auctions. The rate of 825 gallons per day was derived from water bills for the previous business facility located on Lot 31, using an average rate over approximately 6 months. The calculations also contemplated that the new facility on Lot 31 would double its business in the first 5 years and maintain that level of business for the remaining 15 years of the life of the new lagoon. The calculations resulted in a design calling for a new lagoon of over 26,000 square feet.

Williams testified that plans were resubmitted for the new lagoon in order to accommodate input of wastewater from both Lots 31 and 32. The new calculations assumed a seepage rate of one-sixteenth of an inch per day, halfway between the "two extremes that are allowed." Design Associates contemplated waterflow from Lot 32 of 600 gallons per day, which figure was derived from a flowmeter installed on the well for Lot 32 over a period of about 2 to 3 months. Williams testified that due to the

different seepage rate used, the new calculations encompassing wastewater input from both properties yielded a required lagoon size of approximately 23,000 square feet. Nonetheless, the new lagoon was constructed based on the dimensions originally calculated of over 26,000 square feet. Williams testified that the design of the new lagoon was specifically intended to meet all of the requirements for both properties and, as he understood it, had sufficient capacity to meet those requirements. Williams testified that because the size of the lagoon as constructed was greater than required by the new calculations, the new lagoon might have sufficient capacity to accommodate input of an additional 400 gallons of water per day from Lot 32, still assuming a seepage rate of one-sixteenth of an inch per day, but that the question of whether the new lagoon would accommodate such additional input from Lot 32 would be "fairly close."

Curtis Christiansen, an employee of the DEQ, was involved in reviewing the plans for the new lagoon submitted by Design Associates and in investigating the condition of the old lagoon. Christiansen said that the DEQ had several concerns about the proper construction and operation of the old lagoon, including whether it had "proper separation between ground water and the bottom of the lagoon." Christiansen was asked to answer a hypothetical question concerning a two-cell lagoon, constructed approximately 40 years ago, with maintenance problems throughout its life; with weeds, trees, and other vegetation growing on the sides and bottom of the lagoon; and with one cell being unused for a substantial period of time. Christiansen testified that such a lagoon would likely no longer function properly under the rules and regulations of the DEQ.

The individual who laid the new pipeline to connect Lot 32 to the new lagoon was also involved in closing the old lagoon. He testified that before the south cell of the old lagoon was filled in, he ensured that the sewage from Lot 32 would divert to the north cell. He cleaned out the "channel" so water would flow into the north lagoon and used a skid loader to clean the weeds from the bottom of the north cell.

The district court entered judgment in favor of R&S on R&S' petition on May 14, 2004. In ruling on the matter, the court found the approach and reasoning of the Supreme Court of Colorado

in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), persuasive and appropriate to use in the present case and found that the Restatement (Third) of Property: Servitudes § 4.8(3) (2000) should apply. The court found:

> [C]hanges [Auto Auctions] made in relocating the lagoon were reasonable and done to permit normal use and development of its property. All expenses associated with relocating the lagoon and connecting [R&S] to it were born by [Auto Auctions] and . . . the relocation did not lessen the utility of the easement, increase [R&S'] burden's [sic] with respect to its use and enjoyment or frustrate the purpose for which the easement was created.
>
> [R&S] is not entitled to the relief it seeks. At most it is entitled to have the relocated easement set forth in a new conveyance from [Auto Auctions]. The document conveying the relocated easement should set forth the rights and responsibilities of the parties respecting the relocated easement consistent with the Restatement. In my judgement an easement as described by [Auto Auctions] in its Offer to Compromise would be appropriate and [Auto Auctions] is ordered to execute said easement.
>
> Because I am ordering some relief I believe I need to enter judgement for [R&S]. It is customary to tax costs to the party against whom a judgement has been entered. In this case, however, I believe it appropriate that the costs of this action be taxed to [R&S]. This is a lawsuit that never had to be brought. The relief I am granting is no more than what [Auto Auctions] told [R&S] it proposed to do in August of 2001 and [that] to which [R&S], at the time, voiced no objection. Restoring the pre-existing lagoons to the same condition they were in just before they were relocated is, in all probability, an impossibility given current DEQ requirements. Even if that were not the case, [R&S'] insistence that [Auto Auctions] do so, when there is no evidence it had been harmed in any way by the relocation of the lagoon[,] was, in my judgement, completely unreasonable.

The court stated that any further relief requested by R&S from Auto Auctions or by Auto Auctions from R&S not specifically

granted by the court's order was denied. The court gave Auto Auctions 30 days to file a motion to set the third-party petition for trial before the petition would be dismissed.

The district court entered an order on September 7, 2004, dismissing the third-party petition. R&S subsequently perfected its appeal to this court.

## ASSIGNMENTS OF ERROR

R&S asserts, consolidated and restated, that the district court erred in (1) making certain findings of fact, (2) determining the proper remedy in this case, and (3) taxing costs to R&S.

## STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[2,3] An action for injunction sounds in equity. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

## ANALYSIS

*Findings of Fact.*

R&S asserts that the district court erred in making certain findings of fact. Specifically, R&S asserts that the court erred in finding that (1) the original lagoon was inadequate, (2) R&S voiced no opposition to Auto Auctions' plans to construct a new lagoon, (3) R&S suffered no damage due to Auto Auctions' actions, (4) Auto Auctions' actions resulted in reasonable changes in the easement, and (5) restoration of the original lagoon was impossible. To the extent that the district court made these findings of fact based upon conflicting evidence, we give weight to

the fact that the court observed the witnesses and accepted one version of the facts over another. See *Rauscher v. City of Lincoln, supra*. In general, these findings are consistent with our own de novo review of the record, and we decline to disturb these factual findings on appeal.

*Remedy.*

R&S asserts that the district court erred in determining the proper remedy in this case. More specifically, R&S asserts that the court erred in finding that the proper remedy was the conveyance of a new easement rather than the injunctive relief requested.

R&S directs our attention to the Restatement (Third) of Property: Servitudes § 8.3(1) at 492-93 (2000), which provides as follows:

> A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public.

The district court in this case found that R&S was entitled to have the relocated easement set forth in a new conveyance from Auto Auctions and ordered Auto Auctions to execute such a conveyance. In reaching this conclusion, the court found the approach and reasoning of the Supreme Court of Colorado in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), persuasive and appropriate to use in the present case. In *Roaring Fork Club, L.P.*, the Colorado court adopted the Restatement, *supra*, § 4.8(3), as the correct statement of controlling legal principle for purposes of analyzing a case involving a ditch easement relocation or alteration.

The Restatement, *supra*, § 4.8(3) at 559, provides:

> Unless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the

> servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

A comment to this section further discusses the servient owner's right to change the location or dimensions of an easement and provides in relevant part:

> This rule applies unless expressly negated by the easement instrument. If the purchaser of an easement wishes to retain control over any change in location, the instrument should be drafted to accomplish that result.
>
> This rule is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder. It complements the rule that the easement holder may increase use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate. [Citation omitted.] This rule is not reciprocal. It permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the easement to relocate the easement. The reasons for the rule are that it will increase overall utility because it will increase the value of the servient estate without diminishing the value of the dominant estate and it will encourage the use of easements and lower their price by decreasing the risk the easements will unduly restrict future development of the servient estate. In addition, permitting the servient owner to change the location under the enumerated circumstances provides a fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate.

Restatement (Third) of Property: Servitudes § 4.8 comment *f.* at 563 (2000).

[4-9] Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights

to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands. *Kovanda v. Vavra*, 10 Neb. App. 486, 633 N.W.2d 576 (2001). This court has found that an owner whose land is burdened with a right-of-way, unless he or she has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way. *Id.* Nebraska case law provides further that the use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him or her to extra labor and expense in keeping it in repair, and the owner of the way may restrict such use by the owner of the servient tenement as is inconsistent with the enjoyment of the easement. *Id.* The extent of an easement created by a specific grant is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances. *Id.* The possessor of land subject to an easement created by a conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance. *Id.* An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself. *Id.* A servient owner of land subject to an easement may make such use of it as he or she sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. *Id.*

[10,11] The rule set forth in § 4.8 of the Restatement, *supra*, is not inconsistent with these principles of Nebraska law. An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006). Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id.* An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt

administration as the remedy in equity. *Id.* Given the nature of the easement in question and the uncertain continued viability of the old lagoon, we conclude that the district court did not err in applying the Restatement (Third) of Property: Servitudes § 4.8 (2000) in resolving this case, rather than granting the injunctive relief requested by R&S.

The easement in the present case was conveyed to Skelly Oil by the Days in 1966. The conveyance document provides that the easement was for a sanitary sewer lagoon and all necessary piping and connections thereto. Although the conveyance provides that the Days were to construct a lagoon on their property "to be located no more than 500 feet from the south or east property lines of the parcel," the right to move the location of the easement is not expressly denied by the terms of the document. There is nothing in the conveyance document specifying that the grantee, Skelly Oil, wished to retain control over any change in location of the easement. We agree with the district court's assessment that the changes Auto Auctions made in relocating the lagoon were reasonable, especially given the environmental concerns. The record shows that the changes were made at Auto Auctions' expense and were done in the interest of normal development of the servient estate. There is nothing in the record to show that the changes significantly lessen the utility of the easement, increase the burdens on R&S in its use and enjoyment of the easement, or frustrate the purpose for which the easement was created. See Restatement, *supra*, § 4.8(3). The original easement was granted in order to provide R&S' predecessor the use and enjoyment of a sanitary sewer lagoon and all the necessary piping and connections thereto located on what is now Auto Auctions' property. The remedy fashioned by the district court ensures that R&S still has an easement for the use and enjoyment of a sanitary sewer lagoon on Auto Auctions' property with all the necessary connections. While the new lagoon is farther away from R&S' property than the old lagoon, R&S has not shown that the new lagoon is inadequate to meet its needs. The record also shows that continued viability of the old lagoon was in question. We conclude that the district court did not err in ordering the conveyance of a relocated easement or in failing to grant the relief requested by R&S.

*Taxation of Costs.*

[12,13] R&S asserts that the district court erred in taxing costs of the action to R&S. Neb. Rev. Stat. § 25-1708 (Reissue 1995) provides that "[w]here it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." Neb. Rev. Stat. § 25-1711 (Reissue 1995) provides, in relevant part, that "[i]n other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." In equity actions, taxation of costs rests in the discretion of the trial court. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980); *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585 (1954). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). The present action, of course, is an equity action, and we find no abuse of discretion in the district court's taxation of the costs of this action to R&S.

## CONCLUSION

We decline to disturb the factual findings of the district court. The district court did not err in ordering the conveyance of a relocated easement or in failing to grant the relief requested by R&S. The district court did not abuse its discretion in taxing costs to R&S.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
HARRY J. MASTNE, APPELLANT.

725 N.W.2d 862

Filed December 19, 2006. No. A-05-911.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

2. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Sentences.** Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
6. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
7. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
8. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
9. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
12. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
13. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
14. **Statutes: Intent: Appeal and Error.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
15. **Statutes.** It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there.
16. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.

Appeal from the District Court for Dakota County: ROBERT V. BURKHARD, District Judge, Retired. Sentences affirmed in part and in part vacated, and cause remanded with directions.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, Susan J. Gustafson, and Chris Seifert, Senior Certified Law Student, for appellee.

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

INBODY, Chief Judge.

## INTRODUCTION

Harry J. Mastne appeals from the order of the district court for Dakota County, Nebraska, ordering him to register as a sex offender for the remainder of his life and sentencing him to 12 to 20 years' imprisonment. For the reasons set forth herein, we affirm Mastne's sentences in part, and in part vacate the sentences and remand the cause with directions.

## STATEMENT OF FACTS

On October 12, 2004, Mastne was charged by information with five counts of sexual assault of a child. In the information, the State alleged that between the dates of April 1 and July 26, 2004, Mastne subjected five children 14 years of age or younger to sexual contact.

Pursuant to a plea agreement, Mastne pled guilty to four of the five counts of sexual assault of a child and the State agreed to dismiss the fifth count. The State provided the following factual basis:

> [Mastne] confessed that he had sexually molested his foster daughter, J. M., by fondling her clitoris and buttocks. He claimed that this had happened a couple of times in June of 2004 while she was awake. He also . . . admitted to molesting J. M. in this manner two to three times within the month of July 2004.
>
> [Mastne] admitted that he had sexually molested the girls with the initials A. L. and M. L., his relatives, by also fondling their clitoris and buttocks and also their back and chest. He claimed he did this to A. L. and M. L. the weekend of July 23rd through 25th, 2004, while they were sleeping on the couch in the upstairs living room of his home. He also admitted that he molested A. L. and M. L.

> in this manner the weekend before in July 2004 and estimated that he had molested A. L. and M. L. a total of two to three times in the month of July 2004.
>
> Your Honor, during the interview [Mastne] then denied molesting any other victims. Deputy [Jeremy] Bermel then confronted [Mastne] with information that two other children — daycare children with the initials H. E. and H. E., who had been provided daycare in the Mastne home, had also been victimized by Mastne. And after being confronted with that information [Mastne] then confessed that he had also molested H. E., . . . born March 16th, 1993, and also H. E. born May 31st, 1995, by also fondling each girl[']s clitoris and buttocks in May and April of 2004 while they were each sleeping on the floor or in a chair in his home. He admitted that he did this to H. E. and H. E. at least two to three times in April and May of 2004.

The district court accepted Mastne's guilty pleas and found him guilty on four counts of sexual assault of a child. The State and Mastne made a joint motion for evaluation of Mastne by the Diagnostic and Evaluation Center of the Department of Correctional Services, and the district court so ordered.

A sentencing hearing was held on June 28, 2005. At the hearing, the district court judge noted the following:

> As everybody is aware, these victims were quite young. [One of the victims] was 12, [another victim] was 8, [another victim] was 6, [and another victim] was 9. Apparently [one of the victims'] mother is not seeking restitution, but is certainly concerned about the long-term effects on [her daughter].
>
> We've got [two of the victims who] have both been involved in counseling since these incidents. It was in the [presentence investigation report that one of the victims] has been wetting the bed and has nightmares. [One of the victims] wakes up sometimes at night crying.
>
> And the file also indicated [Mastne], I believe, admitted . . . inappropriate sexual contact with the victims probably on about 10 occasions each. Without going into too much details, he touched the private parts of . . . all four girls, as far as that goes, rubbed the vagina of [three of the victims]

> and it's sickening to repeat these things but this is what happened unfortunately.
>
> There's also something in the file from . . . a mental health therapist working with [two of the victims]. Apparently they had had about 11 different placements since their birth. And, as I say, they were only 8 and 6 years old, been in about 11 different places before this came up. Apparently been a lot of chaos and things like that. But with [their current] family they survived, thrived, and apparently began to heal. And they were adopted by their foster parents, then their grandfather harmed them and they knew that he shouldn't have been doing things like that. Somebody they had trusted. Apparently [one of the victims] has been somewhat shut down and [another victim] started having nightmares and separation anxiety.
>
> As regards the report from the Lincoln Regional Center indicates [Mastne] is a moderate risk [to] engage in future offenses relating to sexual misbehavior. It appears he has engaged in a more extensive pattern of sexual misconduct than he would actually admit. And he does not meet the criteria, according to the Lincoln Regional Center, to be classified as a . . . sexually violent offender.
>
> But — and one thing in [Mastne's] favor is his record. I think there are a couple of traffic matters and that was about the extent of it. But these are serious crimes. Any felony is a serious crime. These are Class IIIA [felonies] where the maximum is . . . five years.
>
> . . . .
>
> Also, looking through the statute, this — this offense is considered to be . . . an aggravated one since there was some penetration, however slight, and this is based on attachments to the report of May 4, 2005, from the diagnostic and evaluation center. I believe by finding the offense to be an aggravated offense [Mastne] is required to register under the sex offender registration act basically . . . for the rest of his life.

On each count of sexual assault of a child, Mastne was sentenced to 3 to 5 years' imprisonment, with the sentences to be

served consecutively. He was given credit for 337 days already served. Mastne has timely appealed to this court.

## ASSIGNMENTS OF ERROR

Mastne alleges that the district court abused its discretion in imposing excessive prison sentences upon him and in finding that he was convicted of a registrable offense involving penetration and thus requiring him to register as a sex offender for the rest of his life.

## STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[3,4] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.*

## ANALYSIS

Mastne first alleges that the district court abused its discretion when it imposed excessive prison sentences upon him. Mastne pled guilty to and was convicted of four counts of sexual assault of a child, a Class IIIA felony. Class IIIA felonies are punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Mastne was sentenced to 3 to 5 years' imprisonment on each count, with credit given for 337 days already served. The sentences were ordered to run consecutively. Therefore, Mastne's aggregate sentence was 12 to 20 years' imprisonment.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger, supra.* An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[5,6] Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *Id.*

In Mastne's brief, he asserts: "The record herein demonstrates that the sentencing judge injected his bias into the sentencing determination and made findings apart from the information, plea and factual basis." Brief for appellant at 9. He claims that "the sentence imposed ignored the positive steps taken by [Mastne] in rehabilitating himself and the genuine remorse he feels in regard to his crimes." *Id.* Mastne also suggests that "[u]nder these circumstances a reasonable person would believe that the sentencing judge substituted his personal bias and prejudices in place of the statutory guidance for determining an appropriate and just sentence" and that "[i]gnoring competent evidence and relying on allegations outside the information, plea and factual basis demonstrates an animus, bias and prejudice against [Mastne]." *Id.* at 11.

At Mastne's sentencing hearing, the district court judge noted the following:

> As everybody is aware, these victims were quite young. [One of the victims] was 12, [another victim] was 8, [another victim] was 6, [and another victim] was 9. Apparently [one of the victims'] mother is not seeking restitution, but is certainly concerned about the long-term effects on [her daughter].
>
> We've got [two of the victims who] have both been involved in counseling since these incidents. It was in the [presentence investigation report that one of the victims] has been wetting the bed and has nightmares. [One of the victims] wakes up sometimes at night crying.

> And the file also indicated [Mastne], I believe, admitted . . . inappropriate sexual contact with the victims probably on about 10 occasions each. Without going into too much details, he touched the private parts of . . . all four girls, as far as that goes, rubbed the vagina of [three of the victims] and it's sickening to repeat these things but this is what happened unfortunately.
>
> There's also something in the file from . . . a mental health therapist working with [two of the victims]. Apparently they had had about 11 different placements since their birth. And, as I say, they were only 8 and 6 years old, been in about 11 different places before this came up. Apparently been a lot of chaos and things like that. But with [their current] family they survived, thrived, and apparently began to heal. And they were adopted by their foster parents, then their grandfather harmed them and they knew that he shouldn't have been doing things like that. Somebody they had trusted. Apparently [one of the victims] has been somewhat shut down and [another victim] started having nightmares and separation anxiety.
>
> As regards the report from the Lincoln Regional Center indicates [Mastne] is a moderate risk [to] engage in future offenses relating to sexual misbehavior. It appears he has engaged in a more extensive pattern of sexual misconduct than he would actually admit. And he does not meet the criteria, according to the Lincoln Regional Center, to be classified as a . . . sexually violent offender.
>
> But — and one thing in [Mastne's] favor is his record. I think there are a couple of traffic matters and that was about the extent of it. But these are serious crimes. Any felony is a serious crime. These are Class IIIA [felonies] where the maximum is . . . five years.

[7,8] A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of

reasonableness, even though no actual bias or prejudice was shown. *Id.*

In the instant case, we find that no reasonable person who knew the circumstances of the case would question the district court judge's impartiality under an objective standard of reasonableness. The district court judge merely noted that the acts committed by Mastne were "sickening to repeat." This can hardly be considered proof of judicial bias, particularly when Mastne's own attorney conceded at the sentencing hearing that "[t]his is a horrendous, horrible crime" and that "these were monstrous acts. There's no doubt they were monstrous acts." The district court clearly did not abuse its discretion when it made its comments prior to sentencing.

Mastne also alleges that the district court abused its discretion when it considered allegations not admitted in his guilty pleas and when it "relied on a spurious reference to a child victim's belief that [Mastne] had 'been inside her body' despite the child advocate's disclaimer that the child was 'not sure how she knows he did that.' " Brief for appellant at 11. Mastne claims: "Misapprehension of the facts and circumstances of a case is evidence that a sentencing judge abused his discretion." *Id.* at 10.

[9,10] The information that Mastne is referring to is in a report contained in the presentence report. It does not appear that the district court misapprehended the facts or circumstances of the instant case; it merely relied on information contained in the presentence report. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* Mastne's prison sentences were clearly within the statutory limits prescribed for the crimes he committed. Simply put, the district court did not abuse its discretion when it imposed its prison sentences upon Mastne. This assignment of error lacks merit.

Mastne also alleges that the district court abused its discretion when it ordered him to register as a sex offender for the

remainder of his life. In so ordering, the district court noted the following:

> Also, looking through the statute, this — this offense is considered to be . . . an aggravated one since there was some penetration, however slight, and this is based on attachments to the report of May 4, 2005, from the diagnostic and evaluation center. I believe by finding the offense to be an aggravated offense [Mastne] is required to register under the sex offender registration act basically . . . for the rest of his life.

Neb. Rev. Stat. § 29-4005 (Cum. Supp. 2004) provides in relevant part:

> (2) A person sentenced for a registrable offense under section 29-4003 shall be required to register under the act for the rest of his or her life if such registrable offense is an aggravated offense or the person has a prior conviction for a registrable offense. The sentencing court shall make that fact part of the sentencing order.
>
> . . . .
>
> (4) For purposes of this section:
>
> (a) Aggravated offense means any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years.

[11,12] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.* In the absence of ambiguity, courts must give effect to the statutes as they are written. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id.* Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

[13-15] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither

is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Id.* In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). Likewise, it is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *Id.*

Section 29-4005(2) provides:

> A person sentenced for a registrable offense under section 29-4003 shall be required to register under the act for the rest of his or her life if such registrable offense is an aggravated offense or the person has a prior conviction for a registrable offense. The sentencing court shall make that fact part of the sentencing order.

Further, an aggravated offense is defined by the Legislature as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." § 29-4005(4)(a). By comparison, § 29-4005(3)(a) provides:

> When sentencing a person for a registrable offense under section 29-4003, a court may also determine if the person is a sexually violent predator. When making its determination the court shall consider information contained in the presentence report and the recommendation of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

[16] The intent of the Legislature is expressed by omission as well as by inclusion. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). It is clear from the language used by the Legislature in § 29-4005(3)(a) that in order for an offender to be deemed a "sexually violent predator," the sentencing court must make that determination. By omitting such language from the text of § 29-4003(2), the Legislature made it equally clear that it did not intend for the sentencing court to make a factual finding or determination regarding whether or not an offense is "an

aggravated offense." Rather, it intended for the statutory definition of the crime for which an offender is convicted, or the existence of an offender's prior conviction, to provide whether or not an offense is to be deemed "an aggravated offense." Therefore, we find that the district court erred when it made its own determination that Mastne's crimes constituted aggravated offenses, instead of examining the statutory definitions for the crimes he committed.

In the instant case, Mastne pled guilty to four counts of sexual assault of a child. Neb. Rev. Stat. § 28-320.01(1) (Cum. Supp. 2004) provides the statutory definition of this crime as follows: "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." The crimes for which Mastne pled guilty do not include the element of penetration. Therefore, it was error for the district court to conclude that Mastne's crimes constituted aggravated offenses and to order him to register as a sex offender for the remainder of his life, pursuant to § 29-4005(2).

Section 29-4005(1) provides:

> Except as provided in subsections (2) and (3) of this section, any person to whom the Sex Offender Registration Act applies shall be required to register during any period of supervised release, probation, or parole and shall continue to comply with the act for a period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent. The ten-year registration requirement shall not apply to any person while he or she is incarcerated in a jail, a penal or correctional facility, or any other public or private institution. The ten-year registration requirement does not include any time period when any person who is required to register under the act knowingly or willfully fails to comply with such registration requirement.

We find that the portion of Mastne's sentences ordering him to register as a sex offender for the remainder of his life, pursuant to § 29-4005(2), must be vacated. The cause is remanded to the district court, and that court is directed to order Mastne to register as a sex offender pursuant to § 29-4005(1).

## CONCLUSION

We find that the district court did not abuse its discretion when it imposed its prison sentences upon Mastne. However, the court did err when it found that Mastne was guilty of aggravated offenses and when it ordered him to register as a sex offender for the remainder of his life. Therefore, that portion of Mastne's sentences is vacated, and the cause is remanded with directions to sentence Mastne to register as a sex offender pursuant to § 29-4005(1).

SENTENCES AFFIRMED IN PART AND IN PART VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

CARLSON, Judge, concurs.

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RITA ANN JOHNSON, APPELLANT, V.
MICHAEL RAY JOHNSON, APPELLEE.

726 N.W.2d 194

Filed December 19, 2006. No. A-06-337.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Modification of Decree: Final Orders: Appeal and Error.** When an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Appeal dismissed.

Kent A. Schroeder, of Ross, Schroeder & George, for appellant.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellee.

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

MOORE, Judge.

## INTRODUCTION

Rita Ann Johnson appeals from an order of the district court for Phelps County, Nebraska, which modified the decree dissolving her marriage to Michael Ray Johnson by changing custody of the parties' child from Rita to Michael. Rita asserts the district court abused its discretion in finding that a material change of circumstances had occurred and that the best interests of the child required modification of custody. Because the order appealed from reserved the issue of child support for future determination, the order was not final, and accordingly, we must dismiss this appeal for lack of jurisdiction.

## PROCEDURAL BACKGROUND

On March 30, 2004, a decree of dissolution was entered which, among other things, awarded Rita the custody of the parties' child, born January 10, 2003, and specified visitation to Michael. On August 5, 2004, Michael filed an application to modify the decree, and on July 5, 2005, he filed an amended complaint for modification. Trial was held on October 19 and December 16. On March 14, 2006, an order was filed sustaining Michael's amended complaint and placing permanent custody of the parties' child with Michael, effective April 1.

The March 14, 2006, order, at paragraph 3, required Rita to pay child support effective April 1 and ordered the parties "to submit a stipulated child support calculation or schedule a hearing on the same." On March 24, Rita filed a notice of appeal of the March 14 order. On March 31, an order was filed which placed the parties' child in the temporary custody of Rita during

the period of appeal, declined to enter a child support obligation for Rita at such time, and ordered that during the period of appeal, Michael continue to pay his child support previously ordered. The March 31 order further stated that paragraph 3 of the March 14 order is amended as follows: "The Court will enter an appropriate child support Order when this Order on custody becomes final."

On April 12, 2006, the district court apparently held a hearing on Michael's motion to set child support, although these proceedings are not contained in our record. On April 24, an order was entered finding that the March 14 order should be amended to include an amount for child support. The April 24 order provided that Rita should pay child support in the amount of $277 per month, effective April 1. Also on April 24, an additional order was entered which suspended Rita's child support obligation pending the decision on appeal.

Michael filed a motion for summary dismissal of the appeal in this court, asserting that Rita's appeal was premature because the March 14, 2006, order was not a final order for purposes of appeal. We overruled the motion without prejudice for further consideration of the question of whether the March 14 order is a final, appealable order and what effect, if any, the subsequent orders had.

## ASSIGNMENTS OF ERROR

Rita asserts the district court abused its discretion in finding that a material change in circumstances had occurred and that the best interests of the child required modification of custody.

## STANDARD OF REVIEW

[1,2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

## ANALYSIS

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

It is necessary for us to determine whether the March 14, 2006, order, from which Rita appeals, is a final, appealable order. In *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001), this court held that a court's order modifying custody but retaining jurisdiction for a determination of child support does not constitute a final order for purposes of appeal. In *Paulsen*, we recognized the longstanding principle that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

[5] In *Paulsen*, the father filed an application for modification of a divorce decree, specifically requesting that the trial court award him custody, child support, and attorney fees. This court determined that the order was not final because it had not determined all the issues submitted to the court, namely child support. Likewise, in *Huffman*, 236 Neb. at 106, 459 N.W.2d at 220, the Supreme Court held:

> [W]hen an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or

> other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.

See, also, *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002) (where court expressly reserved ruling on certain aspects of relief requested, order is not final).

In the present case, unlike in *Paulsen* or *Huffman*, there was no request for child support in Michael's initial application or amended complaint. The prayer for relief in Michael's amended complaint to modify decree requested that the court

> enter an order modifying the Decree of Dissolution and awarding [Michael] the care, custody and control of the parties' minor child, or, in the alternative, if custody is not change[d], changing the visitation to more appropriately address the parties' current circumstances and the needs of the child, for attorney fees, and for such other and different relief as the Court deems just and equitable.

Rita asserts that all of the issues that were submitted to the court on Michael's amended complaint were determined by the court in the March 14, 2006, order—namely, modification of custody, visitation, and attorney fees—thus making it a final order for purposes of appeal. We cannot agree. While the prayer in Michael's amended complaint did not make a specific request for child support, a child support determination is an inherent part of a custody modification action. Michael's amended complaint also prayed for other equitable relief, and child support is equitable relief, which can be awarded by the court under Neb. Rev. Stat. § 42-364 (Reissue 2004). See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005) (prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in specific prayer, provided it fairly conforms to case made by petition and evidence). We note that there was some evidence adduced in the present case regarding the parties' current incomes.

Because child support is equitable relief inherent in a child custody modification action, coupled with the fact that the court specifically ordered child support to be calculated following the order, we conclude that the March 14, 2006, order was not a final, appealable order and that the notice of appeal filed on March 24 was therefore premature. To carve out the exception as urged by Rita—that the issue of child support was not submitted to the court—would wreak havoc in the arena of final order jurisprudence, particularly in this area of child custody and support. We decline to distinguish *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001), in this manner.

## CONCLUSION

Because the order of March 14, 2006, reserved the issue of child support for future determination, the order was not final, and accordingly, we must dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

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JANET J. GRANGE, APPELLANT, V.
THOMAS W. GRANGE, APPELLEE.

725 N.W.2d 853

Filed December 19, 2006. No. A-06-502.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.
3. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
5. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
6. **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.

7. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
8. **Divorce: Modification of Decree: Minors.** A decree of divorce, insofar as minor children are concerned, is never final in the sense that it cannot be changed, but is subject to review at any time in the light of changing conditions.
9. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
10. **Modification of Decree: Child Support: Res Judicata.** In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Steven M. Delaney and Laura R. Hegge, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

Janet J. Grange appeals from a summary judgment entered on the motion of Thomas W. Grange, which judgment dismissed Janet's 2005 complaint for modification of decree seeking additional parenting time and reduction of child support. Viewed in the light most favorable to Janet, the evidence shows that although she had completed her surgical residency at the time of an earlier modification, her work schedule was later reduced and became more predictable, and that after the last modification, Thomas had realized additional income from his interest in a retail optical shop. Because Thomas failed to prove that there had been no material change of circumstances, we reverse the judgment and remand the cause for further proceedings.

## BACKGROUND

In 1999, Janet and Thomas agreed upon a parenting plan. The plan recognized that both were fit and proper persons to have

custody of the three then-minor children. The parties agreed that "it [was] in the best interests of the minor children that [Janet] and [Thomas] be awarded joint legal custody" and that "primary residential care" would "rest" in Thomas, "with parenting time and parental rights adhering to [Janet] as specified." The parties agreed to cooperate "so as, in a maximum degree, to advance the children's health, emotional, and physical well-being and to give and afford the children the affection of both parents and a sense of security." The parties agreed to visitation on alternating major holidays, on certain other special days and events, and for vacation times. The agreement further specified that Janet "shall have weekly parenting time with the minor children on one evening a week and alternating weekends. The specific times for the weekly visitations should be arranged by the parties, taking into consideration the activities of the three minor children and the work schedules of each parent."

By a decree entered on June 25, 1999, the district court dissolved the parties' marriage, determined that "the parties [were] fit and proper persons to be awarded the joint legal custody of the three minor children, with primary residential care in [Thomas], subject to [Janet's] rights of reasonable and liberal parental access or visitation as set forth in the parties' Parenting Plan," and ordered Janet to pay child support. The decree noted that Janet "[was] a resident in training to be a surgeon and that upon completion of her training[,] the child support obligation shall be reviewed." To that end, the parties agreed to exchange tax returns annually until the "last" minor child reached the age of majority.

The decree incorporated a child support calculation, based upon the joint custody worksheet, requiring Janet to pay $433 per month as support. The worksheet was premised upon Janet's gross monthly income of $2,540 and Thomas' gross monthly income of $7,590.

On August 13, 2001, Thomas filed an application to modify the decree, alleging that Janet had "completed her resident in training and ha[d] gone into private practice, thus raising her income level." Initially, Janet filed only a responsive pleading in the nature of a general denial. She later filed a cross-application to modify the decree, seeking to obtain custody of the oldest child (who has now attained the age of majority) and to adjust

the support obligations. Although none of the subsequent orders affirmatively granted Janet's requested change of custody concerning the oldest child, we infer from the child support established that the change took place.

By an order entered on August 15, 2002, the district court established child support retroactive to September 1, 2001, in the amount of $513 for three children, $1,085 for two children, and $1,407 for one child. That order also purported to award Janet $2,000 for the services of "his" attorney.

The child support calculations attached to the August 15, 2002, modification order show a split custody calculation for three children and also attach a basic custody calculation for two children. The basic custody calculation shows Janet's gross monthly income as $10,000, Thomas' gross monthly income as $8,788, and, after various appropriate deductions, the total monthly support for two children as $2,035 and for one child as $1,407. Based upon Janet's 53.24 percent share of the parties' monthly net income, the worksheet calculates her share of the total support for two children to be $1,083.43. However, the calculation fails to apply her percentage share of monthly income to the total monthly support amount for one child, thereby in effect requiring Janet to pay 100 percent of the total monthly support for one child.

By an order nunc pro tunc entered on August 20, 2002, the court recognized a scrivener's error in the earlier order and amended the last paragraph to award attorney fees to Thomas rather than to Janet. Further, the order nunc pro tunc amended the earlier order to expressly state that Janet was the person required to pay child support. However, the order nunc pro tunc did not address the error in calculating child support discussed above.

On August 23, 2002, Thomas filed a motion for "clarification" of the August 15 order. Because the motion for clarification refers to the mistaken award of attorney fees to Janet, we infer that at the time of filing Thomas' motion for clarification, he was unaware of the district court's August 20 order nunc pro tunc. Thomas' motion further asserted that "the calculation that the Court uses is for a split custody calculation which should not be used until April 1, 2002[,] when the oldest child went to live

with [Janet]" and that "the figures used by the Court are turned around as they relate to one, two, and three children."

By a supplemental order entered on December 18, 2002, which was prepared and submitted by Thomas' attorney and "approved as to form and content" by Janet's attorney, the court established child support to be paid by Janet at the rate of $513 for three children, $1,085 for two children, and $1,407 for one child. Attached to the order were calculations showing the total monthly support amounts of $2,429 for three children, $2,035 for two children, and $1,407 for one child. The calculation then applied Janet's rounded percentage of 54 percent to each of those amounts, resulting in her monthly support share being $1,287 for three children, $1,078 for two children, and $745 for one child. The attachment then set forth a rudimentary split custody calculation, arriving at Janet's net monthly obligation of $508 for three children and calculating back support for 7 months apparently ending with the month of March 2002 at $1,287 per month for three children and for 5 months from April through August 2002 at $508 per month. The total of these amounts is further reduced by sums apparently paid under the decree. The supplemental order ultimately required Janet to pay a judgment of $3,720 representing back child support, which amount was payable in monthly installments of $300.

No appeal was taken from any of these orders.

We now arrive at the proceedings leading to the instant appeal. On February 25, 2005, Janet filed a complaint for modification of the decree, styled as an application to modify. At the time of this filing, the oldest child had attained the age of majority and the second child was nearly 17 years of age. Janet's application focused upon the parties' youngest child, who was then 9 years old. Janet's application set forth five factual allegations regarding a material change in circumstances. In the discovery process, Janet abandoned one of these factual assertions, and we do not address it any further.

Janet alleged that she "ha[d] completed her residency and [was] a surgeon in private practice with a standard 9:00 a.m. to 5:30 p.m. Monday through Friday work week"; that the youngest child had "repeatedly asked [Janet] to be allowed to spend

more time with [Janet]"; that despite Janet's requests for a "more equal sharing of parenting time," Thomas had refused to allow more time "than what had been set during [Janet's] residency period"; and that Thomas had "routinely used his title of primary residential parent to relegate [Janet] to the status of visiting non-custodial parent" and had not "allowed [Janet] to be able to participate and share in the parenting of the minor children."

In addition to describing the error in the original calculations, Janet alleged that since the entry of the supplemental order, "the incomes of the parties have changed, . . . which constitutes a change of circumstances requiring a modification of the child support to be paid."

Thomas filed a responsive pleading admitting certain allegations, denying others, and setting forth various affirmative defenses, including the doctrine of res judicata.

On March 10, 2006, Thomas filed a motion for summary judgment. A short time later, Thomas filed a motion to dismiss Janet's application, based upon the doctrine of unclean hands.

On March 24, 2006, the district court conducted an evidentiary hearing on both motions. The documentary evidence received generally consisted of copies of earlier documents in the proceedings, such as the property settlement agreement, the parenting plan, the decree of dissolution, the earlier application to modify, and the various orders previously entered by the court, as well as the parties' recent depositions and certain other documents. To the extent necessary, the documentary evidence will be discussed in the analysis section of this opinion.

By a summary judgment entered on April 3, 2006, the district court sustained Thomas' motion and dismissed Janet's application to modify decree. The court also determined that Thomas' motion to dismiss was moot. In granting Thomas' motion for summary judgment, the court stated:

> [Janet] bears the burden of showing a material change in circumstance before the Court will entertain an application to modify visitation or custody. This she has failed to do. She initially relies on the fact that she has completed her residency and now works a more standard work schedule. However, this is not a change of circumstance from the last time the parties were before this Court in 2002 on

> their cross-applications to modify. At that time, she had already completed her residency, but sought no change in visitation or custody with respect to the two younger children. [Janet's] further reliance on an alleged request by her daughter to spend more time with her does not constitute a material change in circumstance. Neither do [Janet's] own wishes or requests made to [Thomas] concerning more time, nor her conclusory allegation that the original arrangement is not working. [Janet's] further claim that she has been relegated to the status of a visiting non-custodial parent also does not state a material change. The fact is, she ***is*** a visiting non-custodial parent, through a custody and visitation schedule she not only agreed to, but that was drafted by her own counsel. She cites the fact that the consent decree acknowledged [she] was a resident in training and her child support obligation would be reviewed upon completion of her training. That was, in fact, accomplished by way of the previous motion to modify the decree and, consequently, custody of one child and child support for the other two were modified accordingly. Her reference to an error in the child support calculations in the previous order not only does not state a change in circumstance, but cannot be raised at all, as she did not appeal from the previous order and may not collaterally attack it at this juncture.

(Emphasis in original.)

Janet timely appeals.

## ASSIGNMENTS OF ERROR

Janet asserts that the district court erred in granting Thomas' motion for summary judgment and in dismissing her application to modify decree.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006). To the extent questions of law are involved, an appellate court is obligated to reach

conclusions independent of the decisions reached by the court below. *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002).

## ANALYSIS

*Motion for Summary Judgment Appropriate.*

In Janet's brief, she claims both to have made an extensive search of case law relating to motions for summary judgment and to have found no cases where summary judgment motions in divorce modification actions were reviewed. Thomas responds that the nature of the proceeding is irrelevant in assessing whether he was entitled to summary judgment and that Nebraska's civil procedure does not limit summary judgment practice to particular categories or topics of actions. We assume without deciding that in an appropriate case, the summary judgment procedure may be utilized in a proceeding to modify a decree of dissolution of marriage.

*Only Changes Since 2002 Modification Considered.*

[3,4] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). Janet argues that because the issue of parenting time with the two younger children was not raised as an issue in the 2002 modification action, she need only show a material change in circumstances from the date of the original 1999 decree. Thomas argues that the change in circumstances must have occurred since the time of the most recent modification of the decree. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006). Because of the way we view the principal question before us, we assume without deciding that we must limit our review in the instant appeal to the circumstances arising after the 2002 modification.

*Summary Judgment on Visitation Issue.*

[5] As we turn to the critical issues before us, we recall that summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in

dispute. *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005). After a full evidentiary hearing on a complaint for modification, a court would consider whether the party seeking modification had met his or her burden to show a material change of circumstance. See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). At that point, Janet would have had the burden of establishing that there had been a material change in circumstances.

[6] But, in the context of summary judgment, the roles are reversed. 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. *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006). In this context, Thomas had the burden to prove that there had not been any material change in circumstances.

[7] The rules concerning summary judgments also control the way we must consider the evidence in the record. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006). We thus view the evidence most favorably to Janet and focus on whether, viewed in that light, Thomas succeeded in proving that there had been no material change of circumstances.

[8] A decree of divorce, insofar as minor children are concerned, is never final in the sense that it cannot be changed, but is subject to review at any time in the light of changing conditions. See *Matson v. Matson*, 175 Neb. 60, 120 N.W.2d 364 (1963). Thomas attributes great importance to the parties' agreement upon a parenting plan and, citing *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992), contends that a consent decree is accorded greater force than an ordinary judgment. That case concerned an effort to modify alimony, which implicates a different statute than the provision governing modification of visitation. See Neb. Rev. Stat. § 42-365 (Reissue 2004) (authorizing modification of alimony for good cause). While we agree that the fact the parties agreed upon the present visitation is an

important consideration, we do not attach as much significance to the parties' agreement as Thomas urges. We now turn to the controlling definition.

[9] A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). We bear in mind that the definition refers to "circumstances" in the plural form; thus, we disapprove of the district court's approach in considering whether each individual factor constituted a material change. Where, as in the case before us, the party seeking modification advances multiple reasons for modification, we consider all of the facts and circumstances raised by the evidence to determine whether there has been a material change.

Thomas argues that the parties were aware in 1999 that Janet's residency would end. He also argues that the change had already occurred prior to the last modification in 2002. Janet's testimony showed that not only had her residency ended, but since 2002, her work schedule had changed. She testified that her work schedule had diminished to a "9:00 to 5:30" job and denied that she had a similar work schedule in 2002. She claimed that in 2002, she was just starting her general surgery practice and needed to be available for consultations and emergency room work. She characterized her schedule in 2002 as "[u]npredictable."

The district court emphasized the completion of Janet's residency at the time of the 2002 modification but failed to focus on the change in Janet's schedule. Where the issue concerns visitation, a significant change in a party's work schedule may well constitute a material change in circumstances sufficient to reopen the extent of visitation.

Janet testified that the youngest child had requested more parenting time with Janet. Janet also testified that at the time of entry of the decree, she expected that her parenting time would be adjusted as her employment allowed. That testimony also raises an inference that in 2002, she expected that as her work schedule diminished and became predictable, her parenting time would increase. Janet also testified that Thomas had failed to accommodate her requests for more parenting time. While the

youngest child's requests for more time with Janet and Janet's testimony regarding Thomas' failure to accede to her requests for more visitation are of lesser importance, considering all of the evidence in the light most favorable to Janet, we cannot conclude that Thomas met his burden to show that there had been no material change in circumstances. We determine that the district court erred in granting summary judgment on the issue of visitation.

*Summary Judgment on Support Issue.*

[10] Thomas contends that the district court correctly granted summary judgment as to modification of child support, because the miscalculation at the time of the last modification does not constitute a material change in circumstances. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). The district court correctly recognized that no appeal was taken from the 2002 modification order and implicitly applied that doctrine.

There is some authority suggesting that a mistake of this type may be subject to correction under the equitable powers of the district court. See *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000). However, in the case before us, we need not consider that question, because both Thomas and the district court failed to recognize that Janet's claim for modification of the decree on the issue of child support also rests on an assertion that the incomes of the parties have changed.

As we detailed above, Janet intermingled her allegation that the 2002 order was erroneous with an assertion that the parties' incomes had changed. There is evidence in the record that Thomas had been a shareholder in a retail optical shop for only 2 years before his deposition in March 2006. Viewed in the light most favorable to Janet, this would have occurred after the last modification. He testified to his portion of the profits from the optical shop in 2004, which portion was a substantial sum. He also testified that the total distribution to him from that firm in 2005 would have been a larger amount—approximately double the amount from 2004. He testified that these distributions were

in addition to his salary from a separate firm that provided professional eye examinations.

At the very least, this evidence raises an inference that a proper calculation under the child support guidelines would result in a variation of Janet's support obligation by 10 percent or more and $25 or more, which would establish a rebuttable presumption of a material change in circumstances. See Nebraska Child Support Guidelines, paragraph Q.

On this record, we cannot agree that Thomas met his burden to prove that there had been no material change of circumstances on the issue of child support. We conclude that the district court erred in granting summary judgment on this issue.

## CONCLUSION

Viewing the evidence in the light most favorable to Janet, we cannot agree that Thomas met his burden of proving that there had been no material change of circumstances since the decree was last modified in 2002. We conclude that the district court erred in granting summary judgment for Thomas and dismissing Janet's complaint for modification. We reverse the judgment of the district court and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V.
JEFFREY DEAN MYERS, APPELLANT.

726 N.W.2d 198

Filed December 26, 2006. No. A-06-114.

1. **Rules of Evidence: Other Acts: Proof.** Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. ____: ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. Stated

another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.

3. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
4. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
5. **Sexual Assault: Minors: Intent.** Intent is an element of sexual assault of a child.
6. **Sexual Assault: Minors.** Sexual assault of a child under Neb. Rev. Stat. § 28-320.01(1) (Cum. Supp. 2004) is described as subjecting another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older.
7. **Sexual Assault: Words and Phrases.** Sexual contact is defined as the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.
8. **Rules of Evidence.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
9. ____. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
10. **Rules of Evidence: Words and Phrases.** Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), is concerned. In the context of rule 403, such prejudice means a tendency to suggest a decision on an improper basis.
11. **Trial: Witnesses: Testimony.** Testimony that can be construed as stating that the complaining witness' testimony is true is an improper statement concerning the credibility of another witness.
12. **Trial: Witnesses: Testimony: Appeal and Error.** Testimony that goes beyond explaining a complaining witness' behavior and asserts, directly or indirectly, that the witness was in fact abused or is telling the truth goes too far, and its admission constitutes reversible error.

Appeal from the District Court for Webster County: TERRI HARDER, Judge. Affirmed.

Joseph H. Murray, P.C., L.L.O., and Lucas L. Swartzendruber, of Germer, Murray & Johnson, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Jeffrey Dean Myers was convicted in the district court for Webster County of five counts of first degree sexual assault, three counts of sexual assault of a child, seven counts of manufacturing child pornography, and five counts of possession of child pornography. Myers now appeals his convictions, and he asserts on appeal that the district court erred in allowing the State to present certain testimony concerning uncharged prior bad acts and in allowing, over Myers' objection, allegedly expert testimony concerning victims of sexual assault. We find the prior bad acts testimony was properly admitted to demonstrate that Myers' sexual contact with the victims when they were under the age of 14 was both intentional and for purposes of sexual gratification. We also find the alleged expert's testimony that was objected to had proper foundation and was not an improper statement about the credibility of the child victims. As such, we affirm.

## II. BACKGROUND

On September 21, 2005, Myers was charged in an amended information with six counts of first degree sexual assault, three counts of sexual assault of a child, eight counts of manufacturing child pornography, and five counts of possession of child pornography. Prior to trial, the district court severed the five counts of possession of child pornography and ordered a separate trial on those five counts.

Also prior to trial, the State filed a motion seeking an order of the district court allowing the State to adduce evidence of uncharged crimes, wrongs, or acts previously committed by Myers, pursuant to the provisions of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). The State indicated that the proffered evidence would "show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and/or absence of

mistake or accident." Pursuant to rule 404(3), the district court held a pretrial hearing for assessing the admissibility of the proffered evidence. The district court entered an order in which the court held, inter alia, that the State would be allowed to introduce rule 404(2) evidence concerning sexual conduct between Myers and J.K. when J.K. was 16 years of age and concerning sexual conduct between Myers and R.O. when R.O. was between 11 and 16 years of age. With respect to evidence concerning R.O., the court held that the State would be allowed to introduce evidence of sexual activities between Myers and R.O., "on the basis of Modus Operandi, Identity, and Intent," and to introduce evidence of a video Myers allegedly showed to R.O. depicting Myers and a boy R.O. estimated to be 13 or 14 years of age attempting to engage in sexual intercourse, "on the basis of Intent."

The record of the two separate trials noted above in this case consists of more than 1,250 pages of hearings, testimony, and arguments; more than 40 exhibits; and a transcript of more than 350 pages. We have reviewed the entire record, but we find it unnecessary to specifically recount the details of the testimony and exhibits upon which Myers was convicted of sexually penetrating and sexually contacting two children under the age of 14, manufacturing various child pornography concerning three children under the age of 18, and possessing various other child pornography. Instead, we summarize the evidence viewed in a light most favorable to the State as follows:

The victims in this case were R.S., born June 3, 1988; G.K., born July 19, 1988; and J.K., born March 30, 1987. Myers was born June 2, 1968. In the first trial, the State presented evidence concerning Myers' sexual involvement with the children occurring between September 2002 and May 2003, including penetration, contact, and manufacturing of child pornography. In the second trial, the State presented evidence concerning Myers' possession of various images of child pornography in June 2003.

R.S. was friends with Myers' son and spent time at Myers' house "[a]bout every day," including spending the night on "[a] lot" of occasions. On a number of occasions between September 2002 and May 2003, Myers performed oral sex on R.S., received oral sex from R.S., and masturbated R.S. Myers videotaped a number of the encounters and took Polaroid photographs of R.S.

while R.S. was naked. In exchange for the sexual encounters, Myers gave R.S. a Nintendo "Game Boy Advance" video game on one occasion and cash on other occasions. R.S. specifically denied ever engaging in anal sex with Myers.

G.K. was also friends with Myers' son and spent time at Myers' house "[a] few times a week," including spending the night on occasion. On a number of occasions between December 2002 and May 2003, Myers performed oral sex on G.K., engaged in anal sex with G.K., fondled G.K. and "manipulate[d]" G.K.'s penis, and engaged in mutual masturbation with G.K. Myers videotaped "quite a few" of the encounters and took Polaroid photographs of G.K. while G.K. was naked or while sexual activity was going on. In exchange for the sexual encounters, Myers gave G.K. cash.

J.K. was friends with R.S. and met Myers through R.S. and one of Myers' foster children. In spring 2003, R.S. told J.K. he "could make some movies for some money" with Myers, and Myers told J.K. he could "jack off in front of the camera and get fifty bucks or [he could] do stuff with [Myers] or somebody else and get more money." Myers videotaped J.K. masturbating on two occasions and performed oral sex on J.K. and received oral sex from J.K. on one other occasion. In exchange for the sexual encounters, Myers gave J.K. cash.

Myers objected to R.O.'s testimony as improper rule 404(2) evidence. The district court overruled the objection, but instructed the jury that R.O.'s testimony was "being allowed . . . only for the purpose of showing modus operandi, identity, and intent." R.O. was not acquainted with R.S., G.K., or J.K. R.O. met Myers when R.O. was 11 or 12 years of age and Myers was the manager of the apartment complex in which R.O. lived. On one occasion, Myers and R.O. "measured [their] penises." On a number of occasions over the next few years, R.O. performed anal sex on Myers and Myers engaged in oral sex with R.O. On one occasion when R.O. was 12 or 13 years of age, Myers took a photograph of R.O. masturbating. In exchange for the sexual encounters, Myers gave R.O. cash and other gifts, including cigarettes and a gym membership. Additionally, Myers once showed R.O. a video of "a nude young boy trying to sit on [Myers'] penis," and on a number of occasions while R.O. was

12 or 13 years of age, Myers attempted to arrange a sexual encounter between R.O. and Myers' wife.

During trial, the State also adduced testimony from an investigator, Charles Venditte. Venditte testified that he conducted six interviews in the course of investigating the State's case against Myers, including interviews of R.S., G.K., J.K., and R.O. During cross-examination, Myers' attorney established that during various interviews conducted by Venditte and various police officers, the children had not disclosed the same details about their sexual encounters with Myers. Venditte testified that the children all indicated "they did not tell the truth to begin with" because "they were afraid." On redirect examination, the State asked Venditte, without objection, the following question: "And you were aware that [the children] weren't being completely honest with you or hadn't been honest with the first interviewers; is this correct?" Venditte answered, without objection, "That's correct." When the State inquired why Venditte had held that belief, Myers' attorney imposed an objection on the basis of foundation, which objection was overruled. Venditte then provided the following response:

> It's been my experience that when you're dealing with child victims of sex crimes, especially they're going to be very hesitant to tell you what is going on, especially if their parents are with them when they're being interviewed. And the more they're interviewed, the more trust they have in the person doing the interview, realizing that there will be help available for them, whether it be in the form of counseling or whatever type of emotional support, and that's always important for the child victim to be aware of that. But it takes more than just one session to do that. And that's the way it played out in this case.

In the first trial, the jury returned verdicts of guilty on five counts of first degree sexual assault, finding that Myers had engaged in sexual penetration with R.S. on two occasions between September 2002 and May 2003 and with G.K. on three occasions between December 2002 and May 2003, all when R.S. and G.K. were less than 16 years of age and when Myers was 19 years of age or older; three counts of sexual assault of a child, finding that Myers had engaged in sexual contact with R.S. on one

occasion between September 2002 and May 2003 and with G.K. on two occasions between December 2002 and May 2003, all when R.S. and G.K. were 14 years of age or younger and Myers was at least 19 years of age or older; and seven counts of manufacturing child pornography, including one incident involving R.S. between September 2002 and May 2003, three incidents involving G.K. between December 2002 and May 2003, and three incidents involving J.K. in May 2003, all when R.S., G.K., and J.K. were under the age of 18 and Myers was 19 years of age or older. See Neb. Rev. Stat. §§ 28-319(1)(c) (Reissue 1995), 28-320.01 (Cum. Supp. 2004), and 28-1463.03 (Reissue 1995). The jury returned verdicts of not guilty on one count of first degree sexual assault concerning R.S. and one count of manufacturing child pornography concerning R.S.

In the second trial, the jury returned verdicts of guilty on five counts of possession of child pornography. We note that Myers' assertions of error on appeal concern only testimony received during his first trial and raise no issues concerning the second trial. As such, we conclude that Myers has raised no issues on appeal concerning his convictions on these five counts of possession of child pornography.

## III. ASSIGNMENTS OF ERROR

Myers asserts two errors on appeal. First, Myers asserts that the district court erred in allowing R.O.'s testimony. Second, Myers asserts that the district court erred in overruling Myers' objection during Venditte's testimony.

## IV. ANALYSIS

### 1. Convictions Challenged

As noted above, Myers' assertions of error on appeal concern only testimony presented to the jury in the first trial, in which Myers was convicted of first degree sexual assault, sexual assault of a child, and manufacturing child pornography. Myers has raised no issues concerning the second trial, in which Myers was convicted of possession of child pornography. As such, we initially conclude that Myers' convictions and sentences imposed on the possession of child pornography charges are affirmed.

### 2. R.O.'s Rule 404 Testimony

Myers first challenges the district court's allowing the State to present R.O.'s testimony of uncharged prior conduct between Myers and R.O. Myers argues on appeal that the testimony was not admissible for any proper purpose under rule 404 and that the testimony was unduly prejudicial and inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). Contrary to Myers' assertions, we find that the evidence was properly admissible to show intent and that the probative value of the evidence was not outweighed by its potential for unfair prejudice.

[1,2] The basic rule concerning the admissibility of uncharged prior conduct is set forth in rule 404(2) as follows:

> 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.

Rule 404(2) prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. Stated another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis. *Id.* The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence. *Id.*

[3] However, rule 404(2) is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). The purposes set forth in rule 404(2) are illustrative only and are not intended to be exhaustive or mutually exclusive. *Id.*

[4] Evidence that is offered for a proper purpose is often referred to as having "special relevance" or "independent relevance," which means its relevance does not depend on its

tendency to show propensity. *State v. Sanchez, supra.* The Nebraska Supreme Court has explained the analytical framework for reviewing the admissibility of other crimes evidence under rule 404(2) as follows:

> "[Nebraska's] rule 404(2) analysis considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted."

*State v. Sanchez*, 257 Neb. at 306, 597 N.W.2d at 373.

(a) Independent Relevance

Myers first asserts that R.O.'s testimony did not have independent relevance. In accordance with the Nebraska Supreme Court's directive in *State v. Sanchez, supra*, the record in the present case indicates that the district court specifically indicated R.O.'s testimony was being admitted to show Myers' (1) intent, (2) identity, and (3) modus operandi. Myers asserts that R.O.'s testimony did not have independent relevance for any of these purposes, because (1) intent was not an element of the sexual assault charges and R.O.'s testimony did not demonstrate Myers' intent to manufacture child pornography, (2) identity was not an issue in this case, and (3) the alleged sexual incidents between Myers and R.O. were not similar enough to the alleged sexual incidents between Myers and the victims in the present case to demonstrate a distinctive or signature modus operandi. Although the State fails to dispute Myers' assertion that intent was not an element of the sexual assault charges, we find intent is an element of sexual assault of a child and R.O.'s testimony had independent relevance to demonstrate that Myers' contact with the children in this case was intentional and for the purpose of sexual arousal or gratification. We therefore need not consider the admissibility of the testimony to show identity or modus operandi.

[5-7] Myers was charged with three counts of sexual assault of a child under § 28-320.01. Contrary to Myers' assertion on

appeal, intent is an element of sexual assault of a child. "Sexual assault of a child under § 28-320.01(1) is described as 'subject[ing] another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.' " *State v. Putz*, 266 Neb. 37, 51, 662 N.W.2d 606, 616 (2003). Neb. Rev. Stat. § 28-318(5) (Reissue 1995) defines "sexual contact" as follows:

> Sexual contact means the *intentional touching* of the victim's sexual or intimate parts or the *intentional touching* of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is *intentionally caused* by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

(Emphasis supplied.) As such, sexual contact, for purposes of sexual assault of a child under § 28-320.01, includes the defendant's intentional touching of the victim's sexual parts or clothing covering the victim's sexual parts, as well as the defendant's intentionally causing the victim to touch the defendant's sexual parts or clothing covering the defendant's sexual parts.

The Nebraska Supreme Court recently recognized that intent is an element of sexual assault of a child. See *State v. Putz, supra*. In *State v. Putz, supra*, the court considered whether sexual assault of a child is a lesser-included offense of first degree sexual assault. In concluding that it is not, the court noted that unlike " 'sexual contact' " for purposes of sexual assault of a child, " 'sexual penetration' " for purposes of first degree sexual assault "includes no intent element." *Id.* at 51, 662 N.W.2d at 616. This difference in the elements of the two crimes, inter alia, prevents sexual assault of a child from being a lesser-included offense of first degree sexual assault. *State v. Putz, supra*. Compare *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999) (intent was not element or fact of consequence where defendant charged only with first degree sexual assault).

The testimony of the child victims in this case indicated that Myers touched their sexual parts and caused them to touch his sexual parts. R.O.'s testimony—when he was less than 14 years of age and Myers was at least 19 years of age or older, Myers performed oral sex on R.O. and caused R.O. to perform oral sex on Myers—had independent relevance to establish that Myers' conduct with the child victims in this case was intentional and was for the purpose of sexual arousal or gratification. As such, the testimony was relevant for some purpose other than to prove Myers' character in order to show that he acted in conformity therewith.

(b) Rule 403

Myers next asserts that R.O.'s testimony was unfairly prejudicial and that the prejudice outweighed the testimony's probative value.

[8-10] Rule 404(2) is subject to the overriding protection of rule 403. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403; *State v. Yager, supra*. Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which rule 403 is concerned. In the context of rule 403, such prejudice means a tendency to suggest a decision on an improper basis. *State v. Yager, supra*.

In *State v. Yager, supra*, the Supreme Court assessed whether evidence of the defendant's prior uncharged sexual contact with young males was rendered inadmissible under rule 403. The questioned evidence indicated that the defendant had sexually assaulted two young boys a number of years prior to the charged incidents, in which the defendant was alleged to have sexually assaulted an 8-year-old boy. The Supreme Court held that in view of the sexual nature of the crime charged, evidence of the defendant's other sexual contacts with young males was highly probative on the issue of the defendant's sexual arousal or gratification, as well as his intent. Further, the Supreme Court held

that although the evidence was prejudicial, the prejudice was not such as to suggest a decision on an improper basis.

Similarly, in the present case, Myers was charged with sexually assaulting two young males, R.S. and G.K. R.O.'s testimony was highly probative on the issues of Myers' intent and sexual arousal or gratification related to the sexual contact with R.S. and G.K. Although the evidence was necessarily prejudicial, the prejudice was not such as to suggest a decision on an improper basis. Further, even though the incidents involving R.O. occurred a number of years prior to the charged incidents involving R.S. and G.K., such remoteness goes to the weight to be given the evidence and does not render it irrelevant or inadmissible. See *State v. Yager, supra*. As such, the evidence was not inadmissible under rule 403.

(c) Limiting Instruction

Myers does not take issue with the limiting instructions given by the district court. The record reveals that the district court gave a proper limiting instruction, both orally when R.O.'s testimony was elicited and in writing as part of the written jury instructions, specifically instructing the jury that the evidence was not being received, and could not be considered, to demonstrate Myers' character to show that he acted in conformity therewith. As such, the final part of the analytical framework was satisfied in this case.

(d) Conclusion on Rule 404(2)

We conclude that R.O.'s testimony had independent relevance to show that Myers' sexual conduct with the child victims in this case was both intentional and for the purpose of sexual arousal or gratification, necessary elements of the three counts of sexual assault of a child with which Myers was charged. Further, the probative value of the testimony was not outweighed by a danger of unfair prejudice, and the district court gave proper and sufficient limiting instructions concerning the testimony. As such, we find no merit to Myers' assignment of error concerning R.O.'s testimony.

3. VENDITTE'S TESTIMONY

Myers next challenges the district court's overruling of Myers' objection during testimony of Venditte on behalf of the State.

Myers argues that Venditte presented expert testimony that improperly commented on the credibility of the child victims in this case. We find that the only objection made by Myers was a foundation objection to one specific question asked of Venditte and that such foundation objection was properly overruled.

Venditte testified that he was a former police officer with experience investigating domestic assault cases. At the time of trial, he was an investigator for the Nebraska Attorney General's office, and he investigated the present case and interviewed, inter alia, the child victims. During Myers' cross-examination of Venditte, he acknowledged that he was aware of various discrepancies between the victims' accounts provided to him and their accounts provided to other interviewers prior to Venditte's interviews.

On redirect examination, the State asked Venditte, without objection, the following question: "And you were aware that [the children] weren't being completely honest with you or hadn't been honest with the first interviewers; is this correct?" Venditte answered, without objection, "That's correct." When the State inquired why Venditte had held that belief, Myers' attorney imposed an objection on the basis of foundation, which objection was overruled. Venditte then provided the following response:

> It's been my experience that when you're dealing with child victims of sex crimes, especially they're going to be very hesitant to tell you what is going on, especially if their parents are with them when they're being interviewed. And the more they're interviewed, the more trust they have in the person doing the interview, realizing that there will be help available for them, whether it be in the form of counseling or whatever type of emotional support, and that's always important for the child victim to be aware of that. But it takes more than just one session to do that. And that's the way it played out in this case.

Myers asserts that his objection should have been sustained and that Venditte's testimony should have been disallowed, because it constituted an improper opinion about the credibility of the witnesses. Myers points us to the Nebraska Supreme Court's opinion in *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989), and this court's opinion in *State v. Doan*, 1 Neb. App.

484, 498 N.W.2d 804 (1993), in support. We do not find either case to indicate that the specific testimony provided by Venditte was inadmissible.

[11] In *State v. Beermann, supra*, the State's expert witness, a police officer, was asked whether, in his opinion, the complaining victim had been sexually abused. The witness answered by indicating that he did believe the complaining witness had been sexually abused. The Supreme Court first held that the officer's testimony was significantly different at trial than at the preliminary hearing, prejudicing the defendant's ability to prepare a meaningful defense. Additionally, the court held that the officer's testimony could be construed as stating that the complaining witness' testimony was true and that the officer's testimony was therefore an improper statement concerning the credibility of another witness.

[12] In *State v. Doan, supra*, the State's expert witness, a counselor with a bachelor's degree in psychology, provided testimony which this court considered as Child Sexual Abuse Accommodation Syndrome (CSAAS) or rehabilitative testimony, e.g., testimony concerning whether it is unusual for a child to not be upset when first reporting abuse or unusual for a child to not immediately report it. In addition to testifying about the fact that complaining witnesses who are children often act counterintuitively when reporting abuse either by delaying reporting or by not appearing visibly upset when reporting, the counselor specifically testified that she had received " 'validation' " of the complaining witness' account of sexual abuse. 1 Neb. App. at 488, 498 N.W.2d at 807. This court recognized other jurisdictions' holdings that CSAAS testimony is admissible but that when the testimony goes beyond explaining the child's behavior and asserts, directly or indirectly, that the child was in fact abused or is telling the truth, the evidence goes too far and its admission constitutes reversible error. This court thus held that the counselor's testimony about receiving "validation" of the complaining witness' account of sexual assault was inadmissible.

In the present case, Myers did not object when Venditte was asked if he was "aware" that the child victims had not been entirely truthful during earlier interviews. The only objection came to the question about why he believed that. The testimony which

was provided over Myers' foundation objection was only that, in Venditte's experience, child victims of sexual assault are hesitant to provide details until they have developed some level of trust with the interviewer, which usually takes more than one interview. We conclude that Venditte's testimony was limited specifically to his own experience, was consistent with his testimony that he had experience interviewing child victims of abuse, and was permissible testimony about how child victims of sexual assault act when being interviewed about the details of their abuse. Venditte's testimony was not a statement that he believed the child victims had, in fact, been sexually abused by Myers and was not a statement that he believed the child victims or that he received any kind of "validation" of the child victims' allegations of sexual assault. Compare, *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993). As such, we find no merit to Myers' assignment of error concerning Venditte's testimony.

## V. CONCLUSION

We find no merit to Myer's assignments of error. R.O.'s testimony about uncharged prior sexual abuse by Myers was admissible to demonstrate that Myers' contact with the child victims in this case was both intentional and for the purpose of sexual arousal or gratification, was not unfairly prejudicial, and was the subject of proper limiting instructions. Venditte's testimony that was objected to had proper foundation and was not an improper statement about the credibility of the child victims. Accordingly, we affirm Myers' convictions and sentences on five counts of first degree sexual assault, three counts of sexual assault of a child, and seven counts of manufacturing child pornography. In addition, Myers has not challenged his convictions and sentences on the five counts of possession of child pornography, which we also affirm.

AFFIRMED.

# IN RE INTEREST OF HAILEY M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. TAMMY C., APPELLEE AND CROSS-APPELLANT, AND THEODORE M., INTERVENOR-APPELLANT AND CROSS-APPELLEE.

726 N.W.2d 576

Filed January 16, 2007. No. A-06-692.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Final Orders: Time: Appeal and Error.** Although dispositional orders of a juvenile court are final, appealable orders, if an order is not new, but merely a continuation of a previous order, it does not extend the time for appeal.
4. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage of a dependency proceeding, for a juvenile court to assume jurisdiction of minor children, the State must prove the allegations of the petition by a preponderance of the evidence.
5. **Parental Rights.** Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.
6. **Criminal Law: Parental Rights.** Termination of parental rights is justified if a parent has committed murder of another child of the parent; committed voluntary manslaughter of another child of the parent; aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent; or committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.
7. **Parental Rights: Evidence: Proof.** The standard for termination of parental rights is clear and convincing evidence.
8. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
9. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
10. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.

11. **Juvenile Courts: Jurisdiction: Words and Phrases.** The juvenile court is a "court of competent jurisdiction" to make a determination regarding whether the exceptions under Neb. Rev. Stat. § 43-283.01(4)(b) (Reissue 2004) apply to excuse reasonable efforts to reunify.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed.

Steve Williams, of Recknor, Williams & Wertz, for intervenor-appellant.

Gary Lacey, Lancaster County Attorney, Michelle A. Paxton, Lori A. Maret, and Henry L. Wiedrich, Senior Certified Law Student, for appellee State of Nebraska.

Jason L. Scott and Mark Buckwalter, Senior Certified Law Student, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellee Tammy C.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

## INTRODUCTION

Theodore M. appeals from an order of the juvenile court of Lancaster County overruling his motion for visitation with his daughter Hailey M. and his request to place Hailey with relatives. Tammy C., Hailey's mother, cross-appeals from an order adjudicating Hailey to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) and terminating Tammy's parental rights to Hailey. The court also found that the State is not required to use reasonable efforts to reunify Hailey with Tammy. For the reasons set forth below, we affirm.

## BACKGROUND

The record shows that Hailey was born to Theodore and Tammy on October 29, 2005, in Lincoln, Nebraska. The State removed Hailey from Tammy's care on October 30.

On November 17, 2005, the State filed a second amended petition stating that Hailey is a child as defined by § 43-247(3)(a) in that Hailey lacks proper parental care by reason of the faults or habits of Tammy. Specifically, the petition alleged that on November 28 or 29, 1996, Tammy committed felony child abuse

resulting in serious bodily injury to another one of her children, Christopher C., born August 7, 1995. The State alleged that these circumstances place Hailey at risk of harm. The State requested an order eliminating the requirement for reasonable efforts to "preserve and reunify [Hailey] with [Tammy]," alleging that Tammy committed the first or second degree murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; committed a felony assault of Christopher which resulted in serious bodily injury to Christopher; or aided or abetted such a felony assault of Christopher.

The State also sought termination of Tammy's parental rights under Neb. Rev. Stat. § 43-292(2) and (10) (Reissue 2004). Specifically, the State alleged that Tammy had substantially and continuously or repeatedly neglected and refused to give one of Hailey's siblings necessary care and protection and that, presumably on November 28 or 29, 1996, and against Christopher, Tammy committed the murder or voluntary manslaughter of another of her children; aided or abetted, attempted, conspired, or solicited to commit the murder of such child; aided or abetted the voluntary manslaughter of such child; or committed a felony assault of such child which resulted in serious bodily injury. The State also alleged that termination of Tammy's parental rights is in Hailey's best interests.

On November 23, 2005, Theodore filed a motion for leave to intervene, stating that he is Hailey's biological father. The trial court granted Theodore's motion. Theodore also filed a motion seeking visitation with Hailey which the court set for hearing. After the hearing, the court overruled that motion, finding that because Theodore is incarcerated, visitation between Hailey and Theodore is not in Hailey's best interests.

On April 17, 2006, Theodore filed another motion requesting visitation with Hailey and further requesting that the court place Hailey with one of three people. A hearing on Theodore's motion was held on May 23. At that hearing, Erin Bader, a protection and safety worker with the Nebraska Department of Health and Human Services (Department), testified that she opposed visitation between Theodore and Hailey due to Theodore's continued

incarceration and the fact that Theodore's expected release date is not until 2013.

Bader also testified that Theodore had provided her with the names of several people with whom Hailey could be placed. Bader testified that the Department ruled out two of the people Theodore listed but was pursuing placement of Hailey with Theodore's sister. Bader testified that the Department's policy is to place a child with relatives as long as a relative completes a satisfactory background check and a home study. Bader testified that as long as Theodore's sister met these requirements and Bader's supervisor approved, Hailey would be placed with Theodore's sister. Bader testified that she had completed her paperwork, but was waiting on the results of the sister's home study. Bader testified that it "takes quite a bit of time" to get such results. The court then overruled Theodore's motion for a change in Hailey's placement as well as Theodore's request for visitation.

Hearings on Hailey's adjudication, the termination of Tammy's parental rights, and the State's motion to eliminate the requirement of reasonable efforts to reunify were held on April 6, 7, and 13, 2006. At the April 6 hearing, Tammy testified that she was currently residing at "the Lancaster County Correctional Facility" and had been there since March 28 because of her conviction for possession of a controlled substance and her 90-day sentence. Tammy testified that that offense occurred in July 2005.

Tammy testified that besides Hailey and Christopher, she has three other children, Ashley, born November 26, 1990; Kyle, born April 29, 1992; and Luke, born May 11, 1994. Tammy testified that the State removed Ashley from her care when Ashley was 3 or 4 months old because Ashley's father was allegedly abusing Ashley. Tammy testified that Ashley's father was abusive toward Tammy and that to protect Ashley, she allowed her parents to obtain guardianship of Ashley. Tammy testified that as of the time of trial, Ashley had never been returned to her care but she still visited Ashley.

Tammy testified that Ashley and Kyle have the same father and that Kyle and Ashley's paternal grandmother "kidnapped" Kyle when he was approximately a year old. Tammy testified

that a hearing was subsequently held regarding Kyle's custody and that the judge decided Kyle and Ashley's grandmother could take better care of Kyle than Tammy could. Tammy testified that although she used to have visitation with Kyle, she had not seen Kyle in a few years.

Tammy testified that she placed Luke for adoption because she was young, single, and financially unable to support him. Tammy testified that Christopher was never removed from her care, but died in her care when he was 15 months old.

Tammy testified that she and Christopher lived in an apartment together. Tammy testified that in September 1996, she began dating Harold T., and that they started spending the night at each other's home in October. Tammy testified that around November 15, Christopher lost a tooth. Tammy testified that she learned of this fact when Harold told her that Christopher's sheets needed to be changed because there was blood on Christopher's sheets. Tammy testified that Harold claimed not to know how Christopher had lost his tooth. Tammy testified that because children typically do not lose a tooth at 15 months of age, she made a doctor's appointment for Christopher.

Tammy testified that after Christopher's doctor's visit on November 20, 1996, he was admitted to a hospital for as much as 4 days because he had developed an infection in his mouth. Tammy testified that soon afterward, Child Protective Services contacted her and informed her that it was attempting to put Christopher in protective custody because its personnel thought that he was being abused. Tammy testified that Christopher was allowed to leave the hospital with her and that she and Christopher stayed at different residences, including Harold's, in order to hide, "[i]n a sense," from Child Protective Services. Tammy testified that she did not believe that Christopher was "in a bad situation." Tammy testified that Christopher's mouth continued to heal after he got out of the hospital.

Tammy testified that on November 28, 1996, which was Thanksgiving, she was staying at Harold's with Christopher. Tammy testified that that morning, she left Christopher with Harold and went to pick up Kyle for visitation in Iowa. Tammy testified that she returned to Harold's a couple of hours later and was told Christopher's face had been burned. Harold told

her initially that Christopher had "looked into the heater" and later that Christopher had fallen into it. Tammy testified that she believed Harold when he told her Christopher's burns were an accident and that she had no suspicions otherwise. Tammy testified that Harold had physically assaulted Christopher only once before.

Tammy testified that she thought about taking Christopher to the doctor for his burns, but that she decided not to because she knew that if she did, the Department would have grounds to remove Christopher from her care.

Tammy testified that after she observed Christopher's burns, she went to her parents' house for Thanksgiving and stayed there several hours. Tammy stated that she left her parents' home in the early evening and returned Kyle to Iowa, but that before doing so, she dropped Christopher off at Harold's. Tammy testified that she returned about an hour later. Tammy testified that later that same evening, Harold went into Christopher's room to change his diaper and she heard a "really soft thump" and Christopher started to cry. Tammy testified that she heard Harold say, " 'Oh, sorry, sorry' " and that Harold later told her that he had "bumped [Christopher] or somethin[g]."

Tammy testified that the next morning, she went to wake Christopher up and found that he was not breathing. Tammy stated that since Harold did not have a telephone, she had Harold take her to a pay telephone, where she called her mother. The record shows that Harold dropped Tammy and Christopher off at Tammy's home, her mother came over, and Tammy and her mother then took Christopher to a hospital, where he was pronounced dead.

Tammy testified that at the time of trial, she had her own apartment and a full-time job that she had held since December 2005. Tammy testified that she is willing to do whatever it takes to get Hailey back and that she has had no contact with Harold since Christopher's death.

The autopsy photographs of Christopher's face were entered into evidence by the State and showed multiple severe burn marks on Christopher's forehead, cheeks, and nose as well as extreme redness and swelling around Christopher's mouth and chin. These photographs also show burns on Christopher's arms

and hands. The autopsy states that Christopher's burn marks were consistent with someone's forcefully holding Christopher's face against a heating vent. Besides these burns, the autopsy showed that Christopher sustained numerous other injuries including contusions to his head, face, neck, and abdomen, in addition to four hemorrhages in his scalp area. The autopsy shows that Christopher died as a result of brain swelling caused by blunt force trauma to his head.

The record shows that in December 1996, the State charged Tammy with one count of manslaughter and two counts of child abuse. Tammy later entered into a plea agreement in which she would plead guilty to one count of child abuse, a Class III felony. The charge to which Tammy pled stated that on November 28, 1996, between midnight and 1 p.m. in Otoe County, Nebraska, Tammy "did then and there knowingly or intentionally cause or permit a minor child, Christopher . . . to be: (a) placed in a situation that endangered his life or health; or (b) cruelly confined or cruelly punished; or (c) deprived of necessary care; and [this] resulted in serious bodily injury to Christopher . . . ."

In February 1998, the trial court sentenced Tammy to 5 to 12 years in prison. Harold was also charged in relation to Christopher's death and served time for abusing Christopher. The record shows that Tammy received parole in November 2002 and that her parole ended in March 2003.

Two protection and safety workers with the Department, Darci Poland and Valerie Hinrichs, testified in favor of terminating Tammy's parental rights to Hailey. Poland testified that she had contact with Tammy and Christopher in 1996 after the Department received an anonymous call on November 14 expressing concern over Christopher's health. Poland testified that she visited Tammy at home on November 18 and that Christopher was with Tammy. Poland testified that the left side of Christopher's mouth was red, swollen, and infected; his left eye was matted, red, and bruised; and he had a sore behind his left ear.

Poland testified that Tammy told her that she had a doctor's appointment for Christopher scheduled for later that day. Poland testified that after Christopher's appointment, she called the doctor's office and learned that Christopher had been hospitalized

and would remain in the hospital for the next few days. Poland testified that after Christopher was discharged on November 21, 1996, she attempted to visit Tammy at home on November 24. Tammy was not there, so she went back on November 25 and found Tammy and Christopher at home. Poland testified that Christopher appeared to be significantly better.

Poland testified that she set up an appointment for an intensive family preservation team to visit Tammy on November 27, 1996, and that Tammy kept that appointment. Poland testified that she and the team visited Tammy on November 27 and that Christopher appeared to be doing well. Poland testified that Christopher also had a followup appointment at the doctor's office on that same date and that the doctor did not relay any concerns regarding Christopher's health.

Poland testified that Tammy never mentioned Harold's name to her, even though she asked Tammy if she had a boyfriend or if someone else provided care for Christopher. Poland testified that she had formed an opinion as to whether it is in Hailey's best interests to terminate Tammy's parental rights because of the case involving Christopher, but she was prevented by objection from stating that opinion.

Hinrichs testified that she was assigned to do the investigation or initial assessment on Hailey. Hinrichs testified that Tammy had not had a consistent place to live for an extended period of time in addition to the fact that Tammy was incarcerated for several years. Hinrichs testified that adoption is in Hailey's best interests because there are no services the Department can offer Tammy to provide for Hailey's safety and well-being, based upon Tammy's prior contacts with the Department and Tammy's criminal case involving Christopher. Hinrichs testified that she has not seen any evidence demonstrating a change in Tammy's lifestyle allowing Tammy to provide for Hailey's safety and well-being. Hinrichs stated that Hailey's current foster parents expressed a desire "to provide for her long term."

In an order filed May 26, 2006, the trial court found that Hailey is a child as defined by § 43-247(3)(a) because Tammy's conduct as it related to Christopher was of such a nature as to place Hailey at risk of harm. The trial court stated that Tammy

either was aware that Harold was inflicting injury upon Christopher or should have been aware that this was occurring.

Acknowledging the State's assertion that reasonable efforts to reunify Hailey with Tammy would be contrary to Hailey's best interests and would be contrary to the paramount concern of Hailey's health and safety, the court found by clear and convincing evidence that the requirement for reasonable efforts to "preserve and reunify [Hailey] with [Tammy]" should be eliminated because Tammy committed the first or second degree murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; committed a felony assault of Christopher which resulted in serious bodily injury to Christopher; or aided or abetted such a felony assault of Christopher.

The court further found by clear and convincing evidence that Tammy's parental rights should be terminated under § 43-292(2) and (10) because Tammy has substantially and continuously or repeatedly neglected and refused to give a sibling of Hailey's, Christopher, necessary parental care and protection and because Tammy had committed the murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; or committed a felony assault that resulted in serious bodily injury to Hailey or Christopher. The court also found that termination of Tammy's parental rights is in Hailey's best interests. Theodore appeals, and Tammy cross-appeals.

## ASSIGNMENTS OF ERROR

In his appeal, Theodore contends that the trial court erred in (1) overruling his motion for visitation with Hailey and (2) failing to order the Department to consider "any and all relative placements for Hailey." In her cross-appeal, Tammy argues that the trial court erred in finding that (1) Hailey is a child as defined in § 43-247(3)(a), (2) termination of Tammy's parental rights is warranted under § 43-292(2) and (10), (3) termination of her parental rights is in Hailey's best interests, and (4) the State is not required to use reasonable efforts to reunify her with Hailey.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

## ANALYSIS

*Theodore's Motion for Visitation.*

Theodore argues that the trial court erred in overruling his motion for visitation with Hailey. In November 2005, Theodore filed a motion seeking visitation with Hailey which the court set for hearing. After the hearing, the court overruled the motion, finding that Hailey's visitation with Theodore, who was currently incarcerated, was not in Hailey's best interests.

On April 17, 2006, Theodore filed another motion requesting visitation with Hailey. The record shows that Theodore remained incarcerated at that time. At a hearing, the State presented testimony opposing visitation for Theodore due to his continued incarceration and the fact that Theodore's expected release date is not until 2013. The trial court then overruled this motion for visitation on May 26.

[2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006).

In the instant case, we have noted that May 26, 2006, is not the first time the court overruled a motion by Theodore for visitation with Hailey. The court denied Theodore's first motion for visitation in January, and that order clearly affected one of Theodore's substantial rights. Theodore did not file an appeal from that order, but subsequently filed the second motion for visitation, which the trial court also overruled. It is from this second order that Theodore appeals.

[3] Therefore, this appeal is simply an attempt to appeal after the time for an appeal has expired. See, e.g., *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *Federal*

*Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996). Although dispositional orders of a juvenile court are final, appealable orders, if an order is not new, but merely a continuation of a previous order, it does not extend the time for appeal. *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997); *In re Interest of Zachary L., supra.*

Given that the court's second order denying Theodore visitation is merely a continuation of the original order, we conclude that this order did not affect one of Theodore's substantial rights, and therefore, we lack jurisdiction to consider Theodore's claim that the trial court erred in denying him visitation with Hailey. This assignment of error is without merit.

*Theodore's Motion Regarding Hailey's Placement.*

Theodore also argues that the trial court erred in failing to order the Department to consider any and all relative placements for Hailey. Hearing on Theodore's motion requesting that the court place Hailey with one of three people was held on May 23, 2006.

Bader, a protection and safety worker with the Department, testified that Theodore had provided her with the names of several people with whom Hailey could be placed. Bader testified that the Department ruled out two of the people Theodore listed but was pursuing placement of Hailey with Theodore's sister. Bader testified that the Department's policy is to place a child with relatives as long as a relative completes a satisfactory background check and a home study. Bader testified that as long as Theodore's sister meets these requirements and her supervisor approves, Hailey will be placed with Theodore's sister. Bader testified that she had completed her paperwork, but was waiting on the results of Theodore's sister's home study. Bader testified that it "takes quite a bit of time" to get such results. The court then overruled Theodore's motion.

After reviewing the record, we conclude that given the evidence that the Department was in the process of considering Theodore's sister as a placement for Hailey, the trial court did not err in failing to order the Department to consider "any and all relative placements for Hailey."

*Tammy's Cross-Appeal From Hailey's Adjudication.*

In her cross-appeal, Tammy argues that the trial court erred in finding that Hailey is a child as defined in § 43-247(3)(a). In its petition, the State alleged that Hailey is a child as defined by § 43-247(3)(a) in that Hailey lacks proper parental care by reason of the faults or habits of Tammy. Specifically, the petition alleged that on November 28 or 29, 1996, Tammy committed felony child abuse resulting in serious bodily injury to Christopher. The State alleged that these circumstances place Hailey at risk of harm.

[4] At the adjudication stage of a dependency proceeding, for a juvenile court to assume jurisdiction of minor children, the State must prove the allegations of the petition by a preponderance of the evidence. See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

The record shows that in December 1996, the State charged Tammy with one count of manslaughter and two counts of child abuse regarding Christopher. Tammy later entered into a plea agreement in which she would plead guilty to one count of child abuse, a Class III felony. The charge to which Tammy pled stated that on November 28, 1996, between midnight and 1 p.m. in Otoe County, Tammy "did then and there knowingly or intentionally cause or permit a minor child, Christopher . . . to be: (a) placed in a situation that endangered his life or health; or (b) cruelly confined or cruelly punished; or (c) deprived of necessary care; and [this] resulted in serious bodily injury to Christopher . . . ." In February 1998, the trial court sentenced Tammy to 5 to 12 years in prison for abusing Christopher.

Tammy argues that the court erred in finding that Hailey is a child as defined by § 43-247(3)(a) because Tammy's actions in 1996 toward Christopher do not place Hailey at risk of harm. We disagree. While Tammy's conduct in relation to Christopher occurred 9 years prior to Hailey's birth, the record shows that Tammy's conviction was for an extremely grave charge, that of felony child abuse resulting in serious injury to Christopher.

Therefore, although a number of years have passed since Tammy's conviction, the fact that the standard to adjudicate is preponderance of the evidence leads us to the conclusion that the trial court did not err in finding that Hailey is a child as

defined by § 43-247(3)(a). The trial court was correct in finding that Tammy's conduct as it related to Christopher was of such a nature as to place Hailey at risk of harm.

*Termination of Tammy's Parental Rights.*

Tammy also argues that the trial court erred in terminating her parental rights to Hailey and in finding that such termination is in Hailey's best interests. The State sought termination of Tammy's parental rights under § 43-292(2) and (10).

[5-7] Section 43-292(2) states that parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection, while § 43-292(10) allows termination if a parent has (a) committed murder of another child of the parent; (b) committed voluntary manslaughter of another child of the parent; (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent; or (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent. The standard for termination of parental rights is clear and convincing evidence. See *In re Interest of Chloe L. & Ethan L.*, 14 Neb. App. 663, 712 N.W.2d 289 (2006).

[8] As to the termination of Tammy's parental rights under § 43-292(10), aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[9,10] Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory. *Id.* One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *Id.*

The record in the instant case contains evidence to show that Tammy committed the offense of aiding or abetting or conspiring with Harold to kill Christopher. The record shows that Tammy committed the offense of aiding or abetting because she assisted or encouraged the murder or voluntary manslaughter of Christopher by placing Christopher in a situation that endangered his life. Tammy did so by leaving Christopher alone with Harold when she knew or should have known that Harold was abusing Christopher.

The record shows that there are two occasions prior to Christopher's death suggesting Harold's abuse of Christopher. First of all, in late October or early November 1996, Tammy was getting ready to leave Harold's residence and Christopher was crying. Tammy testified that as she was "getting [Christopher's] diaper bag put together," Christopher's cry changed, and that when she turned to see what was wrong, she saw Christopher reaching for his face. Tammy testified that she then asked Harold, who was nearby, what had happened and that Harold stated, " 'Oh, well, I didn't realize he was that close to me and I accidentally hit his face.' "

Furthermore, Tammy testified that on approximately November 15, 1996, Harold came to Tammy and told her that he needed to change Christopher's sheets because one of Christopher's teeth fell out and Christopher's sheets were bloody. Harold did not tell Tammy how Christopher lost his tooth, claiming not to know. Tammy's mother testified that the loss of the tooth, or injury to Christopher's mouth, occurred earlier, on either November 11 or November 12. Tammy testified that after this occurred, she made a doctor's appointment for Christopher because 15-month-old children generally do not lose their teeth.

The record shows that prior to Christopher's doctor's visit, Christopher grew very weak, his mouth became infected as a result of bacteria invading the lacerations in his mouth, and he became anemic. Additionally, Poland, one of the Department's protection and safety workers, testified that she visited Tammy at home in the early afternoon of November 18, 1996, and that Tammy was taking Christopher to the doctor later that day. Poland testified that the left side of Christopher's mouth was

red, swollen, and infected; his left eye was matted, red, and bruised; and he had a sore behind his left ear.

After seeing the doctor, Christopher was hospitalized for 4 days until his infection cleared up. During Christopher's hospitalization or shortly thereafter, the Department contacted Tammy's father and told him that its personnel were certain that Christopher was being abused and that they were attempting to remove Christopher from Tammy's care as a result. Tammy testified that she was aware of the Department's concerns, but did not believe that Christopher was in a bad situation. Poland testified that she spoke with her supervisor and the county attorney about filing a petition to adjudicate Tammy regarding Christopher under § 43-247(3)(a). Although Poland recommended that such a petition be filed, the county attorney determined not to and that Christopher would remain in Tammy's care and services would be provided to Tammy to assist her in caring for Christopher. It was later determined that the injury to Christopher's mouth was the result of blunt force trauma.

The record shows that after Christopher was released from the hospital, Christopher went back to live with Tammy, and that Tammy continued to date Harold and spend the night at Harold's residence. In fact, the evidence shows that if anything, Tammy may have increased the amount of time she spent at Harold's residence in order to, "[i]n a sense," hide from the Department so that its personnel could not remove Christopher from her care.

Tammy testified that on November 28, 1996, which was Thanksgiving, she was staying at Harold's with Christopher. Tammy testified that that morning, she left Christopher with Harold and went to pick up one of her other children, Kyle, for visitation. Tammy testified that she returned to Harold's residence a couple of hours later and was told Christopher's face had been burned. Harold told her initially that Christopher had "looked into the heater" and later that Christopher had fallen into the heater. Tammy testified that she thought about taking Christopher to the doctor for his burns, but that she decided not to because she knew that if she did, the Department would have grounds to remove Christopher from her care.

Tammy testified that after she observed Christopher's burns, she went to her parents' house for Thanksgiving with Christopher

and stayed there several hours. Tammy stated that she left her parents' home in the early evening and returned Kyle to Iowa, but that before doing so, she dropped Christopher off at Harold's once again. Tammy testified that she returned about an hour later. Tammy testified that later that same evening, Harold went into Christopher's room to change his diaper and she heard a "really soft thump" and Christopher started to cry. Tammy testified that she heard Harold say, " 'Oh, sorry, sorry' " and that Harold later told her that he had "bumped [Christopher] or somethin[g]."

Tammy testified that the next morning, she went to wake up Christopher and found that he was not breathing. After Tammy took Christopher to the hospital, he was pronounced dead. The autopsy photographs of Christopher's face entered into evidence by the State show multiple severe burn marks on Christopher's forehead, cheeks, and nose as well as extreme redness and swelling around Christopher's mouth and chin. These photographs also show burns on Christopher's arms and hands. The autopsy states that Christopher's burn marks were consistent with someone's forcefully holding Christopher's face against a heating vent. Besides these burns, the autopsy showed that Christopher sustained numerous other injuries including contusions to his head, face, neck, and abdomen, in addition to four hemorrhages in his scalp area. The autopsy shows that Christopher died as a result of brain swelling caused by blunt force trauma to his head. It is impossible to conclude, given the extent of Christopher's injuries, that Christopher sustained all of these injuries on November 28, 1996, and that Tammy was unaware that Harold was inflicting these injuries.

Furthermore, we note that the felony child abuse charge which Tammy pled to stated that Tammy was guilty of child abuse given that on November 28, 1996, Tammy knowingly or intentionally caused or permitted Christopher to be either placed in a situation that endangered his life or health, cruelly confined or cruelly punished, or deprived of necessary care and that Tammy's actions resulted in serious bodily injury to Christopher.

We note that in 1998, Tammy was found guilty of felony child abuse because Tammy knowingly or intentionally caused or permitted Christopher to be placed in a situation that endangered his life. This record shows that Tammy knew or should have

known that Harold was abusing Christopher and that despite this knowledge, Tammy left Christopher with Harold. As a result, Christopher suffered severe injuries which resulted in his death. Given these facts, we find that the trial court did not err in terminating Tammy's parental rights under § 43-292(10), because Tammy aided or abetted Christopher's murder or voluntary manslaughter by her actions.

*Best Interests of Hailey.*

Tammy argues that the trial court also erred in finding that the termination of her parental rights is in Hailey's best interests. Hinrichs testified that adoption is in Hailey's best interests because there are no services the Department can offer Tammy to provide for Hailey's safety and well-being, based upon Tammy's prior contacts with the Department and Tammy's criminal case involving Christopher. Hinrichs testified that she has not seen any evidence demonstrating a change in Tammy's lifestyle allowing Tammy to provide for Hailey's safety and well-being. The record shows that Hailey's foster parents expressed a desire "to provide for her long term."

We note that Hailey is Tammy's fifth child and that Tammy's track record with her children is not favorable. As to Tammy's first two children, the record shows that relatives have physical custody of both Ashley and Kyle. Tammy testified that the State removed Ashley from her care when Ashley was 3 or 4 months old because Ashley's father was allegedly abusing Ashley. Tammy testified that Ashley's father was abusive toward Tammy and that to protect Ashley, she allowed her parents to obtain guardianship of Ashley. Tammy testified that Kyle was also removed from her home and that at a subsequent hearing, the judge decided that Kyle and Ashley's grandmother could take better care of Kyle than Tammy could. The record shows that Tammy has visitation with Ashley, but had not seen Kyle in a few years. Tammy testified that she placed Luke for adoption because she was young, single, and financially unable to support him.

After being convicted of felony child abuse of Christopher in 1998, Tammy remained incarcerated until she received parole in 2002. Tammy was on probation until March 2003 and met Theodore at a work release center in 2003. Tammy became pregnant with Hailey in early 2005, and in July or August 2005,

Tammy, while pregnant with Hailey, was charged with possession of a controlled substance. Tammy was convicted of that offense and spent 90 days in jail in 2006.

Reviewing the record as a whole, including both Tammy's past behavior and her more recent behavior, we conclude that the trial court did not err in finding that the termination of Tammy's parental right is in Hailey's best interests.

*Elimination of Requirement of Reasonable Efforts to Reunify.*

Tammy also argues that the trial court erred in finding that the State was not required to use reasonable efforts to reunify Tammy with Hailey. The question arises by virtue of the language of Neb. Rev. Stat. § 43-283.01(4) (Reissue 2004), which states in relevant part:

> Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

[11] It is clear from looking at the language of § 43-283.01(4)(b)(iii) that this language mirrors that contained in § 43-292(10)(c). The juvenile court is a "court of competent jurisdiction" to make a determination regarding whether the exceptions under § 43-283.01(4)(b) apply to excuse reasonable efforts to reunify. See, *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004); *In re Interest of Janet J.*, 12 Neb. App. 42, 666 N.W.2d 741 (2003), *disapproved on other*

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

We have already found that the record supports a finding that Tammy aided or abetted, or attempted, conspired, or solicited to commit, the murder or voluntary manslaughter of Christopher. Therefore, the trial court did not err in finding that the State was not required to use reasonable efforts to reunify Tammy with Hailey.

## CONCLUSION

After reviewing the record, we conclude that we lack jurisdiction to determine whether the trial court erred in overruling Theodore's motion for visitation with Hailey. The trial court did not err in failing to order the Department to consider "any and all relative placements" for Hailey. Similarly, as to Tammy's cross-appeal, the trial court did not err in finding that Hailey is a child as defined in § 43-247(3)(a) or in finding that termination of Tammy's parental rights to Hailey is warranted under § 43-292(10). Additionally, the trial court did not err in finding that the State is not required to use reasonable efforts to reunify Tammy with Hailey. Therefore, we affirm the trial court's order in its entirety.

AFFIRMED.

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# MBH, INC., APPELLEE, V. JOHN OTTE OIL & PROPANE, INC., APPELLANT.

727 N.W.2d 238

Filed January 23, 2007. No. A-05-292.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on

appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

4. **Uniform Commercial Code: Words and Phrases.** The Uniform Commercial Code defines goods as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8 of the code), and things in action.
5. **Contracts.** The determination of whether goods or nongoods predominate a contract is generally a question of law.
6. **Uniform Commercial Code: Contracts: Sales.** The Uniform Commercial Code applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services.
7. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
8. ____: ____. In a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed.
9. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
10. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
11. **Contracts: Parties: Time.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
12. **Contracts: Time.** When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
13. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
14. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
15. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
16. **Contracts: Waiver.** Conditions precedent in a contract may be waived.
17. **Contracts.** The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Mark A. Fahleson and Glen Th. Parks, of Rembolt Ludtke, L.L.P., for appellant.

Shaylene M. Smith and Bradley T. Kalkwarf, of Kalkwarf & Smith Law Offices, L.L.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

John Otte Oil & Propane, Inc. (Otte), appeals from a judgment of the district court for Lancaster County which awarded $26,605.39 to MBH, Inc., as damages resulting from Otte's breach of a sales contract and $200 to Otte for MBH's breach of the same contract. We conclude that the disputed terms of the contract are sufficiently definite to be enforced. And although we conclude that the trial court erred in applying the Uniform Commercial Code (U.C.C.) to the sales contract at issue, because we conclude that the factual findings reached by the trial court were not clearly erroneous and the trial court awarded proper damages, we affirm.

## BACKGROUND

On September 13, 1996, MBH, doing business under the trade name Hallam Grain Co., entered into a contract with Otte for the sale of Hallam Grain Co., a business that bought and sold grain, chemicals, and fertilizer. MBH agreed to sell Hallam Grain Co. to Otte as an ongoing business. The sales contract provided for the sale of real estate, buildings, fixtures, furniture, equipment, personal property, goodwill, inventory, and other assets associated with the said business. MBH also agreed to sell the name "Hallam Grain Co." to Otte and signed a covenant not to compete as part of the transaction. The contract provided for a purchase price of $430,000 and specified that the transaction was to be closed on or before October 15. The contract allocated the purchase price as follows:

| | |
|---|---|
| Land | $10,000.00 |
| Buildings | $170,000.00 |
| Covenant not to compete | $100,000.00 |
| All personal property, equipment, furniture and fixtures as reflected on attached Schedule "A" | $150,000.00 |
| TOTAL | $430,000.00 |

Paragraph 5 of the contract provided for the sale of certain inventory items as follows:

> Seller and Buyer further agree that, at the time of closing, Seller will sell, transfer and convey to Buyer all remaining chemicals, grain, and fertilizer at a price not to exceed the sum of One Hundred Thousand Dollars ($100,000.00). Such sale is to be made after an inventory is taken by Seller and Buyer, of all such chemicals, grain and fertilizer, after the close of business on the day preceding the date of closing.

The contract did not further define "remaining chemicals, grain, and fertilizer," provided no further pricing information for these inventory items, and did not provide any mechanism for calculating the value of these items upon completion of the described inventory.

Additionally, the contract provided:

> Seller is the owner of merchantable title to all the property described in [an exhibit] attached hereto and made a part hereof, free and clear of any and all liens, charges, encumbrances, security interests or other burdens of every kind whatsoever, or will release all of such encumbrances at or before the time of closing.

Listed in the exhibit, which was attached to the sales contract and incorporated by reference, were the specific farm implements, facilities, and equipment that were included in the transaction. A grain vacuum was among the items listed in the exhibit.

After the sale was closed, MBH filed a petition against Otte in the district court, alleging that Otte failed to pay MBH for several items of inventory listed in paragraph 5 of the contract, which items had been in Otte's possession after Hallam Grain

Co. was transferred to Otte. Otte filed a demurrer for failure to state facts sufficient to constitute a cause of action, claiming that the sales contract was unenforceable because it was too indefinite, the minds of the parties did not meet at every point, issues were left open for future arrangement, and it was an unenforceable agreement to agree. The district court sustained Otte's demurrer and dismissed the action. In *MBH, Inc. v. John Otte Oil & Propane, Inc.*, No. A-00-287, 2001 WL 880683 (Neb. App. Aug. 7, 2001) (not designated for permanent publication), we held that taken liberally, MBH's petition set forth a cause of action, and therefore, we remanded the cause for further proceedings in accordance with our opinion.

In accordance with our instructions in *MBH, Inc.*, the trial court reinstated MBH's petition. MBH alleged in its second amended petition, filed on November 25, 2002, that it entered into a contract with Otte for the sale of Hallam Grain Co. on September 13, 1996. MBH alleged that on or about October 15, the contract was closed, and that on that same day, MBH provided Otte with a detailed inventory of all the chemicals to be purchased. The amended petition alleged that Otte had had continuous possession of the items listed in the inventory from October 15, 1996, to the time the amended petition was filed and that MBH made repeated attempts at collection but Otte refused to pay. MBH alleged that the value of the chemical inventory is $21,827.39. MBH also alleged that it provided Otte billings representing the amount of anhydrous ammonia and wheat it transferred to Otte and that MBH was due $3,471.50 for the anhydrous ammonia and $3,386.71 for the wheat.

On January 7, 2003, Otte filed an answer admitting that it entered into a contract to purchase Hallam Grain Co. from MBH that contained a provision for the sale of chemicals, fertilizer, and grain after a joint inventory and admitting that MBH "left various quantities of worthless agricultural chemicals on Otte's premises after the closing of the sales transaction," but alleging that Otte requested that MBH retrieve such chemicals and that MBH refused. Otte denied the majority of MBH's other allegations. Otte also filed affirmative defenses and filed counterclaims. Otte alleged in its first and only relevant counterclaim that MBH breached the sales contract by selling Otte a grain

vacuum system that was actually owned by a third party, causing it to be repossessed after Otte failed to make appropriate payment.

A bench trial was held. Relevant testimony and evidence ascertained during the trial will be discussed where pertinent in the analysis section of this opinion. Upon completion of the trial, the court entered judgment. The court held that "the predominant thrust of the sale was the sale of goods and therefore, Article 2 of the U.C.C. applies to the contract between MBH and Otte." The court further determined that a joint inventory of the chemicals, fertilizer, and grain was to occur on the day preceding the close of the sale as a condition to the sale of these items, but that a joint inventory was not taken on the day before the closing. However, the court found that inventories of the chemicals, grain, and fertilizer were taken at or near the time of the sale and that Otte's principal officer and shareholder or his employees were present during the taking of these inventories. The court found that MBH did transfer all remaining chemicals, grain, and fertilizer to Otte at the time of the sale and that Otte "manifested the intent to accept, either indirectly or directly, such items, without the joint inventory having occurred after the close of business on the day before the closing." Therefore, the court held, Otte waived the above-mentioned condition, making "the remaining provisions of the contract . . . enforceable."

In response to Otte's contention that many of the chemicals transferred by MBH were obsolete by the time the sale took place and therefore did not conform to the contract, the court found that the chemicals were still of use to Hallam Grain Co., were not obsolete, and therefore conformed to the contract. The court found that because these items conformed to the contract, Otte did not have the option under the U.C.C. to reject the chemicals. The court therefore concluded that Otte breached the contract by not paying for the chemicals and awarded MBH $21,827.39 in damages. The court also concluded that anhydrous ammonia and wheat were transferred to Otte, that Otte failed to pay for either, and that therefore, Otte was liable to MBH for $3,471.50 for the anhydrous ammonia and $1,306.50 for the wheat.

The court further determined that Otte was entitled to the fair market value of the grain vacuum MBH sold to Otte that was repossessed after the sale. The court awarded Otte $200 because evidence showed that the vacuum was sold for this amount after it was repossessed.

After entry of the trial court's order, Otte timely appeals.

## ASSIGNMENTS OF ERROR

Otte alleges, restated and consolidated, that the trial court erred (1) by finding that article 2 of the Nebraska U.C.C. applied to the contract; (2) in determining the damage amount Otte was entitled to as compensation for the repossessed grain vacuum; (3) by finding that paragraph 5 of the contract was enforceable; (4) by determining that the goods conformed to the contract and therefore not finding that Otte's rejection of the goods was effective; (5) by finding that the condition precedent in paragraph 5 of the contract was waived by Otte; (6) by awarding MBH the value of materials other than chemicals, grain, and fertilizer; and (7) in determining the damage amount for Otte's alleged breach.

## STANDARD OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[2] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

## ANALYSIS

*Applicability of U.C.C.*

[4] The Nebraska U.C.C. applies to transactions in goods. Neb. U.C.C. § 2-102 (Reissue 2001). The U.C.C. defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." Neb. U.C.C. § 2-105 (Reissue 2001). If a transaction is not for the sale of goods, the provisions of the U.C.C. do not apply to that transaction. See *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

The sales contract at issue provides for the transfer of both goods and nongoods. The goods at issue include furniture, equipment, personal property, and inventory, including chemicals, grain, and fertilizer. The nongoods include real estate, buildings, goodwill, the business' trade name, and the covenant not to compete. We are therefore confronted with a mixed contract and must decide whether the U.C.C. applies.

[5] The trial court held that the U.C.C. applied to the sales contract. Otte alleges that this decision was erroneous. While MBH disagrees with Otte's argument, both parties believe that while Nebraska courts have not yet specifically addressed this issue, whether the U.C.C. applies to a mixed contract is a question of law. We agree. We also agree with courts from other jurisdictions that have held that the determination of whether goods or nongoods predominate a contract is generally a question of law. See, e.g., *Linden v. Cascade Stone Co., Inc.*, 283 Wis. 2d 606, 699 N.W.2d 189 (2005) (interpreting nature of contract presents question of law subject to independent review); *Valley Farmers' Elevator v. Lindsay Bros.*, 398 N.W.2d 553 (Minn. 1987) (question as to classification of hybrid contract is generally one of law), *overruled on other grounds, Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). We therefore engage in an independent review of this issue. See *Reichert, supra.*

[6] To determine whether the U.C.C. applies to the transaction in the instant case, we must ascertain the predominant purpose of the transaction.

> The test for inclusion in or exclusion from the sales provisions [of the U.C.C.] is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.

*Mennonite Deaconess Home & Hosp.*, 219 Neb. at 308, 363 N.W.2d at 160. The U.C.C. applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services. See *Mennonite Deaconess Home & Hosp., supra.* The same analysis may be used when a transaction includes the sale of goods mixed with the sale of nongoods, as opposed to services. See *Hammond v. Streeter*, 225 Neb. 491, 495, 406 N.W.2d 633, 636 (1987) ("[i]n the present case, as is often true in the sale of a business, the sale of the Hammond Flying Service involved a mixed sale of goods, such as the runway markers, and nongoods, such as the lease on real estate").

We have found no Nebraska case that is factually similar to the instant case and analyzed whether the U.C.C. applies to the sale of an ongoing business. We therefore look to decisions from other jurisdictions that have addressed this issue in a similar context. Our research reveals that many courts have concluded in their decisions that the U.C.C. does not apply to mixed sales contracts for the sale of ongoing businesses. See, e.g., *Dravo Corp. v. White Consol. Industries*, 602 F. Supp. 1136 (W.D. Pa. 1985); *Morgan Pub., Inc. v. Squire Pub. Inc.*, 26 S.W.3d 164 (Mo. App. 2000); *Stewart v. Lucero*, 121 N.M. 722, 918 P.2d 1 (1996); *D.G. Porter, Inc. v. Fridley*, 373 N.W.2d 917 (N.D. 1985); *Field v. Golden Triangle Broad., Inc.*, 451 Pa. 410, 305 A.2d 689 (1973). Our research also reveals several decisions holding that the U.C.C. was applicable to sales of ongoing businesses. See, e.g., *De Filippo v. Ford Motor Company*, 516 F.2d 1313 (3d Cir. 1975); *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974). However, the facts in those cases differed from the facts presented in the instant case, as real estate and goodwill were not transferred in those cases. See *id.*

We find the first line of cases more persuasive. One such case is *D.G. Porter, Inc., supra.* In that case, the parties entered into a contract for the sale of a restaurant. The purchase agreement for the sale involved the transfer of goods, including furniture, equipment, and inventory, and nongoods, including goodwill, a retail liquor license, the assignment of the lease of the business premises, the transfer of fixtures, and the transfer of insurance policies. The court concluded that the transfer of nongoods constituted the essential element of the contract and declined to apply the U.C.C.

In the instant case, we determine that the U.C.C. is inapplicable. The predominant purpose of the contract was the sale of an ongoing business. The essential elements of the contract are nongoods, including real estate, buildings, and goodwill. Several factors lead us to this conclusion. First, the majority of the purchase price is allocated to the purchase of nongoods. This is true even when considering the maximum purchase price for the chemicals, grain, and fertilizer. Second, we believe that the heart of the contract is the goodwill and the real estate. Without the transfer of these things, many of the goods transferred to Otte would be of little or no use. Further, a large part of the goods, including the chemicals, grain, and fertilizer, contemplated in the sale were not itemized in the contract. An inventory of these goods was to occur on the day before the closing. It seems unlikely that elements which are the primary purpose of a contract would remain unspecified until the day before the closing. Viewing the entire contract, the primary purpose was the sale of nongoods.

*Damages for Grain Vacuum.*

Otte argues that while the district court correctly determined that MBH breached the sales agreement by transferring to Otte a grain vacuum that was subsequently repossessed, the court committed reversible error when it awarded an inadequate amount of damages for the breach.

[7,8] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). In

a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed. *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988).

The evidence adduced at trial shows that MBH agreed to sell Otte a grain vacuum system "free and clear of any and all liens, charges, encumbrances, security interests or other burdens of every kind whatsoever" and therefore breached this provision of the sales contract when it sold Otte an encumbered vacuum. The court relied on evidence submitted during trial showing that the vacuum was sold for $200 after it was repossessed and awarded Otte $200. Otte submitted evidence that it paid $16,645.13 to replace the vacuum and argues that this amount is the correct measure of damages. However, a former Otte employee testified that he was employed by Otte when it purchased the replacement grain vacuum. He testified that he did not attempt to determine if the balance due on the repossessed vacuum could be paid so that Otte could keep the vacuum. He further testified that the value of the repossessed grain vacuum was substantially less than the value of the replacement vacuum. Otte's principal officer and shareholder testified that he did not attempt to find a vacuum priced lower than the one he purchased for $16,645. We conclude that the trial court's determination of damages was not clearly wrong.

*Paragraph 5 of Sales Contract.*

Otte's third, fourth, and fifth assignments of error relate to the trial court's interpretation of paragraph 5 of the sales contract. Because we determined that the U.C.C. is not applicable, Otte's fourth assignment of error will not be discussed, as it is premised on the assumption that the U.C.C. applies.

Otte first argues that "[p]aragraph 5 lacks any quantity of goods to be sold under the contract and lacks a sale price (or even a method at determining a price); as a result, it is unenforceable according to general contract principles." Brief for appellant at 19-20. Otte elaborates that paragraph 5 is too indefinite to be enforced, creates an unenforceable agreement to agree, and does not evince a meeting of the minds necessary for an enforceable contract. Because MBH seeks to collect damages for a breach of

paragraph 5, we must determine whether paragraph 5 creates enforceable obligations.

[9] We recognize that the construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. See *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract. *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

[10] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Id.* It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto. *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

[11,12] A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. *Id.*

When the parties entered into the sales contract on September 13, 1996, the terms of paragraph 5 were not definite. The quantity of goods to be transferred was not defined. The provision contemplated that the specific items to be transferred would be determined by a joint inventory to be performed on the day preceding the closing. The trial court found that the joint inventory did not occur. The terms specified that the price for the items was not to exceed $100,000, but did not further specify how the price was to be determined. Because the parties left elements of this provision for future arrangement, this was not an enforceable contract provision on September 13.

In accordance with the Nebraska Supreme Court's decision in *Nebraska Nutrients, supra*, we continue our analysis to determine

if paragraph 5 became enforceable at any time after September 13. In *Nebraska Nutrients*, the court addressed whether an enforceable contract was created by language that provided in part: " '[The appellant] shall advance, as a loan to [a joint venture he is a party to], a mutually agreed upon sum of money and shall lend his business experience to the venture.' " *Id.* at 752, 626 N.W.2d at 499. The appellant in that case argued that the language at issue constituted an agreement to agree and was unenforceable because an essential term, the amount of the appellant's financial contribution, was left open for future arrangement. The appellees conceded that the " 'mutually agreed upon sum of money' " was a term to be agreed upon at a future time. *Id.*

The court found that the agreement "did not contain the essential term of the amount of funds which [the appellant] would advance." *Id.* at 755, 626 N.W.2d at 501. This conclusion reinforces our decision in the instant case that paragraph 5 was not enforceable when it was created, because the quantity and price of the goods were not specified in the contract.

However, the *Nebraska Nutrients* court continued its analysis. It recognized that an unenforceable agreement to agree may become enforceable when the missing term is subsequently supplied by the parties. See *id.* The court recited the rule that " '[e]ven though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by later verbal clarification or their subsequent conduct that indicates their own practical interpretation.' " *Id.* at 755, 626 N.W.2d at 500-01.

The court then concluded that the agreement became enforceable 35 days after the parties entered into the contract. It became enforceable because at that time, the appellant agreed that he would fund " 'the rest of the construction [needed for the joint venture],' " making his obligation "defined with reasonable certainty." *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 755, 626 N.W.2d 472, 501 (2001). The court elaborated that "the nature and extent of [the appellant's] obligation under the . . . agreement [was defined] so as to provide a standard by which his performance could subsequently be measured." *Id.*

We find that the facts of the instant case are similar to the facts at issue in *Nebraska Nutrients*. In the instant case, the terms of paragraph 5 became enforceable after the closing. The terms became defined by the parties' subsequent actions that indicated their interpretation of the terms. MBH's delivery of chemicals, fertilizer, and grain along with inventories of these items and Otte's acceptance of these items supplied the terms missing from paragraph 5, making it an enforceable provision. This occurred despite the fact that the joint inventory contemplated by the parties was not completed. We further explain our decision in our following response to Otte's argument that the trial court erred when it found that Otte waived the joint inventory as a condition precedent to enforcement of paragraph 5.

Otte argues the trial court correctly found that the joint inventory was a condition precedent to Otte's obligation to purchase the items listed in paragraph 5 and that the condition precedent was not met. Because neither party contests the court's determination, we assume without deciding that performance of the joint inventory was a condition precedent. However, we reject Otte's argument that the court erred when it found that Otte waived this condition.

[13-17] Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part. *Id.* A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. *Id.* Conditions precedent in a contract may be waived. *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982). The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. *Id.*

The trial court found that the "condition precedent found within the contract was waived by [Otte], by [its principal officer

and shareholder's] accepting items without performing a joint inventory with MBH after the close of business on the day before the closing." To reach this conclusion, the trial court considered testimony by two of MBH's officers that Otte's principal officer and shareholder or his employees were present when an inventory of these items was taken, which shows that Otte's principal officer and shareholder was aware of the inventory items that remained at Hallam Grain Co. after the closing for transfer to Otte. There was also testimony that Otte did not inform MBH until many months after the closing that it did not want the chemicals that were left at Hallam Grain Co. Although this was controverted, the trial court resolved this factual dispute adversely to Otte. The court concluded that the evidence demonstrated that Otte manifested the intent to accept, either directly or indirectly, the chemicals, grain, and fertilizer without the joint inventory's having first occurred. This decision was not clearly wrong.

The trial court's resolution of this issue leads us to conclude as a matter of law that the terms of paragraph 5 are binding and enforceable. MBH's creation of inventory lists and transfer of items to Otte and Otte's acceptance of the items supplied the quantity absent from paragraph 5. We find that by accepting the goods, Otte also accepted the prices calculated by MBH at the time the inventory lists were created and billed to Otte.

*Damage Amount for Otte's Breach.*

Otte's final assignments of error pertain to the damages the trial court awarded to MBH for Otte's breach. Otte argues that the district court erred when it awarded MBH $21,827.39 as compensation for Otte's failure to pay for the chemicals transferred to Otte. Otte argues that this amount represents more than the chemicals, including items such as twine, gloves, a tin shed, motors for a " 'station house,' " gasoline, and diesel. Brief for appellant at 31. Otte also argues that MBH failed to meet the burden of establishing the price of the chemicals.

We recognize that the amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Brandon v. County of Richardson*, 264 Neb.

1020, 653 N.W.2d 829 (2002). While the amount awarded to MBH represents more than the price for the chemicals, we find that an award of items beyond the chemicals is supported by the evidence. There was evidence presented that other items were transferred to Otte for which MBH was not paid.

Otte argues that "[t]he only competent evidence in the record establishing the value of the remaining chemicals is that of [an agricultural supplies sales] expert . . . . [He] opined that the remaining chemicals were valued at $3,061.00." Brief for appellant at 31. However, the testimony of another of MBH's officers provides evidence supporting the damage award of $21,827.39. That officer itemized and priced the chemicals at issue. He testified that he prepared the inventory on or about September 8, 1996. He included on the list a chemical inventory and the prices of the chemicals as ascertained by a pricelist provided by the wholesaler from whom he bought the chemicals. He opined that the prices represented the fair market value of the chemicals at the time of closing. Otte did not assign error regarding the receipt of this testimony in evidence. Rather, Otte invites us to substitute our judgment for that of the district court on the issue of credibility. We conclude that the determination of credibility falls within the province of the trial court and that the court awarded MBH an amount of damages that is supported by the evidence.

## CONCLUSION

Paragraph 5 of the sales contract became enforceable when the parties' actions after the contract was created defined the parties' obligations under the contract. While the trial court erred in applying the U.C.C. to the transaction at issue, the trial court's factual findings and damage awards were not clearly erroneous. We therefore affirm.

AFFIRMED.

# JOSE ANGEL GARCIA, APPELLANT, V. PLATTE VALLEY CONSTRUCTION CO. AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLEES.

727 N.W.2d 698

Filed January 30, 2007. No. A-06-490.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such.
4. ____: ____: ____. "Conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown.
5. **Judgments.** A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed, and cause remanded with directions.

Samuel W. Segrist, of Meister & Segrist, P.C., L.L.O., for appellant.

John K. Sorensen, of Sorensen, Mickey & Hahn, P.C., for appellees.

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

INBODY, Chief Judge.

## INTRODUCTION

Jose Angel Garcia appeals from the judgment of the review panel of the Nebraska Workers' Compensation Court affirming the trial court's denial of Garcia's motion for waiting-time

penalties and attorney fees. For the reasons set forth herein, we dismiss the appeal and the cause is remanded with directions.

## STATEMENT OF FACTS

Garcia injured his back while working for Platte Valley Construction Co. (Platte Valley) on August 7, 1995. Garcia was awarded temporary partial disability benefits and past and future medical benefits by the Nebraska Workers' Compensation Court on October 24, 1996. Garcia filed an application for modification of the award on January 31, 2000. On December 28, the trial court entered a further award ordering Platte Valley to pay Garcia's pending medical expenses.

On December 17, 2004, an "Application for Approval of Compromise and Final Lump Sum Settlement" was filed in the compensation court. The application indicated that the parties had jointly stipulated and agreed that Garcia would accept payment in the amount of $135,000 "in a lump sum, in full and complete satisfaction and payment of any and all claims for compensation or benefits which [Garcia] has or may have or may claim to have."

The only paragraph of the application that is relevant to the instant case is paragraph 9, which indicated that Garcia was a Medicaid recipient and that the "lump sum settlement [would be] subject to the requirement for a Medicare Set Aside Agreement and set aside allocation in the amount of $8,487.05." This sum was to be paid from the $135,000 lump sum received by Garcia. Paragraph 9 of the application also indicated that Garcia had "received, and will execute an agreement setting forth the terms and conditions for beneficiary administered Medicare set-aside account, and provide a copy of the same to [the Centers for Medicare & Medicaid Services]."

On January 12, 2005, the compensation court entered an order approving the parties' lump-sum settlement application. Specifically, the court ordered that the parties' application "is hereby approved" and that "[u]pon performance of the terms of such application, and the payment of $135,000.00, [Platte Valley and its] successors and assigns shall be discharged from all further liability on account of the accident and injuries of August 7, 1995."

On March 14, 2005, Garcia filed a motion for waiting-time penalties and attorney fees. In his motion, Garcia claimed, "Thirty days from January 12, 2005 was Friday, February 11, 2005. As of this date none of the settlement proceeds owed by [Platte Valley] had been paid to [Garcia] or [his] counsel." Further, the motion alleged, "By February 17, 2005 no settlement proceeds had . . . been received by [Garcia] or [his] counsel. [His] counsel on February 17, 2005 and February 18, 2005 sent correspondence to counsel for [Platte Valley] requesting that the settlement checks be delivered to [Garcia's] counsel." Garcia alleged that on February 21, his attorney received a letter from Platte Valley's attorney indicating that Platte Valley's attorney had the checks, and that on February 22, Garcia's attorney delivered a letter to Platte Valley's attorney asking that the checks be delivered. The checks were delivered by Platte Valley on February 23.

On April 4, 2005, Platte Valley filed an objection to Garcia's motion for waiting-time penalties and attorney fees. In its objection, Platte Valley asserted that the parties' application to approve the lump-sum settlement "included a provision obligating [Garcia] to execute a Medicare set-aside agreement, and to provide the same to the Centers for Medicare and Medicaid Services . . . for . . . approval" and that "[p]aragraph IX of the [application] specifically made these requirements part of the [application]." The objection further stated, "By letter dated February 16, 2005, [Garcia's] counsel sent to [Platte Valley's] counsel a copy of the set-aside agreement and other documents to be executed by [Garcia]. The set-aside agreement contained blanks and was purportedly signed by [Garcia] on September 24, 2004." Platte Valley asserted that it had not received documentation from Garcia regarding approval by the Centers for Medicare & Medicaid Services (CMS) of the set-aside agreement in a timely fashion, that it received this documentation on February 22, 2005, and that payment was provided to Garcia on February 23.

On April 5, 2005, a hearing was had on Garcia's motion for waiting-time penalties and attorney fees. On April 22, the trial court entered an order overruling Garcia's motion. Specifically, the trial court held as follows:

> I read the application and [the] order which approved [the application] to be "subject to the requirement for a Medicare Set Aside Agreement" which at the time of the order of January 12, 2005, had not been approved by CMS. Although counsel for both parties may have believed the Workers' Compensation Medicare Set-Aside Arrangement [(WCMSA)] had been approved, in fact, it was not until February 17, 2005 . . . . That correspondence from CMS provided in bold-face "**Approval of this WCMSA is not effective until a copy of the final executed workers' compensation settlement agreement, which must include this approved WCMSA amount, is received by CMS at the following address**[.]" Counsel for [Platte Valley] forwarded the application and order approving the lump sum settlement, which included the approved WCMSA amount, to CMS on February 22, 2005 . . . . [Platte Valley's] counsel then caused the settlement checks to be hand-delivered to [Garcia's] counsel's office on February 23, 2005 . . . .
>
> I find the Order Approving Compromise and Final Lump Sum Settlement of January 12, 2005, was a "conditional order" because it was "subject to" approval of the WCMSA by CMS. Conditional orders are generally void. Maddux v. Maddux, 239 Neb. 239, 475 N.W.2d 524 (1991); County of Sherman v. Evans, 247 Neb. 288, 526 N.W.2d 232 (1995); Lyle v. Drivers Mgmt., 12 Neb.App. 350, 673 N.W.2d 237 (2004). Even if it were creatively argued that [that] order was an exception to the general rule because it was based upon a future condition which was met, the condition—approval by CMS—was not met until February 17, 2005, and payment occurred February 23, 2005, well within 30 days of the occurrence of the condition which made the conditional order final. Either way, [Garcia's] Motion for Waiting Time Penalty, Attorney Fee, and Interest is denied.

On May 5, 2005, Garcia filed an application for review with the review panel for the Nebraska Workers' Compensation Court. On April 3, 2006, the review panel entered its order affirming the judgment of the trial court overruling Garcia's motion for

waiting-time penalties and attorney fees. Garcia has timely appealed to this court.

## ASSIGNMENTS OF ERROR

Garcia alleges that the review panel erred when it affirmed the trial court's finding that the trial court's order approving the parties' lump-sum settlement application was a conditional order and when it affirmed the trial court's decision overruling Garcia's motion for waiting-time penalties and attorney fees.

## STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

## ANALYSIS

Garcia first alleges that the review panel committed error when it affirmed the trial court's order finding that the January 12, 2005, order approving the parties' lump-sum settlement application was a conditional order.

In its order overruling Garcia's motion for waiting-time penalties and attorney fees, the trial court found as follows:

> I read the application and [the] order which approved [the application] to be "subject to the requirement for a Medicare Set Aside Agreement" which at the time of the order of January 12, 2005, had not been approved by CMS. Although counsel for both parties may have believed the Workers' Compensation Medicare Set-Aside Arrangement [(WCMSA)] had been approved, in fact, it was not until February 17, 2005 . . . . That correspondence from CMS provided in bold-face "**Approval of this**

> **WCMSA is not effective until a copy of the final executed workers' compensation settlement agreement, which must include this approved WCMSA amount, is received by CMS at the following address**[.]" Counsel for [Platte Valley] forwarded the application and order approving the lump sum settlement, which included the approved WCMSA amount, to CMS on February 22, 2005 . . . . [Platte Valley's] counsel then caused the settlement checks to be hand-delivered to [Garcia's] counsel's office on February 23, 2005 . . . .
>
> I find the Order Approving Compromise and Final Lump Sum Settlement of January 12, 2005, was a "conditional order" because it was "subject to" approval of the WCMSA by CMS.

[3-5] A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Thus, orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. *Id.* These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. *Id.* A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Id.*

We find that the trial court's reading of the parties' application for approval of their lump-sum settlement was not clearly wrong. The application contains conditional language in that it indicates that "this lump sum settlement will be subject to the requirement for a Medicare Set Aside Agreement" and that Garcia "has received, and will execute an agreement setting forth the terms and conditions for beneficiary administered Medicare set-aside account, and provide a copy of the same to CMS." The record clearly indicates that this set-aside agreement was not completed by the time the January 12, 2005, order was entered; in fact, it does not appear that the set-aside agreement was completed until more than a month after the January 12

order was entered. In a letter dated February 17, 2005, CMS indicated that CMS had "determined that $8,487.00 adequately considers Medicare's interests." There is nothing in the record to indicate that CMS had approved the set-aside agreement prior to February 17.

Accordingly, we find that the trial court properly found that the January 12, 2005, order approving the parties' lump-sum settlement application was a conditional order. Because that order did not "perform in praesenti," we further find that the January 12 order was wholly void. That order does not operate as a final judgment, and it is wholly ineffective as such. Therefore, we find that the instant appeal must be dismissed for lack of a final, appealable order and that the proper resolution is to remand to the review panel for remand to the trial court for entry of a final order in this case.

## CONCLUSION

Because we agree with the trial court that the January 12, 2005, order was a void conditional order, we dismiss the instant appeal and remand the cause back to the review panel for remand to the trial court for entry of a final order in the instant case.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

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# ANONYMOUS, APPELLANT, V. PAUL VASCONCELLOS AND BLUE VALLEY MENTAL HEALTH ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEES.

727 N.W.2d 708

Filed February 6, 2007. No. A-05-743.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. ____: ____. A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court.
4. **Limitations of Actions: Malpractice: Time.** Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action.
5. **Limitations of Actions: Malpractice.** For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed.
6. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
7. **Limitations of Actions: Malpractice.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
8. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court.
9. **Limitations of Actions.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action.
10. **Actions: Words and Phrases.** A cause of action consists of the set of facts on which a recovery may be had.
11. **Limitations of Actions.** The discovery of the basis of the cause of action is the preeminent concept in determining whether the discovery exception applies to toll the statute of limitations.
12. **Actions.** A theory of recovery is not itself a cause of action.
13. **Limitations of Actions: Time.** Under the 1-year discovery provision of Neb. Rev. Stat. § 25-222 (Reissue 1995), it is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
14. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true.

Appeal from the District Court for Seward County: MARY C. GILBRIDE, Judge. Affirmed.

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

Robert F. Bartle, of Bartle & Geier, for appellees.

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

SIEVERS, Judge.

Anonymous filed suit against Paul Vasconcellos, a licensed mental health professional (LMHP) with training as a family and marriage therapist, and his employer, Blue Valley Mental Health Association (Blue Valley), a nonprofit corporation engaged in the practice of psychotherapy and mental health counseling in Seward, Nebraska. Anonymous claimed that Vasconcellos, while acting in the course and scope of his employment, improperly treated Anonymous. Finding that Anonymous' claims were barred by the statute of limitations pursuant to Neb. Rev. Stat. § 25-222 (Reissue 1995), the district court granted summary judgment and dismissed the complaint. Finding that the discovery exception to the running of the applicable statute of limitation does not apply, we affirm.

## FACTUAL BACKGROUND

Anonymous, born August 11, 1961, alleges that during the 1970's, while she was attending St. John's Elementary School (the School) in Seward, David Mannigel, a teacher who later became the principal, sexually abused her between the ages of 10 and 12. The School is associated with St. John Lutheran Church (the Church) in Seward. Anonymous was a member of the Church from her birth until she got married in 1984.

Since 1978, Vasconcellos has been a member and visiting pastor of the Church. Vasconcellos is an LMHP and practices as a family and marriage therapist. Vasconcellos admits that treating patients who have been sexually abused requires specialized training and that he does not have such specialized training.

Anonymous became Vasconcellos' patient in 1990, when she was approximately 29 years old. That treatment was at Pioneer Mental Health, a community mental health center where Vasconcellos was then employed. The evidence before us is that Vasconcellos did not remember the details of such treatment and that Anonymous did not recall if the issue of Mannigel's sexual abuse of her arose at that time. There are apparently no written records of such treatment. Anonymous testified she went

to Vasconcellos for counseling because she knew that he knew Mannigel; because they were both affiliated with the Church; because she saw Vasconcellos as an "honest Christian figure"; because she knew Vasconcellos from when she attended Concordia University in Seward for 1 year, where he worked; and because Vasconcellos' children attended the School, where Mannigel worked.

On four occasions in 1996, Vasconcellos treated Anonymous, then 35 years old, who reported symptoms primarily of anger and depression. During the 1996 sessions, Anonymous told Vasconcellos that she had been sexually abused by Mannigel during her childhood. According to Anonymous, Vasconcellos appeared shocked when she told him that Mannigel had sexually abused her and Vasconcellos wanted to change the subject. Anonymous testified that when she said she wanted to confront Mannigel, Vasconcellos told her both that a confrontation with Mannigel could be dangerous to her and that she might not get the response she wanted from him. While Anonymous understood that her sessions with Vasconcellos were confidential, she hoped that Vasconcellos would report the abuse to authorities, although she never instructed him to do so. In February 1997, Vasconcellos wrote in the "Closing Summary" in his records that it was mutually agreed between Anonymous and himself that Anonymous "would return for therapy as needed."

In 2000, Vasconcellos treated Anonymous on April 20, and the intake medical record from that visit reflects that Anonymous presented with problems of overwhelming stress and anxiety about death. Vasconcellos recommended that Anonymous "be evaluated by both a clinical psychologist and psychiatrist," although he did not refer Anonymous to a clinical psychologist or a psychiatrist. Both the 1996 and the 2000 medical records from Blue Valley reflect that Anonymous reported she had been sexually abused during her childhood, although the medical records do not mention Mannigel.

The record shows that during the time period of the therapy sessions with Anonymous, Vasconcellos considered Mannigel to be a personal friend and played cards in a social setting with Mannigel. The record further shows that Vasconcellos did not

inform Anonymous either that he was friends with Mannigel or that he played cards with Mannigel.

In March 2001, Anonymous came forward to the Church's administration with her allegations of sexual abuse. Soon thereafter, in June 2001, Mannigel committed suicide.

## PLEADINGS

On February 17, 2004, Anonymous filed in the Lancaster County District Court a complaint for damages against Vasconcellos and Blue Valley. The core allegations were that Vasconcellos failed to properly treat her because he had a conflict of interest due to his relationship with Mannigel, because he did not report to law enforcement authorities that she had been sexually abused as a child, and because he was unqualified to treat a victim of sexual abuse. The Lancaster County District Court transferred the case to the Seward County District Court after Blue Valley filed a motion alleging improper venue.

On September 7, 2004, Anonymous filed an amended complaint for damages. In the amended complaint, Anonymous alleged that she

> was not aware that Vasconcellos was a personal friend of Mannigel and had a conflict of interest, or that he had failed to properly treat her and was in fact, treating her for a condition for which he had no experience until on or about October 9, 2003[,] when she was advised [of such facts] by [her] counsel subsequent to the deposition of Vasconcellos in another case.

Anonymous asserted that the statute of limitations was tolled "because [she] was not aware that Vasconcellos had committed malpractice until after the two year statute of limitations [and] because the cause of action was not discovered and could not . . . reasonably have been discovered within such two-year period." Anonymous alleged that her lawsuit was filed within 1 year from the date of discovery.

Vasconcellos and Blue Valley (collectively Appellees) asserted in their answer that Anonymous' claims were barred by the applicable statute of limitations, and on January 11, 2005, they filed a motion for summary judgment alleging that Anonymous' claims were barred by the statute of limitations.

## SUMMARY JUDGMENT

On February 28, 2005, a hearing was held on the motion for summary judgment. The district court received into evidence eight exhibits, which contained information we will use in our analysis.

The parties also stipulated that if Anonymous were to testify, she would testify that (1) she was not aware that Vasconcellos was a social friend of Mannigel's or that Vasconcellos considered Mannigel as part of a circle of friends; (2) Vasconcellos failed to advise Anonymous that he was personally acquainted with Mannigel; (3) Vasconcellos did not have training to treat sexually abused persons and failed to advise Anonymous of that fact, but continued to treat her; and (4) Anonymous was not aware of these facts until Vasconcellos' October 8, 2003, deposition.

On June 6, 2005, the district court filed, with extensive written findings, its order sustaining Vasconcellos and Blue Valley's motion for summary judgment. Anonymous now appeals.

## ASSIGNMENT OF ERROR

Anonymous alleges that the district court erred by granting Appellees' motion for summary judgment.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003).

[2] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court. See *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

## ANALYSIS

[4,5] Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action. See § 25-222. For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed. See *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). The record shows that Vasconcellos last treated Anonymous on April 20, 2000, and Anonymous contends that she did not discover her claim within the following 2 years or by April 20, 2002. However, if she discovered her claim by such date, this action is obviously barred by the statute of limitations.

[6,7] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *In-Line Suspension v. Weinberg & Weinberg*, 12 Neb. App. 908, 687 N.W.2d 418 (2004).

[8-12] In *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988), the court said: "Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court." Later authority holds that a cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A cause of action consists of the set of facts on which a recovery may be had. *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). The discovery of the "basis of the cause of

action" is the preeminent concept in determining whether the discovery exception applies to toll the statute of limitations. See *Gering-Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 846, 612 N.W.2d 897, 903 (2000). See, also, *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998); *McGinley v. McGinley*, 7 Neb. App. 410, 583 N.W.2d 77 (1998). A theory of recovery is not itself a cause of action. *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002).

From the foregoing authority, the key question in the instant case is: When did Anonymous learn of the "basis" of her cause of action? As pointed out by *Georgetowne Ltd. Part. v. Geotechnical Servs., supra*, this is different than Anonymous learning that she had a legal right to seek redress in a court of law or learning about her theories of recovery for the alleged improper treatment.

[13] It is clear from the record the "basis" of Anonymous' cause of action for improper treatment was that she had been sexually abused as a child, which caused emotional and psychological difficulties in her life; that she informed Vasconcellos about the sexual abuse; and that Vasconcellos never treated her for the sexual abuse. Viewing the evidence most favorably to Anonymous, we assume, for analytical purposes only, that Vasconcellos' treatment of her was improper. However, why the treatment was improper is not part of the discovery exception analysis; rather, the "why" or reasons for the improper treatment are related to her theories of recovery and to whether she actually has a legal right to redress. See *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988) (under 1-year discovery provision of § 25-222, it is not necessary that plaintiff have knowledge of exact nature or source of problem, but only knowledge that problem existed). Therefore, whether Vasconcellos' treatment was improper because of his lack of qualifications to treat sexual abuse victims and his failure to report the abuse to law enforcement as well as the fact that he was the abuser's friend, or any other reason, is not relevant to the issue before us. We hold that the "basis" of her cause of action is that Anonymous had been improperly treated by Vasconcellos for the consequences of her past sexual abuse.

Discovery of why she was improperly treated is not what tolls the 2-year statute of limitations.

Being fully aware that the 2-year statute of limitations has obviously run, Anonymous attempts to bring herself within the discovery exception by using the information her attorney told her on October 9, 2003, about Vasconcellos' testimony given in a deposition on October 8. The parties agreed at the hearing on this motion for summary judgment that Anonymous would testify that after Vasconcellos' deposition on October 8, she learned of Vasconcellos' friendship with Mannigel and his lack of expertise with victims of sexual abuse. Anonymous claims that October 9 was her "date of discovery," when her attorney informed her about what Vasconcellos revealed during his deposition, and that she filed suit within 1 year of that date. But, what Anonymous learned on October 9 relates solely to why she was improperly treated, which is different than the basis of her cause of action—that Vasconcellos negligently treated her for the sexual abuse she experienced as a child.

Returning to the question of when Anonymous learned about the basis of her cause of action, we quote her answers to Appellees' first interrogatories, where she said:

> I finally came to realize that the reason for my anger, depression, and events in my life in general were a direct result of the sexual abuse I had suffered by . . . Mannigel after counseling [w]ith Dr. Bob Larson. It wasn't until he told me that the abuse was the "big thing["] or event in my life that I had been looking for that I fully realized that I had been abused.

Anonymous further testified that Dr. Bob Larson had told her that he was "surprised" and "amazed" that none of her prior counselors had dealt with the sexual abuse issue.

After Anonymous ended her treatment with Vasconcellos following her April 20, 2000, session, Anonymous sought treatment from Dr. Larson. While Anonymous could not precisely identify either the dates that Dr. Larson treated her or the precise date that he told her that she needed to be treated for sexual abuse, Anonymous admitted that she sought treatment from Dr. Larson at or around the time that she came forward to the

Church regarding her allegation that Mannigel sexually abused her when she was a child. She did this in March 2001.

In response to Appellees' interrogatory requesting identification of Anonymous' medical records, she identified her medical records from Dr. Larson as having a date of February 14, 2002. Anonymous said that after she stopped treatment with Dr. Larson, she received treatment from an individual through Lutheran Family Services. In her answers to Appellees' interrogatories, Anonymous disclosed medical records of her treatment with Lutheran Family Services beginning in July 2002, meaning that her treatment with Dr. Larson had ceased by that time.

Taking the most favorable view of when Anonymous had her key conversation with Dr. Larson, which is the most generous view of when she discovered the basis of her cause of action, we conclude that at the latest, Anonymous' treatment with Dr. Larson had concluded by July 2002. Accordingly, the latest she could have been told the facts by Dr. Larson which constitute the basis of her claim is July 31, 2002. Thus, even if we assume that Anonymous was not aware of the basis of her cause of action against Vasconcellos within 2 years of her last session with Vasconcellos on April 20, 2000, the date of discovery of her claim for negligent treatment by Vasconcellos was no later than July 31, 2002. At best, she had until July 31, 2003, to file her lawsuit against Vasconcellos. Because Anonymous did not file her suit until February 17, 2004, Anonymous' suit is barred by the statute of limitations. The district court reached the same result upon a similar analysis.

[14] The above analysis does not take into account some other key material from the record which constitutes another reason for affirmance of the dismissal of the action as barred by the statute of limitations. In Anonymous' amended complaint admitted into evidence at the hearing in the motion for summary judgment, she alleges that she saw Vasconcellos four times in 1996 and on April 20, 2000. She then alleges:

> [Anonymous] related to Vasconcellos during the history taken by Vasconcellos, on each occasion that she consulted with him, that [Anonymous] had been sexually abused by Mannigel while a student at [the] School and that all of

> [Anonymous'] life she had experienced significant emotional and psychological difficulties as a result of that encounter.

Such allegations are a judicial admission dispensing with any need for proof of such facts. See *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992) (judicial admission refers to formal act done in course of judicial proceedings which is substitute for evidence, thereby waiving and dispensing with production of evidence by conceding for purposes of litigation that subject of admission is true). Additionally, Anonymous testified that when she was 18 years of age, she began looking for emotional help because of depression, and when asked if she knew what was "producing [her] depression," her answer was, "It still had to do with [Mannigel]."

Therefore, there is undisputed evidence via Anonymous' judicial admission that she knew within 2 years of her last treatment by Vasconcellos that her "significant emotional and psychological difficulties," to use her own words, were the result of sexual abuse by Mannigel. And, Anonymous was obviously aware during Vasconcellos' treatment that he was not treating her for sexual abuse, which, as said above, is the "basis of her cause of action." On October 9, 2003, Anonymous merely gained knowledge about why Vasconcellos may have improperly treated her, which, as said before, is not the type of information which triggers the discovery exception. Thus, the discovery exception to the 2-year statute of limitations is not implicated in this case, because the premise behind her invocation of the discovery exception—the alleged lack of knowledge of the connection between her sexual abuse and her emotional and psychological difficulties until told of such by Dr. Larson—must fail, given her judicial admission in the amended complaint to the contrary.

That said, while we have examined the discovery exception because that is how the parties and the trial court approached the statute of limitations issue, Anonymous' claim is also barred by the statute of limitations because during the 2-year statute of limitations period, she knew the "basis of her cause of action."

## CONCLUSION

We conclude that Anonymous' complaint is barred by the statute of limitations. We affirm the district court's grant of summary judgment and dismissal of the complaint.

AFFIRMED.

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STATE OF NEBRASKA EX REL. BILLY TYLER, APPELLANT, V. ROBERT HOUSTON AND MIKE KENNEY, APPELLEES.

727 N.W.2d 703

Filed February 6, 2007. No. A-06-010.

1. **Sentences: Time: Prisoners.** Where a prisoner is discharged from a penal institution, without any contributing fault on his or her part, and without violation of conditions of parole, his or her sentence continues to run while he or she is at liberty.
2. ____: ____: ____. There is an exception to the right to a continuous sentence in situations where the interruption of the sentence is caused by escape, violation of parole, or some other fault of the prisoner.

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

Billy Tyler, pro se.

Jon Bruning, Attorney General, and Linda Willard for appellees.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Billy Tyler appeals from an order of the district court for Lancaster County dismissing his petition for habeas corpus relief. The present case is one of a number of actions brought by Tyler in a variety of different courts on the issue of whether Tyler is entitled to credit against his prison sentence for time he spent released on bond pursuant to a grant of habeas relief in July 2003. See, e.g., cases Nos. A-06-696, A-06-604, A-06-603, A-06-602, A-06-380, A-06-189, A-06-183, A-06-076, A-06-053, A-06-052, A-06-026, A-05-1568, A-05-1334, A-05-833, A-05-342, A-05-128, and A-04-1418. We find no merit to Tyler's

appeal, conclude that the district court properly found Tyler was not entitled to habeas relief at the time he filed the petition in this case, and affirm the district court's dismissal of Tyler's petition.

## II. BACKGROUND

Tyler was originally sentenced on February 9, 1996, to three concurrent terms of 7 to 10 years' imprisonment upon Tyler's convictions on three counts of unlawful delivery of a controlled substance. Tyler was given credit for 80 days served.

On July 7, 2003, the district court granted a petition for habeas corpus relief filed by Tyler. The district court found Tyler's continued detention by the Nebraska Department of Correctional Services (Department) after November 22, 2002, was without legal authority. As such, the district court ordered Tyler to be discharged pursuant to an appearance bond pending an appeal by the Department. The appearance bond, signed by Tyler, specified that Tyler agreed "to appear in the District Court . . . as directed by the Court as ordered either for court ordered hearings or as mandated by [the] Court of Appeals or Supreme Court upon resolution of the [appeal]."

In February 2004, the Nebraska Supreme Court reversed the grant of habeas corpus relief. See *State ex rel. Tyler v. Britten*, 267 Neb. xxii (No. S-03-762, Feb. 19, 2004). The mandate was issued on March 26 and entered by the district court on March 30. On March 30, the district court ordered Tyler to appear as follows:

> Tyler is ordered to immediately surrender himself to the . . . Department . . . to complete his sentence as provided by law.
>
> . . . Tyler is directed to appear at the District Court . . . no later than Monday April 19, 2004, at 10:00 a.m. to surrender to the authorities . . . unless he voluntarily surrenders himself before that date. Failure of [Tyler] to surrender himself as ordered by this court shall result in revocation of his appearance bond and warrant for his arrest on April 19, 2004.

Tyler did not surrender himself as ordered by the district court. Tyler was subsequently arrested on November 7.

In July 2003, when Tyler was released on bond, the Department had calculated his projected release date to be

November 18, 2005. At the time of Tyler's release, he had been the subject of numerous disciplinary actions which had resulted in "disciplinary segregation time equivalent to the remainder of his unserved sentence." In other words, at the time of Tyler's release, he had not accumulated any good time credit. None of the disciplinary sanctions have been overturned. As such, at the time of Tyler's release on bond, he had approximately 862 days remaining on his sentence. (July 10, 2003, through July 9, 2004, is 366 days; July 10, 2004, through July 9, 2005, is 365 days; and July 10 through November 17, 2005, is 131 days.)

On September 8, 2005, Tyler filed the petition for habeas corpus relief in this case. Tyler alleged that he was entitled to credit against his sentence for the time from his release on bond until his being returned to incarceration in November 2004. Tyler alleged that with the credit against his sentence, he was then entitled to absolute discharge. Tyler has filed in various courts numerous similar proceedings asserting his entitlement to credit for the time he was released on bond.

On October 28, 2005, the district court entered an order dismissing Tyler's petition. The district court found that Tyler was out of custody in violation of his bond from March 30 until November 6, 2004, a total of 221 days. The district court made no finding whether Tyler was entitled to credit against his sentence for the time he was legitimately out of custody on bond—from July 10, 2003, through March 29, 2004—but specifically found that he was not entitled to credit for the 221 days he was out of custody in violation of his bond. With respect to Tyler's assertion that he was also entitled to earn good time credit toward an earlier release date while he was out of custody on bond, the district court found that Tyler was not entitled to restoration of good time previously forfeited, because "Tyler was not in the custody of the [D]epartment [while] he was out of custody on bond." The court therefore dismissed Tyler's petition.

On November 4, 2005, Tyler filed a motion asking the district court to reconsider its October 28 order. The district court overruled the motion on November 8, but placed an incorrect docket number on the order. After being notified of the error, the district court issued on November 16 a new order overruling the motion. Tyler filed this appeal.

## III. ASSIGNMENT OF ERROR

Tyler's sole assignment of error is that the district court erred in denying him habeas corpus relief.

## IV. ANALYSIS

As we read the myriad of filings and orders in this case, noting that the multitude of filings made by Tyler are all handwritten and often bordering on illegibility, we construe the appeal to present two issues: whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond and whether Tyler is entitled to restoration of previously forfeited good time credit for the period of time he was out of custody on bond. The answer to both questions leads us to conclude that the district court was correct in finding that Tyler was not entitled to habeas corpus relief at the time he filed the petition at issue in this case.

### 1. Time Served Credit

We first consider whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond. This issue was tangentially addressed in this court's opinion in *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005), an opinion Tyler has seized upon and misconstrued in most of the filings he has made in the present case.

In *Tyler v. Nebraska Dept. of Corr. Servs., supra*, this court addressed whether a declaratory judgment action brought by Tyler concerning issues similar to those raised in the present case was properly characterized as frivolous such that the district court could properly deny in forma pauperis status. We concluded that Tyler's claim was not frivolous. We noted that the record presented did not indicate Tyler had violated any of the conditions of his release, and we concluded that Tyler's claim that his sentence should have continued to run during the time he was out of custody on bond was not frivolous. We also, however, specifically emphasized that we were "not expressing any view concerning the ultimate merit of Tyler's claim." *Id.* at 800, 701 N.W.2d at 851. It is the ultimate merit of that claim, in part, that is now presented.

[1] In *Tyler v. Nebraska Dept. of Corr. Servs., supra*, this court looked to the oft-cited case of *White v. Pearlman*, 42 F.2d 788,

789 (10th Cir. 1930), in which the Court of Appeals for the 10th Circuit stated:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. . . . It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.

See, also, *Luther v. Vanyur*, 14 F. Supp. 2d 773 (E.D.N.C. 1997); *McCorvey v. State*, 675 So. 2d 81 (Ala. Crim. App. 1995). Cf. *Free v. Miles*, 333 F.3d 550 (5th Cir. 2003) (holding prisoner was not entitled to credit on federal sentence for mistakenly serving first 6 months of federal sentence prior to completing service of state sentence and stating that sole purpose of rule against piecemeal incarceration is to prevent governmental abuse of coercive power to imprison person by artificially extending duration of sentence through releases and reincarceration).

Applying those same principles to the case before us, we conclude that the district court did not err in dismissing Tyler's petition. The district court properly concluded that Tyler is not entitled to credit as time served for the period of time he was out of custody and in violation of the terms of his bond, and this finding alone is sufficient to conclude that when Tyler filed his petition, he was not entitled to habeas corpus relief on the basis of any credit as time served. Nonetheless, we conclude that the district court miscalculated the period of time during which Tyler was in violation of his bond.

On March 30, 2004, the district court entered the mandate of the Nebraska Supreme Court reversing the district court's earlier grant of habeas corpus relief to Tyler. The district court specifically directed Tyler, in accordance with the terms of his appearance bond, to "immediately surrender himself"; however, the district court further specified that Tyler was directed to appear "no later than Monday April 19, 2004," or his appearance bond would be revoked and an arrest warrant would be issued. As such, we first conclude that the period of time during which

Tyler was out of custody and in violation of his appearance bond was the period of time from April 19 through November 6, or 202 days—rather than the 221 days found by the district court.

[2] We agree with the district court that Tyler is not entitled to credit for time served during this period of time. The principles of law quoted above specifically recognize an exception to the right to a continuous sentence in situations where the interruption of the sentence is caused by escape, violation of parole, or some other fault of the prisoner. Here, the 202 days during which Tyler was in violation of his appearance bond constitute a period of time during which Tyler's sentence was interrupted through his fault—his failure to appear as directed by the court.

At the time of Tyler's release on bond, his projected release date was November 18, 2005. Because Tyler is not entitled to any credit as time served for the 202 days that he was out of custody and in violation of his appearance bond, his projected release date would have become at least sometime in June 2006.

Tyler filed his petition seeking habeas corpus relief on September 8, 2005. At that time, Tyler still had at least approximately 9 months to serve on his sentence, absent any credit for good time, regardless of whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond and not in violation of the terms of his bond. As such, when Tyler filed for habeas corpus relief and when the court ruled on his petition, the district court correctly held that Tyler was not entitled to habeas corpus relief on the basis of credit as time served. Because we need not do so to resolve this appeal, we expressly decline to address whether Tyler is entitled to credit as time served for any period of time he was out of custody on bond and not in violation of the terms of the bond or whether Tyler was, in fact, not in violation of the terms of his bond during any other periods of time.

### 2. Good Time Credit

The other issue that must be addressed is whether Tyler is entitled to good time credit for the period of time he was out of custody on bond. Tyler has asserted that pursuant to Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 2006), he should have earned good time credit during the time he was out of custody on bond,

and that such good time credit entitles him to habeas corpus relief. We disagree.

Section 83-1,107(2) provides for good time credit. However, the record indicates that when Tyler was released on bond in July 2003, he had accumulated no good time credit and had actually "accumulated disciplinary segregation time equivalent to the remainder of his unserved sentence." As such, when Tyler was released on bond in July 2003, he had accumulated more than 2 years of disciplinary segregation. Although § 83-1,107(3) allows for restoration of good time, Tyler has provided no authority which would suggest he was entitled to such restoration of good time. In fact, the Department's administrative regulation No. 117.02 provides that previously forfeited good time "may be restored" if the inmate "has demonstrated progressive positive behavior over an extended period of time." Tyler has not demonstrated an entitlement to restoration under this provision.

Additionally, as noted above, for at least 202 of the days Tyler was out of custody on bond, he was out of custody in violation of the terms of his appearance bond. Inasmuch as we have already concluded above that Tyler is not entitled to any credit for this period of time as time served, he is likewise not entitled to any good time credit for the time. We conclude that the district court correctly held that Tyler is not entitled to restoration of good time credit and was not entitled to habeas corpus relief on this basis.

## V. CONCLUSION

The issues presented herein are limited to whether Tyler was entitled to habeas corpus relief when he filed his petition for habeas corpus relief and when the district court ordered Tyler was entitled to no relief and dismissed his petition. At those times, Tyler was not entitled to habeas corpus relief under a theory of credit as time served or good time credit. Tyler is entitled to no credit for the 202 days he was out of custody and in violation of his appearance bond. We expressly make no determination concerning Tyler's entitlement to credit as time served for the time he was out of custody on bond and not in violation of the terms of his bond.

AFFIRMED.

[By order of the court, *State v. McCulloch*, 15 Neb. App. 381, 727 N.W.2d 717 (2007), withdrawn. See *State v. McCulloch*, 15 Neb. App. 616, 733 N.W.2d 586 (2007). (Pages 382-89) omitted.)]

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RICHARD C. JURA, SPECIAL ADMINISTRATOR OF THE ESTATE OF AMANDA C. JURA, DECEASED, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

727 N.W.2d 735

Filed February 27, 2007. No. A-05-165.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.

2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 13-911(1) (Reissue 1997), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
4. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** For a passenger to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle.
5. **Police Officers and Sheriffs: Motor Vehicles.** In the context of determining whether a passenger is an innocent third party, the question of whether a person is sought to be apprehended in the fleeing vehicle is a mixed question of fact and law.
6. **Police Officers and Sheriffs: Words and Phrases.** Apprehension by a police officer can mean seizure in the name of the law, arrest, catch, or detain.
7. **Police Officers and Sheriffs: Motor Vehicles.** A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

William J. Pfeffer, of Pfeffer Law Offices, for appellant.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellee.

IRWIN and SIEVERS, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

Richard C. Jura (Jura), as special administrator of the estate of Amanda C. Jura, appeals from the decision of the district court for Douglas County which dismissed his wrongful death claim against the City of Omaha (the City). This appeal involves a police pursuit that resulted in a traffic accident that killed two passengers. The issue is whether one of the passengers, Amanda C. Jura (Amanda), was an "innocent third party," thus entitling her estate to recover under Neb. Rev. Stat. § 13-911 (Reissue 1997). We affirm the trial court's finding that Amanda was not an innocent third party.

## FACTUAL BACKGROUND

At approximately 4 a.m. on December 8, 2002, in Omaha, Nebraska, Amanda was a back seat passenger in a stolen Lincoln Town Car (Lincoln) driven by Jacob Witt (Witt had the car for approximately 1 week prior to December 8), although it does not appear that Amanda knew the Lincoln was stolen. Also in the Lincoln were Tiffany Bruce, in the front passenger seat, and Robin Abraham, also in the back seat. Amanda, Witt, Bruce, and Abraham left a party at a private residence and took the Lincoln to "get more dope." Amanda and Abraham were introduced to Witt approximately a half hour before leaving with him in the Lincoln. While in the Lincoln, they drove past a police cruiser driven by Omaha police officer Thomas Deignan. Officer Deignan began to follow the Lincoln, but he did not turn on the cruiser's lights or sirens. Officer Deignan admitted that no traffic violations were committed, but he thought it was strange that young people would be out in an expensive car at 4 o'clock in the morning. Officer Deignan called the police dispatcher to check the Lincoln's license plates, and the dispatcher informed Officer Deignan that the Lincoln was reported stolen. The Lincoln "started to take off," and Officer Deignan declared "pursuit" and turned on the cruiser's lights and sirens. Officer Deignan also radioed for other officers to help in the pursuit. During the pursuit, the Lincoln missed a curve, went over an embankment, and crashed into a tree. Amanda and Abraham died as a result of their injuries. Additional facts will be set forth as necessary in our analysis.

## PROCEDURAL BACKGROUND

Jura filed a complaint on August 14, 2003. The parties stipulated that Jura satisfied the requirements of the Political Subdivisions Tort Claims Act. Jura's complaint alleged that Amanda was a passenger in the Lincoln driven by Witt; that Witt was attempting to evade vehicular pursuit by one of the City's law enforcement officers; that as a result of Witt's attempt to avoid vehicular pursuit, he lost control of the Lincoln and struck a tree, causing Amanda personal injuries and ultimately her death and resulting in both special and general damages. The complaint alleges that the City was liable under § 13-911, the

strict liability statute for injuries or death to innocent third parties caused by police motor vehicle pursuits.

The City's answer denied that Amanda was an innocent third party under § 13-911. The City alleged contributory negligence and assumption of the risk as affirmative defenses—matters we need not discuss because the case is determined by Amanda's status.

The district court granted the City's motion to bifurcate the issues of liability and damages. A trial was held on October 13 and 19, 2004, regarding the liability issue. At such trial, Jura's case was consolidated with cases brought by or on behalf of the other two passengers. Abraham was found not to be an innocent third party by the trial court, a decision we have previously affirmed. See *Reed v. City of Omaha, ante* p. 234, 724 N.W.2d 834 (2006).

In an order filed January 19, 2005, the trial court found that Amanda was not an " 'innocent third part[y]' within the contemplation of . . . § 13-911(1)." The trial court found that on the evening of December 7, 2004, Amanda and Abraham appeared at Bruce's house, where Witt was present; that the four individuals smoked methamphetamine and marijuana and collectively decided that they were going out to buy more drugs; that they left Bruce's house with Witt driving the stolen Lincoln; that Officer Deignan ran a check on the Lincoln's license plates and found there were no warrants, but that the Lincoln was stolen; that Witt started to " 'take off' " and Officer Deignan began a pursuit; and that the high speed pursuit led to its terminus in a park in Omaha.

The trial court also found that Witt gave inconsistent accounts of the chase. Witt's first statement (and a letter he wrote to Bruce) made no mention of the passengers' requesting him to stop, but, rather, Witt said that someone tried to give him directions not to hit a curb. Witt further stated that the passengers made comments regarding the license plate check and outstanding warrants. Witt told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Witt's later testimony, as well as Bruce's testimony, was that after the

police started the pursuit, the passengers all sought to dissuade Witt from fleeing. The district court said:

> To the extent that their accounts are inconsistent, the Court concludes that Witt's custodial statement is the most credible version of these events. It was given within hours of the events themselves. It was given by a person who did not know or wasn't focusing on the civil aspects of the case. It was given to interrogators who were concentrating on the criminal side of the case. In sum, it was the most candid, reliable account of those few minutes.

The district court found that Abraham was the passenger who told Witt that she had an arrest warrant outstanding.

As to Amanda, the district court said:

> Amanda Jura comes as close as any of the three to an 'innocent third party.' She may not have been subjectively aware that Witt was driving a stolen vehicle, although a young man without a job behind the wheel of such an expensive car would prompt questions for most people. [Amanda] did not have any outstanding warrants, and she may not have been carrying drugs. Nevertheless, at 4:00 A.M. when this journey began, the four had agreed to drive Witt from the house at which they were smoking methamphetamine to another location, and to continue their drug use or to purchase additional drugs. All were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched. They were all aware, including [Amanda], that they were taking a circuitous route to their destination, to avoid encountering police in the early morning hours. The confluence of all of these facts exceeds acquiescence. [Amanda], together with her friends Bruce and Abraham, promoted or advocated Witt's flight, at the time when they all became aware of and discussed the first officer's data check on their license plates, and the arrest warrant.
>
> None of these girls consented to, or encouraged Witt to drive erratically, or to crash. They just wanted him to get away. They knew that it would be better for them if he did elude police.

Furthermore, the district court held that Amanda fell within the category of individuals " 'sought to be apprehended in the fleeing vehicle' " and, thus, was not an innocent third party entitled to recovery under § 13-911(1). The district court dismissed Jura's case with prejudice.

Jura timely appeals the order of the district court.

## ASSIGNMENT OF ERROR

Jura asserts that the district court erred in finding that Amanda was not an innocent third party under the terms of § 13-911.

## STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

## ANALYSIS

[3,4] Jura argues that the district court erred in finding that Amanda was not an innocent third party pursuant to § 13-911(1), which states: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." For a passenger to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle. *Reed v. City of Omaha, ante* p. 234, 724 N.W.2d 834 (2006). See, also, *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002). Either circumstance prevents a finding that a claimant

in a police pursuit case was an innocent third party. *Reed v. City of Omaha, supra*. As a result, we need not analyze both disqualifying circumstances, and after our study of the record in this case, we conclude that the disqualifying factor of "sought to be apprehended" lends itself to the most straightforward analysis and resolution. Therefore, we do not address the district court's conclusion that Amanda promoted Witt's flight.

[5,6] Whether Amanda was a person "sought to be apprehended in the fleeing vehicle" is a mixed question of fact and law, and given that the facts surrounding the question of "apprehension" are largely undisputed, we reach our own independent conclusion as to whether Amanda was a person "sought to be apprehended." See *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003). Black's Law Dictionary 110 (8th ed. 2004) defines "apprehension" as "[s]eizure in the name of the law; arrest . . . ." But apprehend can also mean to "catch," see *Reyes-Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004), or "detain," see *United States v. Moderacki*, 280 F. Supp. 633, 638 (D. Del. 1968).

Part of the district court's rationale for its conclusion on the issue of apprehension was that "[a]ll were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched." To the extent that the district court meant that everyone in the group was subject to arrest for the drugs in Bruce's purse, we reject that conclusion. All of the passengers knew that Bruce had drugs in her purse, but such fact did not make Amanda necessarily subject to arrest, because the purse was not her property and she was not in possession of the drugs. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). There was no evidence to show actual or constructive possession of the drugs by Amanda. However, of greater significance is the simple fact that possession of drugs was not the officer's basis for starting or continuing the pursuit, and seeking to apprehend the vehicle's occupants, because he had no knowledge of such circumstance until after the pursuit ended.

Officer Deignan started the pursuit of the Lincoln once he became aware that the vehicle was stolen. The evidence does not establish that Amanda knew the Lincoln was stolen, but as the trial court reasoned, an inference of such knowledge may be permissible. However, Officer Deignan testified as follows:

> Q. [By Bruce's counsel:] Are you aware, with your training as a police officer, as to whether there's such a crime as riding in a stolen vehicle?
>
> A. As far as being a passenger?
>
> Q. Yes.
>
> A. There is a charge. I believe it's 28511, unlawful occupancy. Something similar to that.
>
> Q. Have you ever charged anyone with that?
>
> A. I have not, no.
>
> Q. Would it be accurate to say that you were most interested in stopping the vehicle so that you could apprehend the driver of the stolen vehicle?
>
> A. Not at that time, no.
>
> Q. Didn't matter to you, driver versus passenger?
>
> A. I wanted everybody inside the vehicle.

Officer Deignan also testified: "When you have a stolen vehicle with multiple occupants, you don't know who stole the vehicle, where it was taken from, who might have been driving it earlier. You don't have that information before you stop the vehicle and question the occupants." Also, two other Omaha police officers testified that in a situation involving a stolen vehicle, proper police procedure requires the officer to "catch" all occupants in the car, because not knowing when the vehicle was stolen, it is possible that everyone in the vehicle could have been involved in the auto theft.

[7] Given the testimony of the police officers, we find that Amanda was a person sought to be apprehended in the fleeing vehicle. A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts. Such a basis clearly exists in this case, because the vehicle was a stolen vehicle, as opposed to, for example, a chase starting with a traffic violation. Thus, Amanda was not an innocent third party and her estate is barred from recovering under § 13-911. It follows that we need not address

whether Amanda promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert*, 259 Neb. 160, 608 N.W.2d 588 (2000).

AFFIRMED.

INBODY, Chief Judge, not participating.

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STATE OF NEBRASKA, APPELLEE, V.
AMBER L. MURPHY, APPELLANT.

727 N.W.2d 730

Filed February 27, 2007. No. A-05-1210.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act.
4. **Postconviction: Jurisdiction: Effectiveness of Counsel: Appeal and Error.** The power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
5. **Postconviction: Time: Appeal and Error.** A defendant obtaining postconviction relief of a new direct appeal must properly appeal from his or her original conviction and sentence based on the grant of such postconviction relief. The 30-day limit within which the defendant must file his or her new direct appeal commences on the day that such postconviction relief is granted in the district court.
6. **Postconviction.** Postconviction proceedings are civil in nature.
7. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** When an issue as to the subject matter jurisdiction of the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise sua sponte and determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.
8. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
9. **Stipulations.** Parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.
10. **Jurisdiction: Stipulations: Appeal and Error.** Appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties.

11. **Final Orders: Jurisdiction: Appeal and Error.** An appellate court is not bound by the parties' acquiescence or consent as to whether the district court has entered a final order which would confer jurisdiction upon the appellate court.
12. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by consent.
13. **Judgments: Jurisdiction: Collateral Attack.** Judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Appeal dismissed.

Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

Amber L. Murphy was convicted of distribution of a controlled substance, methamphetamine, following a jury trial in the district court for Hall County and was sentenced to 2 to 4 years' imprisonment. Murphy did not timely perfect an appeal from the original verdict and sentence, but she was subsequently granted the right to file an appeal by the district court, pursuant to a stipulation of the parties. On appeal, Murphy challenges the sufficiency of the evidence to submit the charge to the jury. Because we find that the district court lacked jurisdiction to enter the order allowing Murphy to file an appeal out of time, we dismiss this case for lack of jurisdiction.

## BACKGROUND

The State filed an amended information on January 25, 2005, charging Murphy with two counts of distribution of a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Supp. 2003). The State later moved to dismiss the first count of the amended information, which motion was granted by the district court. In count II of the information, the State alleged that on September 9, 2003, Murphy did unlawfully and knowingly or intentionally manufacture, distribute, deliver, or dispense methamphetamine, a controlled substance.

A jury trial was held on January 27, 2005. Because the underlying facts of this case are not relevant to our disposition, we omit further discussion of the factual background.

The jury returned a guilty verdict. On March 15, 2005, the district court entered an order sentencing Murphy to a term of incarceration for a period of 2 to 4 years with credit for time served of 1 day. Murphy did not file a notice of appeal within 30 days of the March 15 sentencing order.

In her brief on appeal, Murphy asserts that on July 25, 2005, she filed a motion for postconviction relief due to the failure of her former counsel to file an appeal within the time required by statute. The record before us does not contain Murphy's postconviction motion, but it does contain a stipulation and an order allegedly filed in connection with the postconviction proceeding. The stipulation, filed September 9, states that the parties "stipulate and agree that [Murphy] may file an Appeal in the above-captioned case." The parties also recommended to the court that the appeal bond previously set continue to be in effect. The district court's order, entered September 19, states:

> [T]his matter comes before the Court on a Stipulation of the parties hereto for the filing of an Appeal and that the Appeal Bond previously set in this case . . . remain in effect. Upon due consideration, the Court finds that the Stipulation should be granted.
>
> IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED BY THE COURT as follows:
>
> 1. [Murphy] is hereby granted 30 days to file an Appeal in this matter.
>
> 2. The Appeal Bond previously set in this case shall remain in effect.
>
> 3. Balance of Post Conviction motion is not adjudicated. JDL

We observe that the third numbered point of the order is handwritten.

On October 11, 2005, Murphy filed a notice of appeal, purporting to appeal from the March 15 sentencing order. This court initially dismissed Murphy's appeal for lack of jurisdiction as having been filed out of time. On January 13, 2006, Murphy

filed a motion for rehearing and sought leave to file a supplemental transcript. On April 21, this court sustained Murphy's motion for rehearing and granted her leave to file a supplemental transcript. The stipulation and order of September 2005 described above are found in the supplemental transcript in this case. In sustaining Murphy's motion for rehearing, we specifically reserved the issue of jurisdiction and ordered the parties to address the issue in their briefs.

## ASSIGNMENT OF ERROR

Murphy asserts that the district court erred in finding that there was sufficient evidence of corroboration to submit the charge regarding the September 9, 2003, incident to the jury.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

## ANALYSIS

[2] We must first consider whether Murphy has properly perfected her appeal in the present case. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Dunlap, supra.*

It is clear that Murphy did not file a notice of appeal within 30 days of the March 15, 2005, sentencing order. In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006). Murphy argues that her trial counsel failed to perfect an appeal from the March 15 sentencing order, that she filed a postconviction action to address this failure, and that she properly perfected the present appeal based on the relief granted by the district court in the postconviction proceeding.

[3,4] Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). The power to grant a new direct appeal is implicit in Neb.

Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings. *State v. Meers, supra.* The court in *State v. Meers* stated:

> When a postconviction claim of ineffective assistance of counsel is based solely upon counsel's failure to perfect an appeal from a conviction, a new direct appeal permits restoration of the convicted defendant's rights and status at the time of counsel's deficient performance by affording the full statutory time to perfect and prosecute a direct appeal while not disturbing the conviction, unless the appeal discloses reversible error.

267 Neb. at 31, 671 N.W.2d at 237.

[5] A defendant obtaining postconviction relief of a new direct appeal must properly appeal from his or her original conviction and sentence based on the grant of such postconviction relief. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The 30-day limit within which the defendant must file his or her new direct appeal commences on the day that such postconviction relief is granted in the district court. *State v. McCracken, supra.*

> Such a procedure allows the appellate court to obtain jurisdiction over the new direct appeal (assuming that the appeal is properly docketed in the appellate court within 30 days of the grant of postconviction relief), while still authorizing district courts to grant appropriate relief when the constitutional defect in the prior proceedings occurred only at the direct appeal stage. The State, of course, maintains its right to appeal the postconviction judgment of the district court.

*Id.* at 245, 615 N.W.2d at 914.

What is required for purposes of the present appeal is evidence that Murphy was awarded postconviction relief of a new direct appeal and evidence that a notice of appeal was filed within 30 days of the grant of such relief. See *State v. McCracken, supra.* The problem in this case is that the record before us is insufficient to establish that the district court was properly exercising its jurisdiction of a postconviction proceeding.

[6-8] First, the record does not contain Murphy's motion for postconviction relief. Thus, we have no knowledge of the allegations made in the postconviction proceeding. Postconviction proceedings are civil in nature. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). When an issue as to the subject matter jurisdiction of the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise sua sponte and determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). Although in Murphy's brief, she asserts that she filed a motion for postconviction relief "due to the failure of her former counsel to file an appeal within the time required by statute," brief for appellant at 1-2, no such motion appears in the record. A party's brief may not expand the evidentiary record. See *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). Thus, the absence of the postconviction motion in our record precludes us from considering, as a proper element of postconviction relief, the district court's order granting Murphy leave to file an appeal.

Second, and perhaps more importantly, the record fails to provide any factual basis for a determination that Murphy was deprived of any constitutional right in her failure to timely pursue a direct appeal. The only record before us regarding the postconviction proceedings is the stipulation of Murphy's counsel and the prosecutor before the district court, which stipulation states only that Murphy "may file an Appeal in the above-captioned case," and the district court's order pursuant to that stipulation purporting to grant "an Appeal in this matter."

[9] The stipulation does not set forth any facts pertaining to a deprivation of constitutional rights; rather, it is purely conclusory. Parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978).

Under § 29-3001, the jurisdiction of the district court to grant postconviction relief depends upon the existence of a factual circumstance whereby "there was such a denial or infringement

of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States." The same postconviction statute requires the district court to "make findings of fact and conclusions of law with respect thereto." *Id.* In the case before us, there are no allegations of fact, no stipulations of fact, and no findings of fact showing any such denial or infringement of Murphy's constitutional rights. The stipulation sets forth only the bare conclusory agreement that "an Appeal" be allowed, and the district court's order merely implements that stipulation.

[10-12] The Nebraska Supreme Court has long held that appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties. *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 273, 178 N.W. 822 (1920). An appellate court is not bound by the parties' acquiescence or consent as to whether the district court has entered a final order which would confer jurisdiction upon the appellate court. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by consent. See, *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003); *Burkland v. Johnson*, 50 Neb. 858, 70 N.W. 388 (1897). We find that the stipulation was not sufficient to invoke the district court's jurisdiction pursuant to the postconviction statute and constituted an invalid attempt to extend the time for appeal.

[13] Judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). Because the stipulation of the parties was not sufficient to invoke the district court's subject matter jurisdiction in the postconviction proceeding, the district court's order purporting to grant an appeal is void.

## CONCLUSION

We conclude that Murphy failed to timely invoke appellate jurisdiction and that the district court order based solely upon a conclusory stipulation of the parties without any factual basis, which order purports to grant 30 days to file an appeal, is without jurisdiction and void. Accordingly, we must dismiss the appeal.

APPEAL DISMISSED.