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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 20, 1998 and JULY 16, 1998

IN THE

Supreme Court of Nebraska

VOLUME CCLIV

PEGGY POLACEK

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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

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
		Gary B. Randall	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

SEPARATE JUVENILE COURTS
AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	John J. McGrath	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION
COURT AND JUDGES

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

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

Nos. S-96-820, S-96-821, S-96-822, S-96-823: **Mondelli v. Kendel Homes Corp.** Reversed and remanded for further proceedings. Stephan, J.

No. S-96-999: **Gathman v. Mack.** Vacated and dismissed. McCormack, J.

No. S-97-197: **State v. Anderson.** Affirmed. Connolly, J.

No. S-97-205: **Gottsch Feeding Corp. v. Department of Revenue.** Appeal dismissed. Gerrard, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-36-970004: **In re Petition of NSBA to Modify Code of Prof. Conduct**. Petition granted in part, and in all other respects denied.

No. S-96-063: **Teters v. Scottsbluff Pub. Schools**. Judgment of Court of Appeals affirmed by an equally divided court.

No. S-96-433: **M & D Masonry v. Universal Surety Co**. Affirmed without opinion.

No. S-96-704: **Sherman v. Holiday Inns**. Stipulation allowed; appeal dismissed with prejudice.

No. S-96-959: **Zabloudil v. Lacey**. Stipulation allowed; appeal dismissed.

No. S-97-566: **State v. Schrein**. Appeal dismissed as moot. See rule 7C.

No. S-97-911: **Middle Republican NRD v. Bond**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-97-1028: **County of Sherman v. Glinsmann**. By order of the court, appeal dismissed for failure to file briefs.

No. S-97-1036: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-97-1072: **Sikora v. State**. Appeal dismissed for want of a final, appealable order. See rule 7A(2).

No. S-97-1186: **State v. Carr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-97-1248: **State v. Kulju**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-97-1249: **State v. Barfield**. Stipulation to dismiss appeal sustained.

No. S-97-1334: **State v. Kern**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-068: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-98-073: **Pratt v. Nebraska Parole Bd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-98-161: **Krolikowski v. State.** No showing having been made why appeal should not be dismissed, appeal hereby dismissed.

No. S-98-409: **State v. Williams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-524: **State ex rel. NSBA v. Aupperle.** Application for temporary suspension sustained.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-33-970037: **State v. Meiner**. Petition of appellant for further review overruled on February 11, 1998.

No. A-95-1267: **Lahm v. Burlington Northern RR. Co.**, 6 Neb. App. 182 (1997). Petition of appellant for further review overruled on March 13, 1998.

No. S-95-1296: **Sindelar v. Hanel Oil Inc.**, 6 Neb. App. 349 (1998). Petition of appellee for further review sustained on April 1, 1998.

No. A-96-347: **Hoffmeyer v. Spectrum Emergency Care**. Petition of appellant for further review overruled on February 25, 1998.

No. S-96-433: **M & D Masonry v. Universal Surety Co.**, 6 Neb. App. 215 (1997). Petition of appellee for further review sustained on February 11, 1998.

No. A-96-434: **Larsen v. Severa**. Petition of appellant for further review overruled on May 29, 1998.

No. A-96-434: **Larsen v. Severa**. Petition of appellee for further review overruled on May 29, 1998.

No. A-96-459: **Rahe v. Severa**. Petition of appellee for further review overruled on April 1, 1998.

No. A-96-516: **Maloley v. Glinsmann**, 97 NCA No. 49. Petition of appellee for further review overruled on February 11, 1998.

No. S-96-562: **Springer v. Kuhns**, 6 Neb. App. 115 (1997). Stipulation allowed; petition for further review dismissed on March 4, 1998.

No. S-96-587: **Foote Clinic, Inc. v. City of Hastings**, 97 NCA No. 47. Petition of appellant for further review sustained on February 11, 1998.

No. A-96-618: **AMISUB v. Allied Prop. & Cas. Ins. Co.**, 6 Neb. App. 696 (1998). Petition of appellant for further review overruled on May 14, 1998.

No. A-96-623: **F & J Enterprises v. DeMontigny**, 6 Neb. App. 259 (1997). Petition of appellee for further review overruled on February 11, 1998.

No. A-96-656: **Austin v. State Farm Mut. Auto. Ins. Co.** Petition of appellee for further review overruled on June 17, 1998.

No. A-96-710: **Hammond v. Nemaha County**. Petition of appellee for further review overruled on April 22, 1998.

No. S-96-734: **Daubman v. CBS Real Estate Co.**, 6 Neb. App. 390 (1998). Petition of appellee for further review sustained on March 13, 1998.

Nos. A-96-745, A-96-746, A-96-747: **Ahlman et al. v. City of Hastings**. Petition of appellant for further review overruled on March 25, 1998.

No. A-96-799: **Sheehy v. Pearson**. Petition of appellant for further review overruled on April 15, 1998.

No. A-96-808: **Freeburg v. Artistic Woven Labels**, 97 NCA No. 49. Petition of appellant for further review overruled on February 11, 1998.

No. A-96-850: **Eitzmann v. Eitzmann**. Petition of appellee for further review overruled on April 29, 1998.

No. A-96-851: **State v. Bachelor**, 6 Neb. App. 426 (1998). Petition of appellee for further review overruled on April 1, 1998.

No. A-96-873: **Board of Regents v. Thompson**, 6 Neb. App. 734 (1998). Petition of appellant for further review overruled on May 29, 1998.

No. A-96-879: **Renner v. Renner**. Petition of appellee for further review overruled on April 1, 1998.

No. A-96-898: **Steel v. Steel**. Petition of appellant for further review overruled on February 19, 1998.

No. A-96-931: **State v. Hunt**. Petition of appellant for further review overruled on March 13, 1998.

No. A-96-953: **Davenport v. Byington**. Petition of appellant for further review overruled on April 15, 1998.

No. A-96-957: **Spalding v. Reinke's Farm and City, Inc.** Petition of appellant for further review overruled on February 19, 1998.

No. A-96-963: **Quick v. Dirkschneider**. Petition of appellee for further review overruled on May 14, 1998.

No. A-96-986: **State v. Kraupie**, 98 NCA No. 4. Petition of appellant for further review overruled on March 18, 1998.

No. A-96-993: **Blum v. Nowicki**. Petition of appellant for further review overruled on March 25, 1998.

No. S-96-1019: **Vaccaro v. City of Omaha**, 6 Neb. App. 410 (1998). Petition of appellees for further review sustained on February 25, 1998.

No. A-96-1037: **Kouma v. Blue Valley Co-op.**, 6 Neb. App. 714 (1998). Petition of appellant for further review overruled on June 17, 1998.

No. A-96-1054: **State v. Hunt**. Petition of appellant for further review overruled on March 13, 1998.

No. A-96-1075: **Ostwald v. Boyce**. Petition of appellee for further review overruled on April 22, 1998.

Nos. A-96-1087, A-96-1088: **Merritt v. City of Bassett**. Petition of appellant for further review overruled on June 24, 1998.

No. A-96-1138: **Bohaty v. CH LTD**. Petition of appellant for further review overruled on March 25, 1998.

No. A-96-1155: **Wiegert v. Taco John's**. Petition of appellant for further review overruled on June 24, 1998.

No. A-96-1161: **General Service Bureau, Inc. v. Grant**. Petition of appellant for further review overruled on April 1, 1998.

No. A-96-1185: **In re Estate of Kopecky**, 6 Neb. App. 500 (1998). Petition of appellee for further review overruled on April 1, 1998.

No. S-96-1257: **Dukat v. Leiserv, Inc.**, 6 Neb. App. 905 (1998). Petition of appellee for further review sustained on June 17, 1998.

No. A-96-1304: **State v. Rodriguez**, 6 Neb. App. 67 (1997). Petition of appellant for further review overruled on March 18, 1998.

No. A-96-1323: **State v. Williams**. Petition of appellant for further review overruled on April 1, 1998.

No. A-96-1323: **State v. Williams**. Petition of appellee for further review overruled on April 1, 1998.

No. A-97-004: **State v. Beckby**. Petition of appellant for further review overruled on June 10, 1998.

No. A-97-009: **Federal Deposit Ins. Corp. v. Slangal**. Petition of appellant for further review overruled on May 29, 1998.

No. A-97-012: **Williams v. Williams**. Petition of appellant for further review overruled on February 11, 1998.

No. A-97-032: **State v. Irwin**, 97 NCA No. 46. Petition of appellant for further review overruled on February 25, 1998.

No. S-97-105: **State v. Blackman**, 6 Neb. App. 294 (1997). Petition of appellee for further review sustained on February 11, 1998.

No. S-97-159: **Farnsworth v. Farnsworth**, 6 Neb. App. 597 (1998). Petition of appellee for further review sustained on April 29, 1998.

No. A-97-193: **State v. Shafer**. Petition of appellant for further review overruled on March 25, 1998.

No. A-97-193: **State v. Shafer**. Petition of appellant pro se for further review overruled on March 25, 1998.

No. S-97-241: **Woodard v. City of Lincoln**, 7 Neb. App. 11 (1998). Petition of appellant for further review sustained on June 17, 1998.

No. S-97-249: **Boyle v. Welsh**, 6 Neb. App. 931 (1998). Petition of appellee for further review sustained on June 17, 1998.

No. A-97-258: **Boman v. Schmoldt**. Petition of appellant for further review overruled on April 15, 1998.

No. A-97-278: **State v. Hirales-Ayon**. Petition of appellant for further review overruled on March 18, 1998.

No. A-97-279: **Becker v. Becker**, 6 Neb. App. 277 (1997). Petition of appellee for further review overruled on April 22, 1998.

No. A-97-307: **State v. Shields**. Petition of appellant for further review overruled on April 22, 1998.

No. S-97-312: **Brunges v. Brunges**. Petition of appellant for further review sustained on June 10, 1998.

No. A-97-336: **State v. Hemeter**. Petition of appellant for further review overruled on April 1, 1998.

No. A-97-373: **State v. Thomas**, 6 Neb. App. 510 (1998). Petition of appellant for further review overruled on May 29, 1998.

No. A-97-398: **Pratt v. Martin**, 98 NCA No. 2. Petition of appellee for further review overruled on February 25, 1998.

No. A-97-401: **Crippen v. Max I. Walker**, 6 Neb. App. 289 (1997). Petition of appellant for further review overruled on March 13, 1998.

No. A-97-406: **State v. Huston**. Petition of appellant for further review overruled on April 1, 1998.

No. A-97-423: **State v. Nietfeld**. Petition of appellant for further review overruled on April 15, 1998.

No. A-97-435: **State v. Mirzakhanov**. Petition of appellant for further review overruled on May 29, 1998.

No. A-97-449: **In re Interest of Clifford M. et al.**, 6 Neb. App. 754 (1998). Petition of appellees for further review overruled on May 14, 1998.

No. A-97-466: **Gray v. Draper**. Petition of appellant for further review overruled on March 25, 1998.

No. A-97-477: **State v. Wilcox**. Petition of appellant for further review overruled on April 15, 1998.

No. A-97-499: **State v. James**, 6 Neb. App. 444 (1998). Petition of appellant for further review overruled on March 25, 1998.

No. A-97-527: **State v. Erb**, 6 Neb. App. 672 (1998). Petition of appellant for further review overruled on May 14, 1998.

No. A-97-538: **State v. Bartos**. Petition of appellant for further review overruled on April 29, 1998.

No. A-97-543: **In re Interest of Angela S.** Petition of appellant for further review overruled on March 13, 1998.

No. A-97-548: **In re Interest of Laura O. & Joshua O.**, 6 Neb. App. 554 (1998). Petition of appellant for further review overruled on April 15, 1998.

No. A-97-571: **Catron v. Browns Creek Irrigation**. Petition of appellant for further review overruled on March 13, 1998.

No. S-97-572: **Gibson v. Kurt Mfg.**, 6 Neb. App. 371 (1998). Petition of appellee for further review sustained on April 1, 1998.

No. A-97-620: **State v. Wagner**. Petition of appellant for further review overruled on April 29, 1998.

No. A-97-630: **State v. Jones**. Petition of appellant for further review overruled on March 13, 1998.

No. A-97-635: **State v. Vazquez**. Petition of appellant for further review overruled on March 13, 1998.

No. S-97-641: **State v. Stott**, 6 Neb. App. 677 (1998). Petition of appellant for further review sustained on May 14, 1998.

No. S-97-642: **State v. Woods**, 6 Neb. App. 829 (1998). Petition of appellee for further review sustained on June 17, 1998.

Nos. A-97-650, A-97-651: **State v. Burns**. Petition of appellant for further review overruled on March 25, 1998.

No. A-97-654: **Coulson v. Nebraska Bd. of Parole**. Petition of appellant for further review overruled on February 25, 1998.

No. A-97-659: **Castoral v. Farmland Indus.**, 98 NCA No. 4. Petition of appellant for further review overruled on March 18, 1998.

No. A-97-671: **Sikora v. Higley**. Petition of appellant for further review overruled on February 11, 1998.

No. A-97-683: **State v. Osche**, 6 Neb. App. 640 (1998). Petition of appellant for further review overruled on April 15, 1998.

No. A-97-687: **State v. Witherspoon**. Petition of appellant for further review overruled on March 18, 1998.

No. A-97-705: **State v. Fuentes**. Petition of appellant for further review overruled on April 1, 1998.

No. A-97-744: **Melroy v. Kawasaki Motors**. Petition of appellee for further review overruled on April 22, 1998.

No. A-97-748: **State v. Burnett**. Petition of appellant for further review overruled on February 11, 1998.

No. S-97-748: **State v. Burnett**. Motion for rehearing sustained; petition of appellant for further review sustained on February 25, 1998.

No. A-97-754: **State v. Running Shield**. Petition of appellant for further review overruled on March 13, 1998.

No. A-97-779: **In re Interest of Odom**. Petition of appellant for further review overruled on April 22, 1998.

No. A-97-779: **In re Interest of Odom**. Petition of appellee for further review overruled on April 22, 1998.

No. A-97-782: **Cummings v. Omaha Public Schools**, 6 Neb. App. 478 (1998). Petition of appellant for further review overruled on March 25, 1998.

No. A-97-805: **State v. Wahrman**. Petition of appellant for further review overruled on March 13, 1998.

No. A-97-806: **Tyler v. Johnson**. Petition of appellant for further review overruled on May 20, 1998.

No. A-97-824: **State v. Suggett**. Petition of appellant for further review overruled on May 14, 1998.

No. A-97-828: **State v. Jones**, 6 Neb. App. 647 (1998). Petition of appellant for further review overruled on May 29, 1998.

No. A-97-829: **State v. McLeaney**, 6 Neb. App. 807 (1998). Petition of appellant for further review overruled on May 29, 1998.

No. A-97-830: **In re Interest of William S.** Petition of appellant for further review overruled on April 22, 1998.

No. A-97-830: **In re Interest of William S.** Petition of appellee Mary Ellen S. overruled on April 22, 1998.

No. S-97-859: **In re Interest of Anthony G.**, 6 Neb. App. 812 (1998). Petition of appellant for further review sustained on May 20, 1998.

No. S-97-860: **O'Connor v. Kaufman**, 6 Neb. App. 382 (1998). Petition of appellant for further review sustained on March 13, 1998.

No. A-97-871: **In re Interest of Paige R.** Petition of appellant for further review overruled on June 10, 1998.

No. A-97-908: **State v. Johnson**. Petition of appellant for further review overruled on March 13, 1998.

No. A-97-912: **State v. Critel**. Petition of appellant for further review overruled on May 20, 1998.

No. A-97-917: **State v. Lewis**, 6 Neb. App. 867 (1998). Petition of appellee for further review overruled on June 10, 1998.

No. A-97-943: **State v. Jessepe**. Petition of appellant for further review overruled on May 14, 1998.

No. A-97-974: **State v. Green**. Petition of appellant for further review overruled on May 14, 1998.

No. A-97-982: **State v. Beckley**. Petition of appellant for further review overruled on June 17, 1998.

No. A-97-991: **State v. Schweiger**. Petition of appellant for further review overruled on April 15, 1998.

No. A-97-1027: **State v. Sterling**. Petition of appellant for further review overruled on May 14, 1998.

No. A-97-1054: **Ash Grove Cement Co. v. Nebraska Dept. of Revenue**. Petition of appellant for further review overruled on May 14, 1998.

No. S-97-1072: **Sikora v. State**. Petition of appellant for further review sustained on April 15, 1998.

No. A-97-1094: **State v. Davlin**. Petition of appellant for further review overruled on May 29, 1998.

No. A-97-1095: **State v. Felix**. Petition of appellant for further review overruled on April 1, 1998.

No. A-97-1113: **State v. Raven**. Petition of appellant for further review overruled on June 17, 1998.

No. A-97-1116: **State v. Hopper**. Petition of appellant for further review overruled on May 14, 1998.

No. A-97-1129: **State v. Al-Hussaini**, 6 Neb. App. 978 (1998). Petition of appellant for further review overruled on June 17, 1998.

No. A-97-1146: **State v. Ward**. Petition of appellant for further review overruled on March 18, 1998.

No. A-97-1225: **Williams v. Avery**. Petition of appellant for further review overruled on June 17, 1998.

No. A-97-1252: **Cotton v. Houston**. Petition of appellant for further review overruled on June 17, 1998.

No. A-97-1283: **State v. Seberger**. Petition of appellant for further review overruled on March 13, 1998.

No. A-97-1308: **State v. Critel**. Petition of appellant for further review overruled on March 25, 1998.

No. A-98-021: **Pratt v. Nebraska Parole Bd**. Petition of appellant for further review overruled on May 14, 1998.

No. A-98-165: **State v. Smith**. Petition of appellant for further review overruled on May 8, 1998.

No. A-98-168: **Arnold v. Clarke**. Petition of appellant for further review overruled on May 20, 1998.

No. A-98-194: **Greater Omaha Realty Co. v. City of Omaha**. Petition of appellant for further review overruled on June 24, 1998.

No. A-98-195: **Davis v. City of Omaha**. Petition of appellant for further review overruled on June 24, 1998.

No. A-98-230: **Cole v. Green**. Petition of appellant for further review overruled on June 24, 1998.

No. A-98-323: **Miller v. Miller**. Petition of appellant for further review overruled on June 12, 1998.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

CASEY POPPLE AND NICHOLAS POPPLE, MINORS, BY BRIAN POPPLE AND MAUREEN POPPLE, NEXT FRIENDS, ET AL., APPELLANTS, V. WAYNE ROSE AND SHARON ROSE, APPELLEES.

573 N.W.2d 765

Filed February 20, 1998. No. S-96-310.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose 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: Evidence: Proof.** After the moving party has shown facts warranting judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law.
3. **Appeal and Error.** To the extent issues of law are presented, an appellate court is obligated to reach independent conclusions irrespective of the determinations made by the court below.
4. **Parent and Child: Liability: Damages.** Neb. Rev. Stat. § 43-801 (Reissue 1993) provides that the parents shall be jointly and severally liable for the willful and intentional infliction of personal injury to any person or destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons, provided that in the event of personal injuries willfully and intentionally inflicted by such child or children, damages shall be recoverable only to the extent of hospital and medical expenses incurred but not to exceed the sum of $1,000 for each occurrence.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Intent.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it.
7. **Parent and Child: Liability.** Neb. Rev. Stat. § 43-801 (Reissue 1993) imposes vicarious liability on parents of children who intentionally inflict personal injury.
8. **Liability: Legislature.** Neither the plain meaning of Neb. Rev. Stat. § 43-801 (Reissue 1993) nor the legislative history can be read to abrogate common-law liability.

9. **Negligence.** An action predicated on a duty to warn is essentially a negligence action, requiring a duty, breach, proximate cause, and damages.
10. ____. The threshold inquiry in any negligence action, including those involving a duty to warn, is whether the defendant owed the plaintiff a duty.
11. ____. Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury.
12. **Negligence: Words and Phrases.** A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
13. **Negligence.** Duty is a question of whether the defendant is under any obligation for the benefit of the plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk.
14. ____. Determining whether a legal duty exists is a question of law dependent on the facts of a particular situation.
15. **Negligence: Liability: Damages: Words and Phrases.** Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.
16. **Negligence.** A duty to warn cannot be imposed absent a special relationship.

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

Michael C. Klein, of Anderson, Klein, Peterson, Swan and Bogle Louthan, for appellants.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This case raises the issue of whether the parents of a minor child have a duty to warn third parties of the child's allegedly known dangerous sexual propensities. We removed this case, pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court, to determine whether a parental duty to warn exists in the State of Nebraska. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

In September 1992, Brian Popple and Maureen Popple hired W.R. to care for their children, Casey and Nicholas. On November 23, while babysitting the children, W.R. physically overpowered Casey and sexually assaulted him, forcibly committing acts of masturbation, fellatio, and sodomy. W.R. did not

sexually assault Nicholas, but forced him to witness these events. At the time, W.R. was nearly 13 years old, Nicholas was 9, and Casey was 6.

W.R. was charged with sexual assault in the juvenile court for Phelps County and admitted the charges. The Popples then filed suit in district court and claimed Wayne Rose and Sharon Rose, W.R.'s parents, negligently failed to warn them of W.R.'s allegedly known dangerous sexual propensities. The Popples argued they were not seeking recovery under the parental vicarious liability statute, Neb. Rev. Stat. § 43-801 (Reissue 1993), but, rather, were seeking to hold the Roses liable for their independent negligence in failing to warn the Popples of W.R.'s allegedly known dangerous sexual propensities. In response, the Roses filed a motion for summary judgment.

The district court granted the motion and held that § 43-801 was the Popples' exclusive remedy. The court also held that no independent duty existed upon which to predicate negligence, because Nebraska has not recognized a cause of action based upon parents' failure to warn of their children's known dangerous sexual propensities. The Popples' motion for a new trial was overruled, and they appeal.

The Popples contend the district court erred in (1) holding that Nebraska does not recognize a cause of action based on parents' negligent failure to warn of their children's known dangerous sexual propensities; (2) holding that § 43-801 was their exclusive remedy; (3) sustaining the Roses' motion for summary judgment; and (4) overruling the Popples' motion for new trial.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose 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. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). After the moving party has shown facts warranting judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997). To the extent issues of

law are presented, an appellate court is obligated to reach independent conclusions irrespective of the determinations made by the court below. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

The evidence discloses that prior to engaging W.R. as a babysitter, the Popples knew W.R. had a history of physically violent behavior. The record, however, is devoid of any evidence indicating the Roses, the Popples, or any other person was aware W.R. possessed any propensity to commit any acts of sexual assault and/or abuse. In addition, the record is also devoid of any evidence intimating that W.R. even possessed such a habit. In sum, the record is absent any evidence that W.R. demonstrated a history of committing acts of sexual assault and/or abuse or that anyone knew he was prone to such conduct.

The Popples initially argue § 43-801 is inapplicable because their claims are not based on the Roses' vicarious liability for W.R.'s intentional acts. Rather, the Popples claim that liability is based on the Roses' independent negligence in failing to warn third parties of W.R.'s allegedly known propensity to sexually assault and/or abuse minor children. As the Popples' first assignment of error is dispositive, we address only that issue. See *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993).

We must initially determine whether § 43-801 abrogates common-law liability and provides the exclusive source of recovery for claimants filing suit based on the intentional acts of children. Section 43-801 provides as follows:

> The parents shall be jointly and severally liable for the willful and intentional infliction of personal injury to any person or destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons; *Provided*, that in the event of personal injuries willfully and intentionally inflicted by such child or children, damages shall be recoverable only to the extent of hospital and medical expenses incurred but not to exceed the sum of one thousand dollars for each occurrence.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court

will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it. *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996).

Section 43-801 imposes vicarious liability on parents of children who intentionally inflict personal injury. However, neither the plain meaning of § 43-801 nor the legislative history can be read to abrogate common-law liability. § 43-801 (Reissue 1993); § 43-801 (Cum. Supp. 1969); § 43-801 (Cum. Supp. 1951). Because there is no language indicating that common-law liability is prohibited or that § 43-801 was intended to be an exclusive remedy, this court will make no such inference. See, *State ex rel. City of Elkhorn, supra*; *Guzman, supra*. Therefore, reading the statute in a plain, ordinary manner indicates that § 43-801 does not preclude common-law liability.

Having established that § 43-801 does not preclude common-law liability, we must next determine whether a parental duty to warn could exist in the State of Nebraska. This court has imposed a general duty to warn in numerous situations. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994) (duty to warn of electrical lines); *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993) (duty to warn of dangerous condition); *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992) (duty to warn passengers of known dangerous conditions); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992) (duty to warn traveling public of dangerous condition); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987) (duty to warn of defective product). Moreover, this court has also ruled that upon a prospective foster parent's inquiry, the Nebraska Department of Social Services possesses a duty to inform such parent(s) of the known physical and sexual tendencies of prospective foster children. *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *Moore v.*

State, 245 Neb. 735, 515 N.W.2d 423 (1994). While we have not previously imposed a duty upon parents to warn third parties of their children's known dangerous sexual propensities, given the rulings in the aforementioned cases, we do not believe that imposing a parental duty to warn is an illogical next step in the law in the State of Nebraska.

An action predicated on a duty to warn is essentially a negligence action, requiring a duty, breach, proximate cause, and damages. See, *Talle, supra*; *Anderson/Couvillon, supra*; *Moore, supra*; *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). While the common law does not preclude a cause of action based on the parental duty to warn, the essential elements of a negligence action must still be demonstrated. See *id.*

The threshold inquiry in any negligence action, including those involving a duty to warn, is whether the defendant owed the plaintiff a duty. *Anderson/Couvillon, supra*; *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury. *Schmidt, supra*; *Lemke, supra*. See *Anderson, supra*. A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Schmidt, supra*. Duty is a question of whether the defendant is under any obligation for the benefit of the plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk. *Id.* Determining whether a legal duty exists is a question of law dependent on the facts of a particular situation. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

In analyzing this issue, we recognize that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

> The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . "[D]uty" is not sacrosanct in itself, but is only an expres-

> sion of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 54 at 357-58 (5th ed. 1984).

In determining whether a duty exists, this court has employed a risk-utility balancing test. In *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994), we considered such factors as the magnitude of the risk, the public policy considerations, the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public policy interest in the proposed solution. (Citing *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 625 A.2d 1110 (1993).) See, also, *Rodriguez v. Spencer*, 902 S.W.2d 37 (Tex. App. 1995); *Tarasoff, supra*. Foreseeability is also an important factor in establishing a duty. *Merrick, supra*; *Schmidt, supra*; *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 173 N.W.2d 516 (1970). As stated by Justice Cardozo, "[F]oresight of the consequences involves the creation of a duty . . . ." *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E.2d 1050, 1054 (1916). Similarly, this court stated that " '[f]oresight, not retrospect, is the standard of diligence. . . .' " *Lock*, 185 Neb. at 73-74, 173 N.W.2d at 518-19.

Regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship. Compare *Merrick*, 246 Neb. at 661, 522 N.W.2d at 406 (stating "the duty of reasonable care generally does not extend to third parties absent . . . other facts establishing a duty") (citing *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994)). "[W]hen the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim." *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.

Restatement (Second) of Torts § 315 at 122 (1965) provides:

> 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.

Comment *c.* to § 315 of the Restatement further 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. Restatement, *supra*, § 316 at 123-24, states:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

Thus, the parent-child relationship is recognized as a special relationship which may warrant imposing a duty to warn. *Kehler v. Eudaly*, 933 S.W.2d 321 (Tex. App. 1996); *Villacana v. Campbell*, 929 S.W.2d 69 (Tex. App. 1996); *Rodriguez, supra*; *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 439 S.E.2d 771 (1994); *DeLuna v. Guynes Printing Co. of Texas*, 884 S.W.2d 206 (Tex. App. 1994); *Greater Houston Trans. v. Phillips*, 801 S.W.2d 523 (Tex. 1990); *Moore v. Crumpton*, 55 N.C. App. 398, 285 S.E.2d 842 (1982), *modified* 306 N.C. 618, 295 S.E.2d 436.

However, those courts specifically adopting a parental duty to warn of children's dangerous propensities have narrowed the duty even further and limited the application thereof to only situations where the parents are aware of the child's known, habitual, dangerous propensity. *Eldredge v. Kamp Kachess*, 90 Wash. 2d 402, 583 P.2d 626 (1978); *Cooper v. Meyer*, 50 Ill. App. 3d 69, 365 N.E.2d 201 (1977); *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973); *Caldwell v. Zaher*, 344 Mass. 590, 183 N.E.2d 706 (1962); *Preston v. Duncan*, 55 Wash. 2d 678, 349 P.2d 605 (1960); *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955); *Martin v. Barrett*, 120 Cal. App. 2d 625, 261 P.2d 551 (1953);

Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953); *Zuckerberg v. Munzer*, 277 A.D. 1061, 100 N.Y.S.2d 910 (1950); *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944); *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934), *overruled on other grounds*, *Turner v. Bucher*, 308 So. 2d 270 (La. 1975); *Norton v. Payne*, 281 P. 991 (Wash. 1929). Compare *Hackett v. Schmidt*, 630 So. 2d 1324 (La. App. 1993).

Many courts have also refused to impose liability in situations where the child was generally incorrigible, heedless, or vicious. *Gissen, supra*; *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930); *Norton, supra*; *Paul v. Hummel*, 43 Mo. 119 (1868). See, also, W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 123 (5th ed. 1984); Fowler V. Harper & Posey M. Kime, 43 *The Duty to Control the Conduct of Another*, Yale L.J. 886 (1934).

For example, in *Norton, supra*, the guardian ad litem of a 5-year-old child brought suit against the parents of a 7-year-old child who habitually struck smaller children in the face with sticks. The court remanded the cause for a new trial and stated:

> [P]arents are not liable for torts committed by their minor children without participation in the fault by the parent; and it is not enough to make the father liable that he knew that his child was heedless or vicious. . . .
>
> But by the same authority it seems to be stated as a general rule that the parent is liable if he was himself guilty of negligence. He is liable, however, only for his own fault and not that of his child.
>
> While it is also true that the parents did not actually participate in the particular tort here in controversy, they did *know* of the *habit* of their child of striking other children with sticks. They were bound to *know* that was a *habit* liable to cause injury to other children . . . . No one could be so familiar with the *habit* of a child of that age as the parent, and while the parent cannot be held to the degree of liability of one harboring a vicious dog . . . or a wild animal, we think parents should be held responsible and liable for a dangerous *habit* of a child of which they have *knowledge* and take no steps to correct, or restrain. It is that which constitutes the negligence on the part of the parent.

(Emphasis supplied.) *Norton*, 281 P. at 992. Similarly, in *Ellis, supra*, a babysitter filed suit against the parents of a 4-year-old child for their negligent failure to warn of the boy's habit of violently attacking people. The court held the parents liable and stated, " '[T]he parent may be held liable . . . [w]here the parent's negligence consists entirely of his failure to restrain the child from vicious conduct imperilling others, when the parent has *knowledge* of the child's *propensity* toward such conduct.' " (Emphasis supplied.) *Ellis*, 120 Cal. App. 2d at 318, 253 P.2d at 679-80.

Likewise, in *Johnson, supra*, a nurse filed suit against the parents of a 3-year-old child for injuries the nurse sustained when the child bit her. The court rejected the plaintiff's claim and held, "[B]ecause of the plaintiff's failure to allege that the defendant's child was afflicted with a dangerous *disposition* and that the defendant *knew* of the danger and failed to warn the plaintiff, she has failed to set forth a cause of action." (Emphasis supplied.) *Johnson*, 180 La. at 614, 157 So. at 129-30. Therefore, a parental duty to warn a third person will arise only if the parents are aware of the child's known, habitual, dangerous propensity, and when a special relationship exists between the parents and the third person.

The record contains no evidence that the Roses, or anyone else, had prior knowledge of any dangerous sexual propensity. Therefore, no duty to warn arose regarding W.R.'s alleged dangerous sexual propensities because the conduct was not a known, habitual propensity.

Even though we now recognize that a parental duty to warn may exist in certain limited situations, irrespective of § 43-801, the district court correctly ruled that the Popples were relegated to the recovery provided in § 43-801 because the facts involved do not present a scenario where a parental duty to warn could have arisen.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
v. DENNIS KRUTILEK, APPELLANT.
573 N.W.2d 771

Filed February 20, 1998. No. S-96-804.

1. **Trial: Jurors.** Retention or rejection of a juror is a matter of discretion with the trial court.
2. **Trial: Motions to Dismiss: Jurors: Appeal and Error.** The standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Due Process: New Trial: Appeal and Error.** Where it appears to the Nebraska Supreme Court that the accused has not been afforded a fair trial, it is the duty of that court to grant a new trial.
5. **Trial: Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
6. **Trial: Jurors.** A juror is not incompetent merely because he is an acquaintance of one of the witnesses.
7. **Juror Qualifications: Motions for Mistrial.** A juror is not required to be excused from a jury and a mistrial not be declared when the juror is able to decide the case fairly and impartially. However, the juror must be excused or a mistrial declared when a juror cannot be fair and impartial.

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

Karen Falcone Givens for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Dennis Krutilek was convicted for theft of movable property valued at over $1,500. Krutilek appealed his conviction, contending in part that the district court erred in denying his motions to dismiss a juror and to declare a mistrial because the

juror was acquainted with the victim. The Nebraska Court of Appeals affirmed the conviction, see *State v. Krutilek*, 5 Neb. App. 853, 567 N.W.2d 797 (1997), and we granted further review on the issue of whether the trial court abused its discretion in denying Krutilek's motions to remove the juror and to declare a mistrial. We affirm.

BACKGROUND

Sometime during the night of September 16, 1995, a 1987 silver Chevrolet Celebrity owned by Karen Goswick, and driven primarily by her daughter, Julie Goswick (Goswick), disappeared from a bank parking lot near the Eagle's Club in Fremont, Nebraska. Goswick worked as a bartender at the Eagle's Club and had driven the car to work and parked it in the bank parking lot earlier that day. Later that evening, Goswick went outside to move the car and discovered that it was missing. After contacting her boyfriend and parents and asking them whether they had moved the car, Goswick reported the car as stolen.

On October 17, 1995, the car was found on property located outside of Fremont. The car had been stripped, and the engine was subsequently located at an automobile repair business. The owner of the business told the police that Krutilek had sold the engine to him on or about September 28, 1995.

Krutilek was arrested and charged with theft of movable property valued over $1,500. See Neb. Rev. Stat. § 28-511(1) (Reissue 1995). Theft of such property is a Class III felony. It was further alleged that Krutilek was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995).

During Krutilek's trial, Karen Goswick was called as a witness for the prosecution. Following her testimony, a juror brought to the attention of the court that he might be acquainted with Goswick. Outside the presence of the jury, the court examined the juror as follows:

> THE COURT: . . . I understand you may be acquainted with the last witness' daughter; is that correct?
>
> [Juror]: Yes. I am a member of the Eagle's Club and I know her from down there. I didn't know her last name.
>
> THE COURT: Now, other than that you know her, is this a close personal relationship or just a casual acquaintance?

[Juror]: Casual. We visit down there.

THE COURT: Is there anything about that that would make you less than a fair and impartial juror?

[Juror]: I can't say because —

THE COURT: Well —

[Juror]: We visited long enough, kind of friends.

THE COURT: Have you ever visited about this case?

[Juror]: No.

THE COURT: Well, I guess the answer is kind of up to you. All cases are difficult, you know. And all relationships are difficult. The question is: Ultimately is your mindset that you feel that you could be a fair and impartial juror both to Mr. Krutilek and to the State?

[Juror]: I would hate to say that our friendship would sway me.

THE COURT: And do you feel that you would do your best to set that aside?

[Juror]: I'll do my best.

In response to questions asked by Krutilek's attorney, the juror stated that he had known Goswick for over a year, that he also knew her from volunteer work he did at the Eagle's Club, and that he considered himself and Goswick to be friends. The juror also stated that he did not know Goswick's last name.

Krutilek moved to have the juror removed and moved for a mistrial. Both motions were overruled. The trial court ruled that the juror had indicated that he could set aside his friendship with Goswick and attempt to decide the case fairly and impartially. The trial court stated that the voir dire examination might have brought out the fact that the juror was acquainted with Goswick through a more complete identification of the victim and where she worked. Had that been the situation, the trial court further indicated that the juror would not have been disqualified by the court for cause. However, the record does not include the voir dire. After the defense motions were overruled, Goswick testified.

Krutilek's defense was that he had not stolen the car. Rather, Krutilek testified that Goswick had asked him to take the car in order to hide it from her ex-husband, that Goswick had given Krutilek a key to the car, and that she paid him to take the car.

Krutilek stated Goswick later told him to keep the car. Krutilek's girl friend testified that she saw Goswick give a car key to Krutilek and heard her ask him to take the car. Krutilek denied taking the engine out of the car, but admitted to selling the engine. However, another witness testified that she saw Krutilek remove the engine from the car.

Testimony from Goswick indicated that a tire on the car had been slashed the night before it turned up missing and that she believed her ex-husband might have been responsible. Goswick also testified that, to her knowledge, Krutilek was not aware of where the keys to the car had been kept. A police officer had previously testified there was a key in the ignition when he later found the stripped vehicle. However, Goswick also testified she did not give Krutilek a key to the car or give him permission to take the car. Karen Goswick received $2,825 in insurance money for the loss of the car which was used to buy another car for Goswick to use.

The jury convicted Krutilek, and he appealed, contending that the trial court abused its discretion in denying his motion to excuse the juror, in allowing evidence that Krutilek had prior automobile theft convictions, and in denying Krutilek's motion for a new trial. The Court of Appeals, in *State v. Krutilek*, 5 Neb. App. 853, 567 N.W.2d 797 (1997), held that the trial court did not abuse its discretion by denying Krutilek's motion to remove the juror. The Court of Appeals also affirmed the order of the trial court regarding the other assignments of error. We granted Krutilek's petition for further review and will review only the issue of whether the trial court abused its discretion in denying Krutilek's motions regarding the juror.

ASSIGNMENTS OF ERROR

Krutilek assigns that the Court of Appeals erred in (1) determining that a juror was qualified as an impartial juror when that juror was a friend of the victim and stated he would "do [his] best" to decide the case on the evidence presented, (2) holding that the trial court did not abuse its discretion by denying Krutilek's motion to disqualify a juror who was acquainted with the victim, and (3) failing to reverse the judgment and remand the cause when there was evidence that Krutilek's constitutional right to a fair trial by an impartial jury was violated.

STANDARD OF REVIEW

Retention or rejection of a juror is a matter of discretion with the trial court. *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987); *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). Thus, the standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion.

A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997); *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997).

ANALYSIS

Krutilek contends the trial court abused its discretion by not granting his motion to dismiss a juror who was "friends" with the victim, or in failing to declare a mistrial. Simply put, Krutilek's contention is that he was denied his constitutional right to a fair and impartial jury, and as a result, Krutilek argues that he is entitled to a new trial.

The 6th Amendment to the U.S. Constitution, applied to the states through the 14th Amendment, guarantees the right to a speedy and public trial by an impartial jury. The Nebraska Constitution also provides for such a right. Neb. Const. art. I, § 11. Where it appears to this court that the accused has not been afforded a fair trial, it is the duty of this court to grant a new trial. *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977).

However, the competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Coffman, supra.* A juror is not incompetent merely because he is an acquaintance of one of the witnesses. *Id.* A juror is not required to be excused from a jury and a mistrial not be declared when the juror is able to decide the case fairly and impartially. See *id.* However, the juror must be excused or a mistrial declared when a juror cannot be fair and impartial. See, *State v. McHenry,* 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

In *Coffman*, a juror realized after the start of testimony that he was acquainted with a witness in the case but had not recognized her married name. The juror indicated off the record that

his acquaintanceship with the witness would not influence his ability to be an impartial juror. No attempt was made by defense counsel in the case to produce evidence that the juror was prejudiced. Because the juror, albeit off the record, assured the trial court that he could be impartial, and because there was no evidence to the contrary, this court held that the trial court did not abuse its discretion in denying motions that the juror be excused and that a mistrial be declared.

In *State v. Clifford, supra*, a juror realized after the start of testimony that he was well acquainted with some of the defendant's family and knew facts about the defendant. The juror specifically told the trial court that he did not think he could be a fair and impartial juror, and the court declared a mistrial without prejudice. This court affirmed the declaration of a mistrial by the trial court.

This court's decision in *Coffman* illustrates the principle that where a juror who is acquainted with a witness states that he or she can remain impartial and decide the case on the evidence presented, that the juror need not be dismissed or a mistrial declared. Likewise, as with our decision in *Clifford*, when a juror states that he or she cannot be impartial, the defendant would be denied the right to a trial by an impartial jury if the juror were allowed to remain on the jury. However, the instant case presents a situation where the juror in question did not unequivocally state that he could or could not be impartial. Rather, the juror gave equivocal responses, indicating that he would "do [his] best" to be impartial. In addition, unlike the situations in *Coffman* and *Clifford*, the juror in the instant case not only knew a witness, the juror knew the victim who was also a witness, whose mother was a witness, and whose credibility was a key factor for the defense.

This court adheres to the rule that the retention or rejection of a juror is a matter of discretion with the trial court. *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987); *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. Compare *State v. Coffman, supra* (dealing with retention of juror after trial had

begun), and *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (dealing with retention of venireperson as juror). Thus, cases involving either the removal of a venireperson for cause or the retention of a juror after trial has begun are instructive to the instant case.

Most jurisdictions that apply an abuse of discretion standard of review defer to the decision of the trial court when either a juror or potential juror is equivocal in his or her ability to be impartial. See, *People v. Carrillo*, 946 P.2d 544 (Colo. App. 1997) (when none of jurors revealed unyielding belief that defendant was guilty or unwillingness to deliver verdict based on law and evidence, there was no clear abuse of discretion); *Brown v. State*, 913 S.W.2d 577 (Tex. Crim. App. 1996) (when venireperson vacillates or equivocates on his or her ability to follow law, reviewing court must defer to trial court's judgment); *Powell v. State*, 906 P.2d 765 (Okla. Crim. App. 1995) (finding no abuse of discretion when support is found in record for trial court's decision); *Lacy v. State*, 629 So. 2d 688 (Ala. Crim. App. 1993) (determination of whether juror can decide case fairly and impartially is within discretion of trial court); *State v. Bashor*, 188 Mont. 397, 614 P.2d 470 (1980) (when evidence relating to qualification of juror is in conflict, decision of trial court is final absent abuse of discretion).

The determination of whether or not a person can be an impartial juror is influenced by many factors. Thus, situations will arise where the trial court's impression of a juror is not reflected in the record. *Powell v. State, supra.* See *People v. Carrillo, supra.* A rule that requires a juror to be dismissed anytime he or she is equivocal in his or her ability to be impartial would essentially nullify any discretion of the trial court regarding the issue and would ignore the fact that there are more factors involved than simply the juror's statements. For example, a juror who states he will "do his best" to be impartial while vigorously nodding his head is likely to be viewed differently by the trial court than the juror who says he will "do his best" in a meek voice while avoiding eye contact with members of the court. The difference in behavior of such jurors will rarely be noted in the record, but will be readily apparent to the trial court.

Thus, keeping in mind that the competency of a juror is generally presumed and that the burden was on Krutilek to show that the juror in question could not act impartially, we cannot conclude that the trial court abused its discretion in the instant case. Nothing in the record indicates that the juror ever specifically stated that he could not be a fair and impartial juror. While the juror also never unequivocally stated that he would act fairly and impartially, he did state that his relationship with the victim was casual and that he would "do [his] best." The trial court was in the best position to observe the juror as he stated this and to judge from the juror's demeanor and the circumstances whether the juror could act in a fair and impartial manner. Absent something specific in the record that would indicate otherwise, we cannot conclude the trial court abused its discretion. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK G. IRONS, APPELLANT.
574 N.W.2d 144

Filed February 20, 1998. No. S-96-1120.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the courts below.
2. **Constitutional Law: Statutes: Appeal and Error.** A challenge to the constitutionality of a statute presents a question of law, which must be determined by the Nebraska Supreme Court independently from the conclusion reached by the trial court.
3. **Securities Regulation: Convictions: Intent: Proof.** A specific intent need not be proved to sustain a conviction under the fraud provisions of the Uniform Securities Act.
4. ____: ____: ____: ____. To sustain a conviction under either the fraud or registration provisions of the Uniform Securities Act, specific intent need not be proved, and the term "willful" may mean no more than that the actor was aware of what he was doing.
5. **Securities Regulation: Words and Phrases.** The factors that define an investment contract are whether there is (1) an investment (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others.

6. **Securities Regulation.** In interpreting the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1122 (Reissue 1997) encourages reference to federal law and the law of other states that have adopted the Uniform Securities Act.
7. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
8. **Constitutional Law: Statutes.** The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.
9. ____: ____. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
10. **Statutes.** A person of ordinary intelligence must have a reasonable opportunity to know what is prohibited by a statute or what conduct will render him liable for punishment.
11. **Criminal Law: Prosecuting Attorneys.** A prosecutor is free to choose under which statute to prosecute so long as the selection is not deliberately based on any unjustifiable standard such as race, religion, or other arbitrary classification.
12. **Sentences: Appeal and Error.** It is the duty of an appellate court to disturb a sentence on appeal which was within the statutory limits only if the sentence imposed was an abuse of judicial discretion.
13. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Jack G. Irons was charged with the sale of unregistered securities, in violation of Neb. Rev. Stat. § 8-1104 (Reissue 1991). Irons moved to quash the information, alleging that § 8-1104 is unconstitutional. A jury was waived, and after making findings of fact and conclusions of law, the district court found Irons guilty. Irons was sentenced to 1 to 3 years' imprisonment.

SCOPE OF REVIEW

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the courts below. *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997).

A challenge to the constitutionality of a statute presents a question of law, which must be determined by the Nebraska Supreme Court independently from the conclusion reached by the trial court. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997).

FACTS

The "Friends Network" (Network) was a variation of pyramid sales wherein the participants made "gifts" to other participants above them in the pyramid. A participant had to recruit others to join the pyramid in order to progress to a place in the pyramid where that participant would receive gifts. Once a participant had received $12,000 in gifts, the pyramid would split. The participant was then required to leave the first pyramid and start again at the bottom of a new pyramid if he or she so chose. Each participant was required to bring at least one additional person into the Network, although the participants were asked to bring in more than one.

Irons was a participant in the Network, having made gifts to other participants. Irons also acted as a manager of various gifting lists. He contracted with other participants to manage their participation and charged a $1,000 fee to anyone who reached the top of the gifting list and received gifts.

Maria Christian testified that she first met Irons through Rick Carson, a business acquaintance who was a participant in the Network. Carson took Christian to Irons' office, where Irons explained the Network to her. According to Christian, Irons told her that he had learned of the Network through one of the women in his office, was impressed by it, and had inquired about the possibility of his managing the Network. Christian stated she understood that the $1,500 she would give to Irons was not going to him but to an individual at the top of the list.

Christian testified that she knew from the presentation and the literature that in order to receive gifts through the Network,

she would have to actively recruit other participants to fill the bottom row of the chart. However, Irons told her that if she had difficulty in getting participants, two women in his office would be available to make telephone calls. Irons gave Christian a business card, assuring her that he would meet with her prospective recruits at any time to help her progress in the Network. Irons explained to Christian that either he or one of the women in his office would contact her periodically to inform her of her status in the Network. When Christian questioned Irons about the legality of the Network, he responded that the authorities in another state had challenged it and that its legality had been established. Christian eventually declined to participate in the Network.

Chad Schmidt testified that he participated in the Network at the solicitation of a coworker, Andy Rinquest. Irons managed Rinquest's list and told Schmidt that the more people he could recruit, the faster he would move up toward the top of the pyramid. However, Irons suggested that if Schmidt had trouble finding recruits, others on the list would have a motive to help him fill in the slots. Irons told Schmidt he gave no guarantees about moving up, but suggested that others might be willing to buy out Schmidt's slot if he was having difficulty recruiting. Schmidt said he knew that his $1,500 gift went to Carson, not Irons, and that he understood that Irons would collect his $1,000 fee only if Schmidt moved to the top of the list and Schmidt received gifts. Irons gave Schmidt his business card and directed Schmidt to check in with him every couple of days in order to get an update on the Network.

In addition to the preliminary hearing testimony which was offered at trial with the consent of the parties, the State offered evidence from an undercover police officer who had been assigned to investigate the matter. This officer and another officer had a conversation with Irons in which Irons disclosed that once the person at the top of the pyramid received his or her $12,000, Irons would take $1,000 from the total for his operating expenses. The officer said that he was led to understand that the investors on the bottom tier were responsible for bringing in at least one additional person and that the more they brought in, the more quickly he would progress through the Network.

The officer had taped his conversations with Irons, and during the first conversation, Irons indicated that 300 people were involved at the time and that the Network had been going for only a week or so. Irons told the undercover officers that he was trying to manage the Network at his business, assigning spots and keeping track of participants' progress up the charts. When asked whether the Network was legal, Irons explained that it was not a pyramid. Irons distinguished the Network from a pyramid scheme on the basis that a pyramid goes on indefinitely, whereas once the top person in this Network reaches payout, the scheme begins anew.

The officers returned to Irons' business on the afternoon of July 29, 1994, and were told by Irons that he had decided to stop taking the $1,000 fee and was going to turn over the responsibility for maintaining the lists to the person at the top of each list. After giving Irons $1,500 for participation, one of the officers informed Irons of his real identity, to which Irons responded: "Yeah[,] I know exactly where you're from."

Irons was convicted under § 8-1104 of offering for sale or selling an unregistered security. He appeals his conviction and sentence. We affirm.

ASSIGNMENTS OF ERROR

Irons makes five assignments of error: (1) The district court erred in concluding that guilty knowledge or intent to deceive or harm was not an element of the criminal offense of selling unregistered securities; (2) the evidence was insufficient to support a finding that Irons was guilty beyond a reasonable doubt of each of the material elements of the offense; (3) the district court erred in excluding from the trial evidence that Irons did not have knowledge that the Network was a security subject to registration; (4) Irons' conviction of a Class IV felony and sentence to imprisonment, without proof or a finding of criminal intent or intent to deceive, violated his constitutional rights under the 8th and 14th Amendments of the U.S. Constitution and article I, §§ 3 and 9, of the Nebraska Constitution; and (5) Irons' sentence was excessive and an abuse of discretion.

ANALYSIS

Irons first claims that some form of criminal intent is an element of § 8-1104 of the Securities Act of Nebraska. Section 8-1104 provides:

> It shall be unlawful for any person to offer or sell any security in this state, except securities exempt under section 8-1110 or when sold in transactions exempt under section 8-1111, unless such security is registered by notification under section 8-1105 or by coordination under section 8-1106 or by qualification under section 8-1107.

Neb. Rev. Stat. § 8-1117 (Reissue 1997) states in part:

> (1) Any person who willfully violates any provision of sections 8-1101 to 8-1124 except section 8-1113, or who willfully violates any rule or order under the provisions of sections 8-1101 to 8-1124, or who willfully violates the provisions of section 8-1113 knowing the statement made to be false or misleading in any material respect shall be guilty of a Class IV felony.

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the courts below. *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997). Therefore, we review the interpretation of the statutes in question independent from the decision made by the district court.

In overruling Irons' motion to quash, the district court ruled that the evidence as to lack of knowledge or criminal intent was not relevant. Therefore, Irons urges us to revisit our decision in *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983), contending that *Fries* is inconsistent with more recent pronouncements by this court regarding the criminal intent required in any felony prosecution.

In *Fries*, we held that a specific intent need not be proved to sustain a conviction under the fraud provisions of the Uniform Securities Act. The defendant in that case contended that the trial court had failed to properly instruct the jury with regard to the intent the State had to prove as an element of the offense and

incorrectly instructed with regard to the definition of "willfully." He argued that proof of a specific intent to violate the law was required in order to convict. We stated that while state statutes typically require some element of scienter for criminal conviction, under the Uniform Securities Act as adopted by the various states, this is usually expressed by reference to "willful" violations. We noted that several courts have expressly held that proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state's "blue sky" laws. We held that to sustain a conviction under either the fraud or registration provisions of the Uniform Securities Act, specific intent need not be proved, and that "willful" may mean no more than that the actor was aware of what he was doing. We see no reason to revisit our holding in *Fries*, and we decline to do so.

Irons also claims that even if the proper standard is "willfully," he did not act willfully because he did not know or have reason to believe that the Network was an investment contract and, therefore, a security within the purview of the Securities Act of Nebraska. In *State v. Sheets*, 94 N.M. 356, 610 P.2d 760 (N.M. App. 1980), a case relied upon by this court in *Fries*, the court rejected the defendant's contention that in order to commit the crime of selling unregistered securities, one must have knowledge that the item being sold is in fact a security. The court stated that to commit a violation of the state securities act, the violation must be willful, meaning that the defendant "acted intentionally in the sense that he was aware of what he was doing." 94 N.M. at 366, 610 P.2d at 770. According to the *Sheets* court, penalties for willful violation do not require knowledge that the item is a security.

In this case, it is apparent that Irons was aware that he was offering or selling the right to participate in a multilevel chain distribution gifting program. The fact that he did not know that this participation was legally classified as a "security" indicates only that Irons did not act with specific intent or knowledge that he was violating the law. Knowledge by a defendant that the item sold is a security is not required in order to convict under the registration provisions of the Uniform Securities Act. There is no requirement that the defendant purposely intended to vio-

late the law in order to be convicted. See *State v. Fries, supra.* Accordingly, we find Irons' argument to be without merit.

We next address Irons' position that there was insufficient evidence that a security was involved and that, therefore, he was not properly convicted of the unlawful sale of a security. The district court found that the positions on the Network were investment contracts and therefore securities. Irons argues that the positions on the Network cannot be classified as investment contracts because each participant was required to recruit others and that, therefore, the expectation of profits would not be derived from the managerial efforts of others. Irons relies on the definition of an "investment contract" set forth in *S. E. C. v. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946), wherein the Court stated that an investment contract is one where a person is led to expect profits solely from the efforts of the promoter or a third party.

At the time of Irons' alleged offense, a security was defined as, among other things, an "investment contract." See Neb. Rev. Stat. § 8-1101(13) (Cum. Supp. 1994) (definition now found at Neb. Rev. Stat. § 8-1101(15) (Reissue 1997)). However, an "investment contract" was not defined by the Securities Act of Nebraska. The district court, in holding that the positions on the network were investment contracts, adopted the *Howey Co.* definition, but concluded that the word "solely" was not to be interpreted literally and that the reasonable expectation of profits did not have to be arrived at solely from the managerial efforts of others.

We summarized the factors that define an investment contract in *State v. Jones*, 235 Neb. 1, 4-5, 453 N.W.2d 447, 451 (1990), as being whether there was "(1) an investment (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others." In *Jones*, we recognized that in interpreting the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1122 (Reissue 1997) encourages reference to federal law and the law of other states that have adopted the Uniform Securities Act.

Other courts have noted that the *Howey Co.* test could be readily circumvented by adding a requirement that the buyer contribute some minimal effort. In *Securities & Exch. Com. v.*

Koscot Inter., Inc., 497 F.2d 473 (5th Cir. 1974), the court stated that when considering whether something is a security, substance should take precedent over form lest the statutory policy of protecting investors be thwarted. In *Webster v. Omnitrition Intern., Inc.*, 79 F.3d 776 (9th Cir. 1996), the court adopted a flexible approach that focuses on whether the efforts made by those other than the investor are undeniably significant ones. Under various modified *Howey Co.* tests, several courts have specifically held that pyramid schemes involve investment contracts despite the fact that an investor's profits are in part contingent upon his or her successful efforts in recruiting new investors. See, e.g., *Securities & Exch. Com'n v. Glenn W. Turner Enter., Inc.*, 348 F. Supp. 766 (D. Or. 1972).

We agree with the above rationale, and therefore, we find no merit to Irons' position. In *Jones*, we eliminated the requirement set forth in *Howey Co.* that the profits must be derived solely from the entrepreneurial or managerial efforts of others. See, also, *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990).

The facts in this case show that an investor's expectation of profits was derived from the managerial efforts of Irons, and the district court found that Irons' managerial efforts were important acts in the success of the Network. Irons managed the lists that moved investors to the top of the pyramid and set up new lists to continue the scheme. He distributed the gifts from new members to the person at the top of the pyramid and collected a $1,000 managerial fee from that person once all of his or her gifts had been received. Irons met with prospective investors to explain how the Network worked and, if needed, assisted members in finding new recruits. Therefore, we conclude that the evidence was sufficient to support the finding that the Network involved investment contracts, which are securities under the Securities Act of Nebraska.

Irons next claims that § 8-1101(13), which defines what is or is not a security subject to regulation, is unconstitutionally vague as applied in this case. Although the statute defines a security as, among other things, an "investment contract," Irons argues that since the term "investment contract" is not defined by the statute, a person of ordinary intelligence would not know

that obtaining a slot within the Network involved an investment contract. Irons asserts that a person of ordinary intelligence would not have a reasonable opportunity to know what conduct is prohibited. Given the definition of an "investment contract" described above, Irons claims that the provisions of § 8-1104 have been unconstitutionally applied to him under the facts of this case. Although the district court found that § 8-1104 was neither vague nor overbroad, we must determine the constitutionality of the statute independently from the conclusion reached by that court. See *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997).

We first address standing and the tests involved in a challenge to a statute as being unconstitutionally vague. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application. *State v. Sommerfeld, supra*; *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. *State v. Sommerfeld, supra*. The statute must be examined in light of the conduct with which the defendant is charged. *Id.* The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute. *State v. Schmailzl, supra*.

A person of ordinary intelligence must have a reasonable opportunity to know what is prohibited by a statute or what conduct will render him liable for punishment. See *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993). Under § 8-1101(13), the term "security" is defined as "any note, stock, treasury stock, bond [or] investment contract." As mentioned, it is therefore clear that an investment contract is a security. The question is whether the term "investment contract" is so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.

Irons contends that no reasonable person could ascertain that participation in the Network was an investment contract required to be registered as a security before being offered for sale and that this vague provision of the law has been arbitrarily and capriciously used to turn a misdemeanor deceptive trade practice violation into a felony securities fraud case. In *State v. Brewer*, 932 S.W.2d 1 (Tenn. Crim. App. 1996), the court addressed a similar argument that the absence of a statutory or common-law definition of an investment contract rendered the security code unconstitutionally vague. The defendant argued that the trial court erred in refusing to dismiss the indictment on the ground that the Tennessee Securities Act was unconstitutionally ambiguous. The court stated there was no question that an investment contract was a security, but that a question remained as to what constituted an investment contract. Implicit in the court's holding that the absence of a statutory definition of "investment contract" did not render the code vague was the fact that the definition of an investment contract has been in existence in case law since at least *S. E. C. v. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946).

In *Howey Co.*, the Court, interpreting § 2(1) of the Securities Act of 1933, now codified at 15 U.S.C. § 77b(1) (1994), proffered the following definition: "[A]n investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . ." *Howey Co.*, 328 U.S. at 298-99. As noted by the Tennessee Court of Criminal Appeals in *Brewer*, in subsequent years, the *Howey Co.* test has been criticized by both courts and scholars as being too rigid and, thus, easily circumvented. As already discussed herein, the criticism concerned *Howey Co.*'s requirements that profits be derived "solely" from the efforts of others and that a common enterprise had to exist. Subsequently, in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975), the Court explained: "The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." The language requiring the profits to come solely from the

efforts of others was deleted. Case law from other state and federal courts has thus focused on the significance of the efforts of others and has rejected the idea that such efforts must be exclusive.

More important to our analysis here, however, is that in *State v. Jones*, 235 Neb. 1, 453 N.W.2d 447 (1990), by eliminating the "solely" language found in *Howey Co.*, this court defined an investment contract so as to apply to pyramid schemes such as the one in this case. We conclude that the statutes in question are not vague and that Irons could reasonably understand that his conduct was proscribed by the statute. See *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). *Jones* and numerous cases from other jurisdictions gave notice to Irons that his conduct was proscribed by law. Therefore, Irons lacks standing to challenge the statute on vagueness grounds.

Irons next argues that the sale of pyramid chain distribution schemes is governed exclusively by the Uniform Deceptive Trade Practices Act, specifically Neb. Rev. Stat. § 87-302(a)(12) (Reissue 1994), and that, therefore, he has been convicted under the wrong statute. Irons contends that a violation of the Uniform Deceptive Trade Practices Act is prosecutable as a misdemeanor and that under Nebraska law, where two statutes are in conflict, the more specific or special provision governs.

The district court held that criminal prosecutions for chain distribution schemes were not limited to prosecution under § 87-302. We agree. In *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995), both a bribery statute with a misdemeanor provision and a bribery statute with a felony provision were in effect. We held that the prosecutor was free to choose the statute under which to prosecute so long as the selection was not deliberately based on any unjustifiable standard such as race, religion, or other arbitrary classification. Although there are two statutes governing Irons' actions, one defining a misdemeanor and the other a felony, they are not conflicting. Thus, the prosecution was free to choose the statute under which to prosecute unless the decision was deliberately based upon an unjustifiable standard. We find no merit to Irons' argument.

Finally, Irons argues that his sentence was excessive. It is the duty of an appellate court to disturb a sentence on appeal which

was within the statutory limits only if the sentence imposed was an abuse of judicial discretion. *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993). Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.* The sentence imposed upon Irons was well within the statutory limits and was not an abuse of discretion. Although Irons did not originate the scheme, his managerial efforts, for which he received a fee, were essential to the continued life of the scheme. We cannot say that the sentence of 1 to 3 years' imprisonment was an abuse of discretion.

The judgment of conviction and sentence are affirmed.

AFFIRMED.

WARREN STARKS, APPELLANT, V.
CORNHUSKER PACKING CO., APPELLEE.
573 N.W. 2d 757

Filed February 20, 1998. No. S-97-318.

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 the court's powers; (2) the judgment, order, or award was procured by fraud; (3) there is insufficient 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. ____: ____. If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court.
4. ____: ____. A finding upon review by the compensation court regarding whether an applicant's incapacity has increased under the terms of Neb. Rev. Stat. § 48-141 (Reissue 1993) is a finding of fact.
5. **Workers' Compensation.** The amount of any agreement or award may be modified on the ground of increase or decrease of incapacity due solely to the injury.
6. **Workers' Compensation: Proof.** To obtain a modification, the 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.

7. ____: ____. 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.
8. **Workers' Compensation.** To determine whether an increase or decrease in incapacity has occurred, the whole question of plaintiff's physical condition can again be inquired into.
9. **Workers' Compensation: Expert Witnesses.** Where the physician's testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained.
10. **Workers' Compensation.** A modification award cannot be applied retroactively beyond the date the application for the modification is filed.
11. ____. A workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in Neb. Rev. Stat. § 48-141 (Reissue 1993).
12. ____. Once a determination has been made regarding the claimant's disability, the correctness of that determination may not be questioned.
13. ____. Employers are prohibited from unilaterally modifying workers' compensation awards.
14. **Workers' Compensation: Attorney Fees.** If an 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 fee, and the Nebraska Supreme Court may in like manner allow the employee a reasonable sum as attorney fees for the proceedings in the Supreme Court.
15. **Workers' Compensation: Attorney Fees: Interest.** When an attorney fee is allowed, there shall further be assessed against the employer an amount of interest on the final award obtained.
16. **Workers' Compensation: Penalties and Forfeitures: Time.** The 50-percent penalty for waiting time applies when payments are delinquent after 30 days' notice of disability has been given or there is no reasonable controversy and the employer refuses or neglects to pay compensation for 30 days after the injury.
17. **Workers' Compensation.** To avoid the payments assessable under Neb. Rev. Stat. § 48-125(1) (Reissue 1993), an employer need not prevail in opposing an employee's claim for compensation, but the employer must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
18. ____. Whether a reasonable controversy exists regarding Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and McCormack, JJ.

PER CURIAM.

This case involves the modification of appellant Warren Starks' workers' compensation award. We affirm, since there was sufficient, competent medical testimony in the record warranting the modification. See Neb. Rev. Stat. § 48-185(3) (Reissue 1993). However, we also modify the award because the compensation court incorrectly applied the modification award retroactively to the date of the decrease in incapacity.

On August 25, 1993, the Nebraska Workers' Compensation Court determined Starks was permanently and totally disabled. Cornhusker Packing Company (Cornhusker), Starks' employer, made payments in compliance with the award. For reasons undisclosed in the record, Cornhusker later obtained a private investigator to observe Starks. Based on the investigator's observations from June to October 1995, Cornhusker obtained information that Starks was involved in various forms of unlawful activity, including an illegal cab service ("jitney" service), buying and selling food stamps, and selling illegal drugs. Cornhusker also obtained evidence that Starks was selling used cars and was climbing trees to stay physically fit. Relying on this information, Cornhusker terminated Starks' benefits as of October 29, 1995, without obtaining a modification award. In response, Starks filed a motion in the compensation court, requesting an order requiring Cornhusker to resume making total disability payments retroactively from October 29 and to pay a 50-percent waiting penalty, interest, and reasonable attorney fees. After Starks filed his motion, Cornhusker filed an application for modification that claimed Starks' incapacity decreased on November 30.

A modification hearing was held on June 3, 1996. At the hearing, Starks presented the deposition testimony of Dr. Louis Tribulato. Dr. Tribulato opined that Starks' permanent impairment had not decreased and that his physical capabilities had not increased. The compensation court noted, however, that Dr. Tribulato started treating Starks in April 1995 and that Dr. Tribulato last treated Starks on October 17. In response,

Cornhusker offered the medical report of Dr. Lonnie Mercier. In his report, Dr. Mercier essentially concluded that Starks was capable of participating in most gainful employment and that he was not "totally disabled." In addition to the opinions of Drs. Tribulato and Mercier, the court also noted the evidence regarding Starks' legal and illegal activities, Starks' testimony in which he indicated he climbs trees to stay physically fit, Starks' testimony that he is running up his medical bills so that his insurance company will "lump sum" him, and Starks' conditions of probation that require Starks to "be employed or provide proof that employment is being sought."

Based on the aforementioned evidence, the compensation court modified Starks' award, retroactive to August 27, 1995, finding that Starks was not entitled, after said date, to total disability payments and was entitled only to the loss of earning power and permanent partial disability benefits as provided in the original award. The court specifically stated that "the activities of the plaintiff involving 'jitney services' as set forth in the surveillance and audiotapes, in addition to the opinions of Dr. Mercier[,] are sufficient to show a decrease of incapacity due solely to the injury in regard to plaintiff's physical condition . . . ."

Based on the compensation court's modification award, Starks filed an application for review with the Workers' Compensation Court review panel on August 13, 1996. The review panel affirmed the court's award. In turn, Starks filed a notice of appeal on March 20, 1997, and a petition to bypass on April 18. Pursuant to our power to regulate the caseload of the Nebraska Court of Appeals, we removed the case to our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

Pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of the court's powers; (2) the judgment, order, or award was procured by fraud; (3) there is insufficient 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. *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1997). 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. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). A finding upon review by the compensation court regarding whether an applicant's incapacity has increased under the terms of Neb. Rev. Stat. § 48-141 (Reissue 1993) is a finding of fact. See, *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989); *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988).

Starks contends the compensation court erred when the court (1) modified the award when there was no medical opinion that Starks experienced a decrease in his permanent impairment or physical incapacity since the final adjudicated award of permanent total disability; (2) retroactively modified the award by discontinuing total disability benefits as of August 27, 1995; and (3) denied a waiting penalty, attorney fees, and interest by retroactively modifying the award to justify nonpayment of adjudicated benefits.

Section 48-141 provides, in pertinent part, that "the amount of any agreement or award . . . may be modified . . . *on the ground of increase or decrease of incapacity due solely to the injury* . . . ." (Emphasis supplied.) To obtain a modification, the 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. *Gomez, supra*; *Grauerholz, supra*. In proving the increase or decrease in incapacity, the applicant must prove there now 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. *Gomez, supra*. To determine whether an increase or decrease in incapacity has occurred, " 'the whole question of plaintiff's *physical condition* can again be inquired into . . . .' " (Emphasis supplied.) *Camp v. Blount Bros. Corp.*, 195 Neb.

459, 462, 238 N.W.2d 634, 636-37 (1976) (quoting *Great Western Sugar Co. v. Hewitt*, 127 Neb. 790, 257 N.W. 61 (1934)).

In modifying the award, the compensation court found the opinions of Dr. Mercier, as well as Starks' activities involving the jitney services, were sufficient to show a decrease of incapacity due solely to the injury in regard to Starks' physical condition since the August 25, 1993, award. The court further found that as of August 27, 1995, Starks was not permanently and totally disabled and was capable of remunerative employment since said date. Therefore, in determining whether the compensation court's decision was based on sufficient, competent evidence, we must examine Dr. Mercier's testimony and Starks' alleged involvement in illegal activity. See § 48-185(3).

Medical testimony offered to support a workers' compensation award must be based on a reasonable degree of medical certainty. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). In *Welke v. City of Ainsworth*, 179 Neb. 496, 504, 138 N.W.2d 808, 813 (1965), we stated that "[w]here the [physician's] testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained." However, "[w]here . . . the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved." *Id.* at 504-05, 138 N.W.2d at 813. We have also stated that "magic words" indicating an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. *Hohnstein v. W.C. Frank*, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991). As we said in *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992), an expert opinion is not validated or invalidated based solely on the presence or lack of the magic words "reasonable medical certainty," but, rather, the testimony should be judged in view of the entirety of the expert's opinion.

In modifying Starks' award, the compensation court observed that Dr. Mercier evaluated Starks on May 2, 1996, and diagnosed Starks with osteoarthritis of the left elbow, cervical spondylosis, and bilateral carpal tunnel release for bilateral

carpal tunnel syndrome. The court also noted that Dr. Mercier stated that determining whether Starks experienced an increase or decrease in incapacity since 1993 would be difficult to ascertain as Dr. Mercier had not seen Starks at that time. However, Dr. Mercier stated that he certainly did not consider Starks "totally disabled." Dr. Mercier further stated that while Starks has some restricted left elbow movement, pain as a result of osteoarthritis, and some minor cervical spine discomfort and bilateral hand discomfort, none of these conditions, individually or collectively, would render him totally disabled. Moreover, Dr. Mercier stated that "assuming that Mr. Starks was previously unable to engage in any gainful employment then I would express the opinion that there has been a change in that Mr. Starks does, indeed, appear capable of taking part in most physical employment." Dr. Mercier concluded that Starks is certainly employable and that if he wants to pursue work on his own and wishes to take part in gainful employment, Dr. Mercier would be comfortable releasing all restrictions.

Viewing Dr. Mercier's medical report from the entirety of his opinion does not lead to conflicting inferences. See, *Edmonds, supra*; *Welke, supra*. Dr. Mercier concluded that Starks' cervical spine, upper extremities, and hands displayed minimal signs of disability and that Starks was certainly capable of participating in gainful employment. While Dr. Mercier conceded that Starks exhibits some discomfort in his spine, elbow, and hands, Dr. Mercier stated that none of these conditions would render Starks totally disabled or unemployable. Dr. Mercier further stated that assuming Starks was unable to engage in gainful employment at one time, he is now capable of taking part in most physical employment. More importantly, Dr. Mercier flatly stated that he did not consider Starks "totally disabled." In response, Starks offered no other evidence of his continued incapacity other than the deposition testimony of Dr. Tribulato, a physician who had not treated Starks since October 1995.

In analyzing these facts, we note that the compensation court's findings of fact will not be disturbed unless clearly wrong. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). Determining whether an increase or decrease of incapacity has occurred is a finding of fact. *Gomez v. Kenney Deans, Inc.*, 232

Neb. 646, 441 N.W.2d 632 (1989). We also note that if the record contains evidence to substantiate the compensation court's factual conclusions, an appellate court is precluded from substituting its own view of the facts. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). Because the aforementioned evidence is sufficient to support the modification award, we find the compensation court was not clearly wrong in relying on Dr. Mercier's medical report. See § 48-185(3).

Since we determine that the medical testimony is sufficient to support the court's decision, we need not consider whether the alleged illegal activities demonstrated a decrease in incapacity.

In Starks' second assignment of error, he contends the compensation court erred in retroactively modifying his award. In the court's order, the Workers Compensation Court determined Starks had not been totally and permanently disabled since August 27, 1995, and, in turn, ruled Starks was entitled to only partial disability benefits from said date. The court credited Cornhusker for the disability payments made pursuant to the prior total permanent disability award.

Starks argues that by virtue of the principle of res judicata, workers' compensation awards cannot be changed once a final adjudication has occurred unless an increase or decrease in incapacity is demonstrated via the procedural mechanism provided in § 48-141. In response, Cornhusker contends that workers' compensation awards can be modified retroactively because nothing in § 48-141 prohibits such course of action.

This court has never specifically addressed whether a modification award, finding that an increase or decrease in incapacity has occurred, can be applied retroactively. In analyzing this issue of first impression, we initially note that "[w]hen an award is modified for a reason not based on change of condition, but going to some error in the original award, the correction may be made retroactive to the date of the original award, unlike a modification for changed condition." 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 81.52(d) at 15-1194.146 and 15-1194.148 (1997). The underlying basis for such a distinction is that a modification award, retroactively applied to the date of the original award, would effectively afford the parties involved an opportunity to relitigate the orig-

inal award. Such action is prohibited by the principle of res judicata. See, generally, *Nice v. IBP, inc.*, 226 Neb. 538, 412 N.W.2d 477 (1987); *Smith v. Baker's Local No. 433 Welfare Fund*, 221 Neb. 215, 375 N.W.2d 922 (1985). This is the same argument made by Starks. However, Starks fails to recognize that the compensation court did not modify his award retroactively to the date of the original award, but, rather, retroactively to the date of the change in condition. Nonetheless, Starks also argues that even if the compensation court possessed jurisdiction to modify the award, his benefits could have only been modified as of the date of the August 7, 1996, modification award, not retroactive to August 27, 1995. Starks' argument is partially correct.

In the instant case, Cornhusker unilaterally stopped making payments to Starks on October 29, 1995. Not until 1 month later, on November 30, did Cornhusker file an application for modification. The compensation court modified the award on June 3, 1996; yet the compensation court applied the award retroactively to the date Starks' incapacity decreased, August 27, 1995.

A modification award cannot be applied retroactively beyond the date the application for the modification is filed. For example, the Georgia Court of Appeals stated: " 'A new award entered on the basis of a change in condition "cannot be effective to modify or set aside the previous award as to any time prior to the date of the application therefor." ' " *Anglin v. St. Paul-Mercury Indemnity Co.*, 106 Ga. App. 395, 399, 126 S.E.2d 913, 915 (1962). See, also, *Zurich Insurance Co. v. Cooper*, 106 Ga. App. 437, 127 S.E.2d 165 (1962). Nebraska also follows this line of reasoning. In *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996), we said a workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in § 48-141. Likewise, in *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942), we said that once a determination has been made regarding the claimant's disability, the correctness of that determination may not be questioned. Moreover, employers are prohibited from unilaterally modifying workers' compensation awards. See

Blanco v. Kent Gen. Hospital, 56 Del. 97, 190 A.2d 277 (1963), *aff'd as modified* 57 Del. 90, 195 A.2d 553.

Based on the information obtained from the private investigator, Cornhusker unilaterally terminated Starks' payment of benefits. The compensation court modified Starks' award retroactively to the date of the change in Starks' condition, August 27, 1995, not the date Cornhusker filed the application for modification, November 30. The compensation court's award is modified to the extent that Cornhusker owes Starks total and permanent disability payments from the time it unilaterally discontinued paying benefits to Starks, October 29, 1995, until the date Cornhusker filed an application for modification, November 30—1 month of workers' compensation benefits.

In Starks' final assignment of error, he alleges the compensation court erred when the court denied him attorney fees, interest, and a waiting penalty. Neb. Rev. Stat. § 48-125 (Reissue 1993), provides, in pertinent part:

> [I]f 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 . . . and the . . . Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the . . . Supreme Court.

(Emphasis supplied.) See *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). Section 48-125 also provides that "[w]hen an attorney's fee is allowed . . . there shall further be assessed against the employer an amount of interest on the final award obtained . . . ." The compensation court incorrectly modified Starks' award retroactive to the date of his decrease in incapacity. Even though the increase in Starks' award, as herein provided, is trivial at best—1 month of benefits—Starks is still entitled to recover a reasonable attorney fee and interest, since he did, in fact, obtain an increase in the award as required by § 48-125. Starks is awarded $500 in attorney fees and interest.

Starks also contends the waiting-time-penalty provision of the Nebraska Workers' Compensation Act should be applied

and enforced in this case. See § 48-125(1). The 50-percent penalty for waiting time applies when payments are delinquent after 30 days' notice of disability has been given or there is no reasonable controversy and the employer refuses or neglects to pay compensation for 30 days after the injury. *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990). To avoid the payments assessable under § 48-125(1), an employer need not prevail in opposing an employee's claim for compensation, but the employer must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation. *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). Whether a reasonable controversy exists is a question of fact. See *Marshall v. Columbus Steel Supply*, 187 Neb. 102, 187 N.W.2d 607 (1971). Based on the report issued by Dr. Mercier, we find that Cornhusker had an actual basis, in fact, for disputing Starks' claim. As such, Starks' request for a waiting-time penalty is denied.

Since there was sufficient, competent evidence in the record supporting the modification award, we affirm as modified.

AFFIRMED AS MODIFIED.

WHITE, C.J., dissents.

PATTY TAPP AND AWC TRANSPORTATION, INC., APPELLANTS, V. BLACKMORE RANCH, INC., AND LOUIS J. FAHY, APPELLEES.

575 N.W.2d 341

Filed February 27, 1998. No. S-95-159.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.

4. **Jury Instructions.** A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
6. **Negligence: Motor Vehicles: Highways.** It is negligence as a matter of law for a motorist to drive his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision.
7. ____: ____: ____. The range of vision rule applies to driving where vision is impaired by storms or weather conditions such as snow, ice, or fog. Such factors are held to be conditions and not intervening causes, and require drivers to exercise a degree of care commensurate with the circumstances.
8. **Negligence: Jury Instructions.** It is permissible to instruct a jury that a third party who is not a party to the action is negligent as a matter of law.
9. **Trial: Negligence: Proximate Cause.** The determination of causation is ordinarily a question for the trier of fact.
10. **Trial: Negligence: Evidence: Proximate Cause.** Where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury.
11. **Negligence: Proximate Cause: Words and Phrases.** "Efficient intervening cause" has been defined as the new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
12. **Negligence: Tort-feasors: Liability.** An intervening cause will act to cut off a tort-feasor's liability only when the intervening cause is not foreseeable.
13. **Negligence: Motor Vehicles: Highways: Statutes: Evidence: Juries.** A prima facie violation of Neb. Rev. Stat. § 60-6,164 (Reissue 1993) is established by presenting evidence that the person charged stopped, parked, or left a vehicle standing upon the main-traveled portion of a roadway. If a prima facie case is established, in order to create a question of fact for the jury, it becomes incumbent upon the person charged to present evidence that he or she did not violate the statute.
14. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
15. **Negligence: Words and Phrases.** Ordinary negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
16. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded for a new trial.

Robert G. Pahlke and Andrew W. Snyder, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellants.

Patrick M. Connealy, Russell W. Harford, and Stefan T. Wall, of Crites, Shaffer, Connealy, Watson & Harford, P.C., for appellees.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

The appellants, Patty Tapp (Tapp) and her employer, AWC Transportation, Inc., who was joined for subrogation purposes, brought this negligence action seeking damages for injuries sustained by Tapp. Tapp was riding in the sleeper berth of an 18-wheel tractor-trailer driven by her husband, Emmet Tapp, also an AWC Transportation employee, when it collided with the back of a stopped flatbed truck belonging to the appellee Louis J. Fahy, owner of appellee Blackmore Ranch, Inc.

The district court for Dawes County found, and so instructed the jury, that Emmet Tapp, a nonparty to the case, was negligent as a matter of law and was a proximate cause of the accident. The district court then instructed the jury regarding "efficient intervening cause." We conclude that this combination of instructions was misleading and prejudiced Tapp's right to a fair trial. Accordingly, we reverse, and remand for a new trial.

BACKGROUND

SCENE OF COLLISION

The collision occurred on October 6, 1991, at approximately 6:15 p.m. on U.S. Highway 20, 4½ miles west of Chadron in Dawes County, Nebraska. The front of Tapp's westbound 18-wheeler collided with the back of Fahy's 1955 International flatbed truck, which was stopped on the highway.

Highway 20 is a paved two-lane highway. Each traffic lane is approximately 12 feet wide, and there is a 3-foot paved shoulder from the outside of each fog line to the edge of the pavement. A guardrail runs along the north side of the highway, 2 to 3 feet north of the outside edge of the pavement. Just north of the guardrail is an embankment.

As Highway 20 leaves Chadron, it runs in a westerly direction and then begins turning south so that at the scene of the collision, it is running generally from the northeast to the southwest. There is a small rise in the highway, the crest of which is four-tenths of a mile east of the scene. From the crest of the rise, the highway slopes down and then begins a gradual upward slope toward the scene.

Events Prior to Collision

Fahy was accompanied by Frank Carlson on a trip from the Fahy family ranch near Mannville, Wyoming, to a ranch near Chadron. They were followed by Fahy's wife, who was driving a pickup. Upon reaching the ranch, five head of cattle were loaded onto the flatbed truck and three head onto the pickup. The group then began the return trip to Wyoming. As Fahy and Carlson were entering Chadron, Carlson heard a thumping sound. Fahy stopped at a truckstop and checked the tires and lugnuts. He was able to turn one of the nuts on the right outside dual one-eighteenth to one-sixteenth of a turn. The group then continued traveling west on Highway 20.

As Fahy and Carlson drove over the rise in Highway 20 and started up the gradual slope to the west, they heard a grinding noise and felt a vibration. Fahy took his foot off the accelerator, but did not apply the brakes because he thought the sound might be a brake problem, and let the truck coast to a stop, pulling toward the right side of the highway. The truck stopped in a position that covered one-half to two-thirds of the westbound lane. Upon inspection, Fahy discovered that the right rear duals were loose, the threads on the lugbolts to the inside dual were stripped, and the bolts had "beat out" holes in the wheel frame.

Fahy admits he could have pulled his truck closer to the guardrail. However, Fahy testified he pulled the truck over as far as he could but still have room to work on the right side of the truck. Fahy stated he decided not to move the truck because he was afraid the rear tire would come off and the truck would either tip over or the cattle would be thrown out of the truck and run loose on the highway. Instead, Fahy decided to warn approaching traffic by activating the truck's hazard lights, and he sent his wife back to Chadron to get help.

David Mack was traveling west when he saw Fahy's truck "from about a quarter mile away" and stopped to help. He offered to pull Fahy's truck off the road using a towrope, but Fahy declined. Mack drove to the top of the hill, 1,000 to 1,500 feet west of Fahy's truck, turned around, parked on the south side of the highway, and activated the 9-inch amber beacon on top of his truck. The three men then set up a warning system in which Fahy stood 50 to 100 yards behind his truck. When westbound vehicles came over the rise to the east, Fahy would step out onto the highway, wave his arms, and direct the traffic around his truck. Carlson stood beside Fahy's truck on the south side of the highway and directed vehicles around it. Mack stopped eastbound traffic and made sure that the way was clear before permitting the traffic to pass.

According to Carlson, several trucks and approximately 50 to 60 cars passed safely through the scene while the truck was disabled; about 30 from the east, and 20 from the west. According to Mack, 10 to 15 vehicles passed safely through the scene from west to east and the same number from east to west. Fahy thought vehicles were coming through at the rate of about one per minute.

COLLISION

When Fahy saw the truck Tapp was riding in come over the rise, he was standing along the guardrail. He walked to the middle of the highway, waving his arms. The truck continued to approach without slowing down. Fahy started moving to the north, still waving his arms. Before the truck passed Fahy, he stepped over the guardrail on the north side of the highway. Fahy then saw the truck's brake lights come on and heard the airbrakes lock up, the tires squeal, and a big bang.

Emmet Tapp testified as follows:

> I had the cruise set on 55 mile an hour and the sun was starting to set at its brightest peak of the day, I had the sun visor down and I was coming out of Gordon and I peaked this hill and I started coming down on a downgrade and I seen this, I kind of glanced over and I seen this guy waving and pretty soon I looked and seen this truck, I said oh, shit and I hit the brakes and all I could do was keep the

truck on the road and I just come to a skid, hit him, and knocked the truck off.

The resulting collision caused Tapp, who was in the sleeper portion of the truck, to be thrown forward, causing injury. Her face hit the back of the passenger seat, and she subsequently fell into a space between the seat and the mattress, striking her chin on a metal bar which holds the sleeper mattress in place. Tapp appeals from the jury verdict in favor of Fahy.

ASSIGNMENTS OF ERROR

Rephrased and reorganized, Tapp alleges that the district court erred in (1) ruling as a matter of law that Emmet Tapp, a nonparty, was negligent and a proximate cause of the accident; (2) giving Fahy's proposed instruction on proximate cause, which included the term "efficient intervening cause" in its definition; (3) failing to direct a verdict that there was no intervening cause involved in the accident; (4) refusing to give her proposed instruction on Fahy's burden of proof regarding Fahy's alleged violation of Neb. Rev. Stat. § 60-6,164 (Reissue 1993); (5) failing to direct a verdict that it was both practicable and possible for Fahy to remove his vehicle from the road; (6) failing to direct a verdict that Fahy was negligent as a matter of law; (7) failing to give her proposed instruction on the definition of impossibility; (8) failing to give her proposed instruction that she was not negligent and that Emmet Tapp's negligence could not be imputed to her; (9) excluding Fahy's and Calvin Cook's testimony bearing upon Fahy's alleged negligence; (10) denying her the opportunity to present evidence bearing upon the negligence of Emmet Tapp; (11) failing to give her proposed instruction on the effect of findings; (12) making improper comments, in facial expressions and body language, which gave the jurors an appearance of judicial bias; (13) having and encouraging improper contact with the foreman of the jury after jury selection; and (14) overruling her motions for new trial and judgment notwithstanding the verdict.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d

303 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997).

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Dolberg v. Paltani,* 250 Neb. 297, 549 N.W.2d 635 (1996); *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995).

All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997).

A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury. *Hamernick v. Essex Dodge Ltd., supra.*

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

ANALYSIS

ASSIGNMENTS OF ERROR NOS. 1, 2, AND 3

Tapp contends that the district court erred in ruling as a matter of law that Emmet Tapp, a nonparty, was negligent and a proximate cause of the accident. Tapp further asserts the district court erred in giving Fahy's proposed instruction on proximate cause when that instruction included the term "efficient intervening cause" in its definition. Tapp also argues the district court should have directed a verdict that there was no intervening cause involved in the accident.

At the conclusion of Tapp's case in chief, Fahy made a motion for a directed verdict on the issue of Emmet Tapp's negligence. The district court originally granted the motion. However, following some discussion of the issue, the district court

stated that it did not know if a directed verdict was right, but if it came to an instruction on the issue, that was how the court would instruct the jury because, according to Nebraska law, Emmet Tapp was negligent. The district court denied Fahy's motions for directed verdicts on the issues of whether Emmet Tapp's negligence was the proximate cause of the collision and whether Emmet Tapp's negligence was a proximate cause of the collision. Fahy renewed these motions at the end of his case in chief, and the motions were again denied. However, prior to deliberations, the district court instructed the jury as follows: "The court finds, and you are instructed, that Emmet Tapp was negligent as a matter of law because he failed to maintain his vehicle under reasonable control and failed to maintain a proper lookout, and that his negligence was a proximate cause of the accident." Thus, the district court did not specifically direct a verdict on the issue of Emmet Tapp's negligence. Rather, the court determined that Emmet Tapp was negligent as a matter of law and instructed the jury that this was the case.

We have never addressed the issue of whether a jury may be instructed that a third person who is not a party to the action is negligent as a matter of law. Although there is little relevant precedent from other jurisdictions regarding the issue, one case is on point.

In *Schreiber v. Smelting Co.*, 157 Ohio St. 1, 104 N.E.2d 4 (1952), the defendant parked a truck in a manner that caused it to block a portion of the street. The plaintiff was a passenger who sustained injuries after the car she was riding in collided with the truck. The driver of the car was not a party to the lawsuit. Ohio followed an "assured clear distance" rule under which a motorist is negligent if he or she does not control a vehicle so that it may be brought to a stop within the assured clear distance between the vehicle and any discernible object within the vehicle's path. The court in *Schrieber* concluded that the driver of the car was negligent as a matter of law under the "assured clear distance" rule and that the defendant was entitled to establish that the actions of the driver constituted an efficient independent cause. Accordingly, the court determined it was permissible for the trial court to instruct the jury that the driver was negligent as a matter of law and that if the jury determined

the driver's negligence to be the sole cause of the collision, the defendant could not be held liable.

As in *Schreiber*, we adhere to the "range of vison" rule, under which

> it is negligence as a matter of law for a motorist to drive his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. . . . This rule has been applied to driving where vision is impaired by storms or weather conditions such as snow, ice, or fog. Such factors are held to be conditions and not intervening causes, and require drivers to exercise a degree of care commensurate with the circumstances.

C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 745-46, 255 N.W.2d 272, 276 (1977).

In the instant case, the only evidence adduced by Tapp to rebut the evidence of Emmet Tapp's negligence was Emmet Tapp's own testimony that the sun was in his eyes at the time of the collision. We conclude that sunlight, like fog, is a condition that requires drivers to exercise a degree of care commensurate with the circumstances. Thus, as in *Schreiber*, there is no disputed fact that Emmet Tapp was negligent as a matter of law, and Fahy is entitled to a finding that Emmet Tapp was negligent as a matter of law. Accordingly, we hold that it is permissible to instruct a jury that a third party who is not a party to the action is negligent as a matter of law, and we conclude that Tapp's first assignment of error is without merit. However, this conclusion does not end our inquiry because the instruction regarding Emmet Tapp's negligence was combined with other instructions, and the effect of the combination of those instructions must be considered.

Instead of instructing the jury on proximate cause from the pattern instruction recommended at NJI2d Civ. 3.41, the district court gave the following instruction:

> PROXIMATE CAUSE
>
> A proximate cause is a cause that produces a result in a natural and continuous sequence, unaccompanied by an efficient intervening cause, and without which the result would not have occurred.

CONCURRING CAUSE

Where the independent negligent acts or failures to act of more than one person combine to proximately cause the same result, each such act or failure to act is a proximate cause, and each such person may be held responsible for the entire result. This is true though some may have been more negligent than others. It is no defense that all those who might have been held responsible are not parties to this case.

EFFICIENT INTERVENING CAUSE

An efficient intervening cause is a new and independent act, itself a proximate cause of a result, which breaks the causal connection between the original wrong and the result. A person is not legally responsible for a result if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated or reasonably foreseen.

The determination of causation is ordinarily a question for the trier of fact. *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992); *Kidd v. Winchell's Donut House*, 237 Neb. 176, 465 N.W.2d 442 (1991). However, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983); *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975).

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Dolberg v. Paltani,* 250 Neb. 297, 549 N.W.2d 635 (1996); *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997).

We have defined "efficient intervening cause" as the new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989). An intervening cause will act to cut off a tort-feasor's liability only when the intervening cause is not foreseeable. *Id.*

As a matter of policy, Tapp asks this court to direct the trial courts to delete any reference to the term "efficient intervening cause" when instructing juries on proximate cause. Tapp asserts that the inclusion of "efficient intervening cause" in the instruction is unnecessary and inappropriate because the term is subsumed in the definition of proximate cause. We recently reached this conclusion in *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997), and instructed the district courts to discontinue instructing juries regarding efficient intervening cause. However, in the instant case, the instruction regarding efficient intervening cause was given before *Sacco* was decided. Accordingly, our direction to the district courts in *Sacco* is inapplicable to this case.

In the alternative, Tapp contends that "efficient intervening cause" should have been stricken from the proximate cause instruction because the intervening cause alleged by Fahy was foreseeable. Tapp further contends the instruction was prejudicially misleading given that the district court previously instructed the jury that Emmet Tapp was negligent and a proximate cause of the accident. In particular, Tapp alleges that she was prejudiced by the combination of the proximate cause instruction, defined in part as "unaccompanied by an efficient intervening cause," with the instruction that Emmet Tapp was a proximate cause of the accident.

In general, we have concluded that it is foreseeable that oncoming traffic may collide with a disabled vehicle stopped on a highway and that the owner of such a vehicle has a duty to adequately warn of the hazardous condition or remove the vehicle from the highway. See *Looney v. Pickering, supra.* Whether Fahy should reasonably have foreseen that the operator of a vehicle would run into his truck, given the steps he took to warn oncoming traffic, and whether Fahy breached a duty to Tapp in

failing to remove his truck from the highway are questions of fact for the jury. Thus, the district court was not in error in refusing to direct a verdict that there was no intervening cause involved in the accident. However, the combination of instructions given by the court, together with the definition of efficient intervening cause, was in error.

The combination of instructions that Emmet Tapp was negligent and was a proximate cause of the accident, when combined with the definition of efficient intervening cause, could easily mislead the jury to believe that Emmet Tapp's negligence was necessarily an efficient intervening cause. The definitional instruction on efficient intervening cause given by the district court states in pertinent part that "[a]n efficient intervening cause is [1] a new and independent act, [2] itself a proximate cause of a result, [3] which breaks the causal connection between the original wrong and the result." Given the district court's instruction that Emmet Tapp's negligence was a proximate cause of the accident, the jury had no choice but to find that Emmet Tapp's negligence was (1) a new and independent act, (2) itself a proximate cause of the result. This combination unduly emphasized the alleged negligence of nonparty Emmet Tapp. Under these circumstances, the jury could easily be confused by the instruction and believe it was precluded from finding that Fahy was also a proximate cause of the accident and that the causal connection had not been broken. Thus, we agree with Tapp that the instructions, taken as a whole, were prejudicial and adversely affected her right to a fair trial. Accordingly, we reverse, and remand for a new trial.

Because we conclude that the instructions, taken as a whole, acted to prejudicially affect Tapp's right to a fair trial, we need not address Tapp's other assignments of error. However, recognizing that a retrial of this case is possible, we will address those of Tapp's assignments of error which have issues that are likely to come up again on retrial.

Assignment of Error No. 4

Tapp contends the district court erred in refusing to give her proposed instruction on Fahy's burden of proof regarding Fahy's alleged violation of § 60-6,164. Tapp contends that she

was prejudiced by the district court's refusal to give her tendered instruction because evidence of a violation of § 60-6,164 is evidence of Fahy's alleged negligence. See, *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991); *Peterson v. Skiles*, 173 Neb. 470, 113 N.W.2d 628 (1962).

Section 60-6,164 states in pertinent part, and the district court instructed the jury in instruction No. 5, as follows:

> (1) No person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon a roadway outside of a business or residential district when it is practicable to stop, park, or leave such vehicle off such part of a highway, but in any event an unobstructed width of the roadway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred feet in each direction upon such highway.
>
> . . . .
>
> (4) This section shall not apply to the driver of any vehicle which is disabled while on the roadway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

The district court also gave instruction No. 4, which provided:

> It is claimed that [§ 60-6,164] was violated. If you find that is so, that does not necessarily prove negligence. The violation of a statute is evidence that you may consider, along with all of the other facts and circumstances of the case, in deciding whether or not there was any negligence.

Tapp proposed the following instruction, No. 6A, which was refused by the district court:

> If any portion of [Fahy's] truck was standing or stopped in the main traveled portion of the roadway, that creates a legal presumption that [Fahy] has violated [§ 60-6,164].
>
> [Fahy] has the burden of overcoming the legal presumption, and can do so *only* by showing that it was impossible for him to remove his truck from the main traveled portion of the roadway.

(Emphasis supplied.)

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996).

In *Fleischer v. Rosentrater*, 190 Neb. 219, 223, 207 N.W.2d 372, 374 (1973), this court stated:

> The evidence clearly supports . . . that the Fleischer vehicle was standing and stopped in the main-traveled portion of the roadway. Our court has consistently held that such facts constitute a prima facie violation of [§ 60-6,164] sufficient to make a jury question and that it is incumbent upon the person charged to show the existence of facts which take him out of the scope of the statute.

See, also, *Horst v. Johnson, supra*; *Huston v. Robinson*, 144 Neb. 553, 13 N.W.2d 885 (1944).

In other words, a prima facie violation of § 60-6,164 is established by presenting evidence that the person charged stopped, parked, or left a vehicle standing upon the main-traveled portion of a roadway. If a prima facie case is established, in order to create a question of fact for the jury, it becomes incumbent upon the person charged to present evidence that he or she did not violate the statute. Thus, the portions of Tapp's proposed instruction that state, "If any portion of [Fahy's] truck was standing or stopped in the main traveled portion of the roadway, that creates a legal presumption that [Fahy] has violated [§ 60-6,164]" and "[Fahy] has the burden of overcoming the legal presumption" are correct statements of law.

Tapp's proposed instruction further states that Fahy can meet his burden of overcoming the presumption that he violated § 60-6,164 "only by showing that it was impossible for him to remove his truck from the main traveled portion of the roadway." However, a violation of § 60-6,164 occurs when a person stops, parks, or leaves standing any vehicle on a roadway when it is practicable to stop, park, or leave such vehicle off such part of the roadway. Thus, once a prima facie violation is estab-

lished, the person charged can create a jury question by presenting evidence either that his or her vehicle was not stopped, parked, or left standing on the roadway or that it was not practicable to stop, park, or move the vehicle off of the roadway.

Accordingly, the portion of Tapp's tendered instruction which states Fahy can overcome the presumed violation of § 60-6,164 "only by showing that it was impossible for him to remove his truck from the main traveled portion of the roadway" is not a correct statement of law. Thus, the district court did not err in refusing Tapp's proposed instruction.

ASSIGNMENT OF ERROR NO. 5

Tapp next asserts the district court erred in failing to direct a verdict that it was both practicable and possible for Fahy to remove his vehicle from the road. We read this assigned error to allege the district court erred in failing to direct a verdict that Fahy violated § 60-6,164.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

Tapp established a prima facie violation of § 60-6,164 by presenting evidence that Fahy stopped and left his truck standing on the highway. As such, the burden shifted to Fahy to create a jury question by presenting evidence either that his truck was not stopped and left standing on the highway or that it was not practicable to move his truck off of the highway.

Fahy did not dispute that his truck was stopped and left standing on the highway. However, Fahy argued it was not practicable to move his truck off of the highway. He testified he pulled the truck over as far as he could to still have room to work on the right side. He decided not to move the truck because he was afraid that the rear tire would come off and either the truck would tip over or the cattle would be thrown out and run loose on the highway.

Thus, Fahy met his burden of creating a question of fact for the jury, on which question reasonable minds can differ, by presenting evidence that it was not practicable to move his truck off of the highway. As a result, the district court did not err in refusing to direct a verdict that Fahy violated § 60-6,164.

ASSIGNMENT OF ERROR NO. 6

Tapp next contends that the district court erred in failing to direct a verdict that Fahy was negligent as a matter of law. Tapp argues that Fahy was negligent as a matter of law because Fahy violated § 60-6,164, Fahy should reasonably have foreseen that a motorist would run into his truck, and Fahy failed to properly tighten the lugnuts on the wheels of his truck.

In regard to whether Fahy violated § 60-6,164, Fahy met his burden of creating a question of fact for the jury by presenting evidence that it was not practicable to move his truck off the highway. (See prior discussion on assigned error No. 5.) With respect to whether Fahy should reasonably have foreseen that the operator of a vehicle would run into his truck, Fahy created a question of fact for the jury by presenting evidence that he, Carlson, and Mack took steps to warn oncoming traffic that the truck was stopped on the highway. (See prior discussion on assigned error No. 3.)

As to whether Fahy was negligent in failing to properly tighten the lugnuts on the truck's duals, Tapp's expert Cook testified that Fahy should have jacked the truck up, removed the outside dual, and tightened the inside dual. Ordinary negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995). Fahy testified that this was the first time he had ever had lugnuts come loose and that after he initially heard the "thumping" sound, he stopped at a truckstop in Chadron and attempted to tighten the outside duals. Thus, whether Fahy failed to tighten the lugnuts, as a reasonably careful person would do under similar circumstances, is a question of fact for the jury on which reasonable minds can differ. See, *Traphagan v. Mid-America Traffic Marking, supra*; *Reavis v. Slominski, supra*. For these

reasons, the district court did not err in refusing to direct a verdict that Fahy was negligent as a matter of law.

ASSIGNMENT OF ERROR NO. 7

Next, Tapp contends the district court erred in failing to give her proposed jury instruction on the definition of "impossibility." Tapp's proposed jury instruction No. 4A provided: "Imposs-ibility is defined to mean that which, in the course of nature no man can do or perform." Tapp requested this instruction in order to clarify the meaning of "impossible" as that term appears in 60-6,164(4).

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996). Fahy did not plead or argue that it was impossible to avoid leaving his truck on the highway. As stated, Fahy argued it was not practicable to move his truck off of the highway. Thus, subsection (4) of § 60-6,164 was never an issue at trial. For this reason, the district court did not err in refusing to give Tapp's proposed instruction on impossibility.

ASSIGNMENT OF ERROR NO. 8

Next, Tapp asserts that the district court erred in failing to give her proposed instruction that she was not negligent and that Emmet Tapp's negligence could not be imputed to her. Tapp's proposed instruction No. 3A states:

> The court has already ruled, as a matter of law, that Patty Tapp is guilty of no negligence whatsoever in this matter. The court has also ruled, as a matter of law, that any negligence of Emitt [sic] Tapp cannot be attributed to Patty [Tapp], and should not be considered by you in your deliberations on this case.

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Traphagan v. Mid-America Traffic Marking*,

251 Neb. 143, 555 N.W.2d 778 (1996); *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). A jury instruction that misstates issues or defenses and has a tendency to mislead the jury is erroneous. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). See, also, *Kirchner v. Wilson, supra*.

Not only does Tapp's proposed instruction state that she was not negligent and that Emmet Tapp's negligence could not be imputed to her, but it also states that any negligence on the part of Emmet Tapp "should not be considered by [the jurors in their] deliberations on this case." Because the jurors must consider Emmet Tapp's negligence in their deliberations, Tapp's proposed instruction is not a correct statement of the law and is misleading. As a result, the district court did not err in refusing Tapp's proposed instruction.

CONCLUSION

We conclude the district court's instruction that Emmet Tapp was negligent and a proximate cause of the accident, when combined with an instruction regarding efficient intervening cause, was misleading and prejudiced Tapp's right to a fair trial. Accordingly, we reverse, and remand for a new trial. We further conclude that Tapp's assignments of error Nos. 3 through 8 are without merit. We need not address Tapp's remaining assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, C.J., participating on briefs.

GERRARD, J., concurring.

Because the jury instructions, taken as a whole, were prejudicial and adversely affected Patty Tapp's right to a fair trial, I concur in the judgment of reversal in the instant case. However, I write separately to address the issue of properly instructing a jury in the event that a nonparty is, as a matter of law, found to be negligent by the trial court.

Although I agree with the majority that it is not error per se to instruct the jury that a nonparty third person is negligent as a matter of law, this case illustrates why it is rarely a good idea to give such an instruction. Since the determination of causation is ordinarily a question for the trier of fact, *Millard v. Goodyear*

Tire & Rubber Co., 239 Neb. 1014, 480 N.W.2d 162 (1992), that determination should be made on an even playing field and with instructions clearly delineating the fact finder's role.

Thus, if a nonparty is, as a matter of law, found to be negligent, how should the jury be fairly instructed regarding the issues of proximate cause and concurrent cause? Even though we have never been confronted with this precise issue, the case of *Schreiber v. Smelting Co.*, 157 Ohio St. 1, 104 N.E.2d 4 (1952), cited by the majority, is instructive in answering the question. In *Schreiber*, the plaintiff sued the defendant to recover for personal injuries sustained in a collision between an automobile in which she was a passenger and a truck owned by the defendant. The defendant's truck had been placed across the street so that it blocked the east portion and protruded approximately 2 feet into the west portion of the street. The district court instructed the jury, as a matter of law, that the driver of the car in which the plaintiff was riding was guilty of negligence. The district court then instructed the jury in pertinent part:

> "[I]f you find by a preponderance of the evidence that [the nonparty driver's] negligence was *the sole cause* of this collision, this plaintiff cannot recover in this action. If, however, on the other hand, she has proven [defendant truck owner] was guilty of negligence, and that that negligence upon the part of the defendant either directly and proximately caused the collision, or directly and proximately contributed to cause the collision, then she is entitled to recover in this action."

(Emphasis supplied.) *Id.* at 4, 104 N.E.2d at 6.

The jury returned a verdict in favor of the defendant, and on appeal, the Ohio Supreme Court affirmed, stating:

> The trial judge did not submit to the jury the question whether the third person was guilty of negligence but charged . . . that the third person was, as a matter of law, guilty of negligence and that if the negligence of the third person so established was found by the jury to have been *the sole cause* of the collision, the defendant could not be held liable. The charge of the trial court we believe was free of error.

(Emphasis supplied.) *Id.* at 9, 104 N.E.2d at 8.

In the same vein, the Nebraska Supreme Court Committee on Civil Practice and Procedure suggests that the instruction on proximate cause, NJI2d Civ. 3.41; the instruction on concurring cause, NJI2d Civ. 3.42; and the instruction on the conduct of a nonparty third person as the sole and proximate cause, NJI2d Civ. 3.44, are sufficient instructions for the jury under these circumstances. I agree.

NJI2d Civ. 3.44 provides:

> PROXIMATE CAUSE—CONDUCT OF NONPARTY THIRD PERSON
>
> The defendant claims that [insert name of nonparty third person]'s conduct was the only proximate cause of the [accident]. By doing so, the defendant is simply denying that [his/her] conduct was a proximate cause of the [accident]. Remember, the plaintiff must prove that the defendant's negligence was a proximate cause of the [accident].

Like the *Schreiber* instruction, NJI2d Civ. 3.44, when combined with the instructions on proximate cause and concurring cause, does not unduly emphasize the alleged negligence of either the defendant or a nonparty third person, but leaves the determination of proximate cause fairly in the hands of the jury. When reviewing the jury instructions in the instant case, that proper balance was lacking and adversely affected Tapp's right to a fair trial.

With the foregoing in mind, I concur in the judgment.

WHITE, C.J., and MCCORMACK, J., join in this concurrence.

MAX CHALUPA ET AL., APPELLANTS AND CROSS-APPELLEES, V. SHIRLEY CHALUPA, APPELLEE AND CROSS-APPELLANT.
574 N.W.2d 509

Filed February 27, 1998. No. S-96-435.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust is an equity action.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.

4. **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.
5. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment.
6. **Trusts: Property.** Where money is the asset upon which the trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.
7. **Judgments: Appeal and Error.** A judgment will not be reversed for error against a party not entitled to succeed in any event.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

John J. Delaney, of Estes, Porter & Delaney, and Robert G. Pahlke, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellants.

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This is an appeal from an order of summary judgment entered by the district court in favor of defendant, Shirley Chalupa. Plaintiffs, Max Chalupa, Lee Chalupa, and Candy Chalupa, appeal. We removed the case to the docket of the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995).

On March 3, 1970, Fred Chalupa executed a document entitled "Irrevocable Trust Agreement," naming himself as cotrustee and assigning to the trust certain real estate which he owned in Scotts Bluff County, Nebraska (trust property). The beneficiaries of the trust include plaintiffs, the issue of Fred

Chalupa. The trust instrument states that the "purpose in establishing the trusts is to provide his [Fred Chalupa's] children with a regular income and with material comforts during their lives . . . ." Fred Chalupa later married defendant and subsequently executed a last will and testament on April 20, 1973, which ratified the prior transfer of the property in trust.

On April 7, 1981, Fred Chalupa sold the trust property for $175,000. When he died in 1989, defendant succeeded to his entire estate.

Plaintiffs first learned of the trust on February 5, 1992, as a result of prior litigation against defendant. Plaintiffs claim that they have never received any distributions, accounting, or reporting from the trust.

Plaintiffs filed this action in Scotts Bluff County District Court on August 2, 1995, claiming that the rents, profits, and income of the trust property, and the proceeds of the sale of the trust property, were wrongfully converted to the use and benefit of Fred Chalupa. The petition further alleged that defendant, as sole beneficiary of the estate, had retained the beneficial use of the income and proceeds of sale of the trust property. Plaintiffs prayed for a decree declaring that the income, profits, and proceeds of sale of the trust property be held by defendant in a constructive trust for plaintiffs as beneficiaries of said trust.

On February 16, 1996, the district court granted summary judgment for defendant, finding that plaintiffs had failed to show that defendant knew or should have known that the use and sale of the trust property by herself and Fred Chalupa violated a previously established trust.

On appeal, plaintiffs' sole assignment of error is the district court's ruling that a constructive trust may be imposed on property received from a spouse only if the holder of the property can be shown to have had knowledge of the wrongful taking by the spouse. Defendant cross-appealed, assigning as error that the district court failed to determine that this proceeding was frivolous.

An action to impose a constructive trust is an equity action. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* 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. *Battle Creek State Bank v. Preusker, supra*; *Eiche v. Blankenau*, 253 Neb. 255, 570 N.W.2d 190 (1997).

A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment. *Hanigan v. Trumble, supra*; *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). Where money is the asset upon which the trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property. *Hanigan v. Trumble, supra.*

In its order granting defendant summary judgment, the district court stated, "In order to establish a constructive trust, the plaintiffs must show that the defendant knew or should have known that the use and sale of the [trust property] by herself and Fred Chalupa violated a previously established trust." Plaintiffs assert that this is an incorrect statement of the law and assert that whether the defendant knew Fred Chalupa violated the terms of the trust is irrelevant.

In *Hanigan v. Trumble, supra*, Laurence and Ann Hanigan sued the estate of Terry Brockman to establish a constructive

trust. Before his death, Brockman fraudulently obtained $221,000 in loans from the Hanigans. Brockman had for many years been the Hanigans' financial advisor. Brockman told the Hanigans that the money would be used for temporary construction financing of a house that Brockman and his wife recently finished building. Brockman issued promissory notes to pay the money back with interest upon the acquisition of permanent financing. In fact, Brockman never attempted to obtain such financing.

Shortly after the Hanigans commenced suit against Brockman for repayment, Brockman committed suicide. Title to the Brockmans' house passed to the wife, as it was held in joint tenancy. The district court ordered a constructive trust upon the full amount of the house in favor of the Hanigans. On appeal to this court, we affirmed the imposition of the constructive trust, yet we reduced the amount which was actually traceable to the house. In affirming the constructive trust, we stated that "[w]hether [Brockman's wife] participated in or had knowledge of the wrongdoing [of Brockman] is irrelevant. [Brockman's wife] would be unjustly enriched if permitted to retain the wrongfully taken property of another." *Id.* at 383, 562 N.W.2d at 531.

We hold that the district court erred by requiring that plaintiffs, in order to establish a constructive trust, must show defendant knew or should have known that Fred Chalupa violated a previously established trust.

The district court also found that there was no genuine issue of material fact. Plaintiffs' petition asserts that defendant, as sole beneficiary of Fred Chalupa's estate, has since the time of Fred Chalupa's death retained the beneficial use of the income and proceeds of the sale of the trust property. Defendant submitted an affidavit in which she stated that she never received any proceeds of the sale of the trust property. Defendant's affidavit further stated that no proceeds of the sale of the trust property existed on the date of the death of Fred Chalupa. The existence of the proceeds of the trust property is material to establishing a constructive trust. Where money is the asset upon which the constructive trust is based, it is necessary that the specific amounts be identified and located, either by tracing the

money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997).

Plaintiffs did not present any evidence to controvert that defendant did not receive any proceeds of the sale of the trust property. If the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). Since plaintiffs failed to present any evidence of either an account or property owned by defendant to which the proceeds of the trust property could be traced, the district court was correct in determining that there was no genuine issue of a material fact.

The error committed by the district court was harmless, since the decision to grant summary judgment for defendant was correct. A judgment will not be reversed for error against a party not entitled to succeed in any event. *Van Ornum v. Moran*, 186 Neb. 418, 183 N.W.2d 759 (1971).

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

AFFIRMED.

WHITE, C.J., participating on briefs.

WRIGHT, J., not participating in the decision.

DANIEL HOIENGS, ALSO KNOWN AS DANIEL HOINS, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, AND BYRON BUZEK, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, APPELLANTS, V. COUNTY OF ADAMS ET AL., APPELLEES.

574 N.W.2d 498

Filed February 27, 1998. No. S-96-605.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **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.
4. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the pleader's conclusions.
5. **Statutes: Legislature: Intent.** In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails.
6. ____: ____: ____. The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature; all subordinate rules are mere aids in reaching this fundamental determination.
7. **Statutes.** It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible.
8. ____. Where it is possible to harmonize apparently conflicting statutes, such is to be done.
9. ____. In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.
10. ____. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
11. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
12. **Statutes: Appeal and Error.** Courts will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results.
13. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Mary C. Wickenkamp and, on brief, Richard E. Scott and Brian R. Watkins for appellants.

Randall L. Goyette and Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, and Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellees County of Adams et al.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellees E. Benjamin Nelson et al.

Steven L. Willborn for amici curiae Nebraska Sheriff's Association and Nebraska Fraternal Order of Police.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

This is the second appearance in this court of this matter which seeks a declaration that under the County Employees Retirement Act, Neb. Rev. Stat. § 23-2301 et seq. (Reissue 1991 & Cum. Supp. 1992), the defendant-appellee counties are required to make employee account contributions not of 150 percent but of 250 percent of the amount deducted from the compensation paid to members of the retirement system. In the first appearance, *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994) (*Hoiengs I*), we held that the then plaintiff-appellant, Daniel Hoiengs, had stated a cause of action on his own behalf and on behalf of a class and that the district court had thus erred in sustaining the counties' demurrers and in dismissing the petition. (As the records show variation in the spelling of this party's surname, we have elected to continue using the spelling shown in *Hoiengs I*.) Byron Buzek was thereafter added as a plaintiff, and a separate action was filed, seeking a declaration that a 1992 amendment to the retirement act is unconstitutional. The district court consolidated the two actions and ultimately entered summary judgment against the plaintiffs in both actions. The plaintiffs thereupon appealed, asserting, in summary, that the district court erred (1) in not applying the law of the case as established in *Hoiengs I*, (2) in its construction of the retirement act, and (3) in failing to hold the 1992 amendment unconstitutional. The record failing to sustain the assignments of error, we affirm.

II. SCOPE OF REVIEW

Resolution of the cases depends upon the interpretation of statutes, a matter which presents a question of law. *State ex rel.*

Garvey v. County Bd. of Comm., 253 Neb. 694, 573 N.W.2d 747 (1998). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Garvey, supra*; *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998).

III. FACTS

The retirement act, which came into being via 1965 Neb. Laws, ch. 94, § 2, p. 403, establishes a retirement system for certain county employees. It has been amended from time to time, and as of June 1, 1991, the relevant sections provided in part:

> Each employee who is a member of the retirement system shall pay to the county or have picked up by the county a sum equal to three and two-tenths percent of his or her compensation for each pay period. The county shall pick up the employee contributions required by this section for all compensation paid on or after January 1, 1985, and the contributions so picked up shall be treated as employer contributions in determining federal tax treatment under the United States Internal Revenue Code, except that the county shall continue to withhold federal income taxes based upon these contributions until the Internal Revenue Service, or the federal courts, rule that, pursuant to section 414(h) of the United States Internal Revenue Code, these contributions shall not be included as gross income of the employee until such time as they are distributed or made available. The county shall pay these employee contributions from the same source of funds which is used in paying earnings to the employee. The county shall pick up these contributions by a compensation deduction either through a reduction in the cash compensation of the employee or a combination of a reduction in compensation and offset against a future compensation increase. Employee contributions picked up shall be treated for all purposes of the County Employees Retirement Act in the same manner and to the extent as employee contributions made prior to the date picked up.

§ 23-2307 (Reissue 1991).

The county clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amounts deducted from the compensation of employees in accordance with the provisions of section 23-2307.

§ 23-2308 (Reissue 1991).

A member's share of the fund arising from the compensation deductions made in accordance with section 23-2307 shall be known as his or her employee account. . . . As of January 1 of each such year, a member's employee account shall be equal to one hundred percent of his or her employee account as of the next preceding January 1, increased by any regular interest earned and any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307.

§ 23-2309 (Reissue 1991).

(1) A member's share of the fund arising from the county contributions shall be known as his or her employer account. Prior to January 1, 1981, as of any January 1 a member's employer account shall be equal to his or her account as of the next preceding January 1, increased by two hundred percent of any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. As of January 1, 1982, a member's employer account shall be equal to the account as of January 1, 1981, increased by two hundred percent of the amounts deducted from the member's compensation for the first nine months of the year and two hundred fifty percent for the final three months of the year in accordance with section 23-2307. As of January 1, 1983, and each year thereafter, the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307.

§ 23-2310 (Reissue 1991).

The retirement value for any employee who retires under the provisions of section 23-2315 shall be the sum

of the employee's employee account and employer account as of the retirement date.

§ 23-2316 (Reissue 1991).

Effective July 15, 1992, the Legislature amended §§ 23-2308 and 23-2310. 1992 Neb. Laws, L.B. 1057. The following concluding language was added to § 23-2308: ", which two hundred fifty percent equals the employees' contributions plus the county's contributions of one hundred fifty percent of the employees' contributions." In § 23-2310, the word "two" was in each instance changed to "one."

Hoiengs began his employment with Cass County in 1987 and began participating in the retirement system in January 1988. He terminated his employment on July 11, 1994. Buzek was appointed sheriff of Saline County in December 1979 and has participated in the retirement system since that time. As a general matter, for the relevant time period, the participating counties have contributed to the various employee accounts 150 percent of the contributions made by members of the retirement system.

IV. ANALYSIS

1. Law of Case

In the first assignment of error, the plaintiffs assert that the district court erred in not applying the law of the case as established in *Hoiengs I*. In essence, their argument is that by reversing the judgment and remanding that cause to the district court in *Hoiengs I*, we determined that the retirement act requires a county contribution of 250 percent. Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998); *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996); *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994). 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. *Talle, supra*; *In re*

Application of City of Lincoln, 243 Neb. 458, 500 N.W.2d 183 (1993).

It is true that in *Hoiengs I*, we held that the district court erred in determining that Hoiengs had failed to state a cause of action. However, it must be borne in mind that when reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the pleader's conclusions. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). The questions we addressed and resolved in connection with a demurrer in *Hoiengs I* involved only the propriety of bringing a declaratory judgment action and whether Hoiengs had successfully pled an action on behalf of a class consisting of " 'current and past' " participants in the system. *Hoiengs I*, 245 Neb. at 900, 516 N.W.2d at 240. In holding that Hoiengs had stated a cause of action on behalf of a class, we wrote that

> [t]he case will turn on the interpretation of the statutes governing county contributions. So far as now appears, the effect on Hoiengs and the others will, in that regard, be basically the same, an increase in the amount of contributions to their employer accounts or no change to their accounts.

Id. at 903, 516 N.W.2d at 241. As this language clearly indicates, nowhere in the opinion did we interpret the statutes governing the amount of contributions to be made by the counties. As a result, this assignment of error has no merit.

2. Construction of Retirement Act

In the second assignment of error, the plaintiffs make a variety of arguments which combine to urge that the district court erred in concluding that the counties are required to contribute only 150 percent of the members' contributions to the employee accounts.

The plaintiffs essentially argue that § 23-2310 is clear in stating that "the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 . . . ."

On the other hand, the counties contend that § 23-2310 is inconsistent with § 23-2308.

Section 23-2308 declares that "[t]he county clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amounts deducted from the compensation of employees . . . ." However, § 23-2309 requires that employee accounts be increased by 100 percent of the compensation deduction, and the pre-1992 version of § 23-2310 stated that the employer account be increased by 250 percent of the compensation deduction. The obvious problem is that the retirement act instructed the county clerk to pay the primary carrier an amount equal to 250 percent of the deduction, but the sum of the contributions contemplated by §§ 23-2309 and 23-2310 together equaled 350 percent of the amount deducted. While the relevant language of §§ 23-2308 and 23-2310 was clear and unambiguous, it was in conflict.

It is true that in accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails. *Sidney Education Assn. v. School Dist. of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973); *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852 (1960); *Markel v. Glassmeyer*, 137 Neb. 243, 288 N.W. 821 (1939); *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N.W. 366 (1939). However, the fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985). It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993); *Malone, supra*. Where it is possible to harmonize apparently conflicting statutes, such is to be done. See *Sidney Education Assn., supra*.

As it is not possible to harmonize §§ 23-2308 and 23-2310, we look to the axiom that in order to ascertain the proper mean-

ing of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). "'All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.'" *Id.* at 241, 526 N.W.2d at 428.

As it existed from 1965 to 1981, the retirement act provided that the member's employer account be equal to the member's account as of the next preceding January 1, increased by an amount equal to any amounts deducted from the member's salary since the next preceding January 1, that is to say, 100 percent. § 23-2310 (Reissue 1970). Section 23-2308 provided that the county clerk pay to the primary carrier an amount equal to 200 percent of the amounts deducted from a member's compensation. § 23-2308 (Reissue 1970). Thus, no contradiction existed at this point.

The problem began with the amendment through 1981 Neb. Laws, L.B. 459, whereby the Legislature increased the amount to be paid by the county clerk under § 23-2308 to an amount equal to 250 percent of the amount deducted. Because L.B. 459 did nothing to change §§ 23-2309 and 23-2310, the sum of the employee and employer accounts still increased by an amount equal to 100 percent of the amount deducted from a member's compensation, that is to say, a total of 200 percent. In an attempt to remedy the inconsistency caused by the adoption of L.B. 459, the Legislature adopted 1983 Neb. Laws, L.B. 313, which amended the relevant portions of § 23-2310 as set forth in part III above.

In enacting L.B. 313, the Legislature attempted to recite what the counties had contributed in the past and changed the contributions to be made by them in the future. Unfortunately, the recitation in L.B. 313 of what the act provided prior to 1981 was wrong. The counties had contributed an amount equal to 100 percent of the amount deducted from a member's compensation, not 200 percent.

Thus, to remedy the problem and the conflict noted earlier, the Legislature enacted 1992 Neb. Laws, L.B. 1057, which made unmistakably clear that the 250 percent refers to the combined total of the members' contributions and the counties' contributions.

In order to hold as the plaintiffs urge, we also would have to conclude that the Legislature's intention vacillated such that in 1965 it meant the counties to contribute an amount equal to the amount deducted from the members' compensation, intended in 1983 that the counties retroactively pay 100 percent more for deductions made prior to 1981, and in 1992 returned to requiring contributions equal to 100 percent of the amounts deducted from the compensation paid to members of the retirement system for this same period. Such a reading of the Legislature's intention would be absurd.

In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997); *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996). Courts will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991). "'"'In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.'. . ."'" *Id.* at 500-01, 466 N.W.2d at 533.

Reading all of the Legislature's enactments in this regard together, including those adopted prior to the 1981 amendment through L.B. 459 and the amendment adopted in 1992 through L.B. 1057, we are led to the conclusion that at no time did the Legislature intend that the counties make contributions of 250 percent of the amounts deducted from the compensation paid to the members of the retirement system, but, rather, that it intended that all the contributions, those of the counties and the members together, total 250 percent of the amounts deducted from the compensation paid the members since the effective date of L.B. 459.

3. Constitutionality of 1992 Amendment

The foregoing determination moots the third assignment of error, which claims that the 1992 amendment unconstitutionally impaired the vested contractual rights of the members of the system to a county contribution of 250 percent of the amounts deducted from their compensation. As L.B. 1057 did not reduce

the amount of contributions required from the counties, there can be no impairment of any vested contractual right.

V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court is affirmed.

AFFIRMED.

DESIREE BARNETT, APPELLEE, V. CHARLES R. PETERS, APPELLEE, AND FARMERS INSURANCE EXCHANGE, ALSO KNOWN AS FARMERS INSURANCE GROUP, GARNISHEE-APPELLANT.

574 N.W.2d 487

Filed February 27, 1998. No. S-96-705.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Garnishment: Appeal and Error.** Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
4. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
6. **Insurance: Motor Vehicles: Words and Phrases.** Under the initial permission rule, if permission to use an automobile is initially given, then recovery may be had regardless of the manner in which the automobile is subsequently used. As long as the first use is with the permission of the owner, later deviations are immaterial.
7. **Insurance: Contracts: Liability: Motor Vehicles.** Once the named insured of a policy which contains an omnibus clause extending liability coverage to those driving the covered automobile with the insured's consent gives such consent to another, any third person allowed to drive the vehicle by the initial permittee likewise is covered, barring theft or conversion.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for further proceedings.

Kristen D. Mickey, of Sorensen & Zimmerman, P.C., for garnishee-appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Barnett.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

Farmers Insurance Exchange (Farmers) appeals the entry of a summary judgment by the district court for Scotts Bluff County, Nebraska, which determined Farmers was liable for injuries sustained by Desiree Barnett when she was struck by an automobile driven by Charles R. Peters. At the time of the accident, Ronald G. Miglia was the named insured on a liability policy with Farmers and had given his permission to his daughter, Alison, to operate the vehicle. Alison, in turn, allowed Peters to drive the vehicle. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We reverse the decision of the district court and remand the cause for further proceedings.

FACTUAL BACKGROUND

On February 18, 1991, an automobile driven by Peters struck Barnett, a pedestrian, in Scottsbluff, Nebraska. A default judgment was entered against Peters in the amount of $29,412.88 plus costs and interest. Ten days after the default judgment was entered, Barnett's attorney wrote a letter to Miglia with a copy to Farmers' agent, enclosing a copy of the judgment. In its judgment, the district court further made a finding of fact that Peters was driving a 1985 Oldsmobile owned by Miglia, of Gering, Nebraska, at the time of the accident.

Miglia carried a liability insurance policy on the vehicle through Farmers which outlined coverage for any "insured person." Excluded from the definition of an "insured person" under

the policy is "[a]ny person who uses a vehicle without having sufficient reason to believe that the use is with the permission of the owner." The only named insured under the language of the policy was Miglia.

Alison and Peters were living together at the time of the accident. It is undisputed that Alison had her father's permission to operate the vehicle at the time of the accident. Alison gave Peters express permission to drive the vehicle on the date that he struck Barnett, and Alison was present in the vehicle when it struck Barnett.

The record does not reflect the method used to serve notice on Peters. No one seemed to know his whereabouts. Alison testified in her deposition that she had last seen Peters in 1993, and at that time, he was living with his father in Torrington, Wyoming. The police report of the accident, which is in evidence in this case, lists Peters' address as 6th Street in Gering, Nebraska. The record does not reflect if there was service of notice by leaving at Peters' place of residence.

Neither Miglia nor Farmers was ever given notice of the pending action against Peters. Farmers did, however, have notice of the accident and the claim, because Farmers' agent had helped Miglia fill out an accident report form, SR-21, for filing with the State of Nebraska. There is correspondence in evidence between Farmers and State Farm Insurance, Barnett's insurance carrier, about State Farm's subrogation rights because State Farm had paid medical bills for Barnett. Farmers also had notice of the judgment, albeit more than 10 days after the judgment, when Barnett's attorney sent a copy of the judgment to Miglia with a copy to Farmers' agent.

A motion to vacate and a special appearance were filed by Peters' attorney, both of which were denied by the district court and from which no appeals were taken. Barnett filed an affidavit and praecipe for garnishment which was served on Farmers and pertained to their insured, Miglia. Barnett then timely filed an application to determine liability against the garnishee.

Barnett filed a motion for summary judgment in the garnishment action against Farmers, alleging no genuine issue of material fact existed which precluded the court from ruling, as a matter of law, that Farmers was liable to Barnett under the policy

covering Miglia. The court sustained Barnett's motion for summary judgment, entering an award against Farmers in the amount of $29,412.88 plus costs and interest. The trial court overruled Farmers' motion for a new trial and sustained Barnett's request for attorney fees, awarding fees and costs in the amount of $10,221.84. Farmers appealed.

ASSIGNMENTS OF ERROR

Farmers alleges as error the district court's (1) granting Barnett's motion for summary judgment, (2) taxing costs and attorney fees to Farmers, and (3) overruling Farmers' motion for a new trial. Farmers also alleges that the district court erred in finding insurance coverage despite Peters' failure to inform Farmers of the original district court action against him.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997); *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 570 N.W.2d 525 (1997). 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. *Whalen v. U S West Communications, supra*; *Hobbs v. Midwest Ins., Inc., supra*; *Eiche v. Blankenau*, 253 Neb. 255, 570 N.W.2d 190 (1997).

Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997); *Barry v. Tanner*, 250 Neb. 116, 547 N.W.2d 730 (1996); *Watts v. Watts*,

250 Neb. 38, 547 N.W.2d 466 (1996); *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996).

When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997); *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997); *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997).

ANALYSIS

The issues in this case are as follows: (1) Was there a material question of fact which precluded the granting of a summary judgment? (2) Was Peters a permissive user under the terms of the Farmers' policy issued to Miglia at the time of the accident? (3) Did Peters breach the cooperation clause in the Farmers' insurance agreement by failing to provide Farmers with notice of the pending lawsuit, and if so, did this act to Farmers' detriment?

Genuine Issue of Material Fact

There is no dispute that Alison gave Peters permission to drive the vehicle. There is, however, a question of fact as to whether Miglia gave his permission for Peters to operate the vehicle. The question of whether Miglia gave Peters permission, however, is immaterial, as once Miglia entrusted his vehicle to Alison, the only issue is whether Alison gave Peters permission to operate the vehicle, and that permission is not in dispute.

This court held in *Barry v. Tanner, supra*, that under the initial permission rule, if permission to use the automobile is initially given, then recovery may be had regardless of the manner in which the automobile is subsequently used. As long as the first use is with the permission of the owner, later deviations are immaterial. We held in this same case that where initial permission to use the insured vehicle has been given by one having proper authority to give permission to the person operating the

vehicle at the time of the accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured even though specific or expressed terms of the permission given were violated.

In *State Farm v. D.F. Lanoha Landscape Nursery*, 250 Neb. 901, 553 N.W.2d 736 (1996), we held that once the named insured of a policy which contains an omnibus clause extending liability coverage to those driving the covered automobile with the insured's consent gives such consent to another, any third person allowed to drive the vehicle by the initial permitee likewise is covered, barring theft or conversion. There was no issue of theft or conversion in this case.

Therefore, the critical question is whether Alison gave Peters permission to operate the vehicle and not whether Miglia gave permission to Peters to operate the vehicle. There was no issue of material fact as to Alison's giving permission to Peters to operate the vehicle.

NOTICE AND COOPERATION

Since Peters was an insured, the question becomes not whether there was insurance coverage, but, rather, it becomes a liability question of whether Farmers has a legitimate policy defense.

Farmers contends that Peters failed to comply with the cooperation clause in Miglia's liability policy in failing to promptly forward notice of the pending suit. Farmers contends that such conduct materially breached the terms of the policy and prejudiced Farmers to its detriment.

The important facts are as follows: The accident occurred February 18, 1991. Accident reports were filled out by Farmers' agent. There was correspondence between State Farm and Farmers in which State Farm requested that Farmers reimburse it for medical expenses paid under Barnett's health insurance policy and which put Farmers on notice of their subrogation rights. A default judgment was entered in favor of Barnett and against Peters. These facts are undisputed. Therefore, Farmers had actual notice of the action and the claim.

The second issue under cooperation and notice, however, is the failure by Peters and/or Miglia to notify Farmers of the fact

that suit had been filed. We find that there was a material issue of fact as to whether Farmers was notified of the fact that suit had been filed and, if so, whether this alleged breach prejudiced Farmers to its detriment. The record does not indicate whether Peters ever knew that suit had been filed against him by Barnett. Shortly after the default judgment was entered against Peters, his attorney filed a motion to vacate judgment and a special appearance on behalf of Peters. This is the same attorney who represented Farmers in the garnishment proceedings. The motion to vacate judgment and the special appearance were overruled by the trial court and no appeal was taken.

We cannot ascertain from the record whether the attorney filing the motion to vacate the judgment and the special appearance, and then not appealing the adverse ruling on these matters, was acting on behalf of Peters alone, or Peters and Farmers. If the attorney was acting on behalf of Farmers, the failure to appeal this ruling on the motion to vacate and the special appearance would preclude Farmers' present appeal.

Since we cannot ascertain from the record that Peters ever even knew of the filing of the lawsuit, the trial court cannot find as a matter of law that Peters breached the insuring agreement by not informing Farmers of an action he may not even have been aware of.

The record also does not reflect any finding as to whether the breach claimed by Farmers is prejudicial to Farmers. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Questions such as liability and reasonableness of damages are two issues of fact bearing on the determination of a detriment to Farmers. A letter in evidence from Farmers to State Farm asserts potential liability defenses against Barnett. If such a liability defense exists, then the breach of the notice clause by Peters would prejudice Farmers to its detriment.

ATTORNEY FEES

Because we are reversing the district court's decision granting Barnett's motion for summary judgment in this case, we must also reverse the district court's decision granting attorney fees and costs to Barnett. The issue of attorney fees and costs must await the resolution of the other issues in this case.

CONCLUSION

We reverse the judgment and remand the cause to the trial court for further proceedings to determine the following: (1) Whether there was a material breach by Peters or Miglia of the terms of Farmers' policy as to notice and cooperation and, if so, whether this breach prejudiced Farmers to its detriment, and (2) if the trier of fact determines that question in favor of Barnett, then the trial court shall proceed to award such attorney fees and costs as are reasonable under Neb. Rev. Stat. § 44-359 (Reissue 1993).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.

DEWEY HOUGHTON, APPELLANT, V.
BIG RED KENO, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.
574 N.W.2d 494

Filed February 27, 1998. No. S-96-732.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Contracts: Lotteries.** A lottery winner's entitlement to a prize is governed by principles of contract law.
3. **Contracts: Offers to Buy or Sell: Parties.** 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.
4. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Steven J. Lefler, of Lefler & Franklin Law Office, for appellant.

Patrick B. Griffin, of Kutak Rock, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The appellant, Dewey Houghton, purchased a keno ticket from the appellee Big Red Keno, Inc. Big Red Keno refused to pay the $200,000 Houghton contends he won on the ticket. It is undisputed that Houghton was mistakenly issued a ticket for a game after it had already been played, that Houghton overheard the winning numbers for the game, and that he wrote the numbers he overheard on his betting slip. It is also undisputed that Houghton did not intend to purchase a ticket for a game that had already been played and that he did not seek to void his ticket after it was purchased. The district court for Douglas County granted summary judgment in favor of Big Red Keno, and Houghton appeals. We conclude there was no meeting of the minds between the parties to form a contract; thus, Big Red Keno would not be required to pay prize money on a mistakenly issued ticket. Accordingly, we find that there is no issue of material fact and that Big Red Keno is entitled to judgment as a matter of law. The judgment of the district court is affirmed.

BACKGROUND

On June 19, 1992, Houghton purchased a keno ticket at the Brothers Lounge in Omaha, Nebraska. Keno is a type of lottery in which, for each game played, players determine an amount of money to bet and select up to 20 numbers from a total of 80 possible numbers by marking those numbers on a betting slip. Players then take the betting slip to a "keno writer," who inputs the selected numbers into a computer, which in turn generates a paper "ticket" showing the game number played, numbers selected by the player, and the amount of the bet. After a period of approximately 5 minutes, the game is "closed" to any further bets, and 20 numbers are drawn randomly using a blower machine or a random number generator. A player wins if he or she correctly matches some or all of the numbers on the paper ticket with the numbers drawn randomly by the blower machine. The amount of money won is dependent upon the total amount of numbers chosen by the player and the amount of the numbers that are guessed correctly. The rules of keno and the amounts of prize money that can be won are printed in a document called the "Pay Book."

Keno games at Big Red Keno are conducted approximately every 5 minutes throughout the day at the main location. Each game is separately numbered, and winners are tracked by computer. Outside the main location, the same keno games are also played at satellite locations, such as the Brothers Lounge, through the use of a computer link. Sometimes, there are also audio links between the main location and satellite locations. The Nebraska Department of Revenue regulates keno and requires that games played at a satellite location be closed at the same time they are closed at the main location. The regulations also state that no keno ticket may be written after a game has closed and the number selection process has begun.

Each keno betting ticket states on the front that it is subject to conditions printed on the back of the ticket and in the Pay Book. The reverse side of the keno ticket states:

> This bet is accepted subject to the rules of the game set forth below and in the Big Red Keno Pay Book, and by playing the game all players accept such rules. If you do not have a Pay Book, request one before playing.

The ticket further states that errors in the ticket must be corrected before the game commences and before leaving the window, and that liability for errors is limited to a refund of the purchase price, which must be requested before the game commences. The rules of the game listed in the Pay Book state:

> Big Red Keno reserves the right to verify the legitimacy of all prizes. . . . Big Red Keno reserves the right to disclaim the payment of prizes if the balls or equipment have been tampered with or if the procedures prescribed for the conduct of the game by the City of Omaha or the State of Nebraska have been violated.

While Houghton was at the Brothers Lounge on June 19, 1992, the lounge experienced problems with the computer link between the main keno location and its satellite location. The computer link was down for a period of approximately 30 minutes, during which time keno games continued to be played at the main keno location. Brothers Lounge also maintained an audio link with the main location that audibly broadcast the winning numbers of the games at the main location as they were being played. During the time the computer was down at the

Brothers Lounge, game No. 480 was played and its winning numbers were broadcast over the audio system at the lounge.

At the time the winning numbers for game 480 were broadcast, Houghton had filled out several betting slips and was waiting for the computer link to be reestablished so that he could place his bets. While Houghton was waiting, he heard the numbers of the games at the main location being broadcast, threw away his previously marked betting slips, and filled out two new slips that were marked with numbers he heard over the audio system. At some point after the completion of game 480, the computer system began working again and Houghton placed his bets. Although game 480 had been played approximately 13 minutes before Houghton placed his bets, he received a ticket that listed game 480 as one of the games he participated in. As a result, Houghton held a ticket for game 480, even though the ticket was purchased after that game had been played. The record includes an affidavit from Houghton stating that he did not intend to bet on a game that had already been played. Houghton did not attempt to have his ticket voided or corrected after he received it. A subsequent computer scan of the ticket at the Brothers Lounge showed it to be a "winning" ticket in the amount of $200,000.

Houghton went to the main keno site to attempt to collect on the ticket. However, the Charitable Gaming Division of the Nebraska Department of Revenue determined that Houghton's ticket was mistakenly issued in violation of the procedures prescribed for the conduct of the game of keno by the State of Nebraska. Following this determination and a review of the keno rules, statutes, and regulations, Big Red Keno determined that Houghton's ticket was invalid and did not pay him the prize money for his ticket.

Although Big Red Keno did not pay Houghton his prize money, the record indicates that Big Red Keno had sometimes authorized the payment of prize money on losing tickets when a computer scan of the ticket mistakenly showed it as a winning ticket. The record also indicates that Big Red Keno had previously chosen to pay Houghton $1,000 on a ticket that should have won only $30 when there had been an error made by the keno writer.

Houghton brought a contract action against Big Red Keno in district court. Big Red Keno counterclaimed, seeking damages for fraud and conspiracy, and requesting costs and attorney fees. In August 1994, a motion by Big Red Keno for summary judgment on Houghton's claim was denied. Following additional discovery and the transfer of the case to a different judge, Big Red Keno renewed its summary judgment motion on Houghton's claim. Houghton also moved for summary judgment. The district court granted Big Red Keno's motion, and Houghton appeals.

ASSIGNMENT OF ERROR

Houghton assigns as error the district court's action in sustaining Big Red Keno's motion for summary judgment and dismissing his petition.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997).

ANALYSIS

Houghton contends that summary judgment was improper because there are issues of material fact in the case. Specifically, Houghton argues that whether there was an element of chance in the game played by Houghton, whether Houghton received the wrong ticket due to human error or computer error, and whether Big Red Keno may have chosen to honor some tickets and not others, are all issues of material fact. Big Red Keno contends that summary judgment was appropriate because based on undisputed facts, either no contract was formed or any contract that was formed was not enforceable.

Houghton brought his action based on contract principles. This court has never addressed the issue of which principles of law govern actions involving lotteries or keno gambling.

However, numerous jurisdictions have held that a lottery winner's entitlement to a prize is governed by principles of contract law. *Peterson v. District of Columbia Lottery*, 673 A.2d 664 (D.C. App. 1996); *Haynes v. Department of Lottery*, 630 So. 2d 1177 (Fla. App. 1994); *Parsons v. South Dakota Lottery Com'n*, 504 N.W.2d 593 (S.D. 1993); *Driscoll v. Dept. of Treasury*, 265 N.J. Super. 503, 627 A.2d 1167 (1993); *Thao v. Control Data Corp.*, 57 Wash. App. 802, 790 P.2d 1239 (1990); *Valente v. Rhode Island Lottery*, 544 A.2d 586 (R.I. 1988); *Ruggiero v. State Lottery Com'n*, 21 Mass. App. 686, 489 N.E.2d 1022 (1986); *Coleman v Lottery Bureau*, 77 Mich. App. 349, 258 N.W.2d 84 (1977).

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. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995); *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract. *Hoeft v. Five Points Bank, supra.*

In the instant case, it is undisputed that Houghton did not intend to purchase a ticket for a game that had already been closed, nor do the parties contend that Big Red Keno represented to Houghton that it would sell him a ticket for a game that had been played or that Big Red Keno would assent to pay Houghton for winnings on a mistakenly issued ticket. Accordingly, there was no binding mutual understanding between Houghton and Big Red Keno regarding a contract. Under these circumstances, the "meeting of the minds" necessary in order to form a contract was not present. See, e.g., *Driscoll v. Dept. of Treasury, supra* (absent evidence of representation made by seller or request made by purchaser, mutual assent was lacking when lottery ticket was purchased for different drawing than purchaser expected).

Houghton argues that whether the mistake was human error or computer error and whether there was an element of chance to the game are issues of fact. However, neither of these facts is material to the issue of whether there was mutual assent of the parties to contract. Houghton also cites instances where Big

Red Keno paid for tickets that were issued by mistake, contending that Big Red Keno cannot choose to honor some contracts and not others. However, this also does not affect the issue of mutual assent. In addition, because Big Red Keno is allowed discretion under the rules of the game to refrain from paying prize money in instances where tickets have been issued in violation of the rules, Big Red Keno clearly can choose to pay some mistakenly issued tickets and not others.

We conclude there was a lack of mutual assent between the parties to create a contract that would require Big Red Keno to pay prize money on a mistakenly issued ticket. Accordingly, in regard to Houghton's contract claim, there is no issue of material fact and Big Red Keno is entitled to judgment as a matter of law.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
KAREN J. DVORAK, APPELLEE.
574 N.W.2d 492

Filed February 27, 1998. No. S-96-885.

1. **Courts: Judgments: Appeal and Error.** On appeal, the district court reviews the county court judgment for error appearing on the record made in the county court.
2. **Jurisdiction.** Statutory authority to exercise subject matter jurisdiction may be raised sua sponte by a court.
3. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court.
4. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
5. **Judgments: Jurisdiction.** A ruling made in the absence of subject matter jurisdiction is a nullity.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, GERALD E. ROUSE, Judge. Judgment of District Court reversed, and cause remanded with direction.

John J. Kohl, Platte County Attorney, for appellant.

No appearance for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This is an appeal by the State of Nebraska of an order entered by the district court for Platte County, affirming an order of the Platte County Court which granted the application of the defendant, Karen J. Dvorak, to set aside conviction. Dvorak filed the application pursuant to Neb. Rev. Stat. § 29-2264 (Reissue 1995), which the State challenged as unconstitutional.

Dvorak was convicted on January 22, 1996, in Platte County Court of reckless driving on an amended complaint. Dvorak entered a plea of no contest to the charge based upon a plea agreement.

On March 12, 1996, Dvorak filed in the county court an application to set aside conviction pursuant to § 29-2264. Section 29-2264, in relevant part, states:

> (2) Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.
>
> . . . .
>
> (4) The court may grant the offender's petition and issue an order setting aside the conviction when in the opinion of the court the order will be in the best interest of the offender and consistent with the public welfare. The order shall:
>
> (a) Nullify the conviction; and
>
> (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction.

Following an evidentiary hearing, the Platte County Court granted Dvorak's application to set aside conviction and entered an order setting aside conviction on April 8, 1996, which nullified the conviction "as though a pardon had been issued."

On April 9, 1996, the State appealed the decision of the county court to the Platte County District Court. The State assigned as error that the county court (1) concluded that § 29-2264(2) was constitutional, (2) found that it had subject matter jurisdiction, and (3) in the alternative, failed to consider the facts supporting the conviction among the factors to be considered in setting aside a conviction.

On July 2, 1996, the Platte County District Court found that the granting of the application to set aside conviction was in error and ordered that the case be remanded to the county court to reinstate the conviction. Subsequently, on July 5, Dvorak filed a motion to reconsider, arguing that the district court did not rely on the then current version of § 29-2264, which authorized setting aside a conviction where a defendant was sentenced to a fine only.

On August 9, 1996, the district court entered an order reversing its previous decision of July 2 and affirming the county court's order setting aside conviction. It is from this order that the State now appeals. As this case involves a question of law regarding the validity of a statute, we granted direct review by this court pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995).

The State argues that the district court erred (1) in implicitly finding that § 29-2264, which purports to grant the judicial branch of government the power to set aside a conviction and sentence, was not violative of the separation of powers set forth in Neb. Const. art. II, § 1, and art. IV, § 13, and (2) in the alternative, failing to consider whether the county court abused its discretion by finding that the facts supporting the conviction for reckless driving were not relevant to the consideration of whether Dvorak's conviction should be set aside.

On appeal, the district court reviews the county court judgment for error appearing on the record made in the county court. Neb. Rev. Stat. § 25-2733(1) (Reissue 1995); *Workman v. Stehlik*, 238 Neb. 666, 471 N.W.2d 760 (1991).

Statutory authority to exercise subject matter jurisdiction may be raised sua sponte by a court. *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires

an appellate court to reach its conclusion independent from a trial court. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *In re Estate of Andersen, supra*; *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

In the instant case, the State appeals the district court's order of August 9, 1996. Prior to the August 9 order, the district court had rendered an order on July 2 which reversed the county court's decision granting Dvorak a discharge and reinstated her conviction. Dvorak then filed a motion for reconsideration on July 5. The district court granted the motion and reversed its own order of July 2.

In our determination of whether the district court had subject matter jurisdiction to enter the final order sought to be reviewed, see *In re Estate of Andersen, supra*, we note that the district court was exercising its appellate jurisdiction pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1995). However, we do not find any statute or court rule which allows for a rehearing in the district court after the district court has made its ruling subject to § 25-1901. Just as a motion for new trial does not toll the time for appeal when a district court is acting as an appellate court, neither does a motion to reconsider. As a result, the district court's exercise of subject matter jurisdiction over Dvorak's motion for reconsideration was without statutory authority. Therefore, we hold that the order of July 2, 1996, was the district court's final disposition of the appeal and that the district court was divested of jurisdiction over the matter upon that order. A ruling made in the absence of subject matter jurisdiction is a nullity. *In re Estate of Andersen, supra.* Accordingly, the district court's order of August 9, 1996, is void, and this court is without jurisdiction to review the merits of the appeal. See, *In re Estate of Andersen, supra*; *Jacques, supra.*

For the foregoing reasons, the decision of the district court is reversed and the cause remanded with direction to reinstate the conviction.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. REYES J. TORRES, ALSO KNOWN AS JOSE REYES-TORRES, APPELLANT.
574 N.W.2d 153

Filed February 27, 1998. No. S-97-467.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless the question has been properly presented to the trial court for disposition.
3. **Constitutional Law: Courts.** The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action.
4. **Constitutional Law: Convictions: Statutes.** Defendants are prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Gary D. Olson for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This is a criminal case in which appellant, Reyes J. Torres, also known as Jose Reyes-Torres, pled no contest to third degree sexual assault. The district court sentenced Torres to 1 year's probation and informed him of his duty to comply with

Nebraska's Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 1996). Torres appealed his conviction to the Nebraska Court of Appeals, and on our own motion, we removed the case to our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

Torres contends the sentence is excessive because the SORA, via § 29-4011, potentially increases his sentence for failing to register under the act. As Torres lacks standing to challenge the SORA, we affirm the decision of the trial court.

On June 22, 1996, 29-year-old Torres was observed engaging in sexual intercourse with his 14-year-old niece. Torres was charged with first degree sexual assault on a child, but due to a plea bargain the charge was amended to third degree sexual assault, a Class I misdemeanor. See Neb. Rev. Stat. § 28-320 (Reissue 1995). Torres pled no contest, and on April 9, 1997, the district court sentenced him to 1 year's probation. The court also informed Torres of his obligation under the SORA, as a convicted sex offender, to register with the sheriff of the county in which he resides. See § 29-4004.

Torres' obligation to register pursuant to the SORA was not made part of the court's order, but arose solely and independently under the terms of the SORA itself. The only mention of the SORA is revealed in the following conversation between the district court, Torres' counsel, and Torres, through his interpreter:

> THE COURT: . . . .
>
> I believe, Mr. Reyes-Torres, that you have gone over this document entitled Notification of Registration Responsibilities Under Nebraska Sex Offender Registration Act. Is that right? You went over that with Mr. Olson?
>
> (BY INTERPRETER): Yes, but I have a question. Will I have to register? When I committed this act, this law was not yet passed.
>
> THE COURT: That may be, but the statute provides that basically any sentence given — any plea after January 1, 1997, we have to comply with this Sex Offender Registration Act. So even though the offense you were convicted of occurred before then, the statute talks about

pleas after January 1, 1997. So as far as I can determine, you do have to comply with this act.

MR. OLSON: I have told Mr. Reyes-Torres numerous times I do plan on challenging that portion of his sentence to the Nebraska Court of Appeals.

THE COURT: All right. All right. I will give you a copy of [the SORA form], Mr. Reyes-Torres. You've gone over it, and I'm not going to read the whole matter to you. It talks about you have a duty to register under the act, and it states, among other things, that duty begins within five working days after you have been convicted or entered a guilty plea and sentenced. So it appears under this you would have to register within five days from today's date.

I will give you a copy of this, Mr. Reyes-Torres . . . .

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997). However, an appellate court will not consider a constitutional question unless the question has been properly presented to the trial court for disposition. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

Torres' sole assignment of error is that his sentence is excessive because the SORA, via § 29-4011, potentially increases his sentence for failing to register under the act. The SORA provides, in pertinent part:

(1) The Sex Offender Registration Act shall apply to any person who on or after January 1, 1997:

(a) Pleads guilty to or is found guilty of:

. . . .

(iii) Sexual assault pursuant to section 28-319 or 28-320;

(iv) Sexual assault of a child pursuant to section 28-320.01.

§ 29-4003. Section 29-4005(1) of the SORA provides that

any person to whom the Sex Offender Registration Act applies shall be required to register during any period of

> 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 release from incarceration, whichever date is most recent.

Further, § 29-4011 provides:

> Any person required to register under the Sex Offender Registration Act who violates the act is guilty of a Class IV felony unless the act which caused the person to be placed on the registry was a misdemeanor, in which case a violation of the Sex Offender Registration Act shall be a crime of the same class or within the same penalty range as the original act.

Torres essentially contends the SORA unconstitutionally violates the U.S. and State of Nebraska Ex Post Facto Clauses because § 29-4011 imposes an additional penalty on convicted sex offenders who fall under the act for failing to register.

Torres attempts to challenge his third degree sexual assault conviction on excessive sentence grounds by arguing the SORA violates the Ex Post Facto Clauses. However, Torres is prohibited from challenging his third degree sexual assault conviction by mounting a constitutional attack on another statute. As we said in *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988), defendants are prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution. See, also, *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969); *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966); *People v. Starnes*, 273 Ill. App. 3d 911, 653 N.E.2d 4 (1995) (holding that while a constitutional challenge to a statute under which a defendant is convicted cannot be waived, a defendant can waive such a challenge to the constitutionality of a collateral statute).

The SORA's registration requirements are separate and collateral to any sexual offense which the act affects. In fact, the SORA's registration requirements come into play only *after* a conviction is secured. That is, the only way the SORA affects a defendant is if that defendant enters a plea of guilty or is found guilty of one of the enumerated offenses. § 29-4003. The SORA

was irrelevant to Torres' conviction for third degree sexual assault and had no bearing on the underlying charge or conviction. This is emphasized by the fact that the district court's order did not address the SORA's requirements; rather, the SORA's registration requirements arose solely and independently by the terms of the act itself only *after* Torres' conviction. See §§ 29-4003 and 29-4005.

The judgment of the trial court is affirmed.

AFFIRMED.

CONNOLLY, J., concurring.

I concur in the result, but disagree with the majority's assertion that Torres lacks standing. Torres' assignment of error essentially asserts that his sentence was excessive because a certain penalty was imposed pursuant to another statute, which statute violated the ex post facto clause. Torres clearly has standing to challenge his sentence, and may have standing to challenge a sentence that is based on a statute that is applied in violation of the ex post facto clause. In the instant case, however, we need not address Torres' asserted lack of standing. Regardless of whether Torres lacks standing to assert that his sentence was excessive on the ground that it was imposed pursuant to an ex post facto law, a matter we need not decide, I conclude that Torres' sentence for third degree sexual assault was not excessive. See *Bobby v. State*, No. A-6212, 1997 WL 777329 (Alaska App. Dec. 19, 1997). The issue of whether the SORA

> can constitutionally be applied to [the offender] has no effect on the authority of the State to prosecute [the offender] for . . . sexual assault, no effect on the validity of his conviction, and no effect on the . . . court's authority to sentence [the offender] for his crime (*since registration is not a part of the court's sentence*).

(Emphasis supplied.) *Id.* at *4.

The operation of the SORA is entirely independent from the sentence imposed upon Torres for third degree sexual assault. As such, any claim that Torres may have concerning the ex post facto clause implications of the SORA should be raised if and when he becomes subject to its provisions, but not on a direct appeal from his underlying sexual assault conviction.

Thus, we need not characterize Torres' assignment of error as a collateral attack, leaving him without standing. Simply put, the application of the SORA to Torres is not part of his sentence for third degree sexual assault. Therefore, Torres' sentence for third degree sexual assault was not excessive on the asserted grounds, and on that basis, I concur.

GERRARD and STEPHAN, JJ., join in this concurrence.

IN RE INTEREST OF CONSTANCE G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LARRY G., APPELLANT.

575 N.W.2d 133

Filed February 27, 1998. No. S-97-600.

1. **Constitutional Law.** The Constitution of this state distributes the powers of government into three separate and coequal departments, or branches, namely, the legislative, executive, and judicial branches, and prohibits any one branch from exercising any power belonging to another branch.
2. **Constitutional Law: Evidence.** While the legislative branch may have the right in some contexts to prescribe that certain evidence be admissible in a court of law, it is a judicial function to determine whether the evidence is of probative value and to determine the weight, if any, to be given such evidence.
3. **Parental Rights.** A parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection.
4. **Due Process.** The extent to which procedural due process must be afforded a recipient is influenced by the extent to which the recipient may be condemned to suffer grievous loss.
5. **Rules of Evidence: Hearsay.** Because hearsay evidence is not subject to the test of cross-examination, it is unreliable.
6. **Parental Rights: Rules of Evidence: Due Process.** Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
7. **Constitutional Law: Statutes.** Statutory provisions do not overcome constitutional rights.
8. **Parental Rights.** The provisions of Neb. Rev. Stat. § 43-285(6) (Reissue 1993) do not apply to proceedings brought under the Nebraska Juvenile Code to terminate parental rights.
9. **Parental Rights: Evidence: Appeal and Error.** Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for,

as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.

10. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
11. **Parental Rights: Statutes.** A court may terminate parental rights when such action is in the best interests of the child and one or more of the statutorily specified conditions exist.
12. ____: ____. In addition to the statutory grounds, a parent's failure to make reasonable efforts to comply with a court-ordered reunification plan provides an independent reason justifying termination of parental rights.
13. **Parental Rights.** When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay.
14. **Parental Rights: Words and Phrases.** The failure to follow a court-ordered reunification plan cannot result in termination of parental rights unless the terms of the plan are material to the situation and the basis of the adjudication; materiality regarding such a plan exists when a parent's noncompliance results in a continued condition which was the basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the plan.

Appeal from the County Court for Howard County: GARY G. WASHBURN, Judge. Reversed and remanded with directions.

Michael J. Shaughnessy, of Shaughnessy Law Office, for appellant.

Gregory G. Jensen, Howard County Attorney, for appellee.

Patrick L. Neid, guardian ad litem.

Jay B. Judds, of Lauritsen, Brownell, Brostrom, Stehlik & Thayer, for Beth S.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

This juvenile proceeding is before us for the second time. In the first appearance, we held that the county court sitting as a juvenile court had acquired jurisdiction over the subject child, Constance G., under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), as a juvenile who was homeless

or destitute, or without proper support through no fault of her parent, guardian, or custodian. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995) (*Constance G. I*). The juvenile court subsequently terminated the parental rights of the father, Larry G., in and to the child on the grounds that reasonable efforts have failed to correct the conditions leading to the assertion of jurisdiction; that the father has failed to comply with the terms of the court-ordered case plan; that he has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the child; and that it is in the child's best interests that the father's parental rights be terminated. The father has appealed, asserting, in summary, that the juvenile court erred in (1) admitting certain evidence and (2) finding the evidence sufficient to support its order. We reverse, and remand with the direction that the child be reunited with the father, as more particularly set forth in part V below.

II. SCOPE OF REVIEW

In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992). See, also, *Constance G. I.*

III. FACTS

Within 2 weeks of the child's birth on January 1, 1992, following an argument between the mother and father in which the police were called to their apartment, the mother took the child and moved back to her parents' home in Dannebrog, Nebraska.

Because of mental health problems, the mother was hospitalized in early March 1992 and voluntarily relinquished the child to the then Department of Social Services and present Department of Health and Human Services, 1996 Neb. Laws, L.B. 1044, which placed the child in foster care. The mother and father reunited for a few months in Lincoln, but the mother again left, this time moving to Grand Island. The nature of the

mother's mental illness is such that her reunification with the child is not a realistic possibility, and her rights are not at issue in this proceeding.

The child was originally determined to be one who failed to thrive and has been classified as a special needs child by her pediatrician. She suffers from mild cerebral palsy, is cross-eyed, and has a mild attention disorder. The pediatrician testified that she would continue to be a very high-needs child, requiring constant monitoring and very strict structure.

The petition resulting in *Constance G. I* was filed on March 11, 1992. The father was identified as having an anger control problem and as needing parenting skills. He admitted having a history involving domestic violence prior to his relationship with the mother. That included hitting his former wife on more than one occasion, hitting a live-in girl friend once, and hitting another girl friend on a number of occasions, although he described those incidents as self-defense. There were reports of domestic violence involving the father and his girl friend in November 1994 and again in April 1995. The 1994 incident resulted in an assault conviction for which the father received 6 months' probation.

A visitation caseworker testified that a child once reported that the father "almost choked" another child while disciplining him. The caseworker was present in the house when the incident occurred and did not seem to believe it was serious.

Dr. Patricia M. Sullivan, a psychologist, recommended that the child have continued contact with both natural parents, testifying that she expected the child to have problems if her bonds with the parents were broken.

Visitations with the child were scheduled with both parents. A social worker who supervised the meetings between 1992 and 1994 testified that the child generally became upset during these visits, but the social worker could not remember if the child had a more negative reaction to the father or the mother. The social worker described the father as occasionally doing things during the visitations that she characterized as "somewhat antagonistic." During 1993, the father missed numerous scheduled visitations due to work. But the visitations gradually increased in length, and the child reacted positively.

Sullivan proposed six recommended goals that the father be required to meet, suggesting a 6-month timeframe in order to give him sufficient time to show that he could accomplish the goals and so that some kind of closure could be reached. The department developed a case plan with five goals that overlapped with Sullivan's recommendations. The juvenile court adopted both Sullivan's goals and the department's case plan as goals for the father to meet in order to be considered rehabilitated so that reunification with the child could occur. The juvenile court's plan thus required the father to contribute financially to the support of the child; provide a suitable home for visitation by the child; attend a parenting class with coursework providing him an opportunity to demonstrate concepts presented therein; attend psychotherapy sessions, both individual and group, addressing violence issues; participate in a violence group composed of individuals who have physically assaulted loved ones; and attend a 12-step program such as Alcoholics Anonymous and obtain a sponsor.

The father first learned of the requirements of the case plan in a meeting in April 1996. He did not reach all of the goals in the 6-month period, which would have been by October 1996. He did complete a parenting program, in addition to the parenting programs he had earlier completed. He has also met with Dr. Jeffrey Stormberg, a psychotherapist, regularly since 1993. He attended an anger alternatives therapy group through the Nebraska Mental Health Center, but that group did not begin until November 1996. He did not begin attending Alcoholics Anonymous and get a sponsor until February 1997, less than 2 months after the motion to terminate his parental rights had been filed.

A review hearing was held on October 16, 1996, at which time it was determined that the father had only partially complied with the requirements of the case plan, and the juvenile court thereafter entered its termination order.

IV. ANALYSIS

1. Admission of Evidence

The father contends that the juvenile court erred in admitting the opinion of a clinical psychologist that the father's parental

rights should be terminated and in admitting the written report containing the findings and recommendations of the State Foster Care Review Board.

(a) Psychologist's Opinion

The psychologist, Dr. John Meidlinger, examined the father in November 1993 and the child in December. At that time, he was of the view that it was not in the child's best interests for the father to have custody. The opinion in question was expressed on March 5, 1997.

The father urges that as the psychologist's last personal contact with him was in 1993 and the last contacts with the child were in 1995, the psychologist's March 5, 1997, opinion was considerably dated. That argument, however, goes to the weight to be given the opinion, not to its admissibility. Thus, the juvenile court did not err in receiving the March 5 opinion.

(b) Review Board's Report

Next, the father complains that the juvenile court received the hearsay report of the review board. In that regard, Neb. Rev. Stat. § 43-285(6) (Cum. Supp. 1996) provides:

> Any written findings or recommendations of the State Foster Care Review Board or any designated local foster care review board with regard to a juvenile in a foster care placement submitted to a court having jurisdiction over such juvenile shall be admissible in any proceeding concerning such juvenile if such findings or recommendations have been provided to all other parties of record.

It must be borne in mind, however, that the Constitution of this state distributes the powers of government into three separate and coequal departments, or branches, namely, the legislative, executive, and judicial branches. Moreover, the Constitution prohibits any one branch from exercising any power belonging to another branch. Neb. Const. art. II, § 1; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). Thus, we have held that while the legislative branch may have the right in some contexts to prescribe that certain evidence be admissible in a court of law, it is a judicial function to determine whether the evidence is of probative value and to determine the weight, if any, to be given such evi-

dence. See, *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978).

The decisions of the U.S. Supreme Court have made plain that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). In a later parental termination case, that Court noted: "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). It observed:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895[, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)]. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

452 U.S. at 24-25 (involving due process considerations for proceedings to terminate parental rights).

Shortly after *Lassiter*, the U.S. Supreme Court wrote in *Santosky v. Kramer*, 455 U.S. 745, 753- 54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982):

> In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." [Citations omitted.] The absence of dispute reflected this Court's historical

> recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations omitted.]
>
> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

The *Santosky* Court further noted at 455 U.S. at 758: " 'The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." ' " See, also, *Stanley v. Illinois, supra* (integrity of family unit is protected by Due Process Clause of 14th Amendment). Because hearsay evidence is not subject to the test of cross-examination, it is unreliable. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). For that reason, with certain exceptions not applicable here, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 1995), renders hearsay evidence inadmissible.

Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). Thus, although the rules of evidence are inapplicable, they nonetheless provide a guidepost in determining whether fundamental due process has been afforded. *Id.*

Because statutory provisions do not overcome constitutional rights, see *In re Interest of J.H., supra*, we must conclude that the provisions of § 43-285(6) do not apply to proceedings brought under the juvenile code to terminate parental rights. See, also, *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45

N.W.2d 122 (1950) (Legislature cannot lawfully act beyond limits of Constitution). Accordingly, the district court erred in admitting the report of the review board.

However, that determination does not end our analysis, for the improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, we will not consider any such evidence in our de novo review of the record. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992); *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990).

2. SUFFICIENCY OF EVIDENCE

The father also contends that the juvenile court erred in finding the evidence established (1) that he failed to comply with the court's reunification plan and (2) that the child's special needs, combined with his failure to comply with the plan of reunification, made it in the best interests of the child to terminate his parental rights.

It is to be recalled that the grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996) provides that a court may terminate parental rights when such action is in the best interests of the child and one or more of the statutorily specified conditions exist. We have held that in addition to the statutory grounds, a parent's failure to make reasonable efforts to comply with a court-ordered reunification plan provides an independent reason justifying termination of parental rights. *In re Interest of J.S., A.C., and C.S., supra.* Moreover, when parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay. *Id.*

(a) Reunification Plan

We review the father's efforts to comply with the juvenile court's reunification plan under the precept that when such a plan is implemented, it must be reasonable and conducted under

the direction of the court before failure to comply with the plan can be an independent reason for termination. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

As noted earlier in part III, the reunification plan sets six goals for the father to meet. First, the plan required the father to contribute financially to the child's support and demonstrate his willingness to invest money in assisting the State in supporting the child. In this regard, the State relies heavily on the father's failure to pay part of Sullivan's bill for her evaluation. However, Sullivan's testimony indicates that the father was negotiating with her for the father to pay the portion of the bill not paid by the State, but that the State paid the entire bill. A caseworker testified that the amount of child support the father was expected to pay was never discussed with the father. The father has made a significant investment in his relationship with the child by traveling to Grand Island on a consistent basis for visitation. He also testified that he had provided health insurance through his job for the child before she was born and that he is currently carrying medical coverage for her.

The plan next required that the father maintain sufficient income to provide security and maintain adequate living quarters. The father has a general equivalency diploma and a diploma from a school of commerce. While he has made several job changes since the child was born, he has always been able to find employment. His ability to maintain an income and adequate living quarters in which to rear a child has not been raised as a concern.

Additionally, the father was to attend a parenting class of a type which would provide him with the opportunity to demonstrate his parenting ability. The father contacted one group for parenting classes but received notification on August 14, 1996, that he would not be accepted. In September, he received information about another parenting class but could not enroll because it conflicted with his work schedule. He later enrolled in a parenting class provided by a third group and completed it. He had earlier completed a separate parenting class.

The father was also required to continue individual, family, and group therapy. He began to do so in May 1993 and continued doing so on almost a weekly basis through the date of the

termination hearing, with a single 2-month break. The sessions included the child and the father's girl friend and directed specific attention to anger management.

In addition, the father was required to participate in a violence management group composed of people who had physically assaulted their loved ones. He received information on November 4, 1996, about an anger group and has been attending that class regularly since November 20. While that group does not consist entirely of those who have physically assaulted loved ones, it does include such people.

Finally, the plan required that the father attend a 12-step alcohol dependency program and obtain a sponsor. The father has attended such a program since the middle of February 1997 and has a sponsor. He testified that he did not receive from the department a list of groups until November 4, 1996.

Sullivan thought the father presented an alcohol dependency problem, but stated that the main reason for requiring attendance at alcohol dependency meetings was to help him resolve some of the issues he had with his own father so as to provide him with a good father-type role model. A certified alcohol and drug counselor testified that he evaluated the father and found that he does not have a chemical dependency problem.

The department argues that the father failed to complete three of the requirements contained in the juvenile court's reunification plan, that is, (1) failed to provide financial support for the child, (2) failed to attend a 12-step alcohol dependency program and obtain a sponsor, and (3) failed to attend group therapy dealing with violence issues. But a close examination of the record does not support these claims by clear and convincing evidence.

As the juvenile court observed with regard to the financial support claim, the father is "a hardworking person of limited income, who has expended substantial time and money on various problems to meet the goals required by the Court. Those expenses can be considered expenses for the child."

It is true that the father was clearly tardy in beginning to participate in a 12-step alcohol dependency program and in obtaining a sponsor. But the failure to follow a court-ordered reunification plan cannot result in termination of parental rights unless the terms of the plan are material to the situation and the basis

of the adjudication. Materiality regarding such a plan exists when a parent's noncompliance results in a continued condition which was the basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the plan. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). As noted therein, it seems somewhat draconian to dictate that a parent attend an alcohol dependency program when the parent has no alcohol-related problem. While the father does have a driving under the influence arrest, there was no testimony that drinking either caused or exacerbated his anger control problem. Given the lack of materiality of the attendance at an alcohol dependency program, it is unjust to rely upon it as a basis for termination.

That brings us to the therapy dealing with the father's history of violence. Here again, the question is not whether the father fulfilled the requirement but whether he did so in time. In any event, the father's problem with controlling his anger is one of the more serious considerations in determining his fitness as a parent. His history includes several incidents of domestic violence, beginning with his reports that his upbringing involved parents who yelled and hit each other. In order to evaluate his propensity for violence and to put it into perspective, it is useful to review the evidence in that regard.

In 1994, the father was convicted of assault against his live-in girl friend. His version of that incident is that they were roughhousing in bed and that he was tickling her when she became hysterical because she had a flashback to when she was raped at age 14. He testified that as he went to roll off of her, he accidentally caught her nose with his knee, causing her nose to bleed. He was charged and convicted of assault and was put on probation for this incident.

In addition to that incident, a social worker received a report of domestic abuse in April 1995 concerning the father and the girl friend. The report came from either a therapist for the girl friend or her children's therapist, and the incident was apparently serious enough to make an impression on the children, although the father described it as a "playful kick in the butt."

There was some testimony from a family support worker about the father's almost choking a child while disciplining

him. However, the support worker was present in the home when this incident occurred, and the clear impression from her testimony is that she did not perceive this as being a serious incident. The father's own testimony would indicate that he was acting appropriately in disciplining the child.

Stormberg testified that he did not believe the father had a pattern of anger management problems. He acknowledged isolated instances in which the father handled situations poorly, but concluded that he did not consistently or commonly react in such a fashion.

While the initial determination that foster care was appropriate was as a result of the child's negative reaction when in the presence of her parents, any conclusion that this was based upon abuse or anger by the father during the very brief time that she was in his care immediately following her birth seems, according to Meidlinger, quite unlikely.

There is no question that the father has exhibited a history of domestic violence, but there is no proof that any violence was ever directed toward the children or the mentally handicapped adults who have been in his care, other than the choking incident about which the only witness to testify, other than the father, said, "I'm not saying that he did anything . . . ."

Neither is there any evidence of any episodes of anger leading to violence in the period after the case plan was formulated. Nor is there any evidence that he failed in his attempts through therapy to control his problem. Indeed, if the sketchy evidence concerning the father's history of violence were sufficient to justify the termination of parental rights, then it was justified in April 1996, and the charade of investing the department's resources in an attempt at family reunification should have been avoided.

Since the evidence does not clearly and convincingly establish that the father failed to comply with the court's reunification plan, his conduct in that regard does not justify the termination of his parental rights.

(b) Best Interests

The father next claims that the juvenile court erred in finding that it was in the child's best interests that his parental rights be terminated.

There are indications that the child has a short attention span, is nervous, and "is going to need constant monitoring . . . to be watched very closely . . . to have a very, very strict, structured time" as to "when she eats, what she eats, when she goes to bed." Among other things, the child worries and screams excessively, has extreme mood swings, is disobedient, is cruel to animals, does not get along with children her own age, physically attacks people, and is excessively loud. At the time of Sullivan's report, the child was still wetting herself during the day even though she was almost 4 years old. All of this indicates that she is a child needing special attention.

However, that circumstance in and of itself does not provide a basis for terminating the father's parental rights, as the record does not clearly and convincingly establish that he is not capable of providing that special attention. See § 43-292(2). The evidence is that he has learned and can demonstrate some sound parenting techniques, that he has had considerable vocational experience working with people with special needs, and that he has lived in a household with at least one child exhibiting some special needs.

A family support worker who supervised the father's visits with the child was complimentary.

> The visits are good. [The father] does a good job parenting, demonstrating the parenting skills. He's patient. He allows for time to transition from the foster family to him. . . . He does not push her to do things that she's not ready to do. He encourages her, uses a lot of praise. Challenges her a little bit at times, very aware of safety, and lets you know how much he cares.

The father's therapist testified that "[the father's] knowledge of parenting has revealed a fairly well-informed parent of the physical, developmental, child care, and relationship needs of children. [He] has read *Dr. Spock's Baby and Child Care* and Penelope Leach's *Your Baby and Child*, and subscribes to *Parenting Magazine*."

The father's work history includes working at the Beatrice Community Hospital, working with developmentally disabled residents at the Beatrice State Developmental Center from 1978 through 1989, and working as a residential aide at the Lincoln

Office on Mental Retardation. A past coworker testified that during 2 years of working with the father providing care to people who were mentally retarded, the coworker had never seen him become violent, nor was he ever worried about the safety of those in his care.

When the father lived with one of his girl friends, he also served as a surrogate father to the two of her children who lived with them, one of whom was hyperactive. According to the father's therapist, the father "spent a good deal of time on a daily basis not just assisting [the girl friend] in managing the kids, but he was often in charge while [the girl friend] was gone. . . . He was continually challenged with these two kids in the home."

There is no indication that the child will have any more trouble developing in the custody of the father than she would have in the custody of the foster parents. The evidence is that the father has benefited from the therapy that he has received and the parenting classes he has attended. On the record presented, we must conclude that the father has substantially complied with the juvenile court's reunification plan and has substantially rehabilitated himself. We therefore find that the best interests of the child are not served by terminating the father's parental rights but, quite to the contrary, are best served by reestablishing his parental role.

V. JUDGMENT

For the foregoing reasons, the order of the juvenile court terminating the father's parental rights is reversed and the cause is remanded with the directions that the rights of the father to the child be reinstated and that physical custody of the child be restored to him, subject to supervision by the department for such reasonable period of time as the juvenile court deems appropriate.

REVERSED AND REMANDED WITH DIRECTIONS.

ELLEN C. SMART, APPELLEE, V. SCRIVNER/FOOD 4 LESS AND GALLAGHER BASSETT SERVICES, INC., APPELLANTS.

574 N.W.2d 505

Filed February 27, 1998. No. S-97-693.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. However, as to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
2. **Workers' Compensation: Limitations of Actions: Time.** Neb. Rev. Stat. § 48-137 (Reissue 1993) provides that when payments of workers' compensation have been made, the statute of limitations will not take effect until the expiration of 2 years from the time of the making of the last payment of compensation.
3. **Workers' Compensation: Limitations of Actions.** Payments for medical case-management services that are not required by the Nebraska Workers' Compensation Act and that result in no benefit to the injured employee do not constitute payments of compensation which toll the statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 1993).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions to dismiss.

John R. Timmermier, of Timmermier, Gross & Burns, for appellants.

Glenn A. Pettis, Jr., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

While employed by Scrivner/Food 4 Less (Scrivner), Ellen C. Smart was involved in an on-the-job accident on March 20, 1992, and, as a result, she sustained bodily injuries. Immediately following the accident, Gallagher Bassett Services, Inc. (Gallagher), Scrivner's claims agent, began paying Smart workers' compensation benefits, which payments continued until January 27, 1993. On December 2, 1993, and July 7, 1994, Gallagher made payments for medical case-management services rendered in an attempt to assess Smart's med-

ical status. On December 1, 1995, Smart filed a petition in the Nebraska Workers' Compensation Court, claiming that she was entitled to additional payments of compensation. Scrivner and Gallagher filed an answer, contending that Smart's claim was barred under Neb. Rev. Stat. § 48-137 (Reissue 1993), which provides that an injured employee has 2 years from the time of the making of the last payment of compensation to file a claim. Agreeing with Scrivner and Gallagher, a single judge of the compensation court entered an order of dismissal, finding that Smart's December 1, 1995, petition was barred by the statute of limitations because Gallagher made its last payment of compensation on January 27, 1993. However, on review of this determination, a three-judge review panel of the compensation court, in a two-to-one decision, reversed the judgment and remanded the case, finding that Smart's petition was timely filed because Gallagher's December 2, 1993, and July 7, 1994, payments for medical case-management services were payments of compensation that tolled the statute of limitations. Scrivner and Gallagher appeal. Because we determine that payments for medical case-management services do not constitute payments of compensation which toll the statute of limitations, we reverse the judgment of the three-judge review panel and remand this cause to the Workers' Compensation Court with directions to dismiss Smart's petition.

FACTUAL BACKGROUND

While employed by Scrivner, Smart was involved in an on-the-job accident on March 20, 1992, and, as a result, she sustained shoulder and cervical injuries, a fractured elbow, and associated psychological trauma. Immediately following the accident, Gallagher began paying Smart workers' compensation benefits for her injuries, which payments continued until January 27, 1993. On December 2, 1993, and July 7, 1994, Gallagher made payments of $108.80 and $91, respectively, to General Rehabilitation Services Inc. (GRS) for the medical case-management services of GRS' employee, Patricia Hart.

On December 1, 1995, Smart filed a petition in the Workers' Compensation Court, claiming that she was entitled to additional payments of compensation for her continuing disabilities as a result of the March 20, 1992, accident. Scrivner and

Gallagher filed an answer, contending that Smart's claim was barred by the applicable statute of limitations. Section 48-137 provides, inter alia, that an injured employee has 2 years from the date of the accident or 2 years from the time of the making of the last payment of compensation to file a claim for workers' compensation benefits.

Prior to the hearing on Smart's petition, Hart testified by deposition that she was employed by GRS as a medical case manager during 1993 and 1994. Hart described her function and purpose as a medical case manager as follows: "I review files. See what's going on. Meet with the clients, employees, doctors, [and] therapist[s]. See what's going on in the case, how things are going. And make recommendations. Assist as needed to get [the injured employee] medically better." Hart testified that Gallagher had asked her on October 11, 1993, to reopen Smart's case and to assess Smart's medical status and make a recommendation.

By letter dated December 7, 1993, Hart informed Smart's attorney of Gallagher's request that she reopen Smart's case. Hart wrote, in relevant part, as follows:

> I am a rehabilitation specialist with [GRS]. My role is to assist injured workers by providing medical case management or vocational assistance to return to work. I have been asked by . . . Gallagher . . . to work with your client, Ellen Smart. [Gallagher] has requested [that] I meet with Ms. Smart, if possible, to get an update on her status and to find out where we stand from the medical/vocational standpoints.

Based on her experience, Hart testified that, in her opinion, Gallagher believed that it still owed a duty to help Smart from both a medical and a vocational standpoint. Hart then discussed the services that she conducted on Smart's case, which included reviewing Smart's file and making arrangements with Smart's attorney to meet with Smart, although no meeting or conversation between Smart and Hart ever took place. In addition, Hart made telephone calls and sent correspondence to Gallagher and analyzed whether Smart still suffered from posttraumatic reactive depression disorder in light of new circumstances that had come to Gallagher's attention.

Following the evidentiary hearing on Smart's petition, a single judge of the compensation court entered an order of dismissal, finding that Smart's December 1, 1995, petition was barred by the 2-year statute of limitations because Gallagher made its last payment of compensation on January 27, 1993. Smart filed an application for review of the single judge's determination. A three-judge review panel of the Workers' Compensation Court, in a two-to-one decision, reversed the judgment and remanded the case for further proceedings, finding that Smart's petition was timely filed because Gallagher's December 2, 1993, and July 7, 1994, payments for GRS' medical case-management services were payments of compensation which tolled the statute of limitations. Scrivner and Gallagher appeal.

SCOPE OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998); *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997). However, as to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Roth v. Sarpy Cty. Highway Dept., supra*; *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

ASSIGNMENT OF ERROR

Scrivner and Gallagher's three assignments of error can be consolidated and restated into the following single assignment: The three-judge review panel of the compensation court erred in determining that Smart's December 1, 1995, petition was timely filed by finding that the December 2, 1993, and July 7, 1994, payments for medical case-management services were payments of workers' compensation which tolled the 2-year statute of limitations as set forth in § 48-137.

ANALYSIS

Section 48-137 provides that when payments of workers' compensation have been made, the statute of limitations will not take effect until the expiration of 2 years from the time of the making of the last payment of compensation. See *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). Scrivner and Gallagher assert that Smart's December 1, 1995, petition was not timely filed because Gallagher's December 2, 1993, and July 7, 1994, payments for GRS' medical case-management services were not payments of workers' compensation, but, rather, were payments to an agency for administrative expenses incurred by it in an attempt to assess Smart's medical status. Smart, on the other hand, contends that Gallagher's payments for GRS' services were payments of workers' compensation because Hart's December 7, 1993, letter created the reasonable impression that Hart was intending to provide Smart with vocational assistance. Therefore, the issue we must resolve is whether the payments made by Gallagher for GRS' medical case-management services were payments of "compensation" which tolled the statute of limitations.

The term "compensation" is not defined in the Nebraska Workers' Compensation Act (Act). We have, however, previously characterized "compensation" as a chameleonlike expression which takes its meaning from the context in which the word is used in the statute. See *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). In addressing the definition of "compensation" under § 48-137, we have held that where an employee who suffered an accident arising out of and in the course of his or her employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of the Act. *Schwieger v. Island Supply Co.*, 178 Neb. 547, 134 N.W.2d 233 (1965). In addition, we have held that payments made by the employer's insurance carrier for hospital and medical expenses incurred by the injured employee "clearly constitute payments of compensation." *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 448, 225 N.W. 117, 119 (1929). The rationale underlying our prior holdings, as succinctly stated by Professor Larson in 7 Arthur Larson & Lex K. Larson, Larson's

Workers' Compensation Law § 78.43(h) at 15-348 (1997), is that the "furnishing of any kind of benefit required by compensation law indicates an acceptance of liability and thus satisfies the policy of the 'last payment' clause."

Although we have held that payments for medical services constitute payments of compensation, we have never addressed the question of whether payments for medical case-management services constitute payments of compensation. However, as distinguished from medical services, an employer is not obligated to provide medical case-management services with regard to an injured employee's claim. See, e.g., Neb. Rev. Stat. § 48-120(1) (Reissue 1993) ("employer shall be liable for all reasonable medical, surgical, and hospital services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment"); Neb. Rev. Stat. §§ 48-120.01 through 48-124 (Reissue 1993). The evidence reveals that, in the instant case, Gallagher hired GRS to assess Smart's medical status and to analyze whether Smart still suffered from posttraumatic reactive depression disorder in light of new circumstances that had come to Gallagher's attention. In that regard, GRS' employee, Hart, reviewed Smart's file and attempted to make arrangements with Smart's attorney to meet with Smart, although no meeting or conversation between Smart and Hart ever took place. In contrast to medical services intended for the benefit of the injured employee, it is clear that the type of medical case-management services provided in this case were neither required by the Act nor did the services provide a benefit to Smart so as to indicate an acceptance of liability by Scrivner and Gallagher. Hart's function was to assess Smart's medical status and make an administrative recommendation to Scrivner and Gallagher.

Therefore, we hold that payments for medical case-management services that are not required by the Act and that result in no benefit to the injured employee do not constitute payments of compensation which toll the statute of limitations set forth in § 48-137.

Smart, however, argues that Hart's December 7, 1993, letter created the reasonable impression that Gallagher was continu-

ing to recognize liability by intending to provide her with vocational rehabilitation services. In support of her argument, Smart relies on *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 636-37, 371 N.W.2d 294, 301 (1985), wherein we stated that the statute of limitations will be tolled if from the "conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitute compensation and a conscious recognition of liability for compensation benefits on the part of the employer."

While it is true that Hart's letter stated that she was a rehabilitation specialist and that her role was to assist injured workers "by providing medical case management or vocational assistance to return [them] to work," Hart testified that she never provided Smart with vocational assistance and that the sole purpose for her employment by Scrivner and Gallagher was to assess Smart's medical status. Indeed, the record is clear that Smart derived no benefit, in the form of vocational assistance, from the services provided by Hart, since the nature of Hart's services was purely administrative in determining whether Smart still suffered from a psychiatric disorder. Therefore, it cannot reasonably be inferred that Gallagher's payments for Hart's services were made with an intent to provide Smart compensation in the form of vocational assistance or that Scrivner and Gallagher were continuing to recognize liability for Smart's disability, since Scrivner and Gallagher were not obligated to provide the type of medical case-management services rendered in the instant case. Accordingly, we conclude that Gallagher's December 2, 1993, and July 7, 1994, payments for GRS' medical case-management services rendered in an attempt to assess Smart's medical status were not payments of compensation which tolled the 2-year statute of limitations, and, thus, Smart's December 1, 1995, petition was not timely filed.

CONCLUSION

Based on our independent determination of the dispositive question of law, we conclude that the three-judge review panel of the Workers' Compensation Court erred in finding that Gallagher's December 2, 1993, and July 7, 1994, payments for GRS' medical case-management services were payments of

"compensation" within the meaning of § 48-137. Therefore, there is not sufficient competent evidence in the record of a payment of compensation to Smart after January 27, 1993; thus, there is no sufficient evidence to warrant the order of reversal entered by the three-judge review panel. Accordingly, the judgment of the three-judge review panel is reversed, and this matter is remanded to the Workers' Compensation Court with directions to dismiss Smart's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FRED H. BAUERMEISTER AND DOROTHY L. BAUERMEISTER, HUSBAND AND WIFE, AND ROBERT A. BAUERMEISTER, INDIVIDUALLY, APPELLEES AND CROSS-APPELLANTS, V. TIMOTHY J. MCREYNOLDS, APPELLANT AND CROSS-APPELLEE, RONALD B. ROOTS AND RESOURCE RECYCLING, INC., APPELLEES AND CROSS-APPELLEES, AND RICHARD P. DEAVER AND CLARA E. DEAVER, HUSBAND AND WIFE, APPELLEES.

575 N.W.2d 354

Filed March 6, 1998. No. S-94-1088.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

William Jay Riley, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellees Bauermeister.

Steven E. Achelpohl for appellee Roots.

John C. Wieland and Monica Green Kruger, of Raynor, Rensch & Pfeiffer, for appellee Resource Recycling.

CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This case is before the court on the motion for rehearing of the appellees and cross-appellants, asserting, among other things, that although our opinion reported at *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997), correctly states the standard of proof applicable to an equitable rescission action based on fraud, undue influence, misrepresentation, or business coercion, that rule does not apply when such an action involves a fiduciary or confidential relationship such as exists between an attorney and the attorney's clients.

There is no question that the relationship between an attorney and client is one of the highest trust and confidence such as to require the attorney to observe the utmost good faith and not to allow the attorney's private interests to conflict with those of the client. *James v. McNair*, 164 Neb. 1, 81 N.W.2d 813 (1957). *Hamilton v. Allen*, 86 Neb. 401, 125 N.W. 610 (1910), was a suit in equity for an accounting to recover from the defendant attorneys profits they had made through the purchase of real estate from their clients. In determining that the attorneys had to account for the profits, we wrote that it was their burden to show by clear and convincing proof that no advantage was taken of the clients, that everything was explained to them, and that the price was fair and reasonable.

As explained in *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944), a stockholders' derivative suit on behalf of a corporation, where a fiduciary or confidential relationship exists between the parties to a transaction, the burden of proof is upon the party holding the fiduciary or confidential relationship to establish the fairness, adequacy, and equity of the transaction. This rule rests on the premise that it is the duty of the fiduciary to fully inform the other party of all the facts relating to the subject matter of the transaction which come to the knowledge of the fiduciary and which are material for the other party to know for the protection of that party's interests. While fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law, courts of equity are not restricted by the same rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. Nonetheless, the proof must be sufficient to overcome the natu-

ral presumption of honesty and correct motivation and cannot be based on guess or conjecture. Moreover, it is the burden of the party claiming the benefit of the relationship to establish its fiduciary or confidential nature or any unequal footing. See, also, *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994).

Finding merit in the assertion that we recited an incorrect standard of proof, and that assertion only, we overrule the motion for rehearing but substitute for the present first two sentences, the second of which consists of citations, under the heading "EQUITABLE RESCISSION" found at 253 Neb. at 566, 571 N.W.2d at 88, the following:

> In an equitable rescission action brought by a client against an attorney representing him or her in the transaction giving rise thereto, the burden is upon the attorney to show by clear and convincing evidence that no advantage was taken of the client and that the transaction was fair and reasonable. *Hamilton v. Allen*, 86 Neb. 401, 125 N.W. 610 (1910). See, also, *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994); *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944).

The remainder of the paragraph shall continue beginning with "In its order" and ending with "(1996)."

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

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

IN RE INVOLUNTARY DISSOLUTION OF BATTLE CREEK STATE BANK, A NEBRASKA BANKING CORPORATION.
WILLIAM B. HENGSTLER, COTRUSTEE OF THE A.W. HENGSTLER TESTAMENTARY TRUST, APPELLANT, V. BATTLE CREEK STATE BANK ET AL., APPELLEES.

575 N.W.2d 356

Filed March 6, 1998. No. S-96-062.

1. **Judgments: Appeal and Error.** In connection with a question of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. **Corporations: Banks and Banking.** Banking corporations are quasi-public institutions in the sense that the whole stream of commerce, whether interstate or intrastate, largely depends upon their existence.
3. **Corporations: Courts: Fraud.** The Nebraska Business Corporation Act empowers the district courts to dissolve a corporation in a proceeding by a shareholder when the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.
4. **Corporations: Banks and Banking.** When a corporation is conducting business as a bank, that corporation falls within the purview of Neb. Rev. Stat. §§ 8-101 to 8-1,139 (Reissue 1991 & Cum. Supp. 1994), which regulate banks and banking in this state.
5. **Banks and Banking.** Neb. Rev. Stat. § 8-187 (Reissue 1997) empowers the Department of Banking and Finance to take possession of the property and business of a bank and conduct its affairs, retaining possession of all money, rights, credits, assets, and property of every description belonging to the bank, whenever it finds that a bank is conducting its business in an unsafe or unauthorized manner.
6. **Corporations: Banks and Banking: Courts.** Once the Department of Banking and Finance takes possession of a banking corporation, a court is powerless to conduct the affairs of that corporation or enter a decree of dissolution.
7. **Corporations: Banks and Banking: Courts: Receivers.** Even after a court has appointed a receiver to liquidate a banking corporation's assets and business, Neb. Rev. Stat. § 8-187 (Reissue 1997) still empowers the Department of Banking and Finance to take possession of that bank and conduct its affairs, since the corporation continues its legal existence.
8. **Statutes.** A legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict.
9. ____. In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
10. ____. To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
11. ____. In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
12. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
13. **Statutes: Banks and Banking.** Because of the public nature of the banking industry, the banking statutes have the effect of taking the banking industry out of private hands and placing it under state control.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

David A. Domina, of Domina & Copple, P.C., for appellant.

Thomas H. DeLay, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellees Battle Creek State Bank et al.

Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellees Robert Doering and Karen Hale.

Rodney W. Smith, of Smith & Doerr, P.C., for appellee Jean Brestel.

Don Stenberg, Attorney General, and Fredrick F. Neid for amicus curiae Department of Banking and Finance, State of Nebraska.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and STEPHAN, JJ.

PER CURIAM.

STATEMENT OF CASE

This appeal presents the question of whether an allegedly oppressed minority shareholder may invoke involuntary dissolution proceedings pursuant to Neb. Rev. Stat. §§ 21-2096 to 21-20,104 (Reissue 1991) to dissolve a Nebraska bank. We conclude that such a shareholder may not invoke involuntary dissolution proceedings in the district courts. Rather, the proper venue is the Nebraska Department of Banking and Finance (Department), pursuant to Neb. Rev. Stat. § 8-187 (Reissue 1997).

Section 8-187, which empowers the Department to take possession of a Nebraska bank and conduct its affairs, is inconsistent with § 21-2096, which gives the district courts similar powers. In resolving this inconsistency, we apply well-settled rules of statutory construction, bearing in mind that banks are quasi-public institutions that have long been closely regulated by the Legislature. Legislative intent is not clear as to whether § 21-2096 was intended to implicitly repeal § 8-187. The Legislature clearly intended, however, to give the Department broad authority over Nebraska's banks. Accordingly, § 8-187 controls, and we affirm.

The plaintiff-appellant, William B. Hengstler, as cotrustee of the A.W. Hengstler testamentary trust, a shareholder of the

defendant-appellee Battle Creek State Bank, seeks the involuntary dissolution of the bank under the provisions of the Nebraska Business Corporation Act (Act), Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1991 & Cum. Supp. 1994), since rewritten by the Legislature in 1995 as the Business Corporation Act, § 21-2001 et seq. (Reissue 1997). The district court concluded that as the bank is a Nebraska corporation which is chartered as a commercial bank, its dissolution lies exclusively within the jurisdiction of the Department or the Federal Deposit Insurance Corporation (FDIC). It therefore granted the bank's motion for summary judgment and sustained the demurrers of the other shareholders, the defendants-appellees Battle Creek State Company, William M. Svoboda, Richard B. Grant, Donald E. Smejkal, Lawrence Praeuner, Almira Freudenburg, Robert Doering, Karen Hale, Roger L. Brestel, and Jean Brestel. The appellant successfully petitioned this court to bypass the Nebraska Court of Appeals on the ground that the case presents a question of first impression. He asserts, in summary, that the district court erred in ruling as it did.

PROCEDURAL POSTURE

Although the district court sustained the demurrers of the defendant shareholders, it did not dismiss the suit as to them. As the sustaining of a demurrer not followed by a judgment of dismissal terminating the litigation does not constitute a reviewable final order, we have acquired no jurisdiction over that aspect of the appeal. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). We therefore concern ourselves only with the matter of the summary judgment in favor of the bank.

We also observe that notwithstanding that the appellant is designated as "cotrustee," the assignments of error raise no issue as to his capacity to bring this action without the participation of any other trustee. As a consequence, we do not concern ourselves with the matter of the appellant's capacity to maintain this action.

SCOPE OF REVIEW

The dispositive question, whether the Act permits a shareholder to bring an action to involuntarily dissolve a corporation

chartered as a commercial bank under the state's banking statutes, Neb. Rev. Stat. § 8-101 et seq. (Reissue 1991 & Cum. Supp. 1994), is one of law. In connection with a question of law, we, as an appellate court, have an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

ALLEGATIONS ON RECORD

The appellant has alleged that the directors and officers of the bank, which is insured by the FDIC and is a member of the Federal Reserve System, engaged in "improper, oppressive or fraudulent acts, all contrary to the best interests of the Bank" in that they paid excessive amounts of compensation to certain shareholders, directors, and officers; used bonuses as a subterfuge to avoid the payment of dividends otherwise reasonably due to shareholders; and engaged in insider purchases and sales of loans to and from the bank.

ANALYSIS

The appellant argues, inter alia, that because banking corporations are generally subject to the Act, which does not specifically exclude banks from its involuntary dissolution procedures, involuntary dissolution of a bank is proper pursuant to § 21-2096 (Reissue 1991). The bank, however, contends that § 21-2096 is inconsistent with the banking laws contained within chapter 8 of our statutes and thus, that chapter 8 controls. The Department joins in this contention as amicus curiae. Therefore, the issue we must resolve is whether a banking corporation may be involuntarily dissolved under § 21-2096 of the Act despite the fact that such action would conflict with the banking laws.

We begin our analysis by noting that the Act does not prohibit the involuntary dissolution of a corporation. However, a banking corporation is unlike a purely private corporation in that a banking corporation is a quasi-public institution subject to the special banking rules and regulations of the State of Nebraska. § 8-102. It is a quasi-public institution in the sense that "[t]he whole stream of commerce, whether interstate or

intrastate, largely depends upon [its existence]." *United States v. Doherty*, 18 F. Supp. 793, 794 (D. Neb. 1937), *aff'd* 94 F.2d 495 (8th Cir. 1938). Indeed,

> "[b]anks are indispensable agencies through which the industry, trade, and commerce of all civilized countries and communities are carried on; the business which they transact, though for private profit, is of a pre-eminently public nature, and is therefore universally recognized as a proper subject of legislative regulation under the police power of the state. . . ."

Placek v. Edstrom, 148 Neb. 79, 92, 26 N.W.2d 489, 497 (1947). Thus, due to the stark contrast in nature between banking corporations and strictly private corporations, public policy dictates that banking corporations should be afforded different treatment with respect to the manner in which they may be involuntarily dissolved. However, even though there are sound public policy arguments for not treating banks the same way as other business corporations, our analysis of the banking statutes and the Act is necessary to the resolution of the instant case.

The Act empowers the district courts to dissolve a corporation in a proceeding by a shareholder when the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent. § 21-2096(1)(b). Once the foregoing is established, the district court may liquidate the assets and business of the corporation in accordance with §§ 21-2097 to 21-20,100 (Reissue 1991). Once liquidation proceedings have begun, § 21-2097 empowers the district court to conduct the affairs of the corporation prior to entering a decree of dissolution. Specifically, the district court has the power, inter alia, to issue injunctions, appoint receivers, and carry on the business of the corporation. *Id.* Furthermore, receivers appointed by the district court to carry on the liquidation have the authority to sell, convey, and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. *Id.* Most significantly to the instant case, § 21-2097 states that "[t]he court appointing such receiver shall have *exclusive* jurisdiction of the corporation and its property, wherever situated." (Emphasis supplied.)

When a corporation is conducting business as a bank, however, that corporation falls within the purview of §§ 8-101 to 8-1,139, which regulate banks and banking in this state. Section 8-187 empowers the Department to take possession of the property and business of a bank and conduct its affairs, retaining possession of all money, rights, credits, assets, and property of every description belonging to the bank, whenever it finds that a bank "is conducting its business in an unsafe or unauthorized manner." § 8-187.

The grounds for involuntary dissolution alleged by the shareholders in the instant case, "improper, oppressive or fraudulent acts, all contrary to the best interests of the Bank," are encompassed within the broader language of § 8-187. The specific acts alleged by the shareholders, that the directors and officers of the bank paid excessive amounts of compensation to certain shareholders, directors, and officers; used bonuses as a subterfuge to avoid the payment of dividends otherwise reasonably due to shareholders; and engaged in insider purchases and sales of loans to and from the bank, are neither "authorized" under Nebraska law, nor are they "safe." See § 21-2035 (Reissue 1991) (stating that director shall discharge his or her duties in good faith, with care ordinarily prudent person in like position would exercise under similar circumstances, and in manner that is in best interests of corporation).

Thus, the Department is authorized to take possession of the property and business of a bank upon the same grounds that a shareholder may bring a proceeding for involuntary dissolution.

Moreover, the Department's power is effective against any mesne or final process issued by any court against the bank whose property has been taken, which includes a proceeding for dissolution. § 8-187. Thus, according to the plain language of § 8-187, once the Department takes possession of a banking corporation, the court is powerless to conduct the affairs of that corporation or enter a decree of dissolution. See *Svoboda v. Snyder State Bank*, 117 Neb. 431, 220 N.W. 566 (1928) (holding that suit may be brought against corporation that is in possession of administrative agency, so long as it is not sought to take away or subject any of assets of corporation, or to interfere with possession thereof by agency).

Likewise, even after a court has appointed a receiver to liquidate the corporation's assets and business, § 8-187 still empowers the Department to take possession of that bank and conduct its affairs, since the corporation continues its legal existence. See §§ 21-20,100 and 21-20,101 (Reissue 1991). Clearly then, § 21-2096, which gives the court exclusive jurisdiction of the corporation and its property, is in conflict with § 8-187, because a corporation may not be in the exclusive possession of both the Department and the district court simultaneously. For example, not only is the court powerless to enter a decree of dissolution under § 21-20,101 once the Department takes control of a bank, it also is powerless to appoint a receiver under § 21-2097, both by statute and by prior case law. See *Farmers State Bank v. Luikart*, 131 Neb. 692, 269 N.W.2d 627 (1936).

It is true that a legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict. *Mauler v. Pathfinder Irr. Dist.*, 244 Neb. 217, 505 N.W.2d 691 (1993). However, it is also true that in the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Moreover, to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997). Sections 8-187 and 21-2096 both regulate the proceedings available when a corporation's directors act in a manner that is inimical to that corporation's best interests. Section 8-187 is more specific, however, in that it regulates the proceedings available when such action is taken by the directors of a corporation that is conducting business as a bank. Thus, § 21-2096 did not implicitly repeal § 8-187; rather, § 8-187 controls.

We have long held that in construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997). Furthermore, the components of a series or collection of statutes pertaining to a

certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *SID No. 2 v. County of Stanton, supra.* In construing § 21-2096 and § 8-187 together, it is apparent that the Legislature intended § 8-187 to control. The purpose of § 21-2096, insofar as it provides for the involuntary dissolution of a corporation by a shareholder, is to protect the rights of that corporation's minority shareholders. 3 Model Business Corporation Act Annotated § 14.05 (3d ed. 1984 & Supp. 1996). The purpose of § 8-187, however, is to protect not only the minority shareholders of a bank, but also the entire public at large.

It is the public nature of the banking industry that prompted this court's conclusion that the purpose of the banking statutes is to take the banking industry out of private hands and place it under state control, *State, ex rel. Chamberlin, v. Morehead*, 99 Neb. 146, 155 N.W. 879 (1915), which purpose would be defeated if a banking corporation's shareholders could bring a private action for involuntary dissolution.

Therefore, we conclude that the shareholders of a corporation conducting business as a bank may not institute involuntary dissolution proceedings in a district court.

CONCLUSION

We conclude, therefore, that the district court was correct in granting summary judgment in favor of the bank. The judgment of the district court as regards the bank's motion for summary judgment is, therefore, affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

CAPORALE, J., dissenting.

I respectfully dissent. It should be noted at the outset that the majority assumes a jurisdictional conflict which is not present. It may well be that had the Department of Banking and Finance taken possession of Battle Creek State Bank under Neb. Rev. Stat. § 8-187 (Reissue 1997), the district court would have no jurisdiction to entertain this action. But that is not the situation. It is only by ignoring that the department had not taken possession of the bank and by ignoring as well a number of well-

established rules relating to the construction of statutes that the majority has converted statutory silence into a nonexistent statutory conflict. As a result, it rests its erroneous conclusion on faulty premises.

Our banking statutes provide that the business of banking may be conducted only by "means of a corporation duly organized for such purpose under the law of this state," Neb. Rev. Stat. § 8-114 (Reissue 1997), thereby placing banking corporations within the general coverage of the Nebraska Business Corporation Act, Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1991 & Cum. Supp. 1994), since rewritten as the Business Corporation Act, § 21-2001 et seq. (Reissue 1997).

The corporation act empowers district courts to liquidate a corporation in an action by a shareholder when the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent. § 21-2096(1)(b) (Reissue 1991). Neither our banking statutes nor the corporation act restricts the kinds of corporations that may be involuntarily, or judicially, dissolved by shareholder action.

Had the Legislature intended to exempt banking corporations from the purview of the corporation act in this regard, it could have so provided. It is a general principle of interpretation that the mention of one thing implies the exclusion of another: Expressio unius est exclusio alterius. Under this principle, it has been held that the enumeration of certain powers implies the exclusion of all others not fairly incidental to those enumerated and that an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases. *Harrington v. Grieser*, 154 Neb. 685, 48 N.W.2d 753 (1951). Indeed, the Legislature has found occasion to specifically exclude banking corporations from the operation of certain provisions of the corporation act. For example, the Legislature specifically exempted shareholders of banks from the right to dissent and obtain payment for the fair value of their shares in the event of certain corporate actions. § 21-2079(3) (Reissue 1991).

We have applied general corporate law to banking corporations in several cases. *Schmid v. Clarke, Inc.*, 245 Neb. 856, 515 N.W.2d 665 (1994), arose from the merger of two bank holding

companies. The merger agreement provided for the payment of a premium to shareholders who signed a covenant not to compete. One of the minority shareholder plaintiffs claimed he was unfairly treated because he was not in the position to sign such a covenant, inasmuch as he served as president of a competing bank. Noting that he and his shareholder plaintiff wife neither attended the meeting called to vote on the merger nor voted against it, electing instead to surrender their stock and receive payment for it, we held that they were estopped from seeking redress for mistreatment. Although we observed that the plaintiffs had a statutory opportunity to object to the terms of the merger before the Department of Banking and Finance and to have a hearing thereon, we decided the case under general corporate law, relying on *Dold Packing Co. v. Doermann*, 293 F. 315 (8th Cir. 1923) (where party doing business with corporation expended time and money in reliance on actions of corporation, stockholders estopped from denying those actions), and *Nerken v. Standard Oil Co. (Indiana)*, 810 F.2d 1230 (D.C. Cir. 1987) (minority shareholders of acquired corporation claiming they had not received fair price should have challenged merger before it was completed).

There are other instances in which the banking statutes being silent, we have applied the general law. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983) (applying principles of contract and trust law in action by minority shareholder to determine which shareholders had contractual rights to buy certain bank stock); *Farmers State Bank v. Petersburg State Bank*, 108 Neb. 54, 187 N.W. 117 (1922) (applying contract law in enforcing covenant not to compete signed by bank stockholders and officers).

Of particular significance in illustrating that banking corporations are not governed solely by the banking statutes is our decision in *McMillan v. Chadron State Bank*, 115 Neb. 767, 214 N.W. 931 (1927), wherein we held that as the then Department of Banking had not taken possession of the bank, the bank did not have the authority to order a capital assessment against stockholders. Thus, *McMillan* establishes that the present Department of Banking and Finance can exercise only powers which have been statutorily granted to it. While our banking

statutes require the consent of the department in the voluntary dissolution of a bank, Neb. Rev. Stat. § 8-184 (Reissue 1997), and give it the power to dissolve a bank that is found to be insolvent, § 8-187, they are silent on the matter of an involuntary dissolution of a bank sought by a shareholder.

Michie's treatise on banks and banking notes that "*[p]roceedings to dissolve banking corporations are usually regulated by statute* in the various jurisdictions, and they can only be dissolved in the prescribed manner. But if the statute provides no method of procedure, that specified for ordinary actions should be followed." (Emphasis in original.) 3 Michie on Banks and Banking § 46 at 191-92 (1996). Stated another way, it is not the province of a court to read into a statute something omitted by the Legislature, see *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952), and a court may not read an exception into a statute which the Legislature did not make, *Siren v. State*, 78 Neb. 778, 111 N.W. 798 (1907). Thus, if a state has not passed a statute providing a special procedure, then a court must apply the general statutes, in this instance the corporation act.

The Legislature's requirement that banking organizations incorporate under state law, its willingness to specifically enumerate the exclusion of a shareholder's right to dissent and obtain payment in the event of certain corporate actions, and its failure to exclude bank shareholders from the right to bring an action for involuntary, or judicial, dissolution clearly establish, under our rules of construction, that it intended bank shareholders to have such a right.

I recognize, as suggested by the bank and the Department of Banking and Finance as amicus curiae, that there are important policy considerations weighing against allowing minority shareholders in banking corporations to bring an action seeking corporate dissolution. Banks and other banklike institutions are the centers of economic activity in communities. "The very nature of banking is a quasi public business. The whole stream of commerce, whether interstate or intrastate, largely depends upon this business." *United States v. Doherty*, 18 F. Supp. 793, 794 (D. Neb. 1937). Concern over the stability and management of banks and, in particular, a desire to protect depositors have

led both state and federal governments to establish special procedures for banks, including creating the Federal Deposit Insurance Corporation (FDIC) and giving the state banking department the authority to audit banks and require periodic reports. It may therefore be that, as suggested, denying minority bank shareholders the right to file an action for dissolution of a bank is a logical extension of the state's attempt to protect depositors and safeguard the stability of our banking system. But if that is so, it is the province of the Legislature, not of this court, to make that policy determination. See, *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *State ex rel. Douglas v. Thone*, 204 Neb. 836, 286 N.W.2d 249 (1979).

Having concluded that the corporation act permits a shareholder to bring an action to dissolve a corporation chartered as a commercial bank under our banking statutes, it seems to me I am obligated to consider the amicus' claim that in any event, our law is preempted by federal law.

In that regard, I begin by noting that a state bank insured by the FDIC may voluntarily withdraw from membership in the Federal Reserve System by giving 6 months' written notice to the system's board of governors and surrendering all of its capital stock in the Federal Reserve bank. 12 U.S.C. § 328 (1994). Upon withdrawal as a member of the system, a bank may then voluntarily, upon giving the FDIC at least 90 days' written notice, terminate its insured status with the FDIC. 12 U.S.C. § 1818(a)(1) (1994). However, no insured bank may "convert into a noninsured bank or institution" without the prior written consent of the FDIC. 12 U.S.C. § 1828(i)(3) (1994).

Termination of insured status is not a prerequisite to liquidating a bank. The grounds for FDIC consent in § 1828(i)(4) are relevant only if the bank planned to continue operating without FDIC insurance. Thus, the statement of the bank that

> voluntary termination of the banks [sic] insured status, however, would result in the *automatic forfeiture of the charter of the bank*, and the bank would be liquidated and dissolved either voluntarily by its board of directors under the supervision of the Department of Banking, or involuntarily by the Department "as in cases of insolvency"

(emphasis in original), brief for appellee bank at 18-19, is a misstatement of Neb. Rev. Stat. § 8-702(5) (Reissue 1997). While that statute reads that "[t]he charter of any banking institution which fails to comply with the provisions of this section shall be automatically forfeited and such banking institution shall be liquidated and dissolved . . . ," § 8-702(3) specifically provides that state banks may continue operations without FDIC insurance provided they prominently advertise that they are not so protected.

Moreover, the argument that involuntary dissolution of the bank would change the control of the banking corporation and is thus prohibited without the prior consent of the FDIC constitutes a misreading of 12 U.S.C. § 1817(j)(1) (1994). That section refers to one acquiring control of a depository institution, which is not applicable to a dissolution proceeding. Federal banking law, particularly with reference to the FDIC, focuses on the handling of insolvent banks. The court was not directed to, nor have I found any federal statutory language that regulates procedures when a solvent bank goes through involuntary dissolution, or under the new terminology of our corporation act, judicial dissolution.

Thus, Nebraska law is not preempted by federal law in the area of the involuntary dissolution of a banking corporation that is unrelated to insolvency.

As we all know, summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law. *Chalupa v. Chalupa, ante* p. 59, 574 N.W.2d 509 (1998); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). Inasmuch as the shareholder dissolution provisions of the corporation act apply to banking corporations, the bank is not entitled to judgment as a matter of law.

Accordingly, I would reverse the judgment of the district court and remand the cause for further proceedings.

WHITE, C.J., joins in this dissent.

WHITE, C.J., dissenting.

I agree with the dissent of Justice Caporale. I write separately to point out that a person who claims injury to his property by reason of the oppressive acts of others is denied relief in apparent violation of the Bill of Rights, Neb. Const. art. I, § 13, which provides, "All courts shall be open, and every person, for any injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

AMERICAN FAMILY INSURANCE GROUP, APPELLANT, V. RODNEY L. HEMENWAY, APPELLEE.

575 N.W.2d 143

Filed March 6, 1998. No. S-96-528.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
3. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Insurance: Contracts: Parties.** The parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
5. **Insurance: Contracts: Intent: Appeal and Error.** In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
6. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
7. ____: ____. When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.

8. ____: ____. An ambiguous insurance contract will be construed in favor of the insured, but ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract.
9. ____: ____. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
10. ____: ____. The interpretation of an unambiguous term or provision in an insurance policy also presents a question of law.

Appeal from the District Court for Antelope County: RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

Eugene L. Hillman and Patricia McCormack, of McCormack, Cooney, Hillman & Elder, for appellant.

Kathleen Koenig Rockey, of Domina & Copple, P.C., for appellee.

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

STEPHAN, J.

American Family Insurance Group appeals from an order of the district court for Antelope County denying its motion for summary judgment and granting the cross-motion for summary judgment of Rodney L. Hemenway. The district court determined that an exclusion contained in an automobile liability insurance policy which American Family issued to Hemenway was ambiguous and, therefore, should be construed in Hemenway's favor. Based upon our determination that the exclusion is unambiguous and that the uncontroverted facts fall within its scope, we reverse the judgment of the district court and remand the cause with directions to enter judgment in favor of American Family.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 1994, Hemenway was operating a 1985 Ford F82D straight truck (the straight truck) owned by his employer, Keith Wortman, which collided with another vehicle, near the intersection of Highways 13 and 20 in Antelope County, Nebraska. Hemenway had previously purchased a "Family Car Policy," No. 2615-0171-11-53-FPPA-NE, issued by American Family, which was in force at the time of this accident. This policy was not issued for the purpose of certifying proof of finan-

cial responsibility under Neb. Rev. Stat. § 60-528 et seq. (Reissue 1993).

The family car policy's declarations listed Hemenway as the named insured and described a 1987 Chevrolet vehicle by its vehicle identification number. The policy contained the following definitions which are pertinent to this case:

> 3. **Car** means **your insured car**, a **private passenger car**, and a **utility car.**
>
> . . . .
>
> 5. **Private passenger car** means a four-wheel **car** of the private passenger type.
>
> . . . .
>
> 9. **Use** means ownership, maintenance, or use.
>
> 10. **Utility car** means:
>
> a. A **car** with a rated load capacity of 2,000 pounds or less, of the pickup, van, sedan delivery or panel truck type if not used in any business or occupation.
>
> b. A truck used for farming purposes.
>
> c. A motor home not used for business purposes.
>
> . . . .
>
> 14. **Your insured car** means:
>
> a. Any **car** described in the declarations and any **private passenger car** or **utility car you** replace it with. **You** must tell **us** within 30 days of its acquisition.
>
> b. Any additional **private passenger car** or **utility car** of which **you** acquire ownership during the policy period, provided:
>
> 1) If it is a **private passenger car**, **we** insure all of **your** other **private passenger cars;** or
>
> 2) If it is a **utility car**, **we** insure all of **your** other **private passenger cars** and **utility cars.**
>
> **You** must tell **us** within 30 days of its acquisition that **you** want **us** to insure the additional **car.**
>
> c. Any **utility trailer you** own.
>
> d. Any **car** or **utility trailer** not owned by **you** being temporarily used as a substitute for any other vehicle described in this definition, because of its withdrawal from normal use due to breakdown, repair, servicing, loss, or destruction.

Under the heading "**Part I - Liability Coverage**," the policy stated:

> **We** will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer.**
>
> **We** will defend any suit or settle any claim for damages payable under this policy as **we** think proper.

Under the heading "**Exclusions**," the policy provided: "This coverage does not apply to: . . . 9. **Bodily injury** or **property damage** arising out of the **use** of any vehicle, other than **your insured car,** which is owned by or furnished or available for regular **use** by **you** or any resident of **your** household."

In its operative petition filed on June 28, 1995, American Family alleged that it had denied Hemenway's written demand for liability coverage with respect to the October 20, 1994, accident because the vehicle which Hemenway was operating at the time of the accident had been furnished by his employer for his regular use, and, therefore, the exclusion quoted above was applicable. American Family sought a declaratory judgment that its policy provided no coverage to Hemenway with respect to the accident. In his answer, Hemenway admitted that the straight truck was owned by his employer, Wortman, and was insured by Farmers Mutual Insurance Company of Nebraska. However, he denied that the vehicle was "owned by him or furnished or available for his regular use by him or residents of his household" and alleged that American Family improperly applied the coverage exclusion contained in its policy. Both parties filed motions for summary judgment. Evidence received during a hearing on these motions disclosed the following uncontroverted facts:

Hemenway worked as a general farm laborer for Wortman since 1983. He tended cattle and hogs, worked with crops, and performed maintenance. In addition to a salary, Wortman provided Hemenway with a 1986 Ford pickup truck, owned and insured by Wortman, which Hemenway drove to and from work on a daily basis. As additional compensation, Wortman also provided Hemenway with the use of a house located on Wortman's property.

In the early 1990's, Wortman purchased the straight truck equipped with an 18-foot, steel grain box for use in his farming

operation. When not in use, the straight truck was sometimes garaged in a building located on the property where Hemenway lived. The key was always left in the ignition. Hemenway did not have a separate set of keys for the vehicle.

The straight truck was used by Hemenway and Wortman's other employees to haul silage, corn screenings, and feed grain in conjunction with Wortman's farming operation. Hemenway did not have to ask Wortman's permission each time he used the straight truck; they had an "understanding" that he would use the straight truck when needed "within reason." Although Hemenway had Wortman's permission to use the straight truck in connection with his work, he usually told Wortman when he planned to use it. Wortman was generally aware of when his employees would be using the straight truck because he usually met with them in the morning to discuss the work to be performed that day. Hemenway used the straight truck more frequently than Wortman's other employees and referred to himself as the "main driver" and "principal driver" of the vehicle. Hemenway used the straight truck only in connection with his employment by Wortman and not for personal purposes. Wortman considered Hemenway's use of the straight truck to be "part of his job."

The frequency of use varied. During two or three winter months, the straight truck was seldom used. At other times, Hemenway used the straight truck as necessary in the performance of his duties—never on a daily basis but sometimes as often as four to five times a week. Hemenway estimated that he had used the straight truck "hundreds of times" prior to October 20, 1994, and Wortman acknowledged that during this period, Hemenway had "probably driven [the straight truck] a hundred times . . . ." At the time of the accident on October 20, Hemenway was driving to a grain elevator in Creighton, Nebraska, to pick up feed for Wortman's hogs.

The district court entered summary judgment for Hemenway based upon its determination that the "regular use" exclusion was ambiguous and should therefore be construed against American Family. The district court determined that the "insurance policy issued to [Hemenway] by [American Family] does not define the term 'regular use', does not define by whom it is

to be furnished, and that leaves the court with no alternative but to find said language ambiguous." Thereafter, the court further ordered that the policy "issued by [American Family] to [Hemenway] provide coverage to [Hemenway] under the limits provided therein for any damages that [Hemenway] may be ordered to pay as a result of the two-vehicle automobile accident that occurred on October 20, 1994 . . . ." In subsequent orders, the district court awarded Hemenway attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993) and denied American Family's motion for new trial. American Family perfected this appeal, and pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we removed the matter to our docket on our own motion.

ASSIGNMENTS OF ERROR

Restated, American Family contends that the district court erred in (1) overruling its motion for summary judgment and sustaining Hemenway's motion for summary judgment, (2) determining that the regular use exclusion contained in Hemenway's personal insurance policy was ambiguous and unenforceable, (3) denying its motion for a new trial, and (4) awarding Hemenway attorney fees.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further pro-

ceedings as it deems just. *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994).

The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997); *Luedke v. United Fire & Cas. Co.*, 252 Neb. 182, 561 N.W.2d 206 (1997); *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997).

ANALYSIS

As Hemenway acknowledges in his brief, valid reasons exist for having a regular use exclusion in an automobile liability insurance policy. As one court observed:

> "The [regular use exclusion] represents an attempt on the part of the insurance company to strike a balance between the desire of the insured to be covered, even though not using his own car, and its own right to receive payment of premiums based upon the risk presented by the number of automobiles operated. It is generally held that such a clause covers the insured during infrequent or casual use of a nonowned automobile, but excludes coverage as to another's automobile which the policyholder frequently uses or has the opportunity to use . . . ."

Crum and Forster v. Travelers Corp., 428 Pa. Super. 557, 559-60, 631 A.2d 671, 673 (1993). See, also, *Volpe v. Prudential Property and Cas. Ins. Co.*, 802 F.2d 1 (1st Cir. 1986); *Auto Owners Insurance Co. v. Miller*, 138 Ill. 2d 124, 561 N.E.2d 630, 149 Ill. Dec. 260 (1990); *Farmers Ins. Co. of Arizona v. Zumstein*, 138 Ariz. 469, 675 P.2d 729 (Ariz. App. 1983). The principal issue before us in this case is whether the exclusion was clearly and unambiguously stated in the American Family policy.

In resolving this issue, we are guided by well-established principles of law. The parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation

under the contract not inconsistent with public policy or statute. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996); *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996). In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Farm Bureau Ins. Co. v. Bierschenk, supra*; *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995). The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Farm Bureau Ins. Co. v. Bierschenk, supra*; *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993). When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 567 N.W.2d 548 (1997); *Farm Bureau Ins. Co. v. Bierschenk, supra*; *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). An ambiguous insurance contract will be construed in favor of the insured, but ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract. *Farm Bureau Ins. Co. v. Bierschenk, supra*; *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). Here, we focus on the phrase "regular use" as used in the coverage exclusion. In *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 66, 493 N.W.2d 171, 173 (1992), we considered an automobile liability insurance policy which excluded coverage for damages arising from " 'the ownership, maintenance or use of . . . [a]ny vehicle, other than "your covered auto," which is . . . furnished or available for the regular use of any "family member." ' " In that case, the insured's son who resided in the insured's household was involved in an accident while operating a vehicle owned by the

insured's son's brother. The vehicle was not listed on the insured's policy as a covered vehicle, but was insured under a separate policy obtained by the owner, who also paid the taxes, licensing, repairs, and maintenance on the vehicle. Based upon evidence that the insured's son regularly used his brother's vehicle when the brother did not need it, we held as a matter of law that the vehicle was "available for the driver's regular use while he was a member of the named insured's . . . family." 242 Neb. at 68, 493 N.W.2d at 174. After finding that the exclusion was not preempted by § 60-535 because the policy was not utilized for proof of financial responsibility, we stated:

> Being referred to no statute which prohibits the aforedescribed family-use exception in a policy of automobile liability insurance not certified as proof of future financial responsibility, and being aware of none, we discern no legal basis for not enforcing the *clear and unambiguous* language of the subject exception.

(Emphasis supplied.) 242 Neb. at 69, 493 N.W.2d at 174-75.

In the instant case, the district court relied on *Ricci v. U. S. Fidelity and Guaranty Co.*, 110 R.I. 68, 290 A.2d 408 (1972), which held that the phrase "regular use" in a similar policy exclusion was ambiguous because there was no indication whether it included business as well as personal use, or "principal use as distinguished from a casual or incidental use." *Id.* at 76, 290 A.2d at 413. Hemenway cites no other cases finding similar policy language to be ambiguous. The majority of courts which have considered regular use exclusions subsequent to *Ricci* have held the phrase "regular use" to be unambiguous as a matter of law, notwithstanding the absence of a specific definition in the policy. See, *Nationwide Mut. Ins. Co. v. Shoemaker*, 965 F. Supp. 700 (E.D. Pa. 1997); *Crum and Forster v. Travelers Corp.*, 428 Pa. Super. 557, 631 A.2d 671 (1993); *Woodman v. Hartford Acc. and Indem. Co.*, 27 Mass. App. 1120, 537 N.E.2d 601 (1989); *Grange Insurance v. MacKenzie*, 37 Wash. App. 703, 683 P.2d 221 (1984), *aff'd* 103 Wash. 2d 708, 694 P.2d 1087 (1985); *Foster v. Johnstone*, 107 Idaho 61, 685 P.2d 802 (1984); *Farmers Ins. Co. of Arizona v. Zumstein*, 138 Ariz. 469, 675 P.2d 729 (Ariz. App. 1983); *LeDoux v. Iowa Nat. Mut. Ins. Co.*, 262 N.W.2d 418 (Minn. 1978).

We disagree with the finding of the district court that the absence of specific definitions in the policy for the terms "furnished" and "regular use" left it with "no alternative but to find said language ambiguous." There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous. Where the terms used in an insurance policy are clear, they are accorded their plain and ordinary meaning. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996). The ordinary meaning of the word "furnish" is to "provide or supply." Webster's Encyclopedic Unabridged Dictionary of the English Language 575 (1994). The adjective "regular" means "usual," "normal," or "customary." *Id.* at 1209. Thus, we agree with courts which have held that a vehicle is furnished for "regular use" if it is provided for a customary and recurring use, as distinguished from an occasional or incidental one. See, *Commercial Standard Insurance Company v. Haley*, 282 F. Supp. 16 (S.D. Iowa 1968); *Crum and Forster v. Travelers Corp., supra*; *Foster v. Johnstone, supra*; *Farmers Ins. Co. of Arizona v. Zumstein, supra*. We do not perceive and Hemenway does not suggest any other meaning which can reasonably be derived from the policy language at issue. We conclude that the regular use exclusion contained in the American Family policy is not ambiguous.

The interpretation of an unambiguous term or provision in an insurance policy also presents a question of law. *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 567 N.W.2d 548 (1997); *Kast v. American-Amicable Life Ins.*, 251 Neb. 698, 559 N.W.2d 460 (1997). Thus, we must determine whether American Family was justified in denying liability coverage to Hemenway based upon the regular use exclusion contained in its policy. It is undisputed that the straight truck which Hemenway was operating at the time of the accident on October 20, 1994, was not an "insured car" as that term is defined in the policy. It is also undisputed that the straight truck was available for Hemenway's use whenever needed to perform the duties of his employment with Wortman; that both Wortman and Hemenway expected that he would use the straight truck as needed; and that Hemenway actually and routinely used the straight truck whenever needed in connection with his work, driving it at least "a hundred

times" during the 3- to 4-year period preceding the accident. Hemenway's use of the straight truck was clearly recurring and customary, not occasional or incidental. His operation of the straight truck on the date of the accident was not a special or unusual occurrence, but, rather, a normal part of the duties of his employment. See *Farmers Ins. Co. of Arizona v. Zumstein*, 138 Ariz. at 474, 675 P.2d at 734 ("[a] finding that a vehicle is regularly available or furnished for use is even more compelling where . . . the insured is not required to obtain special permission to use the vehicle and the driving is among the employee's duties"). Under the unambiguous language of its policy, American Family did not provide liability coverage to Hemenway with respect to claims relating to the October 20, 1994, accident because he was operating a vehicle other than an "insured car," as defined in the policy, which was furnished and available to him for regular use.

CONCLUSION

For the reasons stated, we determine that the district court erred in granting Hemenway's motion for summary judgment and denying that of American Family. We reverse the judgment of the district court and remand the cause with directions to enter a declaratory judgment in favor of American Family consistent with our holding that American Family has no obligation under Policy No. 2615-0171-11-53-FPPA-NE to provide liability coverage to Hemenway with respect to the October 20, 1994, accident. Because Hemenway has not prevailed in this action, we deny his motion for attorney fees on appeal pursuant to § 44-359 and Neb. Ct. R. of Prac. 9F (rev. 1996).

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., participating on briefs.

MCCORMACK, J., not participating.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, ON BEHALF OF THE UNIVERSITY OF NEBRASKA-LINCOLN, APPELLEE, V. CHARLES M. PINZON, APPELLANT, AND DAN DOLAN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

575 N.W.2d 365

Filed March 6, 1998. No. S-96-806.

1. **Employment Security: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record; but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** Reading a meaning into a statute that is not there or reading anything direct and plain out of a statute is beyond the court's province.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

Carole McMahon-Boies, of Pepperl & McMahon-Boies Law Offices, for appellant.

John C. Wiltse for appellee Board of Regents.

John F. Sheaff and John H. Albin for appellee Dolan.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This is an action for unemployment benefits brought by Charles M. Pinzon against the Board of Regents of the University of Nebraska (University) and the Commissioner of Labor. Based on the district court's denial of Pinzon's request for unemployment benefits, Pinzon appeals. We determine that Pinzon was "unemployed" pursuant to Neb. Rev. Stat. § 48-602(22) (Cum. Supp. 1994). We reverse, and remand.

Pinzon began working for the University in 1993 as a non-tenured assistant professor, teaching undergraduate courses in advertising and public relations. After Pinzon's first year of teaching, the University renewed his contract for the 1994-95 academic year. At the end of the 1994-95 year, the University elected not to renew Pinzon's contract for the next academic year. Because the University did not offer Pinzon a subsequent contract, Pinzon was no longer obligated to perform services for the University when the 1995 spring semester examinations were graded.

After the 1995 spring semester examinations were graded, Pinzon was unable to find employment. On July 21, 1995, Pinzon applied for unemployment benefits for the period of July 16 through September 2. During this time, the University was paying Pinzon $740.38 per week in wages. The final monthly payment on Pinzon's contract was paid on August 31. Even though Pinzon contracted with the University to draw his wages on a 12-month basis, Pinzon was obligated to perform services for the University on only a 9-month basis or, in other words, during the academic year. Therefore, Pinzon received remuneration over a 12-month period but was being paid for only 9 months of service.

A Department of Labor claims deputy initially denied Pinzon's application for unemployment benefits because Pinzon was still being paid by the University. Pinzon appealed to the Nebraska Appeal Tribunal, which determined he was entitled to unemployment benefits. The University appealed to the Lancaster County District Court, and the court determined that Pinzon was not entitled to unemployment compensation benefits for the period he was receiving pay from the University. Pinzon appealed to the Nebraska Court of Appeals, and we removed the case pursuant to our power to regulate the Court of Appeals' caseload. Neb. Rev. Stat. § 24-1106 (Reissue 1995).

In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record; but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors

appearing on the record. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). When reviewing an order 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.* When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997).

Pinzon contends the district court erred when the court (1) determined wages are paid "with respect to" the months the wages are received instead of the months the wages are earned, (2) determined a teacher with a 9-month contract who receives pay for that 9-month period subsequent to the termination of his position is disqualified from the receipt of unemployment compensation benefits, (3) failed to give deference to the Nebraska Appeal Tribunal's interpretation of the tribunal's own rules and regulations, and (4) failed to uphold the decision of the Nebraska Appeal Tribunal. Because Pinzon's first assignment of error is dispositive, we will not address the remaining arguments. See *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997).

Pinzon initially contends the district court erred in determining he was not entitled to unemployment compensation pursuant to § 48-602(22), which provides: "Unemployed shall mean an individual during any week in which the individual performs no service and with respect to which no wages are payable . . . ." The district court found that Pinzon was unable to satisfy § 48-602(22) because he was still receiving compensation from the University. However, Pinzon urges this court to construe the phrase "with respect to" as meaning that wages are paid with respect to the months that remuneration is earned, not the months that remuneration is received.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary

meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Reading a meaning into a statute that is not there or reading anything direct and plain out of a statute is beyond the court's province. See *id.*

We find that § 48-602(22) is unambiguous. Affording § 48-602(22) a plain, ordinary meaning, we find that two elements must be satisfied to demonstrate unemployment. First, the individual must not perform any services for the weeks in question; and second, no wages may be payable with respect to the time period the individual performed no services. Several jurisdictions support this finding. See, *Meyer v. Employment Appeal Bd.*, 441 N.W.2d 766 (Iowa 1989); *Tracy v. Employment Division*, 29 Or. App. 851, 565 P.2d 403 (1977); *Hawaii State Teachers Ass'n v. Department of Labor & Indus. Rel.*, 56 Haw. 590, 546 P.2d 1 (1976); *Ackerson v. Western Union Telegraph Co.*, 234 Minn. 271, 48 N.W.2d 338 (1951). However, to address Pinzon's argument, we must determine when wages are payable.

In addressing this issue, the district court determined, albeit implicitly, that wages are payable when remuneration is received. Pinzon, on the other hand, contends the language "with respect to" does not refer to the time period the wages are received, but, rather, to the time period the wages are earned. Pinzon claims that he was unemployed because he rendered no services and that the wages he received from July 16 through September 2 were paid "with respect to" work he performed during the 9 months he actually worked for the University, not the summer months in question. We agree.

We find guidance and support for our position from many other jurisdictions. In *Meyer v. Employment Appeal Bd.*, 441 N.W.2d at 768, the Iowa Supreme Court stated, " 'The test is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply.' " (Quoting *South Hadley v. Director of the Division of Employment Security*, 389 Mass. 399, 450 N.E.2d 596 (1983).) Similarly, in *State, Dept. of Indus. Relations v. Deslattes*, 372 So. 2d 867, 870 (Ala. Civ. App. 1979), the Alabama Court of Appeals stated that absent a provision to the contrary, " 'it may

not be presumed that the contracting parties meant to pay wages for no services, and allocate such payments to a period *after* termination. Generally speaking, wages are tied to the week of work and not to the week in which they are paid. . . .' " (Quoting *Southwestern Bell Telephone Co. v. Employment Security Board of Review*, 189 Kan. 600, 371 P.2d 134 (1962).) See, also, *Mt. Healthy Bd. of Edn. v. Cook*, 28 Ohio St. 3d 1, 3, 501 N.E.2d 615, 616 (1986) ("[s]ince . . . deferred remuneration is for services performed during the school year, such remuneration is *not* for a week in which 'no services' were performed").

The Nebraska Appeal Tribunal also agreed with the above determinations. In their decision filed September 11, 1995, the appeal tribunal noted the Department of Labor's definitions regarding wage payments wherein the agency defined "when earned" as " '[w]hen the amount of earnings can be determined at the time the service is actually performed and are based upon an established payment schedule of wages for hours of work, this income is reportable when earned.' " The appeal tribunal determined that because Pinzon's earnings could be determined at the time the services were rendered, the earnings must be applied to the time period the remuneration was earned.

In addition, our reading of § 48-602(22) is further supported by Neb. Rev. Stat. § 48-628 (Cum. Supp. 1994). Section 48-628(h)(1) prohibits teachers from receiving unemployment compensation benefits during the summer months when a "reasonable assurance" exists that they will be teaching in the following academic year. Conversely, if no "reasonable assurance" exists, an inference can be drawn that unemployment benefits may be obtained during the summer months. As noted in *South Hadley v. Director of the Division of Employment Security*, 389 Mass. at 402-03, 450 N.E.2d at 598:

> If the Legislature has concluded that one who has a reasonable assurance of working in the next school year is not entitled to unemployment compensation during the summer, the inference may fairly be drawn that the Legislature intended that a person who has no such assurance is entitled to unemployment compensation during the summer weeks following the end of school sessions for the year. If the Legislature had intended that a teacher with no rea-

sonable assurance of employment in the next school year should be ineligible for unemployment compensation until the commencement of the next school year, it could have said so.

In the instant case, there is no dispute that the weeks for which Pinzon claims unemployment compensation are weeks in which he "performed no services." The record also discloses that even though Pinzon was paid on a 12-month basis, he provided services for only a 9-month teaching period. Pinzon's wages were payable when he earned them during the 9-month academic year he was actually working for the University, not when the wages were received. Therefore, because Pinzon's wages were "payable" when he earned them, not when he received them, we reverse the decision of the district court and remand the cause with the instruction to award Pinzon unemployment compensation benefits for the period he was unemployed.

REVERSED AND REMANDED.

WHITE, C.J., participating on briefs.

WRIGHT, J., not participating in the decision.

NORMA L. HALL ET AL., APPELLANTS,
V. PROGRESS PIG, INC., APPELLEE.
575 N.W.2d 369

Filed March 6, 1998. No. S-96-857.

1. **Injunction: Equity.** Injunction is a form of equitable relief.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
4. **Courts: Jurisdiction.** For there to be an exercise of judicial power, an actual case or controversy must be presented.
5. **Justiciable Issues: Standing.** Standing is a key function in determining whether a justiciable controversy exists.
6. **Actions: Parties: Standing.** Under the common law, before one is entitled to invoke a court's jurisdiction, one must have standing to sue, which requires having some real

interest in the cause of action; in other words, to have common-law standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy.

7. **Constitutional Law: Initiative and Referendum.** The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.
8. **Constitutional Law: Initiative and Referendum: Appeal and Error.** In a case involving a constitutional amendment initiated by the people of Nebraska, it is not the province of the Nebraska Supreme Court to judge the wisdom or the desirability of the amendment.
9. **Constitutional Law: Corporations: Standing.** The common-law rules concerning standing do not apply to actions brought under Neb. Const. art. XII, § 8.
10. ____: ____: ____. Whether a Nebraska citizen has standing under Neb. Const. art. XII, § 8, depends entirely on whether the Attorney General performed his or her duty to commence an action if the Attorney General has reason to believe that a corporation is violating the amendment.
11. **Constitutional Law: Corporations.** The Attorney General has the authority to discharge the duties imposed by Neb. Const. art. XII, § 8, by directing a county attorney to act as the Attorney General's surrogate.
12. **Constitutional Law.** Like statutes, constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore that construction is necessary.
13. **Constitutional Law: Initiative and Referendum.** Although, generally, the rules governing the interpretation of legislative enactments apply to constitutional provisions adopted by the people, such constitutional provisions are to receive a broader and more liberal construction than statutes; consequently, constitutions are not subject to rules of strict construction.
14. **Constitutional Law.** Every clause in a constitution has been inserted for a useful purpose and should receive even broader and more liberal construction than statutes.
15. **Constitutional Law: Courts: Intent.** In determining the intent of a constitutional provision, a court may not supply any supposed omission, add words, or take words from the provision as framed; it must be construed as a whole, and no part will be rejected as meaningless or surplusage if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layperson.
16. **Constitutional Law: Corporations: Standing.** If an Attorney General has information which would support an objective belief that a corporation is in violation of Neb. Const. art. XII, § 8, and fails to commence an action, Nebraska citizens have standing to seek enforcement in the district court.

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Reversed and remanded for further proceedings.

Robert V. Broom, of Broom, Johnson & Clarkson, for appellants.

Leo A. Knowles, of McGrath, North, Mullin & Kratz, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

The plaintiffs-appellants private citizens, Norma L. Hall, David L. Hansen, Everett Holstein, and John K. Hansen, challenge the district court's dismissal of this action, which seeks to enjoin the operations of the defendant-appellee corporation, Progress Pig, Inc., as violative of the corporate farming limitations imposed by Neb. Const. art. XII, § 8. In appealing to the Nebraska Court of Appeals, the plaintiffs asserted that the district court erred in a variety of procedural and substantive rulings, including by determining that the plaintiffs lack standing to bring suit and failing to rule in the plaintiffs' favor on the merits. Under our authority to regulate the caseloads of the Court of Appeals and this court, we removed the matter to our docket. Because the plaintiffs have standing, we reverse, and remand for further proceedings.

SCOPE OF REVIEW

Injunction is a form of equitable relief. *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided 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. *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997). However, on questions of law, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. *Hoiengs v. County of Adams, ante* p. 64, 574 N.W.2d 498 (1998); *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

CONSTITUTIONAL PROVISION

In relevant part, article XII, § 8, reads:

> (1) No corporation . . . shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.
>
> Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.
>
> Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.
>
> . . . .
>
> These restrictions shall not apply to:
>
> (A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.
>
> . . . .
>
> The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the

> Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. . . .
>
> If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment, Nebraska citizens and entities shall have standing in district court to seek enforcement.

FACTS

Initially, the corporate stock of Progress Pig was owned 80 percent by David Zahn and 20 percent by Kenneth Wamstad, who is not related to Zahn. In the summer of 1994, Zahn became the sole owner of the corporate stock. Progress Pig is engaged in the keeping and feeding of hogs for production of pork and pork products in Otoe County, Nebraska. Zahn does not reside on the Progress Pig farm.

In a June 7, 1991, letter, Jerome Olmsted and Lorraine Olmsted asked the Attorney General to investigate whether Progress Pig was in violation of article XII, § 8. On June 12, Marty Strange sent a similar request to the Otoe County Attorney and the Johnson County Attorney.

On July 29, 1991, the Nebraska Attorney General's office informed Strange that it was disqualified from investigating Progress Pig, as the Attorney General had performed legal services for one of the individuals alleged to have an ownership interest in the corporation. The letter also advised Strange of the citizen standing section of article XII, § 8, and suggested that Strange contact "the appropriate county attorney."

On August 28, 1991, the Attorney General's office wrote to the Otoe County Attorney informing him of the Attorney General's disqualification and mentioning that the Johnson County Attorney also had a conflict of interest. The letter further reads:

> [W]e would respectfully request that you look into the relevant facts regarding Progress Pig, Inc. and [make] a determination as to whether this company is in violation of [article XII, § 8]. Such inquiries are usually initiated simply by contacting the company in question to obtain infor-

> mation and documentation regarding compliance with [article XII, § 8].

In reference to this letter, the Attorney General's office wrote to Strange that "[w]e are hopeful that [the Otoe County Attorney] will agree to pursue this matter . . . ."

The Otoe County Attorney asked the Otoe County sheriff's deputy to conduct an investigation, instructing the deputy to "'[g]o to Progress Pig. Determine who lives on property. Interview owners as to who is the corporation, shareholders, where they live. Determine if whoever resides on property is related to any member of [the corporation] or is an actual shareholder.'"

According to the deputy's report, he telephoned the Secretary of State and found that a corporation named Progress Pig was registered and that Zahn and Wamstad were the officers. The report further indicates that on October 16, 1991, the deputy visited Progress Pig and spoke to Wamstad. Wamstad reported that he and Zahn were the sole shareholders, with Zahn owning 80 percent of the shares, and told the deputy that he was the secretary and production manager of Progress Pig and that he resided in the house located on the Progress Pig property. In addition, Wamstad advised the deputy that "Zahn works at Progress Pig, Inc., on a day-to-day basis doing the bookkeeping and other duties." The deputy did not interview Zahn.

In an October 21, 1991, letter to Strange, the Otoe County Attorney wrote the following:

> I have had an investigator with the Otoe County Sheriff's Office contact both the Secretary of State's office and go out and visit the location here in Otoe County, Nebraska. According to the investigator's report . . . Zahn performs duties at the hog confinement site located in Otoe County, Nebraska on a day to day basis. Therefore, unless there is some evidence to the contrary, it would appear that the Progress Pig, Inc., operation that is located in Otoe County, Nebraska is operating within [article XII, § 8].

The Otoe County Attorney was not compensated in any way for his involvement.

Although the Otoe County Attorney was not in possession of the following evidence, the information is useful for a clearer

understanding of the Progress Pig operations. Zahn stated in his June 27, 1995, deposition that one Doug Beach manages Progress Pig and oversees the day-to-day operations of the farm. Progress Pig also employs two other full-time employees, Lynn Summers, assistant manager, and Paul Sliger. As for his personal duties, Zahn testified that he meets with Beach in person every Tuesday to discuss the business and that he either calls or visits Beach every Friday for the purpose of setting the pig price for the coming week. Zahn handles "the financial side of things" from his home. Zahn's own records indicate that while he performs bookkeeping, writes checks, talks with Progress Pig's manager, and deals with the bank, he does not regularly work with the hogs.

ANALYSIS

Unlike the U.S. Constitution, the Nebraska Constitution does not require the existence of an actual case or controversy for jurisdiction to vest in the courts of the state (compare U.S. Const. art. III, § 2). Nonetheless, our case law has required that for there to be an exercise of judicial power, an actual case or controversy must be presented. *In re Petition of Anonymous 1*, 251 Neb. 424, 558 N.W.2d 784 (1997). Standing is a key function in determining whether a justiciable controversy exists. *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

Under the common law, before one is entitled to invoke a court's jurisdiction, one must have standing to sue, which requires having some real interest in the cause of action; in other words, to have common-law standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy. See, *In re Interest of Archie C.*, 250 Neb. 123, 547 N.W.2d 913 (1996); *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996). The purpose of a standing inquiry is to determine whether one has a legally protected interest or right in the controversy that would benefit by the relief to be granted. *In re Interest of Archie C., supra*; *Marten, supra.*

However, the Nebraska Constitution specifically recognizes the right of the people to amend that document, independent of any action by the Legislature, by passing a ballot initiative, the

means by which the subject constitutional language came into being. See, Neb. Const. art. III, §§ 1 and 2; 1982 Initiative Measure No. 300; *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986). The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties. *State ex rel. Stenberg v. Moore*, 251 Neb. 598, 558 N.W.2d 794 (1997). Moreover, in a case involving such a constitutional amendment, it is not the province of this court to judge the wisdom or the desirability of the amendment. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997).

Pursuant to Neb. Rev. Stat. § 49-101 (Reissue 1993), the common law of England applies in Nebraska "insofar as it is not inconsistent with our statutes and Constitution." *State v. Turner*, 194 Neb. 252, 255, 231 N.W.2d 345, 348 (1975). Here, the common-law rules regarding standing are inconsistent with the provisions of article XII, § 8, which confer upon the citizens of Nebraska standing to seek judicial enforcement of that constitutional provision if the Attorney General "fails to perform his . . . duties as directed" therein. Thus, the common-law rules concerning standing do not apply to this matter.

As a consequence, whether the plaintiffs have standing depends entirely on whether the Attorney General performed his duty under article XII, § 8, to "commence an action" if the Attorney General "has reason to believe that a corporation . . . is violating [the] amendment."

It is clear that the Attorney General's office conducted no investigation, but, instead, looked to the Otoe County Attorney to do so. While article XII, § 8, contains no provision for a county attorney to act in the place and stead of the Attorney General, Neb. Rev. Stat. § 23-1201(2) (Reissue 1991) provides, in relevant part:

> The county attorney may be directed by the Attorney General to represent the state in any action or matter in which the state is interested or a party. When such services require the performance of duties which are in addition to the ordinary duties of the county attorney, he or she shall receive such fee for his or her services, in addition to the salary as county attorney . . . .

In addition, Neb. Rev. Stat. § 84-205(2) (Cum. Supp. 1992) provides that the Attorney General "shall have authority to require aid and assistance of the county attorney in all matters pertaining to the duties of the Attorney General in the county of such county attorney . . . ."

The Attorney General therefore has the authority to discharge the duties imposed by article XII, § 8, by directing a county attorney to act as the Attorney General's surrogate. The questions are whether the Attorney General directed the Otoe County Attorney to so act and whether the county attorney acted as directed.

By simply reading the language employed by the Attorney General in his letters, it would appear that the Otoe County Attorney's involvement in the investigation was optional, for it would seem that one exercising the power to "direct" another to act would not write in terms of being "hopeful that [the other] will agree to pursue this matter." However, the evidence is that the Attorney General's office instructed the Otoe County Attorney as to how to conduct the investigation, that the Otoe County Attorney in fact instructed the deputy sheriff to investigate Progress Pig, and that the Otoe County Attorney determined not to bring an action against Progress Pig based upon that investigation. Regardless of the language employed by the Attorney General's office in its letters, the Otoe County Attorney's actions reveal that he was acting under the direction of and for the Attorney General. The fact that the Otoe County Attorney received no extra compensation, as contemplated by § 23-1201(2), may create an issue as between him and the Attorney General, but it does not negate the facts that the investigation was conducted and the decision was made.

The issues therefore become whether the Otoe County Attorney, as the Attorney General's surrogate, had reason to believe that the Progress Pig operations violated article XII, § 8, and was thus obligated to commence an action in the district court to enjoin them and whether the Otoe County Attorney's failure to commence an action conferred standing upon the plaintiffs to do so.

Like statutes, constitutional provisions are not open to construction as a matter of course; construction is appropriate only

when it has been demonstrated that the meaning of the provision is not clear and therefore that construction is necessary. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). Because it is unclear from the plain language of article XII, § 8, whether citizen standing rests upon an attorney general's or his or her surrogate's subjective view of the evidence, construction is appropriate.

Although, generally, the rules governing the interpretation of legislative enactments apply to constitutional provisions adopted by the people, such constitutional provisions are to receive a broader and more liberal construction than statutes. Consequently, constitutions are not subject to rules of strict construction. *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966). Every clause in a constitution has been inserted for a useful purpose and should receive even broader and more liberal construction than statutes. *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922 (1986). In determining the intent of a constitutional provision, a court may not supply any supposed omission, add words, or take words from the provision as framed. It must be construed as a whole, and no part will be rejected as meaningless or surplusage if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layperson. *Pig Pro Nonstock Co-op, supra.*

Article XII, § 8, does not provide that the Attorney General shall commence an action if he or she "believes" that a violation has occurred. Rather, the relevant language directs the Attorney General to commence an action if he or she "*has reason to* believe" that a violation has occurred. (Emphasis supplied.) Citizen standing cannot depend on an attorney general's or his or her surrogate's subjective belief. If such were the case, citizen standing would never apply absent the unlikely circumstance wherein an attorney general or surrogate honestly believed that an operation was violating the constitutional provision, but declined to seek to enjoin the violation. Thus, if an attorney general or surrogate has information which would support an objective belief that an operation is in violation of article XII, § 8, and fails to commence an action, Nebraska citizens have standing to seek enforcement in the district court.

The Otoe County Attorney was aware that Progress Pig is a corporation engaged in the production of livestock and that Zahn, the corporation's majority shareholder, did not reside on the farm. In order for the family farm or ranch corporation exception to apply, at least one member of the family holding the majority of the voting stock must either reside on the farm or be "actively engaged in the day to day labor and management of the farm." Wamstad represented that on a day-to-day basis, Zahn kept the books and performed other duties. We need not and do not decide whether performing "bookkeeping and other duties" constitutes labor for purposes of the family farm or ranch corporation exception, since the information obtained during the investigation is such that a reasonable person could conclude that Zahn is not actively engaged in the day-to-day management of the farm. Thus, the Otoe County Attorney possessed information supporting an objective belief that Progress Pig was in violation of article XII, § 8, and failed to seek judicial enforcement of the provision. As a consequence, the plaintiffs have standing to bring this action.

Having so determined, we decline the plaintiffs' invitation that since our standard of review is de novo and the parties tried all of the substantive issues, we resolve those issues. See *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979) (declining to make determination on merits after reversing trial court's judgment on issue of standing, despite fact that remaining issues presented questions of law).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., concurs.

CAPORALE, J., concurring.

Although I agree that the plaintiffs have standing and that the cause is to be remanded to the district court, I write separately, for it seems to me the majority's opinion implies that this court possesses the authority to have reviewed the cause on the merits had it elected to do so. I respectfully submit that under present law, no such authority exists.

Neb. Rev. Stat. § 25-1925 (Reissue 1995) provides that an appellate court, in its appellate review of suits in equity, shall review de novo those "findings of fact of the district court"

which an appellant seeks to have reviewed. Thus, § 25-1925 limits the scope of our de novo review of factual issues to the findings of fact of the district court. It does not empower us to make original factual findings with regard to issues not reached by the district court.

In keeping with that statutory provision, we have written in equity actions that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial tribunal. E.g., *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997) (action in equity to impose constructive trust); *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994) (action in equity to foreclose mechanic's lien); *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994) (action in equity to void election of directors); *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989) (action in equity to enforce covenants and restrictions on real property); *State v. Merritt Brothers Sand & Gravel Co.*, 180 Neb. 660, 144 N.W.2d 180 (1966) (action in equity to enjoin land use).

Indeed, we addressed the limits of appellate review of factual determinations in equity actions even prior to the enactment of § 25-1925 and over 100 years ago in *Coombs v. MacDonald*, 43 Neb. 632, 62 N.W. 41 (1895). The plaintiff therein brought an action in equity to enjoin the defendant from removing garbage under a contract which the plaintiff claimed was entered into pursuant to a void ordinance. The plaintiff alleged that the contract was procured through bribery and other unlawful and corrupt means and that it contravened settled rules of public policy. In perpetually enjoining the defendant from interfering with the plaintiff, who was also engaged in the business of removing garbage, the district court ruled that the contract and ordinance on which it depended contravened public policy, and expressly reserved any decision as to whether the contract was procured by fraud. This court concluded that the contract was not void as being against public policy, reversed the judgment of the district court, and remanded the cause for further proceedings. In refusing to consider whether the contract had been procured by fraud, we wrote: "It is a rule of universal application to appellate proceedings that the examination by the reviewing court . . . will be confined to issues determined by the court of primary

jurisdiction." *Id.* at 633, 62 N.W. at 42. We most recently reiterated this language in *Edgerton v. Hamilton County*, 150 Neb. 821, 36 N.W.2d 258 (1949) (declaratory judgment action to determine exemption of homestead from claims of creditors in estate proceeding).

It seems to me that if a majority of this court is of a mind to expansively construe § 25-1925 and overrule precedent which is over a century old, it ought to do so directly and not by implication.

STATE OF NEBRASKA, APPELLEE,
V. ERIC T. KIRKSEY, APPELLANT.
575 N.W.2d 377

Filed March 6, 1998. No. S-97-272.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Trial: Evidence.** When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial.
4. **Trial: Rules of Evidence: Appeal and Error.** Error cannot be predicated on the admission of evidence to which no timely objection was made when the evidence was adduced.
5. **Trial: Testimony: Appeal and Error.** Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made.
6. ____: ____: ____. Where testimony objected to is substantially identical to testimony admitted without objection, its admission is not prejudicial error.
7. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
8. **Trial: Evidence: Appeal and Error.** All relevant evidence is normally admissible. Because the exercise of judicial discretion is implicit in determinations of relevancy, the trial court's decision will not be reversed absent an abuse of discretion.

9. **Homicide: Intent: Proof.** While proof of motive is not an element of first degree murder, any motive for the crime charged is relevant to the State's proof of the element of intent.
10. **Criminal Law: Motions for Mistrial: Juries.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial.
11. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
12. **Hearsay: Extrajudicial Statements.** An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay.
13. **Witnesses.** A witness will not be permitted to testify as to objective facts in the absence of foundational evidence establishing personal knowledge of such facts.
14. **Trial: Evidence: Waiver: Estoppel.** A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence.
15. **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 relevant other bad acts for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character.
16. **Rules of Evidence.** Evidence that is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), may be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), 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.
17. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discretion.
18. **Evidence: Other Acts: Appeal and Error.** In reviewing trial court rulings which have admitted evidence of other crimes, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.
19. **Rules of Evidence: Words and Phrases.** Probative value is a relative concept within the context of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case.
20. **Rules of Evidence: Other Acts.** An acquittal does not, in and of itself, preclude admission of the facts underlying the charge as evidence of other bad acts when offered for one of the purposes specified in Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). However, the acquittal is a factor which the court must consider when weighing the probative value of the evidence against the potential for unfair prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

21. **Rules of Evidence: Words and Phrases.** For purposes of the balancing test required by Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), unfair prejudice means an undue tendency to suggest a decision on an improper basis.
22. **Evidence: Jury Instructions: Appeal and Error.** Where the probative value of evidence is outweighed by its potential for unfair prejudice, its admission is error even if an appropriate limiting instruction is given.
23. **Criminal Law: Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
24. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for a new trial.

J. William Gallup, of Gallup & Schaefer, for appellant.

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

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

A jury convicted Eric T. Kirksey of two counts of first degree murder and two counts of use of a deadly weapon to commit a felony. He appeals the convictions, asserting that prejudicial error occurred at his trial by virtue of evidentiary rulings by the district court and prosecutorial misconduct during closing argument. We conclude that the admission of certain evidence over Kirksey's objection constituted prejudicial error and that Kirksey is therefore entitled to a new trial.

I. BACKGROUND

On January 3, 1994, the bodies of James Burnett and Terri Hall were discovered in Burnett's car, which was parked in a vacant lot at 61st and Ames Streets in Omaha. The couple had been missing since January 1. Both victims had been shot in the head. Burnett had been shot several times with a .380-caliber weapon. Hall was killed by a .380-caliber bullet which lodged in her brain stem, but she also suffered a wound near her left ear

caused by a smaller caliber weapon. A .25-caliber shell casing and a .25-caliber spent bullet were found in the front passenger compartment where Hall was seated.

During their investigation, law enforcement officers learned that Burnett was one of the leading drug distributors for a California-based drug ring which was operating in Omaha. The murder investigation initially focused on Burnett's associates in California. Subsequently, the investigation focused on Kirksey when some of his associates told police that Kirksey had implicated himself in the homicides.

On December 22, 1995, Kirksey was charged with two counts of first degree murder and two counts of use of a deadly weapon to commit a felony. Following trial in September 1996, a jury found Kirksey guilty on all counts. A three-judge sentencing panel convened by the district court for Douglas County sentenced him to life imprisonment on each of the first degree murder convictions, and 10 to 20 years' imprisonment on each of the weapons convictions, with each sentence to run consecutively. After his motion for new trial was overruled, Kirksey perfected this appeal.

Other facts will be set forth as pertinent to the discussion of specific assignments of error.

II. ASSIGNMENTS OF ERROR

Restated, Kirksey assigns as error the following actions of the district court: (1) admitting certain testimony of police detective Felands Marion regarding Kirksey's involvement in the Burnett and Hall homicides, (2) admitting evidence of Kirksey's involvement in the shooting of Carvorggio Brown approximately 29 days following the homicides, (3) overruling Kirksey's motions for mistrial, (4) admitting evidence of drug transactions and drug usage by various persons, (5) admitting certain evidence regarding federal narcotics indictments, (6) admitting hearsay testimony with respect to the activities of Clint Crawford, (7) permitting the prosecution to present exculpatory evidence as to other potential suspects in the Burnett and Hall homicides, and (8) permitting the prosecutor to argue facts not in evidence and make derogatory comments about defense counsel during his closing argument.

III. STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Allen, supra*; *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

IV. ANALYSIS

1. Evidence of Drug Transactions

(a) Facts

Kirksey filed a pretrial motion in limine to prevent the prosecutor from presenting evidence of drug transactions between Kirksey and individuals other than the homicide victims. The district court overruled the motion, reasoning that Kirksey's general involvement in illicit drug trafficking was relevant to the State's contention that Kirksey committed the murders with a motive to rob Burnett of drugs and money. Additionally, the court held that the probative value of this evidence outweighed its prejudicial effect.

Throughout the trial, several witnesses called by the prosecution testified as to the existence of a drug conspiracy in Omaha involving Burnett and several California residents. Several of these witnesses testified either that they did not know Kirksey or that they had no knowledge concerning the Burnett and Hall homicides. Kirksey's counsel objected to some but not all of the testimony concerning the drug conspiracy.

Brown testified that he purchased crack cocaine from Burnett and sold it to Kirksey, who resold it to others. Brown also testified that Kirksey was acquainted with Burnett.

(b) Application of Law to Facts

When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial. *State v. Merrill, supra.* Error cannot be predicated on the admission of evidence to which no timely objection was made when the evidence was adduced. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1995).

Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made. Neb. Rev. Stat. § 25-1141 (Reissue 1995). Kirksey made a relevancy objection to the testimony of Brown and Romalis Ozuna concerning the drug conspiracy, but he did not object to similar testimony by Herbert Blake, Darrell Howard, Thomas Cotton, Wamai Smith, and Ceritta Turner. Where testimony objected to is substantially identical to testimony admitted without objection, its admission is not prejudicial error. *McDonald v. Miller,* 246 Neb. 144, 518 N.W.2d 80 (1994); *State v. Thompson,* 231 Neb. 771, 438 N.W.2d 131 (1989). Thus, Kirksey's failure to object to testimony of other witnesses concerning the existence of the drug conspiracy precludes him from asserting on appeal that the admission of such testimony from Brown and Ozuna constituted prejudicial error.

This assignment of error would lack merit even if it had been properly preserved. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995); *State v. McBride,* 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Newman,* 250 Neb. 226, 548 N.W.2d 739 (1996). All relevant evidence is normally admissible. *State v. McBride, supra.* Because the exercise of judicial discretion is implicit in determinations of relevancy, the trial court's decision will not be reversed absent an abuse of discretion. *State v. McBride, supra*; *State v. Eona,* 248 Neb. 318, 534 N.W.2d 323 (1995).

The State contended at trial that Kirksey killed Burnett with the motive of robbing him of money and drugs. Motive is defined as that which leads or tempts the mind to indulge in a criminal act. While proof of motive is not an element of first degree murder, any motive for the crime charged is relevant to the State's proof of the element of intent. *State v. McBride, supra*; *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). We cannot say that the district court abused its discretion in determining that evidence of a drug conspiracy in which both Kirksey and Burnett were involved was relevant to the alleged motive for killing Burnett or in determining that the probative value of such evidence outweighed the potential for unfair prejudice so as to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

2. Evidence of Federal Indictment

(a) Facts

Kirksey and Anthony Murry were incarcerated in the same area of the Douglas County Department of Corrections facility during portions of 1994 and 1995. Murry testified that during this period, he heard Kirksey make statements implicating himself in the shooting of Brown, discussed above. On cross-examination by Kirksey's counsel, Murry testified that "[Kirksey] showed me his [presentence investigation], I showed him mine. We was showing each other the paperwork because we were on the same indictment. I didn't know him. I just seen his name." Defense counsel did not object to this statement or move that it be stricken. During subsequent cross-examination of Murry, defense counsel asked him why Kirksey would tell a complete stranger about his past crimes. Murry responded that he and Kirksey began talking when he told Kirksey that he saw his name on Murry's federal drug indictment. Kirksey's counsel objected and moved for a mistrial on the grounds that Murry's nonresponsive answer was prejudicial in that it disclosed the fact that Kirksey was named in a federal drug indictment. The district court ruled that Murry's answer was in direct response to defense counsel's question and that therefore, there was no basis for a mistrial.

Kirksey's inclusion on a federal drug indictment was also mentioned during Ozuna's testimony. Ozuna testified that Kirksey admitted to him that he murdered Burnett and Hall. During the prosecutor's questioning of Ozuna, the prosecutor asked about telephone calls Kirksey made to Ozuna from jail subsequent to the admission. During this questioning, the prosecutor asked, "What did he tell you in those conversations?" and Ozuna responded, "That he was being charged with a drug conspiracy." Defense counsel objected and moved for a mistrial. The prosecutor replied that he did not expect Ozuna to respond as he did. Rather, he expected Ozuna to say that Kirksey denied any knowledge of the murders after previously admitting his involvement. In ruling on the motion, the trial judge began by noting that his ruling on Murry's testimony did not give the prosecutor license to raise the issue of Kirksey's indictment through other witnesses. However, the judge held:

> In the context of the overall testimony of the drug dealings, the drug use, et cetera, by most all of the witnesses that have been called here, and in direct testimony of various witnesses indicating that . . . the defendant . . . [was] involved in drug sales, drug use, [and] drug dealings, the Court finds that while it is a prejudicial statement to the position of the defendant, that it does not rise to the level of granting a mistrial.

At the request of Kirksey's counsel, the judge admonished the jury to disregard Murry's answer concerning the indictment.

The last mention of the federal drug indictment occurred during Stephen Sanchelli's testimony. The prosecutor asked Sanchelli, an officer with the Omaha Police Division, how many persons had been named in the federal indictment. After the court overruled Kirksey's relevance objection, Sanchelli responded that approximately 34 individuals were indicted.

(b) Application of Law to Facts

A mistrial is properly granted in a criminal case where an event occurs during the course of the trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial. *State v. Trackwell*, 244 Neb. 925, 509

N.W.2d 638 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996); *State v. Trackwell, supra.*

We find no abuse of discretion in the refusal of the district court to grant Kirksey's motions for mistrial when certain witnesses referred to Kirksey's federal indictment. As noted, Murry first mentioned the indictment in response to a question asked by Kirksey's counsel on cross-examination. Having initially elicited this fact, Kirksey cannot claim that its second mention by Murry in direct response to another question from defense counsel was so prejudicial as to deprive him of a fair trial. When Ozuna mentioned the indictment again, apparently as an unintended response to a question by the prosecutor on redirect examination, the district court gave a timely and proper admonition to the jury to disregard it. Likewise, because the existence of the federal indictment was initially raised by Kirksey's cross-examination of Ozuna, we conclude that the district court did not abuse its discretion in overruling Kirksey's relevance objection to Sanchelli's testimony regarding the number of persons indicted.

3. Evidence Exculpating Other Persons

(a) Facts

Celeste Ehlers, a childhood friend of Burnett, testified that Burnett had been involved with several persons from California in the distribution of crack cocaine in Omaha. She stated that in November 1993, Burnett owed $20,000 to Cotton, one of the individuals from California, and that when she learned of Burnett's death, she thought one or more of the California parties were responsible. Kirksey did not object to any of this testimony and, in fact, explored it further on cross-examination of Ehlers.

Cotton, Brian Duke, Smith, and Turner, all former residents of Bakersfield, California, testified at trial regarding the illegal drug trade in Omaha in which they had been involved with

Burnett. At the time of trial, Cotton, Duke, and Smith had been convicted on federal narcotics charges and Turner was incarcerated on a shoplifting conviction. None was asked if he or she killed Burnett or Hall. Only Cotton and Duke were asked if they personally knew who killed the victims, and both responded that they did not. Duke testified that Burnett was an asset to the California dealers because he made a lot of money. Kirksey did not object to the testimony of these witnesses.

Shannon Harris, a friend of Burnett's, called Burnett on Burnett's cellular phone on the afternoon of January 1, 1994. Burnett told Harris that he was on 33d Street and that he was with "Terri and Croft." At that point, Harris heard a male voice say, "Don't move. Don't fuckin' move." Harris then hung up the phone because all she could hear was static. Crawford, an acquaintance of Burnett's, is known by the nickname "Crawf."

Throughout the trial, defense counsel cross-examined law enforcement personnel regarding the adequacy of their investigation, specifically questioning their failure to investigate Crawford more thoroughly in light of Harris' testimony. In response, the prosecutor presented evidence that none of the individuals involved in the drug conspiracy knew of Crawford or connected him in any way with the conspiracy. During Sanchelli's direct examination, the prosecutor asked, "[D]id any of those people [who were federally indicted on drug charges] at any time give you any evidence or information linking Clinton Crawford to the drug conspiracy?" After Kirksey's hearsay objection was overruled, Sanchelli replied, "None." Shortly before this exchange, the prosecutor asked if Sanchelli's investigation had uncovered any evidence linking Crawford to the drug conspiracy, and Sanchelli answered that it had not. Defense counsel did not object to this testimony.

(b) Application of Law to Facts

Because Kirksey did not object to the testimony of witnesses who were involved with Burnett in drug trafficking, there is no merit to his contention that the district court erred in admitting their testimony. See, § 27-103(1)(a); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

Nor do we find any prejudicial error with respect to Sanchelli's testimony. The prosecutor's question to Sanchelli on redirect examination does not appear to have been for the purpose of eliciting statements of other persons for the purpose of proving the matter asserted, but, rather, to establish that Sanchelli had no reason to suspect Crawford of committing the homicides. An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995). Thus, Sanchelli's testimony was not hearsay.

4. Testimony of Marion

(a) Facts

Marion, a detective with the Omaha Police Division, participated in the investigation of the Burnett and Hall homicides. On direct examination by the prosecutor, Marion testified concerning the nature and scope of the investigation, including the process by which police attempted to include or exclude possible suspects by interviewing witnesses and gathering evidence. Marion further testified that he arrested Kirksey in connection with the homicides.

Defense counsel cross-examined Marion in detail with respect to the investigation, inquiring as to why certain leads were not followed and certain facts not developed. During his cross-examination, Marion admitted that Omaha police officers had arrested a suspect in a highly publicized homicide case who was later released when another man was charged with the crime. The cross-examination included the following exchange: "Q: And at some point, it was your conclusion that Eric Kirksey committed these crimes, and the minute you reached that conclusion you quit investigating all other possible suspects; isn't that a fair statement? A: No, it's not." During further redirect examination shortly after this testimony, Marion testified as follows:

> Q: Counsel asked you if you knew who killed James Burnett and Terri Hall. Do you?
>
> A: Yes, I do.
>
> Q: Who?

[Defense counsel]: Just a minute. I object to this. No proper, sufficient foundation. How does he know?

A: He asked.

Q: The objection is overruled.

A: The individual Eric Kirksey (pointing).

During recross-examination, which immediately followed this testimony, Marion admitted that he did not observe the homicides and that his identification of Kirksey as the person who killed Burnett and Hall was based upon his "professional opinion."

Following Marion's testimony, Kirksey's attorney moved for a mistrial on the grounds that Marion should not have been permitted to state an opinion on the ultimate issue in the case. The prosecutor argued that defense counsel had "opened the door" by asking Marion on cross-examination if he "[knew] who killed those people?" The district court denied the motion for mistrial, stating:

> The Court notes for the record that there were numerous questions propounded by defense counsel to the witness, Officer Marion. The Court would agree with the general principle that I think [defense counsel] is trying to build this point on, that if the prosecution on direct examination were to elicit the opinion of such a witness, that would be an objectionable and not a permissible bit of trial presentation on the part of the prosecution.
>
> The Court notes, however, that in the context of the extremely vigorous cross-examination by defense counsel of each and every method that Officer Marion was trying to explain the techniques used and the manner in which this investigation proceeded over a period of many, many months, that he was repeatedly asked by defense counsel things such as, do you have any direct evidence linking Eric Kirksey with this crime, et cetera. There were numerous questions which came up in that regard.
>
> And the point about the question of whether he had an opinion or knew who ultimately killed the two parties in this case, I find that his responses do not invade the province of the jury. Rather, I think it's abundantly clear to the jury what their job is going to be, is to sort through the

> evidence. And the Court does not find — really, I find hardly any prejudice. And even if there is some prejudice, it's of the Court's opinion of a very minor degree in allowing that question to be answered.

Kirksey subsequently renewed his motion for mistrial based upon a lack of foundation for Marion's testimony identifying Kirksey as the person who committed the homicides. The district court again denied the motion.

(b) Application of Law to Facts

We begin our analysis of this assignment of error by focusing upon the specific evidentiary issue from which it arises. Marion was not asked for his *opinion* as to who committed the Burnett and Hall homicides; he was asked if he *knew* who committed them. Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1995), provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." Under this rule, a witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993); *State v. Smith*, 238 Neb. 111, 469 N.W.2d 146 (1991). Prior to asking Marion who committed the homicides, the prosecutor did not present any foundational evidence that Marion had personal knowledge upon which he could answer the question, as required by § 27-602. Subsequent cross-examination established conclusively that he did not. Kirksey's counsel properly objected to the question on grounds of insufficient foundation, and the objection should have been sustained.

The error in admitting Marion's identification of Kirksey as the person who committed the homicides was not cured by Marion's subsequent characterization of that identification as a "professional opinion." The district court recognized that a question eliciting such an opinion would have been improper, and the State concedes in its brief that "it would ordinarily be improper to allow an investigating officer to express his opinion about the ultimate issue in the case, here the identity of the

killer, unless he or she was an eyewitness." Brief for appellee at 13. We agree.

Furthermore, we are not persuaded by the argument that the question asked of Marion on redirect examination was in some way justified by the cross-examination which preceded it. It is true that a party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *In re Estate of Hill*, 214 Neb. 702, 335 N.W.2d 750 (1983). However, there is no basis for application of that rule in this case. Where a basis exists, vigorous cross-examination of a witness called by an adverse party is consistent with the duty of an attorney to represent his or her client "zealously within the bounds of the law." Canon 7, EC 7-1, of the Code of Professional Responsibility. The fact that Marion was questioned closely by defense counsel concerning conclusions and assumptions made in the course of his investigation did not suspend the operation of § 27-602 on redirect so as to permit the prosecutor to elicit testimony from Marion concerning an objective fact, i.e., the identity of the killer, as to which he had no personal knowledge. Contrary to the prosecutor's assertion, defense counsel did not ask Marion, during prior cross-examination, if he knew who committed the homicides. The district court erred in admitting this testimony over Kirksey's objection.

5. Shooting of Brown

(a) Facts

Kirksey was charged with assault resulting from the shooting of Brown on January 30, 1994, less than 1 month after the Burnett and Hall homicides. He pled not guilty, and after presenting evidence that he shot Brown in self-defense, he was acquitted by a jury.

Prior to the trial of the present case, Kirksey filed a motion in limine to prevent the prosecution from offering evidence pertaining to the Brown shooting. He contended that this evidence was irrelevant and that any probative value it may have was outweighed by its unfair prejudicial effect. The district court overruled the motion after reviewing testimony from Kirksey's trial

on charges stemming from the Brown shooting. The court found that there were significant similarities between the Brown shooting and the Burnett and Hall homicides, including the facts that the crimes occurred within a period of 1 month, that all three victims were shot with the same caliber weapon from behind during the commission of an attempted robbery, and that Brown and Burnett were first cousins who were involved together in drug transactions. The district court concluded that this evidence was relevant in that it "supports the State's theory that [Kirksey] was involved in drugs and is probative of [Kirksey's] motive and intent to commit homicide during the commission of a robbery . . . ." The district court further found that the probative value of this evidence outweighed its potential prejudicial effect upon Kirksey.

During the trial, the prosecutor referred to the Brown shooting during his opening statement. Kirksey's objection and motion for mistrial were overruled. Additionally, several witnesses testified about the Brown shooting. The first was Murry, who testified over defense objection that while he and Kirksey were incarcerated in 1994 and 1995, Kirksey told him that he had gone "to [Brown's] house to rob him or whatever and that he beat it in self-defense."

Brown also testified about the incident over defense objection. He stated that beginning in late 1993 he bought cocaine from Burnett and sold it to Kirksey, who would in turn sell it to others. When Brown left Omaha in mid-December to visit relatives in another state, Kirksey owed him $2,100 for cocaine. When Brown returned to Omaha, he made several unsuccessful attempts to contact Kirksey in order to recover the money. Brown testified that on January 30, 1994, Kirksey called to say that he would come to Brown's home later in the day to repay the money. When Kirksey arrived, Brown let him in and agreed to let him use the restroom. Brown testified that as he sat in a chair watching television, Kirksey came out of the restroom and shot him twice in the left temple and cheekbone. Brown stated that Kirksey removed cash from Brown's pockets as he lay on the floor feigning death immediately following the shooting. A short time later, when Brown got up and tried to run from the

apartment, Kirksey shot him in the arm, and after a chase, the two exchanged punches.

Following the direct examination of Brown, the district court gave the following instruction:

> I wish to advise you that the evidence that has been presented as to the incident involving this witness, Mr. Brown, of a shooting and an attempted robbery effort, or a robbery, that we are not litigating in this trial that issue of whether Mr. Kirksey was guilty or not guilty of the shooting of Mr. Brown; and as has already been brought out to you in the voir dire examination and in the opening, that he was found innocent of those charges in a separate trial.
>
> This evidence is presented for a limited purpose. It is is not admissible to prove what we refer to as bad character of Mr. Kirksey. It is not allowable for that purpose, and it is not allowable to show that anything that he did in this case that we're here for, that he acted in conformity with the character, if you talk about the question of bad character. It is not for that purpose.
>
> This evidence is admitted for the limited purpose of showing items such as motive, opportunity, intent, preparation, plan, knowledge or identity of the defendant, Mr. Kirksey.
>
> So I tell you at this point that it is only admitted for that limited purpose, and when I give the final instructions in this case I will give you a further instruction, which is what we call a limiting instruction, as to what the evidence of this episode with Mr. Brown is being admitted for.

The record does not contain any other instruction on this subject.

Three other witnesses testified about the Brown shooting. Over defense objection as to relevance, Ozuna testified that Kirksey called him from jail and stated that he shot Brown in self-defense. On cross-examination, Ozuna acknowledged that Kirksey had been acquitted on criminal charges relating to the Brown shooting.

Earl "Lance" Rahn testified over objection that sometime in January 1994 Kirksey told him that Brown had kicked in Kirksey's door and that he needed protection. Rahn stated that he sold Kirksey a .380-caliber handgun and gave Kirksey a ride

to Brown's apartment building. Kirksey's former wife, Dana Legon, testified over objection that Rahn brought Kirksey home on the night of an "incident" involving Kirksey and Brown which occurred shortly before Kirksey and Legon's marriage in February.

During his closing argument, the prosecutor compared the Brown shooting to the Burnett and Hall homicides by noting that each victim was shot from behind or from the side. Citing testimony from Rahn that Kirksey had admitted taking money from Burnett's person after the shooting, the prosecutor further argued that robbery was the common motive in each crime.

(b) Application of Law to Facts

The admissibility of evidence pertaining to the Brown shooting must be determined by application of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), which provides that

> [e]vidence 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.

We have interpreted this rule as one of inclusion, rather than exclusion, holding that it permits the use of relevant "bad acts" for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). However, evidence that is admissible under rule 404(2) may be excluded under rule 403 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." Rule 403. See, also, *State v. Newman, supra*; *State v. Eona, supra*; *State v. Williams, supra*.

It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discre-

tion. *State v. Newman, supra*; *State v. Eona, supra*; *State v. Williams, supra*. In reviewing trial court rulings which have admitted evidence of other crimes, an appellate court considers

> (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.

State v. Newman, 250 Neb. at 240-41, 548 N.W.2d at 750. See, also, *State v. Eona, supra*; *State v. Williams, supra*.

Assuming arguendo that evidence regarding the Brown shooting was relevant and was offered for a proper purpose, matters we need not decide, we view the critical issue as whether the district court abused its discretion in holding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice so as to warrant exclusion under rule 403. Probative value is a relative concept within the context of rule 403. *State v. Eona, supra*. The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case. *State v. Newman, supra*; *State v. Eona, supra*; *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). In this case, there are factors which minimize the persuasiveness of the Brown shooting on the issue of whether Kirksey shot and killed Burnett and Hall. The Brown shooting was an isolated incident occurring 29 days after the Burnett and Hall homicides. The case is therefore distinguishable from *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), in which multiple murders associated with sexual assaults occurred within 72 hours after similar crimes with which the defendant was charged. We held that these subsequent acts were admissible because they established a "continuous chain of evidence detailing the course of defendant's flight, and the patterned course of criminal conduct which was an integral part of it." *Id.* at 65-66, 287 N.W.2d at 24.

Similarly, in *State v. Eona, supra*, where the defendant was charged with the murder of an occupant of a stolen van, we held

that the district court did not abuse its discretion in admitting evidence that the defendant and his accomplices used the van to commit a drive-by shooting shortly after the homicide, reasoning that the incident was probative of motive, i.e., that the occupant of the van was killed so that he would not be a witness to the drive-by shooting. In *Williams* and *Eona*, the close temporal relationship between the charged crimes and subsequent unlawful acts was a critical factor in the determination that probative value outweighed the risk of potential prejudice. That factor is not present in this case.

The probative value of the Brown shooting to show robbery as a motive in the Burnett and Hall homicides is diminished by several factors. First, there is conflicting evidence as to whether Burnett and Hall were in fact murdered in the commission of a robbery. This theory is supported primarily by the uncorroborated testimony of Rahn, who stated that sometime after the murders, Kirksey admitted stealing $1,000 from Burnett. However, there was also evidence that valuable watches and jewelry were found on the victims' bodies, permitting an inference that robbery was not a motive.

Of greater significance is the fact that Kirksey was acquitted by a jury of criminal charges arising from the Brown shooting after pleading that he acted in self-defense. An acquittal does not, in and of itself, preclude admission of the facts underlying the charge as evidence of other bad acts when offered for one of the purposes specified in rule 404(2). See, *State v. Evans*, 212 Neb. 476, 323 N.W.2d 106 (1982); *Koenigstein v. State*, 101 Neb. 229, 162 N.W. 879 (1917). However, the acquittal is a factor which the court must consider when weighing the probative value of the evidence against the potential for unfair prejudice under rule 403. In this case, we think it was a very important factor. A jury's determination that Kirksey shot Brown in self-defense significantly diminishes the probative value of the Brown shooting to establish robbery as a motive in the Burnett and Hall homicides.

The State argues that the circumstances of the Brown shooting suggest a modus operandi similar to the Burnett and Hall homicides in that all three persons were shot in the temple with a .380-caliber handgun. However, there is no evidence connect-

ing the weapon used in the Brown shooting to the weapon used to kill Burnett and Hall. The only evidence on this subject was Ozuna's testimony that Kirksey told him he grabbed Brown's own gun and used it to shoot Brown in self-defense. Thus, while the fact that all three victims were shot in the head with the same caliber handgun was relevant, its probative value was not high.

For purposes of the balancing test required by rule 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995). Where the probative value of evidence is outweighed by its potential for unfair prejudice, its admission is error even if an appropriate limiting instruction is given. See *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). The potential for unfair prejudice in this case involved the risk that notwithstanding the limiting instruction, the jury would conclude that Kirksey had a propensity for assaulting people with a handgun and that the verdict would be influenced by this conclusion. Based upon our review of the facts contained in this record, we conclude that the district court abused its discretion in holding that the probative value of Kirksey's involvement in the Brown shooting was not substantially outweighed by the risk of unfair prejudice. Therefore, the district court erred in admitting evidence of the Brown shooting.

6. Harmless Error Analysis

Having concluded that the district court erred in admitting Marion's testimony identifying Kirksey as the killer and evidence of the Brown shooting, we must now determine whether the error was prejudicial. The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. *State v. McBride, supra*; *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995).

Based upon our review of the entire record in this case, we cannot conclude that the erroneous admission of evidence was harmless. While the evidence properly admitted is sufficient to sustain a guilty verdict, it is not overwhelmingly so. There were no eyewitnesses and no physical evidence linking Kirksey to the homicides. There were substantial inconsistencies in the testimony of the key prosecution witnesses regarding incriminating acts and statements by Kirksey, and the credibility of many of these witnesses was impeached on cross-examination. In addition, several members of Kirksey's family testified that they saw him at a family gathering during the time when the crimes allegedly occurred. On this record, we simply cannot conclude beyond a reasonable doubt that improperly admitted evidence did not materially influence the jury in reaching its verdict. Kirksey is therefore entitled to a new trial.

7. Other Assignments of Error

In view of our remand for new trial, we do not reach Kirksey's assignments of error pertaining to comments made to the jury by the trial judge regarding a newspaper found in the jury room during trial and alleged improper comments during the prosecutor's closing argument.

V. CONCLUSION

For the reasons stated above, the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed and remanded for a new trial.

White, C.J., participating on briefs.

Le Roy Johnson, appellant, v.
Ford New Holland, Inc., appellee.
575 N.W.2d 392

Filed March 6, 1998. No. S-97-733.

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

order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Judgments: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. However, the findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong.
4. **Workers' Compensation.** The Workers' Compensation Court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state.
5. **Workers' Compensation: Pretrial Procedure.** Substantive sanctions regarding discovery and other pretrial matters in the Workers' Compensation Court should be subject to at least the same procedural safeguards as comparable sanctions for alleged discovery violations in Nebraska's civil courts.
6. **Pretrial Procedure.** Before the ultimate sanction of prohibiting a party from introducing otherwise admissible evidence is imposed in civil cases, all affected parties must have received notice and an opportunity to be heard on the merits.
7. **Hearsay.** Medical reports produced outside of the courtroom are hearsay.
8. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
9. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
10. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
11. **Workers' Compensation: Proof.** To recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
12. **Workers' Compensation.** A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then the claimant cannot recover.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas A. Wagoner for appellant.

Thomas D. Wulff and Kevin L. Flynn, of Welch & Wulff, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The trial court of the Nebraska Workers' Compensation Court refused to accept appellant Le Roy Johnson's unsigned medical report into evidence because it was not timely disclosed, in violation of Workers' Comp. Ct. R. of Proc. 4 (1996), and was not signed, in violation of Workers' Comp. Ct. R. of Proc. 10 (1996). The court then denied Johnson's motion for a continuance. Subsequently, the action was dismissed because Johnson failed to show causation. A review panel of the Workers' Compensation Court affirmed. We conclude that the trial court did not abuse its discretion by rejecting Johnson's unsigned medical report and by denying Johnson a continuance. We further conclude that the trial court did not err in determining that Johnson failed to prove causation. Accordingly, we affirm.

BACKGROUND

On January 20, 1994, while working for appellee Ford New Holland, Inc., Johnson used a hoist to position a combine component, known as a "grain head," that weighed approximately 2,500 to 3,000 pounds. As Johnson was positioning the grain head with the hoist, the grain head came toward him and he fell backward. Johnson felt a "twinge" in his back and testified that "it hurt." Johnson reported the incident to his supervisor but did not seek medical attention at that time. Johnson's back continued to bother him at work the next day, and at the end of his shift, Johnson told his supervisor that "[he could] hardly stand it."

Johnson had sustained a previous injury at Ford New Holland in 1983, when his foot became caught in some wire mesh while he was working several feet off the ground. As a result, Johnson fell and ended up hanging by his right leg. Johnson was stiff and sore following the incident but did not take any time off work as a result of it. The record indicates that Johnson experienced some pain in his right leg following this incident.

On January 23, 1994, Johnson bent over to pick up a paper from the floor in his home. When Johnson bent over, he could not get back up and had to be assisted to a chair. The next day,

Johnson went to see his family physician, Dr. William Fowles, who later referred Johnson to Dr. Gordon D. Bainbridge. Johnson did not work for about a month following the injury, then returned to work on "light duty." Johnson continued to experience pain, and Dr. Bainbridge referred him to Dr. Patrick W. Bowman. Under Dr. Bowman's care, Johnson underwent surgery on May 30, 1996, and following surgery, he did not return to work until August 1996. After he returned to work, Johnson did not work full time but was on a schedule whereby his working hours would be gradually increased. At the time of trial, Johnson was working 4 hours each workday.

On January 16, 1996, Johnson filed a workers' compensation action in the Workers' Compensation Court, alleging that on or about January 23, 1994, he sustained a herniated thoracic disk in the course of his employment with Ford New Holland and that Ford New Holland had refused to pay some of his medical and hospitalization expenses, temporary total benefits, and compensation for his loss of earning capacity. Ford New Holland denied the allegations in Johnson's petition. Trial was set for July 24, 1996, and later was continued at Johnson's request until September 26.

At trial, two exhibits were entered into evidence. Exhibit 1 contained a written statement by Dr. Bainbridge. Following a description of the 1983 incident and Johnson's injuries on January 20 and 23, 1994, Dr. Bainbridge wrote:

> [Johnson] asked me if this was related to the initial injury, he tells me the pain he is having in his right leg is the same as he experienced when he fell and I told him I can't preclude the fact that that might be the precipitating factor.

The statement did not specifically state which incident Dr. Bainbridge was referring to when he wrote "the initial injury" and "when he fell." Exhibit 1 also contained a report by Dr. Bowman describing Johnson's prior accidents and symptoms. Exhibit 2 contained a health insurance claim form filed by Dr. Bowman for services provided to Johnson on May 30, 1996. A box next to the word "no" was checked on the claim form in response to the question of whether the patient's condition was related to employment.

Johnson offered exhibit 3, consisting of a letter from Dr. Bainbridge stating that Johnson was injured at Ford New

Holland in January 1994 and that, to a reasonable degree of medical certainty, Dr. Bainbridge believed the injury sustained at Ford New Holland resulted in Johnson's thoracic disk injury which required surgical intervention. The letter was dated September 25, 1996, 1 day before the trial, and was not signed. Ford New Holland objected to the exhibit on the grounds that it was not timely disclosed and was not signed by Dr. Bainbridge. Johnson argued that he had received the letter only the day before the trial and did not have time to get a copy to Ford New Holland on that day, and he stated that, if the objection was for timeliness, he was requesting a continuance. The trial court sustained the objection to the exhibit and denied the motion for a continuance. The trial court subsequently dismissed the action with prejudice because causation had not been established. The trial court further stated in its order that exhibit 3 was not admitted into evidence because it was dated 1 day before trial, was not signed, and thus, was not admissible under rules 4 and 10. The review panel affirmed the trial court's decision.

ASSIGNMENTS OF ERROR

Johnson assigns that the compensation court erred in (1) failing to receive his proposed exhibit 3, (2) refusing his motion for a continuance, and (3) finding he had failed to establish causation between his accident and the injuries he sustained.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the sin-

gle judge who conducted the original hearing. *Acosta v. Seedorf Masonry, Inc., supra*; *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997).

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Sheridan v. Catering Mgmt., Inc., supra*; *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). However, the findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

ANALYSIS

UNSIGNED EXHIBIT 3

Johnson contends that this court's decisions in *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997), and *Zessin v. Shanahan Mechanical & Elec., supra*, mandate reversal of the compensation court's exclusion of exhibit 3 from evidence. In particular, Johnson contends the remedy for a failure to timely disclose is not an exclusion of evidence.

Rule 4 was recently amended to state that discovery in the Workers' Compensation Court will be pursuant to the Nebraska Discovery Rules for all civil cases promulgated by this court. However, because rule 4 was amended after the time the instant case was tried, the 1996 version of rule 4 applies in the instant case. The 1996 version of rule 4D provides in part:

> No party will be allowed to introduce documentary evidence not timely identified or exchanged, or to amend forms, answers, medical reports or lists of witnesses within 30 days of the date of trial, unless the offering party shows good cause why the late offering of such evidence should be excused.

Rule 10 is an evidentiary rule. The 1996 version of rule 10 states:

> The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evi-

> dence; and accordingly, with respect to medical evidence on hearings before a single judge of said court, written reports by a physician or surgeon *duly signed* by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such physician or surgeon . . . .
>
> Each party shall serve all reports of a physician or surgeon . . . relevant to the case in possession of the party upon each opposing party. The service shall be received at least 30 days prior to the time set for hearing if the party intends to offer the report as evidence.

(Emphasis supplied.)

The 1996 version of rule 4 allows for the exclusion of evidence in the compensation court that would otherwise be admissible but for the failure to disclose. However, we have held that the compensation court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state. *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998); *Zessin v. Shanahan Mechanical & Elec., supra*; *Phillips v. Monroe Auto Equip. Co., supra.* Substantive sanctions regarding discovery and other pretrial matters in the compensation court should be subject to at least the same procedural safeguards as comparable sanctions for alleged discovery violations in Nebraska's civil courts. *Id.* Thus, before the ultimate sanction of prohibiting a party from introducing otherwise admissible evidence is imposed in civil cases, all affected parties must have received notice and an opportunity to be heard on the merits. *Cunningham v. Leisure Inn, supra*; *Phillips v. Monroe Auto Equip. Co., supra.* See, also, Neb. Ct. R. of Discovery 37 (rev. 1996) (before ultimate sanction of prohibiting party from introducing otherwise admissible evidence is imposed, opposing party must file notice requesting such sanction with reasonable notice to all affected parties).

In *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997), a single judge of the compensation court sustained the employer's rule 4 objections to the depositions of two medical doctors that were not timely disclosed. However, the evidence would have been admissible in virtually all trial

courts in this state. We stated that while the compensation court is empowered to admit evidence that is not admissible in the trial courts of this state, it does not have the right to establish rules of evidence or procedure that are more restrictive than the rules applicable to trial courts in this state.

In *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997), we upheld the action of the compensation court in overruling an employer's rule 4 objection to evidence regarding causation because the compensation court determined that good cause existed for receiving the testimony due to a prior agreement between the parties. Most recently, we have upheld the exclusion of evidence based on a rule 4 objection.

In *Cunningham v. Leisure Inn, supra*, a worker offered into evidence a medical report that had not been disclosed. The compensation court allowed the worker to attempt to show "good cause" under rule 4 as to why the exhibit had not been exchanged. After an explanation that the worker was unable to pay the physician for the report, the compensation court determined that good cause had not been shown and sustained the employer's rule 4 objection. A review panel of the compensation court reversed. However, we reversed the conclusion of the review panel and reinstated the action of the trial court because the trial court clearly gave the worker the opportunity to show cause and because the worker specifically stated that she was not seeking a continuance.

The instant case is distinguishable from *Phillips*, *Zessin*, and *Cunningham* with respect to one key fact. Unlike those cases, the exhibit offered by Johnson, while not timely disclosed in violation of rule 4, was also not signed in violation of rule 10. The trial court specifically stated in its order of dismissal that one of the reasons exhibit 3 was not received was because it was not signed. Thus, the instant case does not involve a situation where the compensation court or a rule of that court prohibited a party from introducing evidence that would otherwise be admissible in the trial courts of this state without providing the same procedural safeguards comparable for discovery violations in Nebraska's civil courts. Rather, this case involves the violation of rule 10 which is an evidentiary rule.

In the instant case, rule 10 is not more restrictive than the rules applied to trial courts in this state. To the contrary, rule 10 allows for the introduction into evidence of signed medical reports in place of live expert testimony. In the trial courts of this state, medical reports produced outside of the courtroom are hearsay. *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994). See Neb. Rev. Stat. § 27-802 (Reissue 1995). Therefore, rule 10 allows the compensation court to admit into evidence medical reports that would not normally be admissible in the trial courts of this state, providing that those reports are signed. Johnson concedes that exhibit 3 would not have been admissible in any other court action.

The compensation court is not bound by the usual common-law or statutory rules of evidence; admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). In the instant case, the compensation court refused to accept into evidence a written report that would not have been admissible in the trial courts of this state and was further in violation of the compensation court's own evidentiary rule requiring the report to be signed. In addition, Johnson does not contend that exhibit 3 would have been admissible in any other action. Accordingly, our previous cases involving rule 4 violations do not apply, and the compensation court did not abuse its discretion in refusing to accept exhibit 3 into evidence.

Motion to Continue

Johnson next contends the compensation court erred in denying his motion for a continuance. Continuances are governed by Workers' Comp. Ct. R. of Proc. 8 (1996), which states that "[a] continuance, under any circumstances, may be granted if good cause is shown . . . ."

A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). See, also, *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992) (applying abuse of discretion standard to workers' compensation cases).

The Nebraska Court of Appeals has stated that a continuance is ordinarily the proper method for dealing with a claim that there has been a failure to disclose in a timely manner. *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993). This court has indicated agreement with that principle. See *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1997). However, as discussed previously, the instant case involves more than a failure to disclose in a timely manner. Rather, exhibit 3 was evidence that, even if timely disclosed, would not have been admissible in the compensation court because it was not signed. Accordingly, the issue is not whether a continuance must be granted or is the only remedy available when there is solely a failure to timely disclose. Rather, the issue is whether the compensation court abused its discretion in denying a continuance when exhibit 3 was not timely disclosed and was not signed, and when a prior continuance had already been granted in the case at Johnson's request.

Johnson argues that exhibit 3 was received only the day before trial, making timely disclosure impossible. However, Johnson had been seeing Dr. Bainbridge since shortly after his injury in January 1994. Johnson also had additional time from early June 1996 until the time of trial in September to obtain the necessary medical reports because the case had already been continued from July 24 to September 26. Furthermore, the compensation court inquired into whether the report referenced something Johnson either had received treatment for or had been diagnosed with in the past 30 days, noting that the exhibit referenced the 1994 injury. Johnson indicated that it did not. Thus, it is clear that Johnson had ample time to obtain the proper documentation necessary to prosecute his case and that exhibit 3 did not include any new information that could not have been obtained in a timely fashion. Good cause was not shown to continue the case, and the trial court did not abuse its discretion in refusing to grant Johnson a continuance.

CAUSATION

Johnson's final contention is that the trial court erred in determining that Johnson failed to establish causation between his work-related accident and the injuries he sustained. Johnson

argues that the records of Dr. Bowman are sufficient to establish causation because a report by Dr. Bowman mentions the 1994 accident at work even though the report does not state that the injury was caused by the 1994 accident "with reasonable medical certainty." In particular, Johnson argues that usage of the phrase "with reasonable medical certainty" is unnecessary. However, Dr. Bowman's report not only fails to state an opinion regarding causation "with reasonable medical certainty," the report appears to give no opinion at all regarding causation.

Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996). To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then the claimant cannot recover. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

The report describes Johnson's work-related incidents and his symptoms without making a statement indicating Dr. Bowman's opinion of causation. Finally, the record contains an insurance form submitted by Dr. Bowman with the "no" box checked where asked if the patient's condition is related to employment. Thus, it is left to speculation whether Johnson's injuries and subsequent surgery were the result of the 1983 accident at work, the work-related incident in January 1994, the action of Johnson picking up a paper at home, or some other source. References to causation made by Dr. Bainbridge are equally unclear.

Exhibit 3, Dr. Bainbridge's medical report, would have provided the necessary medical opinion regarding causation. However, exhibit 3, as previously discussed, was not allowed into evidence. Thus, not only does the record lack any medical testimony showing a causal relationship between the 1994 work-related incident and Johnson's surgery in 1996, but it con-

tains a statement that the opposite might be true. Because it was not error for the compensation court to exclude exhibit 3 from evidence, Johnson failed to show causation.

The trial court did not abuse its discretion by refusing to allow exhibit 3 into evidence or by overruling Johnson's motion for a continuance. Because exhibit 3 was not entered into evidence, causation was not shown. Accordingly, we affirm.

AFFIRMED.

TIMOTHY LAWRY AND COLLEEN LAWRY, APPELLANTS,
V. THE COUNTY OF SARPY, NEBRASKA,
A POLITICAL SUBDIVISION, APPELLEE.
575 N.W.2d 605

Filed March 13, 1998. No. S-96-426.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
3. **Political Subdivisions Tort Claims Act: Tort Claims Act: Liability.** The discretionary function exception is expressed in nearly identical language in the State Tort Claims Act, see Neb. Rev. Stat. § 81-8,219(1) (Cum. Supp. 1992), and the Political Subdivisions Tort Claims Act; thus, cases construing the state exception apply as well to the exception granted to political subdivisions by Neb. Rev. Stat. § 13-910(2) (Reissue 1991).
4. **Actions: Statutes: Liability.** The essence of an affirmative defense is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits the defendant to avoid liability for the acts alleged.
5. **Political Subdivisions Tort Claims Act: Immunity: Waiver: Pleadings: Proof.** The discretionary function exceptions, found in Neb. Rev. Stat. § 13-910 (Reissue 1991), to the general waiver of tort immunity, provided for in Neb. Rev. Stat. § 13-908 (Reissue 1991), are matters of defense which must be pled and proved by a political subdivision.
6. **Courts: Jurisdiction: Political Subdivisions: Immunity: Pleadings.** In order for the district court to have subject matter jurisdiction under the disaster and civil defense statutes, the plaintiff must allege facts which show either (1) that the political subdivision's actions were not undertaken when complying with or reasonably attempting to comply with the provisions relating to civil defense set forth by Neb. Rev. Stat. § 81-829.55 (Reissue 1994) or an order, rule, or regulation promulgated

thereunder and therefore the general immunity does not apply, or (2) that the political subdivision's actions constituted willful misconduct, gross negligence, or bad faith so as to fall within an exception to the general immunity.

7. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
8. **Judgments: Appeal and Error.** Where the record demonstrates that a decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Timothy K. Kelso, of Rasmussen, Mitchell & Kelso, for appellants.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

In this case, the district court sustained a demurrer in favor of the County of Sarpy and dismissed Timothy Lawry and Colleen Lawry's petition, which alleged that the county was negligent with respect to flood warnings it undertook, based on Neb. Rev. Stat. § 13-910(2) (Reissue 1991), the discretionary function exception in the Political Subdivisions Tort Claims Act. Because we determine that one of the grounds on which the county's demurrer was asserted was well taken, we affirm the judgment of the district court.

FACTUAL BACKGROUND

The Lawrys initially filed a petition asserting a negligence cause of action against the county pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992). The circumstances giving rise to the action involved flooding that occurred in Sarpy County along the Platte River in early March 1993. The initial

petition claimed that the county negligently failed to warn the Lawrys of impending flooding and that the county's failure to warn caused damage to the Lawrys' real and personal property. Additionally, the petition alleged that the county negligently attempted to construct an emergency dike, that its action was not effective, and that such action caused delay and omission in warning the Lawrys and others of the flooding. The county demurred to the petition on the bases that the district court lacked subject matter jurisdiction over the action and that the petition failed to state facts sufficient to constitute a cause of action.

The district court, on November 7, 1995, sustained the demurrer on the grounds that the governmental actions at issue were discretionary functions and therefore immune from suit under the Political Subdivisions Tort Claims Act. Because the district court found that the action was barred by virtue of the county's immunity under the Political Subdivisions Tort Claims Act, the court did not consider the county's other claim of statutory immunity under Neb. Rev. Stat. § 81-829.55 (Reissue 1994). The Lawrys then filed an amended petition in the district court.

The Lawrys made the following assertions in their amended petition, which this court must accept as true for the purpose of reviewing the order sustaining the county's demurrer: The Lawrys were, at all relevant times, owners of real property located in Sarpy County, Nebraska, which they occupied as their primary residence. Sometime prior to 4:30 p.m. on March 8, 1993, the county, by and through its officers, agents, or employees, had knowledge of an impending flood from waters flowing in the Platte River and of the threat the flooding posed to persons and property within the county's jurisdiction. On March 8, at approximately 4:30 p.m., a dike or levee used to contain waters flowing in the Platte River broke, allowing floodwaters to escape and placing property downstream from the dike or levee, including the Lawrys' property, in peril. The Lawrys' property is located approximately 3 miles downstream from the point along the Platte River where the dike or levee broke.

Sometime after 4:30 p.m. on March 8, 1993, the county made a decision to warn all persons located downstream from the damaged dike or levee. Additionally, the county made a deci-

sion to try to impede the floodwaters by building an emergency dike. The emergency dike succeeded in holding back the floodwaters until about midnight on March 8, at which time it gave way and released the floodwaters, which caused extensive damage to property located downstream, including the Lawrys' property.

In their amended petition brought pursuant to the Political Subdivisions Tort Claims Act, the Lawrys allege five specific acts of negligence by the county that proximately caused damage to their real and personal property. Generally, the Lawrys assert that the county, having made the decision to warn all the downstream residences, had a duty to exercise reasonable care in the implementation of that decision by acting in a fashion reasonably calculated to warn, in a timely manner, those persons whose lives and property were jeopardized by the flooding. Specifically, the county allegedly breached this duty in the following five ways: (1) in failing to identify all downstream residents, including the Lawrys; (2) in failing to utilize the civil defense siren; (3) in not initiating the warning process sooner; (4) in utilizing the sheriff's department's existing dispatchers to provide the warning without calling in additional staff and/or invoking its mutual aid contracts; and (5) in failing to establish and maintain a written procedure or protocol to be followed in circumstances like those present in this case. The amended petition does not contain an allegation of negligence with respect to the construction of the emergency dike or any delay or omission of warning resulting therefrom.

The county again demurred to the amended petition on the same bases as the original demurrer, i.e., lack of subject matter jurisdiction and failure to state a cause of action. The district court sustained the county's demurrer "for the same reasons" set forth in the court's November 7, 1995, order and granted the Lawrys 30 days to further amend their petition. However, the Lawrys elected to stand on the amended petition for the purpose of an appeal, and the district court dismissed the lawsuit with prejudice. The Lawrys brought this appeal in the Nebraska Court of Appeals, and we removed the case to our docket pursuant to our authority to regulate the dockets of the Court of Appeals and this court.

ASSIGNMENT OF ERROR

The Lawrys claim that the district court erred in determining that the discretionary function exception to the Political Subdivisions Tort Claims Act applies to the facts of this case and, therefore, that the district court erred in sustaining the county's demurrer.

STANDARD OF REVIEW

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997); *County of Adams v. Nebraska State Bd. of Equal.*, 252 Neb. 847, 566 N.W.2d 392 (1997).

ANALYSIS

An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996); *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996). The county demurred on two separate grounds in the district court. The county, claiming immunity under the discretionary function exception to the Political Subdivisions Tort Claims Act, § 13-910(2), asserted that the Lawrys' amended petition did not state facts sufficient to constitute a cause of action. Additionally, the county claimed that the Lawrys did not successfully invoke subject matter jurisdiction by a pleading that facially alleges matters that reveal a waiver of immunity under § 81-829.55, which provides governmental immunity for disasters and civil defense governmental functions undertaken pursuant to Neb. Rev. Stat. § 81-829.36 et seq. (Reissue 1994). The two grounds for the county's demurrer are based on distinctly different reasons and require separate analysis.

Discretionary Function Exception

One of the questions in this appeal is whether the county's conduct, as alleged in the amended petition, involves a discretionary function or duty for which the county is immune from liability based on the exception found in § 13-910(2), which

states that the tort liability imposed by the Political Subdivisions Tort Claims Act shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused."

It is important to note at the outset that the discretionary function exception is expressed in nearly identical language in the State Tort Claims Act, see Neb. Rev. Stat. § 81-8,219(1) (Cum. Supp. 1992), and the Political Subdivisions Tort Claims Act; thus, cases construing the state exception apply as well to the exception granted to political subdivisions by § 13-910(2). See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

In *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997), we held that the exceptions found in § 81-8,219 to the general waiver of tort immunity provided for in Neb. Rev. Stat. § 81-8,215 (Reissue 1996) are matters of defense which must be pled and proved by the State. We determined that jurisdiction is conferred by the general waiver of tort immunity found in § 81-8,215, so long as the plaintiff alleges all facts necessary to confer subject matter jurisdiction in the district court. See *Sherrod v. State, supra* (citing *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952)). However, once subject matter jurisdiction is conferred, we stated that it then becomes a matter of defense to plead and prove that the cause of action no longer exists due to the applicability of an exception to the general waiver of immunity found in § 81-8,215. *Sherrod v. State, supra* (citing *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993), and *Prescott v. U.S.*, 973 F.2d 696 (9th Cir. 1992)). The essence of an affirmative defense is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits the defendant to avoid liability for the acts alleged. *Sherrod v. State, supra* (citing *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993)). For the reasons that follow, we are convinced that the same rule should apply in cases brought under the Political Subdivisions Tort Claims Act.

The Lawrys' primary contention on appeal is that their amended petition states a cause of action because the discre-

tionary function exception is inapplicable to the facts of this case, as presented by the amended petition. The Lawrys assert, inter alia, that once the county made a decision to warn all the downstream residents of the flooding, it had a duty to exercise reasonable care in carrying out the warning. The facts alleged in the Lawrys' amended petition include that the county decided to warn all downstream residents of the flooding, but that its failure to use reasonable care when carrying out the warning proximately caused the damages the Lawrys suffered in the flooding. In support of their position, the Lawrys point to *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996), wherein we stated that when one under no obligation to act does undertake action, one must act with reasonable care. The Lawrys' first specific allegation of breach of the duty of reasonable care is that the county failed to identify all downstream residents, including the Lawrys. However, based on the allegations in the amended petition, we are unable to determine whether the alleged negligence of the county in carrying out the flood warning involved discretionary policy-level decisionmaking or operational-level conduct.

In *Rocky Mountain Thrift v. Salt Lake City*, 784 P.2d 459 (Utah 1989), the Supreme Court of Utah was faced with a situation similar to the one presented by this case. There, the court held that summary judgment based on the discretionary function exception was not appropriate. In *Rocky Mountain Thrift v. Salt Lake City*, the plaintiffs sued Salt Lake City for damages they sustained during flooding. The Utah Supreme Court held that decisions made by the city prior to the flood regarding the design, capacity, and construction of its flood control systems were discretionary functions involving basic policy decisions. *Id.* However, the court was unable to determine, based on the record, whether allegedly negligent operation and maintenance of the drainage system involved operational-level conduct or policy decisions. The court stated:

> These decisions [regarding the operation and maintenance of the drainage system] may not have been made on the policy level on which decisions were made before the flood as to the design, capacity, and construction of the City Creek drainage system. When the flood waters came,

> many decisions were doubtlessly made in a short time as to what course of action should be taken. An adequate record needs to be developed to separate what decisions qualify as "policy" from those that may have been only "operational."

Id. at 464.

Likewise, in the instant case, the decisions regarding the method and manner in which persons located downstream were warned may or may not have been made on the policy level prior to the time of the flood. Additionally, the manner in which the warnings were actually carried out may have been an unreasonable violation of established protocol, or conversely, the method and manner of warning may have changed from hour to hour, based on legitimate social or economic policy decisions, to meet the exigencies of the flood. An adequate record would have to be developed to separate what decisions qualify as *policy* from those that may have been only *operational* or *ministerial.*

Therefore, for the reasons set forth in *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997), and aptly illustrated by the facts in this appeal, we hold that the discretionary function exceptions, found in § 13-910, to the general waiver of tort immunity, provided for in § 13-908, are matters of defense which must be pled and proved by a political subdivision. Because the discretionary function exception is an affirmative defense, which must be pled, we conclude that the district court erred when it sustained the county's demurrer based solely on the discretionary function exception to the general waiver of tort immunity.

However, because an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken, we must analyze the county's other ground for demurring to the amended petition. See, *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996); *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996).

Immunity Under Disaster and Civil Defense Statutes

The county also claimed that the Lawrys did not successfully invoke subject matter jurisdiction by a pleading that facially

alleges matters that reveal a waiver of immunity under § 81-829.55, which provides governmental immunity for disaster and civil defense governmental functions undertaken pursuant to § 81-829.36 et seq. The district court did not address this claim because it held that the county was immune under the discretionary function exception to the Political Subdivisions Tort Claims Act. Although we determined in the foregoing section that the district court erred in sustaining the county's demurrer based on the discretionary function exception, we conclude that the demurrer would have been properly sustained on the basis of the county's immunity under the disaster and civil defense statutes.

In contrast to the discretionary function *exception* analyzed above, the county asserts that in cases of natural disasters, such as floods, a political subdivision does not waive its sovereign immunity and, thus, that the district court does not acquire subject matter jurisdiction, absent factual allegations of willful misconduct, gross negligence, or bad faith on the part of the political subdivision. We agree.

The version of § 81-829.55(1), in effect on March 8, 1993, provides, in pertinent part:

> All functions provided for in sections 81-829.36 to 81-829.66 and all other activities relating to civil defense are hereby declared to be governmental functions. Neither the United States, the state, nor any political subdivision thereof nor other agencies of the United States, the state, or political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any civil defense worker complying with or reasonably attempting to comply with the provisions of sections 81-829.36 to 81-829.66 or Public Law 93-288, or any order, rule or regulation promulgated pursuant to the provisions of sections 81-829.36 to 81-829.66 or Public Law 93-288, or pursuant to any ordinance relating to black-out or other precautionary measures enacted by any political subdivision of the state shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity.

By its very terms, *except in cases of willful misconduct, gross negligence, or bad faith*, § 81-829.55(1) provides immunity to

political subdivisions for the negligence of any civil defense worker complying with or reasonably attempting to comply with the provisions relating to civil defense set forth in § 81-829.55(1). As was true under the Political Subdivisions Tort Claims Act, the plaintiff must allege facts necessary under the disaster and civil defense statutes to confer subject matter jurisdiction in the district court. See *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997), citing *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993) (plaintiff bears burden of persuading court that it has subject matter jurisdiction).

Section 13-908 of the Political Subdivisions Tort Claims Act sets forth a general *waiver* of immunity subject to certain limited exceptions stated in § 13-910; whereas, § 81-829.55(1) sets forth a general *grant* of immunity to disaster and civil defense workers subject to the exceptions of willful misconduct, gross negligence, or bad faith stated therein. Thus, in situations involving the Political Subdivisions Tort Claims Act, which provides a general waiver of immunity in § 13-908, the plaintiff must merely allege facts that fall within the general waiver and then the political subdivision bears the burden of pleading and proving that the case falls within an exception to the general waiver of immunity. See *Sherrod v. State*, *supra*. In contrast, § 81-829.55(1) is a general immunity statute rather than a general waiver statute. Therefore, in order for the district court to have jurisdiction, the plaintiff must allege facts which show either (1) that the political subdivision's actions were not undertaken when complying with or reasonably attempting to comply with the provisions relating to civil defense set forth by § 81-829.55 or an order, rule, or regulation promulgated thereunder and therefore the general immunity does not apply, or (2) that the political subdivision's actions constituted willful misconduct, gross negligence, or bad faith so as to fall within an exception to the general immunity. If the plaintiff has not pled facts that show that the actions taken are outside the disaster and civil defense immunity statutes or that the actions constituted willful misconduct, gross negligence, or bad faith, the district court is without jurisdiction over the matter and the petition is properly subject to demurrer.

In the instant case, the Lawrys pled that the county's alleged negligent actions were undertaken while it was responding to a flood. Section 81-829.39(1) defines the term "civil defense" to include preparation for and carrying out of all emergency functions to prevent, minimize, and repair injury and damages resulting from disasters caused by floods. "Disaster," in turn, is defined as the occurrence or imminent threat of widespread or severe damage, injury, loss of life, or property resulting from any natural or manmade cause, including floods. § 81-829.39(3).

The Lawrys did not plead facts which would show that the county was not complying with or attempting to comply with the disaster and civil defense provisions set forth in § 81-829.55(1), or an order, rule, or regulation promulgated pursuant thereto, when it acted to warn the downstream residents of the flooding. Moreover, the Lawrys did not plead facts sufficient to allege willful misconduct, gross negligence, or bad faith on the part of the county—rather, the Lawrys' operative petition alleges facts constituting ordinary negligence. In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997). Because the Lawrys' amended petition does not allege that the county's actions were outside the governmental immunity granted by the disaster and civil defense statutes and does not allege that the county's actions constituted willful misconduct, gross negligence, or bad faith, we conclude that the district court was without subject matter jurisdiction in the instant case, and the county's demurrer should have been sustained on that basis.

Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm. *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997); *Siffring Farms, Inc. v. Juranek*, 252 Neb. 150, 561 N.W.2d 203 (1997).

CONCLUSION

Accordingly, we affirm the district court's order sustaining the county's demurrer, albeit on a different ground. Because the district court granted the Lawrys an opportunity to further amend their petition and the Lawrys chose instead to stand on the amended petition in order to pursue this appeal, the dismissal by the district court is affirmed as well. See *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991) (order sustaining demurrer and order of dismissal affirmed after plaintiff elected to stand on pleadings rather than amend).

AFFIRMED.

WHITE, C.J., participating on briefs.

IN RE ESTATE OF EILEEN C. FOXLEY, DECEASED.
JOHN FOXLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF EILEEN C. FOXLEY, DECEASED, APPELLEE, V. MICHAEL LUKE HOGAN, APPELLANT.
575 N.W.2d 150

Filed March 13, 1998. No. S-96-497.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Wills: Legislature: Intent.** The primary legislative purpose of a holographic will statute is to prevent fraud by virtue of the difficulty of forging an entire handwritten instrument.
4. **Wills.** In determining the validity of a holographic instrument, only the portion of the instrument actually in the handwriting of the testator is to be considered; all other language is to be disregarded.
5. **Wills: Intent.** The important determination in deciding the validity of a holographic instrument is whether the handwritten portion clearly expresses a testamentary intent.
6. **Wills.** A decedent's handwritten initials, as opposed to her whole name, constitute a signature within the meaning of Neb. Rev. Stat. § 30-2328 (Reissue 1995).
7. **Wills: Intent: Words and Phrases.** Material provisions are defined as those provisions which express donative and testamentary intent.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the County Court for Douglas County, SAMUEL V. COOPER, Judge. Judgment of Court of Appeals reversed.

David L. Welch and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellant.

Charles F. Gotch and Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

In his petition for further review, the appellant, Michael Luke Hogan, seeks review of the Nebraska Court of Appeals' decision admitting a purported holographic codicil for probate. We now reverse.

BACKGROUND

Eileen C. Foxley executed a valid will on February 8, 1985. Foxley received the original will and a photocopy thereof. At the time she executed the will, she had six daughters and two sons. The relevant portion of the will provided that the bulk of Foxley's estate was to be divided among her six daughters in equal shares. In December 1993, one of the daughters, Jane F. Jones, died and was survived by her only son, Hogan.

Foxley died in October 1994. Upon her death, two of her daughters found a folder containing the original will and the photocopy of the will in the den of Foxley's home. The photocopy of the will had been changed in the following manner on the first page:

ARTICLE I

My only children are William C. Foxley, Sarah F. Gress, John C. Foxley, Winifred F. Wells, Elizabeth F. Leach, Shiela F. Radford, Mary Ann Pirotte and ~~Jane P. Jones.~~ her share to be divided to between 6 daughters E.F. 1-7-94

ARTICLE II

After consulting with my children, my personal representative

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The third page had been changed as follows:

ARTICLE III

I hereby give, devise and bequeath all of the rest of my proper to my ~~six~~ 5 (6) daughters in equal shares.

ARTICLE IV

I hereby nominate and appoint my son, John C. Foxley, as the

Foxley's personal representative submitted the will and the photocopy, alleged to be a codicil, for probate. Hogan objected to the admission of the photocopy, alleging that it was not executed with the formalities necessary for a valid will or codicil.

At trial, evidence was adduced that Foxley did not like Hogan, believing that Hogan abused Jones. Evidence indicated that on January 1, 1994, approximately 3 weeks after Jones died, Foxley approached one of her attorneys, James Schumacher, regarding a previously established irrevocable trust. After learning that Hogan would take Jones' share of the trust, Foxley told Schumacher that she wanted Hogan bought out and did not want him to be an ongoing beneficiary or to participate in the trust.

During the same conversation, Foxley "emphatically" indicated that she did not want Hogan participating in her estate and told Schumacher that she would "take care of it." Schumacher explained that based on his long relationship with Foxley, he took Foxley's statement to mean "butt out . . . this is my business."

Foxley's daughter Winifred Wells testified that after raising eight children on her own, Foxley was used to handling her own affairs and felt her opinions were "more savvy" and "meant more to her than most other people['s opinions]." Wells testified that Foxley regretted that in setting up the trust she had overlooked the possibility that one of her daughters might predecease her. Wells also testified that Foxley explicitly stated that she did not want Hogan to participate in her estate.

The trial court found that Foxley had substantially, if not fully, complied with the requirements of a holographic codicil and admitted the photocopy and original will to probate. The Court of Appeals affirmed this decision, finding that Foxley's

signature, the material provisions, and an indication of the date of signing were in her handwriting and that she had clearly demonstrated her intentions by her spoken words, her writings, and her actions. See *In re Estate of Foxley*, 6 Neb. App. 1, 568 N.W.2d 912 (1997). Therefore, the Court of Appeals found the codicil to be a valid holograph to be given effect as a testamentary instrument pursuant to Neb. Rev. Stat. § 30-2328 (Reissue 1995). See *In re Estate of Foxley, supra.*

ASSIGNMENTS OF ERROR

In his assignments of error in the petition for further review, Hogan contends that the Court of Appeals erred (1) in determining that Foxley's changes on a photocopy of her will evidenced testamentary intent and qualified as material provisions under § 30-2328, (2) in failing to follow § 30-2328 in not requiring the material provisions of the alleged holographic codicil to be in the handwriting of the testator, and (3) in finding that Foxley's handwritten changes on a photocopy of her will constituted a validly executed holographic codicil.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997); *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996); *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997).

ANALYSIS

The parties do not dispute that Foxley's original 1995 will was executed with all of the formalities required by Neb. Rev. Stat. § 30-2327 (Reissue 1995) and was properly admitted to probate. The parties also concede that the changes made on the photocopy of the will were not executed with the formalities required by § 30-2327 and therefore have no legal effect unless

the changes on the photocopy qualify it as a holographic document pursuant to § 30-2328.

Section 30-2328 provides in pertinent part: "An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator . . . ." The parties do not dispute that the changes made on the photocopy of the will are in Foxley's handwriting, that the signature is in Foxley's handwriting, and that Foxley dated the instrument when she made the changes.

The Court of Appeals noted that the primary legislative purpose of a holographic will statute is to prevent fraud " 'by virtue of the recognized difficulty of forging an entire handwritten instrument. . . .' " *In re Estate of Foxley*, 6 Neb. App. at 12, 568 N.W.2d at 919, quoting *Estate of Black*, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982). The Court of Appeals found that the changes on the photocopy of Foxley's will met the requirements of § 30-2327 and therefore created a valid holographic codicil, which, by definition, only supplements, adds to, or qualifies an existing will. *In re Estate of Foxley, supra*, citing *Flint v. Panter*, 187 Neb. 615, 193 N.W.2d 279 (1971). In his petition for further review, Hogan does not dispute the Court of Appeals' finding that § 30-2328 may be applied to validate a holographic codicil. Rather, Hogan contends that the Court of Appeals erred in finding the altered instrument to be a holographic codicil, because the handwriting does not evidence any testamentary intent and the material provisions are not in the handwriting of the testator as required by § 30-2328.

Testamentary Intent

In support of his argument, Hogan cites *Cummings v. Curtiss*, 219 Neb. 106, 361 N.W.2d 508 (1985). In *Cummings*, a client sued his attorney, claiming the attorney had made fraudulent misrepresentations because the attorney expressed reservations about a will executed on a printed will form and urged the client, one of the beneficiaries under the will, to accept a settlement offer urged by relatives of the testator. After accepting the offer, the client learned of the statute on holographic wills and

sued his attorney for falsely representing that the will was invalid. The district court granted summary judgment in favor of the attorney, and the client appealed.

In addressing whether handwriting on the original will constituted a valid holographic will, this court stated that only the portion of the will actually in the handwriting of the testator is to be considered; all other language is to be disregarded. This court further stated that the important determination is whether "'the handwritten portion clearly express[es] a *testamentary* intent.'" *Id.* at 109, 361 N.W.2d at 510. The handwritten portion of the document read:

> "Nebraska
> Pierce
> Ren J Kroupa
> For helping me and taking care of me
> Frank Kroupa Jr. and Bobby Cummings
> w.r.o.s.
> the court
> who the courts decides [sic]
> Pierce Pierce
> Nebraska 29 Jan 79
> Witness is chief of police Gordon Halbmayer [sic]
> who i gave this to keep safe for me.
> Ren J Kroupa."

Id. at 109, 361 N.W.2d at 510-511.

In affirming the decision of the district court, the *Cummings* court stated that "[b]ased on this language alone, it is doubtful that the requisite testamentary intent was demonstrated and that all material portions of a will were present." *Id.* at 109, 361 N.W.2d at 511.

In the instant case, the Court of Appeals found the facts to be distinguishable from *Cummings* because the present case involves an original, validly executed will, not a printed will form. The Court of Appeals further found that by crossing out "Jane F. Jones" and writing "her share to be divided to between 5 daughters" on the photocopy, Foxley clearly demonstrated her testamentary intent. While we recognize that the present case involves an original, validly executed will as opposed to the printed will form at issue in *Cummings*, the statutory requirements for a holographic instrument remain the same.

Therefore, in order to determine if the instrument is a valid holograph, we must apply the rule in *Cummings* to the facts of the instant case to determine whether the handwritten portion of the photocopy of the will clearly expresses testamentary intent. In the present case, the only provisions in Foxley's handwriting are "her share to be divided to between 5 daughters. E.F. 1-3-94" and "5." It is not clear which share is to be divided among which daughters without reference to the typewritten words. Therefore, it is clear that the handwritten words, standing alone, do not evidence a clear testamentary intent. We note, however, that the decedent's handwritten initials, as opposed to her whole name, constitute a signature within the meaning of § 30-2328. See *Estate of Morris*, 268 Cal. App. 2d 638, 74 Cal. Rptr. 32 (1969); *Kehr Will*, 373 Pa. 473, 95 A.2d 647 (1953).

Although one might be sympathetic toward giving effect to the decedent's perceived testamentary intent, the Legislature has chosen to require that testamentary intent be expressed in certain ways before an instrument is entitled to be probated as a will. Unfortunately for the decedent, the instrument in this case fails. See *Matter of Estate of Muder*, 159 Ariz. 173, 765 P.2d 997 (1988). In this case, the testimony of Foxley's attorney and her daughter Wells indicates that when Foxley changed the terms on the copy of her will, she was at least considering, if not actually intending, to write Hogan out of her will. We cannot conclude, however, that she had come to a final decision when writing on the copy of the will. We must remember that both the original and the copy of the will were found together in the den of Foxley's home, and an argument can be made that she was simply making notes on the copy of the will as to possible changes and had not, at the time of making those notes, made a final decision as to Hogan. If she was making a final decision, a plausible argument can be made that she would have made those changes on the original. If we make an exception in this case to the rule that holographic words, standing alone, have to demonstrate a clear testamentary intent, where do we stop? To weaken the rule would be to invite mischief or outright fraud by overreaching heirs, friends, or other potential beneficiaries taking advantage of testators in their most vulnerable moments, such as advanced age or right after an argument with one of the

children or grandchildren. If one has made a final decision to write an heir out of his or her will, this must be done in such a way that the expression of this intention complies with the statute. This is not the case with regard to the copy of Foxley's will, and we therefore find that the Court of Appeals erred in determining that the handwritten language on the copy of Foxley's will demonstrated the requisite testamentary intent.

MATERIAL PROVISIONS

We first note that material provisions are defined as those provisions which express donative and testamentary intent. *Matter of Estate of Krueger*, 529 N.W.2d 151 (N.D. 1995). See *Matter of Estate of Muder, supra.* In support of his argument that the material portions of the will were not in Foxley's handwriting, Hogan cites *In re Estate of Sola*, 225 Cal. App. 3d 241, 275 Cal. Rptr. 98 (1990). In *In re Estate of Sola*, the testator executed a valid will, of which he had a copy. He later scratched out certain names on the photocopy of the will and wrote in the name of another one of his brothers. The court rejected the validity of the change, stating that "[w]here the handwriting in itself lacks testamentary intent and substance and has meaning only in relationship to the typewritten words it relates to, there is no complete testamentary document that can be deemed a holographic will." *Id.* at 247, 275 Cal Rptr. at 101.

Hogan argues that Foxley's additional handwritten words cannot be understood on their own without reference to the original will's typewritten words and that therefore, the handwritten document fails to qualify as a holographic codicil. We agree. When read on their own without reference to the original will, Foxley's words cannot be understood. The statement "her share to be divided to between 5 daughters" does not express testamentary intent and is not clear without a handwritten reference to which daughter is to be excluded. Similarly, the line through "Jane F. Jones" is not sufficient because that line has no meaning unless read in conjunction with the typewritten names. Without the requisite testamentary intent, Foxley's handwritten words cannot be deemed material provisions. Therefore, we find that the record does not support the Court of Appeals' judgment finding that the material provisions of the alleged codicil were in Foxley's handwriting.

INCORPORATION BY REFERENCE

Neb. Rev. Stat. § 30-2335 (Reissue 1995) provides that "[a]ny writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." Having determined that the writings and obliterations on the photocopy of Foxley's will do not constitute a valid holographic codicil to Foxley's will, we hold that they cannot be incorporated into a validly executed will. We therefore find the county court erred in determining that Foxley made an incorporation by reference.

CONCLUSION

Having determined that the handwritten changes on the photocopy of Foxley's will do not constitute a valid holographic codicil and may not be incorporated into her will by reference, we reverse.

REVERSED.

STATE OF NEBRASKA, APPELLEE,
v. EVERETT D. JONES, APPELLANT.
575 N.W.2d 156

Filed March 13, 1998. No. S-96-889.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
3. **Postconviction.** A court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.

4. **Postconviction: Appeal and Error.** From a procedural standpoint, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
6. **Indictments and Informations: Oaths and Affirmations.** To meet the requirement that an information shall be verified by the oath of the county attorney, it is sufficient if it appears, no matter in what form, that the truth of the charge or charges contained in the information are confirmed and substantiated by the oath of the county attorney.
7. **Effectiveness of Counsel: Proof.** The standard for determining the propriety of a defendant's claim that his counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area.
8. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
9. **Postconviction.** The Nebraska Postconviction Act requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.
10. **Sentences: Evidence.** A trial court has broad discretion as to the source and type of evidence and information it may use in determining the kind and extent of punishment to be imposed.

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

Mark E. Ford for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Everett D. Jones appeals from the district court's dismissal without an evidentiary hearing of his petition for postconviction relief. We affirm.

SCOPE OF REVIEW

A criminal defendant requesting postconviction relief has the burden of establishing a basis for such relief, and the findings

of the district court will not be disturbed unless they are clearly erroneous. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

FACTS

Following a plea of nolo contendere, Jones was convicted of assault in the first degree for the multiple stabbing of a male victim after Jones found the victim with a woman with whom Jones believed he was romantically involved. Jones was sentenced to imprisonment for a period of not less than 6⅔ nor more than 20 years. Jones appealed to the Nebraska Court of Appeals, which summarily affirmed. See *State v. Jones*, 1 Neb. App. xxx (case No. A-92-139, July 6, 1992). The sole issue before the Court of Appeals was the excessiveness of Jones' sentence.

On January 2, 1996, Jones filed a petition for postconviction relief. The district court dismissed the petition without an evidentiary hearing, concluding that Jones had failed to allege facts which, if proved, established a denial or violation of his constitutional rights that would cause the judgment against him to be void or voidable. Jones timely appealed from the district court's dismissal of his petition for postconviction relief.

ASSIGNMENTS OF ERROR

Jones assigns as error the district court's denial of an evidentiary hearing and the dismissal of his petition for postconviction relief.

ANALYSIS

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Boppre, supra*. However, a court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant,

or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable. *Id.* From a procedural standpoint, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995).

Jones asserts that the district court erred in failing to grant him an evidentiary hearing at which he might show that his Sixth Amendment right to effective assistance of counsel has been violated. To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Boppre, supra.*

Jones first claims that his right to effective assistance of counsel was violated because trial counsel failed to file a motion to dismiss the allegedly unverified information. Neb. Rev. Stat. § 29-1603 (Reissue 1995) provides: "All informations shall be verified by the oath of the county attorney, complainant, or some other person . . . ."

The information in the case at bar provided as follows:

> DAVID W. STEMPSON, Deputy Lancaster County Attorney by authority of the State of Nebraska, comes here in person into Court at this, the July Term, A.D. 1991-92, thereof, and for the State of Nebraska gives the Court to understand and be informed that EVERETT D. JONES on or about June 2, 1991, in the County of Lancaster, and the State, aforesaid, contrary to the form of the statutes in such cases made and provided then and there being, did intentionally or knowingly cause serious bodily injury to MYLES DAVIS.
>
> THE STATE OF NEBRASKA, Plaintiff

GARY E. LACEY
LANCASTER COUNTY ATTORNEY
/s/_____
DAVID W. STEMPSON
DEPUTY LANCASTER COUNTY
ATTORNEY

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of July, 1991.

/s/_____
DEPUTY
CLERK OF THE DISTRICT COURT

Jones appears to argue that the information was deficient because it did not contain the language approved by this court in *Nichols v. State*, 109 Neb. 335, 191 N.W. 333 (1922). In *Nichols*, the information approved of stated in part: " 'Allen E. Warren, being duly sworn according to law, says the facts stated in his foregoing information are true as he verily believes.' " 109 Neb. at 343, 191 N.W. at 335.

We addressed this issue in *Marshall v. State*, 116 Neb. 45, 215 N.W. 564 (1927). Before arraignment, Marshall's attorney moved to quash the information because, inter alia, it was not verified as required by law, and the motion was overruled. The information was in the form of an affidavit. Immediately following the title of the case and preceding the information appeared the following: " 'State of Nebraska, County of Sarpy, ss.' " *Id.* at 47, 215 N.W. at 566. In the body of the information, forgery was charged in direct and positive terms. The county attorney's signature appeared at the end of the information along with the following: " 'Subscribed and sworn to before me this 9th day of October, 1926, Eliza M. Wilson, Clerk of the District court, by C. S. Marth, Deputy.' " *Id.* at 48, 215 N.W. at 566. To this was attached the seal of the district court.

Marshall argued that because no formal verification in the form of a statement or certificate was appended to the information stating that the facts therein contained were true, or true as the county attorney verily believed, the information was not verified by oath of the county attorney as required by law. Comp. Stat. § 10088 (1922), which was in effect at the time, required that an information " 'shall be verified by the oath of

the county attorney, complainant, or some other person.'" *Marshall*, 116 Neb. at 48, 215 N.W. at 566. This language is identical to § 29-1603, which is applicable to the case at bar.

We held in *Marshall* that to meet the requirement that an information shall be verified by the oath of the county attorney, it is sufficient if it appears, no matter in what form, that the truth of the charge or charges contained in the information are confirmed and substantiated by the oath of the county attorney. Because the county attorney in *Marshall* subscribed to the information and it was sworn thereto by an officer qualified to administer the oath, we held that it appeared in the information that he made the charge on his oath. We further held that the legal import was that the county attorney made an oath that the charges therein were true and that this was sufficient to meet the requirements of the statute even though no formal verification was appended thereto. While we noted that the form used was not recommended as a model and that a form meeting all of the requirements was set forth in *Nichols*, we explained that any form could be used that met the requirements of the statute.

Here, we conclude that the information, having been subscribed and sworn to before the deputy clerk of the district court and having the seal attached, meets the requirements of § 29-1603. Therefore, Jones' first assignment of error has no merit.

Assuming arguendo that the information did not meet the requirements of § 29-1603, objections to verification are waived if not made before arraignment and plea. See *Emery v. State*, 78 Neb. 547, 111 N.W. 374 (1907). The petition for postconviction relief filed by Jones fails to show how he was prejudiced by trial counsel's failure to object to the information not being verified. If counsel objected to the information, upon being advised that the information had not been verified, the county attorney could have filed a new information immediately and, therefore, cured any defect. Jones has not alleged that he was prejudiced in any manner by counsel's failure to object to the information.

Next, Jones argues that his right to effective assistance of counsel was violated because trial counsel failed to independently investigate the circumstances of his prior conviction and argue the invalidity of such conviction as a mitigating factor

during the sentencing hearing. Jones had a prior conviction for second degree murder which was entered June 8, 1984. He served his time and was discharged from the sentence imposed on that conviction. Jones, however, asserts that his conviction was void because the jury was not instructed on the element of malice as required by *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

The standard for determining the propriety of a defendant's claim that his counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id.* The second prong of an ineffective assistance of counsel claim requires that the defendant show that any deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

A challenge to the validity of Jones' conviction for second degree murder would be a collateral attack on the judgment. The Nebraska Postconviction Act requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence. *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993); *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990). Without reaching the validity of Jones' conviction for second degree murder, it is obvious from the record that at all times relevant, Jones was not in actual custody under a Nebraska sentence. Jones would not be able to collaterally attack the conviction for second degree murder. Jones has therefore failed to show that he was prejudiced by counsel's failure to investigate the circumstances of Jones' prior conviction and to argue the invalidity of such conviction as a mitigating factor during the sentencing hearing.

It is undisputed that the trial court could take notice of Jones' prior criminal act. In a psychological assessment presented as part of the presentence investigation, Jones admitted that in

1983, he stabbed and killed a man when he found that man with his girl friend. A trial court has broad discretion as to the source and type of evidence and information it may use in determining the kind and extent of punishment to be imposed. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). See *State v. Guida*, 230 Neb. 961, 434 N.W.2d 522 (1989). The court may consider reports of probation officers, police reports, affidavits, and other information almost without limitation as long as it is relevant to the issue of sentencing. See *id.* Clearly, Jones' admission that he had previously stabbed and killed a man was relevant to the court's sentencing decision. Therefore, Jones' second assignment of error is also without merit.

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED.

CHRISTINE L. RICE, FORMERLY KNOWN AS CHRISTINE L. HITZEMANN, APPELLANT, V. GEORGE M. ADAM, M.D., AND MARY LANNING MEMORIAL HOSPITAL, APPELLEES.

575 N.W. 2d 399

Filed March 13, 1998. No. S-96-899.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Pleadings.** The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
3. **Actions: Parties: Standing.** In determining if a party is the real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
4. ____: ____: ____. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court.
6. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.

7. **Summary Judgment: Jurisdiction.** A summary judgment motion based on jurisdictional grounds is treated as and serves the same purpose as a demurrer on jurisdictional grounds.
8. **Pleadings: Summary Judgment: Jurisdiction: Demurrer.** For purposes of applying the rule regarding pleadings, a summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect.
9. **Summary Judgment: Jurisdiction: Pleadings.** After a summary judgment motion on jurisdictional grounds has been granted, but where there is a reasonable possibility that the jurisdictional defect may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.
10. **Demurrer: Pleadings.** After a demurrer is sustained, leave to amend is to be given, unless it is clear that no reasonable possibility exists that the plaintiff will be able to correct the deficiency.

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

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom, Stehlik & Thayer, for appellant.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellee Adam.

Robert W. Wagoner for appellee Hospital.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Prior to commencing this malpractice action against the defendants, George M. Adam, M.D., and Mary Lanning Memorial Hospital, the plaintiff, Christine L. Rice, formerly known as Christine L. Hitzemann, filed a chapter 7 bankruptcy which was still pending when Hitzemann commenced this action. The district court sustained the defendants' motion for summary judgment, finding that Hitzemann was not the real party in interest.

SCOPE OF REVIEW

The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an

appellate court to reach its conclusions independent from a trial court. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

FACTS

The plaintiff-appellant in this case is Christine L. Rice, who was formerly known as Christine L. Hitzemann. Because the briefs filed herein refer to the plaintiff as Hitzemann, we shall do so also. Hitzemann brought this malpractice action against the defendants-appellees, George M. Adam, M.D., and Mary Lanning Memorial Hospital. On May 5, 1991, Adam performed a diagnostic laparoscopy on Hitzemann at the hospital. Allegedly, Adam was also to have performed a tubal sterilization, but he did not perform the procedure because the hospital did not inform him that Hitzemann had given her consent. After Hitzemann was discharged, Adam allegedly made attempts to inform her of the omission, but he was unable to communicate this information until June 27. On July 24, it was determined that Hitzemann was pregnant and that the date of conception was early to mid-June 1991. On April 10, 1992, Hitzemann filed for bankruptcy. Her lawsuit was filed against the defendants on July 1.

This is the second time that this matter has appeared before us. Hitzemann's original petition alleged that the defendants negligently failed to perform a tubal sterilization procedure she had authorized during her hospitalization in May 1991. The defendants' demurrers to the original petition were sustained on the basis that Hitzemann had failed to properly allege a cause of action for medical malpractice and had failed to properly allege a cause of action for breach of contract.

On appeal, we reversed the judgment and remanded the cause for further proceedings, stating that although the district court had correctly sustained the demurrers, it had erred in dismissing the action without leave to amend, because "it may be possible for the plaintiff to state a cause of action for medical malpractice against the defendants in an amended petition." *Hitzemann*

v. Adam, 246 Neb. 201, 206, 518 N.W.2d 102, 106 (1994). We concluded that damages for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure, if proved, could be recovered.

Hitzemann subsequently filed a third amended petition. In response to this petition, the defendants denied they were negligent and alleged that Hitzemann was contributorily negligent, more than slight in degree, so that her claim was barred as a matter of law.

During discovery, the defendants learned that Hitzemann had filed a chapter 7 bankruptcy on April 10, 1992. Schedule B, which was filed with Hitzemann's petition for bankruptcy, required that she identify "[o]ther contingent and unliquidated claims of every nature," but Hitzemann's claim against the defendants was not listed. The bankruptcy was discharged on July 30.

After learning of the bankruptcy, the defendants moved for summary judgment, and the district court concluded that upon Hitzemann's filing for bankruptcy, all of Hitzemann's assets became the property of the bankruptcy estate. The district court entered summary judgment in favor of the defendants because it concluded that Hitzemann was not the real party in interest and dismissed the action without prejudice so that the real party in interest could file suit.

Hitzemann filed a timely appeal with the Nebraska Court of Appeals, and we moved this case to our docket pursuant to our authority to regulate the caseloads of the Court of Appeals and this court.

ASSIGNMENTS OF ERROR

In summary, Hitzemann claims the district court erred (1) in finding that this lawsuit should have been listed as an asset on her bankruptcy schedule, (2) in addressing the real-party-in-interest issue on a motion for summary judgment instead of a demurrer, and (3) in not providing Hitzemann with an opportunity to amend her petition to reflect the real party in interest.

ANALYSIS

We first address the issue of Hitzemann's standing to commence this action against the defendants. The activities which gave rise to Hitzemann's alleged cause of action occurred on May 5, 1991. Hitzemann filed for chapter 7 bankruptcy on April 10, 1992, and subsequently filed this lawsuit on July 1.

In *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992), we noted that the plaintiff's negligence claim against an attorney which accrued prior to the client's bankruptcy filing became the property of the trustee of the bankruptcy estate. We held that the district court had correctly concluded that once the plaintiff filed bankruptcy, she lacked standing to bring the lawsuit in her own name and on her own behalf.

Hitzemann argues that her potential cause of action against the defendants was not an asset of the bankruptcy estate and, therefore, did not need to be listed on her bankruptcy schedule. She asserts that a debtor need list on the debtor's schedule only assets which are certain at the time the bankruptcy is filed and that if there is a contingent future interest or expectancy, the debtor need file an amendment to the schedule only if the contingency vests within 180 days after the filing of the original bankruptcy petition. She argues that

> "[a] special rule applies to contingent future interests and mere expectancies. Under the 1938 amendment of the [Bankruptcy Act of 1898], Section 70(a) and the separate paragraph following Section 70a(8) provided that such interest or estate shall pass to the trustee if it vests in the debtor within six months after the filing of a petition in bankruptcy. . . ."

Brief for appellant at 12. In summary, she argues that because wrongful pregnancy was an issue of first impression in Nebraska at the time she filed bankruptcy, she was not required to list the potential lawsuit against the defendants as an asset on her bankruptcy schedule.

We find Hitzemann's claim that her malpractice action was outside the reach of the bankruptcy statutes because she sued under a novel legal theory to be without merit. Although it is true that this court had never decided a wrongful pregnancy action prior to this action, Hitzemann's claim against the defen-

dants is simply one for medical malpractice. It is undisputed that the alleged negligence occurred on May 5, 1991, the date of Hitzemann's surgery. Accordingly, Hitzemann's cause of action accrued on this date; she had a recognizable claim on the day she filed bankruptcy, and she should have listed her claim on the bankruptcy schedule.

Hitzemann next asserts that the district court erred in finding that she was not the real party in interest and in sustaining the defendants' motion for summary judgment on these grounds. Neb. Rev. Stat. § 25-301 (Reissue 1995) provides that, with an exception not involved here, every action must be prosecuted in the name of the real party in interest. In determining if a party is the real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994). The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). It was established in *Pappas v. Sommer, supra*, that once a party files bankruptcy, the trustee of the bankruptcy estate becomes the only party with standing to bring pending or accrued suits. Consequently, the district court was correct to grant summary judgment on these facts, because Hitzemann filed bankruptcy prior to commencing her suit against the defendants and, therefore, was no longer the real party in interest.

Next, Hitzemann argues that summary judgment was improperly granted because lack of real party in interest is properly raised by demurrer. Under the provisions of Neb. Rev. Stat. § 25-806 (Reissue 1995), a defendant may demur to the petition only when certain matters appear on the face of the petition. *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997). In this case, Hitzemann did not inform the court that she had filed bankruptcy, and the defendants did not allege by answer that she lacked standing to bring suit. Thus, a real-party-in-interest or standing defect could not have been raised by demurrer because the defect was not apparent on the pleadings, and a

motion for summary judgment could be used to bring the standing issue to the attention of the district court. See *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984).

The defendants did not waive the real-party-in-interest defect by failure to raise the defect by answer. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. See, *In re Interest of Archie C.*, 250 Neb. 123, 547 N.W.2d 913 (1996); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *Bronner v. Exchange State Bank*, 455 N.W.2d 289 (Iowa App. 1990). Accordingly, lack of standing to sue is a jurisdictional defect that is not waived by the failure to plead.

Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court. *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

In *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993), the plaintiff filed a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989). The department demurred, alleging that the district court had no subject matter jurisdiction and that Concerned Citizens of Kimball County, Inc. (Concerned Citizens), was not a proper plaintiff. Another defendant, Waste-Tech Services, Inc., moved for summary judgment. The district court sustained both the demurrer and the motion for summary judgment and dismissed the action with prejudice because, inter alia, Concerned Citizens had no standing. We held that the district court correctly sustained the demurrer because of lack of subject matter jurisdiction. In affirming the district court's grant of summary judgment, we stated that "a summary judgment motion based on jurisdictional grounds is treated as and serves

the same purpose as a demurrer on jurisdictional grounds." *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. at 160-61, 505 N.W.2d at 661. See, also, *Nelson v. Sioux City Boat Club, supra* (absence of subject matter jurisdiction may be raised either by demurrer or by summary judgment motion).

However, we reversed the district court's dismissal of the petition. We held that for purposes of applying the rule regarding pleadings, a summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect. Consequently, after a summary judgment motion on jurisdictional grounds has been granted, but where there is a reasonable possibility that the jurisdictional defect may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion. We concluded that Concerned Citizens could amend its petition to cure the defect or defects therein and state a cause of action and that the district court had abused its discretion in dismissing Concerned Citizens' petition with prejudice.

Our decision in *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997), that the plaintiff was not entitled to amend his complaint in an effort to state a cause of action does not conflict with the result we reach in the case at bar. In *Hynes*, the defendant alleged in his answer that the plaintiff had failed to state a cause of action, but the defendant did not file a demurrer raising the issue. The case proceeded to trial, and the court determined that the plaintiff did not have a cause of action. We held that when no demurrer has been filed and the matter proceeds to trial on the merits under an objection in an answer that a cause of action has not been stated, and it is determined that the objection should have been sustained, the party against whom the objection was directed shall not be granted leave to amend. *Id.*

In denying the plaintiff in *Hynes* the right to amend, we distinguished between a demurrer to a failure to state a cause of action and a trial on the merits which ultimately results in a finding that the petition fails to state a cause of action. We noted that where a demurrer is sustained, the cause of action continues to pend until dismissed and no adjudication of the merits occurs. *Id.* See, also, *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995). Therefore, the party against whom a

demurrer is directed must be granted leave to amend, unless it is clear that no reasonable possibility exists that the amendment will correct the defect. *Hynes v. Hogan, supra.* See, also, *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). In contrast, once an action proceeds to trial, one party has sustained the burden and expense of trial and has succeeded in securing a judgment on the facts at issue. That party has a right to keep the benefit of the judgment unless there is prejudicial error in the proceedings in which the judgment was secured. *Hynes v. Hogan, supra.* In the case at bar, the district court sustained a summary judgment motion on jurisdictional grounds. Thus, *Hynes* is readily distinguishable from the facts of this case and does not conflict with our holding.

Pursuant to our decision in *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993), we treat the summary judgment motion filed by the defendants as a demurrer based on jurisdictional grounds. After a demurrer is sustained, leave to amend is to be given, unless it is clear that no reasonable possibility exists that the plaintiff will be able to correct the deficiency. *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998). Denying Hitzemann the opportunity to replead under these circumstances would be an abuse of discretion.

Without speculation as to whether Hitzemann will be permitted to reopen her bankruptcy estate, we conclude that there is a reasonable possibility that the trustee could be substituted as the real party in interest. See *id.* Therefore, the district court correctly sustained the motion for summary judgment because Hitzemann was not the real party in interest, but it erred in dismissing the cause of action without giving Hitzemann the opportunity to amend the petition to substitute the real party in interest. We therefore reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., not participating.

SANDRA SCHADE, APPELLANT, V. COUNTY OF CHEYENNE, A POLITICAL SUBDIVISION, APPELLEE.

575 N.W.2d 622

Filed March 20, 1998. No. S-96-507.

1. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, where two reasonable logical inferences are available, appellate courts are obligated to draw the inference most favorable to the nonmoving party.
5. **Summary Judgment.** Summary judgment is an extreme remedy because summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Cheyenne County, JOHN D. KNAPP, Judge. Judgment of Court of Appeals affirmed.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

Sandra Schade brought an action against the County of Cheyenne for injuries Schade allegedly sustained after slipping and falling in the Cheyenne County Courthouse. The district court granted the county's motion for summary judgment, and Schade sought review by the Nebraska Court of Appeals. The Court of Appeals reversed the judgment and remanded the cause, and the county thereafter filed a petition for further review, which this court granted. Affording Schade every reasonable inference deducible from the evidence, the record discloses a genuine issue of material fact. We affirm.

On January 12, 1993, Schade slipped, fell, and injured her left wrist and thumb while walking down the hall in the Cheyenne County Courthouse. Schade filed notice of her claim pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992). When no action was taken by the county, Schade filed suit in the Cheyenne County District Court and alleged the county was negligent in allowing water to accumulate, failing to remove the accumulated water, failing to recognize the danger, and failing to warn patrons of the danger. The county denied Schade's claims and alleged she was contributorily negligent.

Following discovery, the county filed a motion for summary judgment, which the district court sustained. The court held:

> Defendant's motion for summary judgment considered and sustained, the Court concluding that the depositions and affidavits submitted clearly establish that defendant had neither actual nor constructive notice of the condition of which plaintiff complains; that such condition was not visible and apparent nor had it existed for a sufficient period of time prior to plaintiff's fall to permit defendant's employees to discover and remedy it.
>
> Further, there is no evidence that defendant failed to use reasonable care to prevent occurrences of that condition.

The issue before the Court of Appeals was whether the county had constructive notice of the dangerous condition. Schade argued summary judgment was improper because the county's maintenance worker was in the area of the accident

approximately 2 minutes before Schade fell, and he either failed to look or failed to see the water which caused Schade to slip and fall—a condition the maintenance worker characterized as easy to spot. In a memorandum opinion filed September 30, 1997, the Court of Appeals reversed the judgment and remanded the cause, reasoning that sufficient evidence existed to infer the maintenance worker was present when the dangerous condition existed, the condition was visible and apparent, but the condition was not removed. This court granted the county's petition for further review.

The county's sole argument on review is that the Court of Appeals improperly inferred the maintenance worker must have failed to look and see the water on the floor because he was in the area approximately 2 minutes before the fall occurred and saw no water on the floor. The county contends this inference improperly assumes water was, in fact, on the floor at that time and was the cause of the fall. The issue presented to this court is whether the Court of Appeals' inference that water was on the floor when the maintenance worker was in the area was a reasonable inference.

A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995).

Based on the maintenance worker's testimony, a fact finder could infer that water was easy to see, that the maintenance worker was in the area in which the accident occurred anywhere from 2 to 15 minutes prior to Schade's fall, and that the maintenance worker was in the area when the dangerous condition was present. Further, a fact finder could also infer that if the

maintenance worker had looked, the water would have been visible, apparent, discovered, and remedied.

Witnesses testified to seeing the maintenance worker in the area a few minutes before Schade fell. Shade testified in her deposition that she saw the maintenance worker in the area of the accident approximately 10 to 15 minutes before she fell. Wayne and Sheila Gray offered affidavit testimony that they saw the maintenance worker "walk through the area in which Sandra Schade fell just a couple of minutes prior to Sandra Schade walking through the area."

Schade testified in her deposition that after she fell she noticed water on the floor and her hand was wet; yet, Schade testified she did not notice a puddle of water on the floor prior to the fall. Thomas Brown testified in his deposition that after Schade's fall, he located a 6 to 8 inch puddle of water on the floor only after kneeling down and looking at the floor from an angle. Brown also failed to see a puddle of water before Schade fell.

The conflicting inferences are that the water existed at the same time the maintenance worker was in the area and he should have discovered and remedied a condition he characterized as easy to spot or that the water was not present at the time the maintenance worker was in the area and he could not discover and remedy the condition—that is, the water accumulated between the time the maintenance worker left the area and the time Schade slipped and fell. The question is which inference is more reasonable, and that decision is reserved for the fact finder.

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. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997). Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Blue v. Champion International Corp.*, 204 Neb. 781, 285 N.W.2d 511 (1979). In fact, summary judgment is not appropriate even where there are no conflicting evidentiary facts if the ultimate inferences to be

drawn from those facts are not clear. *Fisher v. Stuckey*, 201 Neb. 439, 267 N.W.2d 768 (1978). Where two reasonably logical inferences are available, as in the case at bar, appellate courts are obligated to draw the inference most favorable to the nonmoving party.

Disallowing Schade such an inference undermines the summary judgment standard of review. At the summary judgment stage of a lawsuit, the evidence is viewed in the light most favorable to the nonmoving party and the nonmoving party is afforded the benefit of all reasonable inferences. *Battle Creek State Bank v. Preusker, supra.* Not to afford such inferences to the nonmoving party effectively disallows that party a right to proceed to trial. As this court has stated, summary judgment is an extreme remedy because summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996). Moreover, overruling a motion for summary judgment effectuates no real harm to the moving party.

For the reasons stated above, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

BARBARA L. WHEELER, APPELLEE, V.
DARREL BAGLEY, APPELLANT.
575 N.W.2d 616

Filed March 20, 1998. No. S-96-662.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
4. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
5. **Motions for New Trial: Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude rais-

ing an objection thereafter. However, that does not prevent the trial judge from correcting his or her instruction error by sustaining a motion for a new trial.

6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute.
7. **Actions: Negligence: Jury Instructions: Appeal and Error.** In those cases where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense, it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

Appeal from the District Court for Garden County: JOHN D. KNAPP, Judge. Affirmed and remanded for a new trial.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

Barbara L. Wheeler brought a negligence action against Darrel Bagley for injuries she sustained while working as a ranch employee for Bagley. After a trial, the jury returned a verdict that found Wheeler to be 49 percent negligent and Bagley to be 51 percent negligent with respect to Wheeler's injuries, and valued Wheeler's damages at $40,000. After the trial court entered judgment in favor of Wheeler, Wheeler filed a motion for new trial on the basis that the jury had not been instructed as to the effect of the allocation of negligence, as required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). The trial court sustained Wheeler's motion and ordered a new trial. Bagley timely appealed. Because we determine that the jury was not properly instructed on the effect of the allocation of negligence, as required by § 25-21,185.09, we affirm the order and remand the cause to the district court for a new trial.

FACTUAL BACKGROUND

Wheeler was injured on November 15, 1994, when she attempted to tag a cow while working as a ranch hand for

Bagley. Wheeler brought a negligence action against Bagley, alleging that her injuries were caused because Bagley failed to (1) have the cow properly restrained, (2) provide proper equipment to restrain the cow, and (3) provide the proper number of employees to properly restrain the cow. Bagley, in turn, claimed Wheeler was contributorily negligent by (1) failing to maintain a proper lookout, (2) placing her head in close proximity to the head of the cow, and (3) failing to make certain that the head of the cow was restrained before placing her head in a position such that she could be struck by the cow if the cow moved its head.

At trial, an instruction conference was held before the case was submitted to the jury, and neither party had any objections to the instructions adopted by the court which are relevant to this appeal. The trial court's verdict form No. 3, set forth below, which was to be used by the jury if it found that both the plaintiff and the defendant had met their respective burdens of proof regarding negligence and contributory negligence, was taken from NJI2d Civ. 5.05.

The jury returned a verdict in favor of Wheeler on verdict form No. 3, completed as follows:

VERDICT FORM NO. 3

We the jury find that both the plaintiff and the defendant have met their burdens of proof.

LIST OF PERCENTAGES:

What percent of the negligence was Barbara Wheeler's?
49%

What percent of the negligence was Darrel Bagley's?
51%

The total negligence must add up to 100%

TOTAL = 100%

If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court.

If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, using Instruction No. 10, you must determine the amount of damage suffered by plaintiff, and enter that figure.

Plaintiff's damages, figured pursuant to Instruction No. 10, are $40,000.

DATED: 4-9-96[.]

The verdict form is reproduced in the trial court's journal entry dated April 9, 1996, and filed on April 19, which journalizes the trial proceedings and concludes: "The court accepted the verdict and rendered judgment thereon." The journal entry does not state the amount of the judgment that was rendered as a result of the jury verdict.

After the trial, Wheeler filed a motion seeking a new trial on the basis that the court had failed to instruct the jury on the effects of its allocation of negligence, as required by § 25-21,185.09. A hearing on the motion for new trial was held. At the hearing, Wheeler's attorney argued that the jury verdict form should be interpreted to mean that the verdict was $40,000. Bagley's attorney, on the other hand, argued that the verdict form should be interpreted to mean that Wheeler's total damages were $40,000 and that amount should be reduced by the percentage of her negligence, leaving a verdict in the amount of $20,400. The trial court declined to state what it believed the verdict amount to be and, instead, granted the motion for new trial because the jury was not instructed as required by the statute. The trial judge candidly noted that this was the court's and the plaintiff's attorney's first case under the new allocation statute. The trial court concluded that the NJI2d Civ. 5.05 verdict form was not adequate to fulfill the statutory requirement and that therefore, it had no choice but to sustain the motion for new trial. Bagley timely appealed.

ASSIGNMENT OF ERROR

Bagley asserts that the trial court erred in determining that, under the facts and circumstances of this case, Wheeler was entitled to a new trial on the basis that the trial court failed to properly instruct the jury with respect to the effects of its allocation of negligence.

STANDARD OF REVIEW

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Abboud v. Papio-Missouri River NRD*,

253 Neb. 514, 571 N.W.2d 302 (1997); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

When reviewing a question of law, however, an appellate court reaches a conclusion independent of the lower court's ruling. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998); *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998).

ANALYSIS

It is well established that a trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Moreover, it is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996).

Bagley first contends that because Wheeler did not object to the court's jury instructions at the time of the instruction conference, she cannot raise an error in the instructions on appeal. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. However, that does not prevent the trial judge from correcting his or her instruction error by sustaining a motion for a new trial. *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

The trial court found that its instructions to the jury did not satisfy the requirements of § 25-21,185.09. Section 25-21,185.09 applies to all cases, including the instant case, where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense. The statute states:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or

> greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. *The jury shall be instructed on the effects of the allocation of negligence.*

(Emphasis supplied.) § 25-21,185.09.

The statute, which was enacted as part of the comparative negligence statutory scheme in 1992, mandates that juries that have been instructed on contributory negligence as a defense must also be instructed on the ultimate effect of their allocation of negligence to each party. Some background is helpful to place into context the legislative mandate of § 25-21,185.09 to instruct juries "on the effects of the allocation of negligence."

In contrast to the requirement in § 25-21,185.09 that the jury be informed of the effect of its allocation of negligence in contributory negligence cases, initially some courts in comparative negligence states prohibited the jury from having such information. See, e.g., *McCourtie v. United States Steel Corp.*, 253 Minn. 501, 93 N.W.2d 552 (1958); *Grasso v. Motor Freight Lines*, 125 Tex. 154, 81 S.W.2d 482 (1935); *Coats vs. Town of Stanton*, 90 Wis. 130, 62 N.W. 619 (1895). The so-called blindfold rule adopted by these early courts was based on the belief that because the jury's role is to act as the fact finder, it should not have an interest in determining how the law is applied to the facts that are found. A jury informed of the effect of its factfinding, it was believed, might try to manipulate the allocation of negligence in order to achieve what it perceived to be a more desirable result. See *Roman v. Mitchell*, 82 N.J. 336, 413 A.2d 322 (1980).

There has been, however, a strong, if not overwhelming, recent trend away from the blindfold rule in comparative negligence states and toward a requirement that juries be fully informed as to the effects of their allocation of negligence through an "ultimate outcome charge." The requirement of an ultimate outcome charge has been variously imposed by legislative action, court rule, and judicial decision. See, e.g., *Loup-Miller v. Brauer & Ass'n*, 40 Colo. App. 67, 572 P.2d 845 (1977) (legislative amendment of statute); *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973) (court rule); *Roman v. Mitchell, supra* (judicial decision). In the

jurisdictions which have rejected the blindfold rule, there is a recognition that despite attempts to keep the jury "in the dark," some jurors will guess about the effect of the law, and there is, therefore, a risk that decisions will be shaped by misimpressions of the law. See *Kaeo v. Davis*, 68 Haw. 447, 719 P.2d 387 (1986). Not informing the jury about the effects of its allocation of negligence "is likely to cause an unjust result and produce a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of [the] law." *Seppi v. Betty*, 99 Idaho 186, 194, 579 P.2d 683, 691 (1978).

The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence. Section 25-21,185.09 contains a clear mandate to that effect, and the courts of this state may not circumvent the ultimate outcome charge requirement, either purposely or inadvertently. Likewise, we are without power to ignore the plain language of § 25-21,185.09. It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

With the foregoing in mind, we now consider Bagley's assignment of error. It is undisputed that no instruction was given regarding the effects of the allocation of negligence in the instant case. Nevertheless, Bagley contends that the instructions, taken as a whole, adequately instructed the jury as to the effects of the allocation of negligence and that neither party was prejudiced by the omission. We disagree.

It is true that the verdict form returned by the jury states that if the contributory negligence of the plaintiff is equal to or greater than the negligence of the defendant, then the jury must return a verdict for the defendant. However, the verdict form is not a substitute for a proper instruction, and, in any event, the verdict form did not adequately convey the effects of the allocation of negligence in the present case. The jury was never instructed that in the event the plaintiff was found to be less than 50-percent contributorily negligent, the damages would be

decreased in proportion to the degree of the plaintiff's contributory negligence. The proportional diminution of damages aspect of the law of contributory negligence is of equal importance to the aspect that contributory negligence equal to or greater than the negligence of the defendant will bar a plaintiff from recovering damages. As the West Virginia Supreme Court recognized in *Adkins v. Whitten*, 171 W. Va. 106, 109, 297 S.E.2d 881, 884 (1982):

> From a practical standpoint it is apparent that a jury, given the type of verdict form . . . which requires a gross damage verdict and a finding of the plaintiff's percentage of negligence, may well surmise that the plaintiff's negligence may reduce his damage award. It seems to us that a jury's deliberations should not be attended by such surmises but rather they should be openly informed as to the legal principles involved in our comparative negligence doctrine so that they may make a rational decision.

The Nebraska Legislature has made the same judgment that a jury should be fully and openly informed with respect to the effects of the allocation of negligence in every case. See § 25-21,185.09. Therefore, for those cases where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense, we hold that it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09.

Recognizing that § 25-21,185.09 does not give guidance as to the method of instruction "on the effects of the allocation of negligence" in cases where a jury finds some contributory negligence on the part of the plaintiff, we offer the following instruction to the bar and trial courts as a guideline to be utilized in single-defendant negligence cases, and adjusted as the circumstances of a particular case merit:

> If you find the plaintiff, (name), was damaged and that the plaintiff's damages were proximately caused by both the negligence of the plaintiff, (name), and the defendant, (name), then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

> If you find that both the plaintiff and the defendant were negligent and that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, then the plaintiff will not be allowed to recover.
>
> If you find that both the plaintiff and the defendant were negligent and that the negligence of the defendant was greater than the negligence of the plaintiff, then the plaintiff will be allowed to recover.
>
> If the plaintiff is allowed to recover, you will first determine the plaintiff's total damages without regard to his or her percentage or degree of negligence.
>
> If the plaintiff is allowed to recover, you will then reduce the total damages by the percentage of the plaintiff's negligence.

See, e.g., 1 Comparative Negligence Manual § 13:18 (3d ed. 1995) (quoting Colorado jury instruction No. 9:31 for use in jurisdictions where plaintiff's equal or greater negligence will defeat recovery); 3 Arthur Best, Comparative Negligence Law and Practice § 18.30(3) (1998) (quoting with approval jury instruction in *Adkins v. Whitten, supra*, for instructing jury on effect of its findings).

Furthermore, we offer the following verdict form to be utilized in single-defendant negligence cases, and adjusted as the circumstances merit, in conjunction with the instruction regarding the effects of the allocation of negligence in cases where a jury finds some contributory negligence on the part of the plaintiff:

> VERDICT FORM NO. _____
>
> We the jury find that both the plaintiff and the defendant have met their burdens of proof. We answer the questions on Verdict Form No. ____ as follows:
>
> LIST OF PERCENTAGES:
>
> What percent of the negligence was (here insert name of plaintiff)'s? ____%
>
> What percent of the negligence was (here insert name of defendant)'s? ____%
>
> The total negligence must add up to 100%. TOTAL = 100%

If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court.

If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, using Instruction No. ____, you must determine the total amount of damage suffered by the plaintiff and enter that figure below.

Plaintiff's total damages, figured pursuant to Instruction No. ____, are $_____.

Multiply the total damages, from above, by the percent of negligence attributable to the defendant to determine the amount of damages that the plaintiff may recover and enter that figure below.

Amount of damages plaintiff may recover: $_____.

DATED: _____.

Because the trial court has a duty to instruct the jury on the proper law of the case, whether specifically requested to do so by the parties or not, and because we hold that the failure to instruct a jury with respect to the effects of its allocation of negligence in accordance with § 25-21,185.09 is prejudicial error, we conclude that the trial court did not abuse its discretion in sustaining Wheeler's motion for new trial. Not only did the trial court not abuse its discretion, the trial court is to be commended for its *use of discretion* in recognizing its mistake in instructing the jury and accordingly ordering a new trial in the instant case.

Finally, Wheeler asserts in her brief that a new trial in this matter should be limited to the issue of damages. We do not agree. Wheeler admits that in her motion to the trial court she asked for a new trial, not a new trial on the issue of damages alone. Furthermore, the rationale behind requiring a jury instruction on the effects of the jury's allocation of negligence militates against a new trial on damages only. The statute requires that the jury be fully informed of the impact that its allocation of negligence will have on the parties. Both the jury's finding of liability and the allocation of negligence are the targets of the instruction required under § 25-21,185.09; thus, the jury should be fully aware of the ramifications of its allocation of negligence so that it may make a careful and considered

determination regarding the apportionment of liability. It would be enigmatical to remand this cause for a new trial on damages only when the missing instruction is to be used by the jury in its determination of both liability and the attendant allocation of negligence.

CONCLUSION

Accordingly, we affirm the order of the district court and remand this cause to the district court for a new trial.

AFFIRMED AND REMANDED FOR A NEW TRIAL.

JOHN S. SWENSON, APPELLEE, V. HILDEGARDE M. SWENSON, NOW KNOWN AS HILDEGARDE M. DALE, APPELLANT.

575 N.W.2d 612

Filed March 20, 1998. No. S-96-1005.

1. **Modification of Decree: Visitation: Child Support: Appeal and Error.** Modification of a dissolution decree, child visitation, and amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Appeal and Error.** Although in conducting its de novo review of a modification of a dissolution decree an appellate court reaches a conclusion independent of the trial court, 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
4. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.

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

Rex R. Schultze and Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

Hildegarde M. Swenson appeals from the order of the district court for Douglas County, Nebraska, modifying her divorce decree which instructed her to use preferred health care providers for her minor child's needs and directed her to pay all uninsured costs connected with using a nonparticipating surgeon for her daughter's previous surgery. We, on our own motion, removed this case to our docket pursuant to our authority to regulate the dockets of the Nebraska Court of Appeals and this court. We reverse.

BACKGROUND

John S. Swenson and Hildegarde M. Swenson, now known as Hildegarde M. Dale, were divorced on February 23, 1990. Under the parties' property settlement agreement, the parties were to split equally any medical, hospitalization, and dental expenses not paid by insurance for each of the minor children of the parties. Dale initially carried the health and accident insurance covering the two minor children. Between the time of the original decree and the time that the motion for modification in this case was filed, however, the health and accident insurance for the two minor children was changed so that they were covered under a health and accident policy issued to Dale's new husband. The record does not reflect what differences, if any, there are between the coverage provided for the two minor children by Dale's health and accident policy in effect at the time of the decree and the policy now carried by her new husband. Under the new policy, there are some physicians who are considered participating physicians and some who are not. If a participating physician is used, the amount left for the parties to

pay after their insurance pays is generally less than if the physician used was a nonparticipating physician. If the physician is a nonparticipating physician, the noncovered medical expense is the difference between what the physician charges and what the insurance company pays. The decree was subsequently modified in April 1994, but this modification did not affect the insurance requirements set out in the original decree.

The parties' child Inga was 15 years old when the surgery which is at issue was performed. Inga was adopted as an infant, and the parties knew at that time that she would require major surgery to bring her jaw into alignment. The surgery Inga required involved breaking her jaw and performing a chin adjustment. Inga had been an orthodontic patient of Dr. Robert Glenn, who recommended Dr. David Blaha for the surgery. Dale did not know at the time of the recommendation whether Blaha was a participating physician, but she determined prior to surgery that he was not a participating physician. When Swenson learned that Blaha was not a participating physician, he objected to using Blaha for the surgery, wanting to use someone in Omaha, Nebraska, who would be a participating physician to reduce the out-of-pocket expenses of the parties. Dale chose Blaha to perform the surgery.

At the outset of trial, the parties stipulated that there were two doctors in Lincoln, Nebraska, who were qualified to perform the surgery, specifically a Dr. Wickless, who was a participating physician under Dale's health plan, and Blaha, who was a nonparticipating physician under the plan. Wickless, however, referred such cases to Blaha. Wickless informed Dale that he had to refer Inga to Blaha because of the complications in her case. Additionally, the parties stipulated that there are four oral surgeons in Omaha who are qualified to perform this type of surgery and who are participating physicians under Dale's insurance.

Dale testified that she chose to have Blaha perform the surgery for a variety of reasons, including the convenience, the ability to stay with her daughter in the hospital at night, the support she would receive from her hometown of Lincoln, the availability of Blaha for postsurgical problems, and her feeling that Blaha would do the best job for Inga and give her the best care.

The charge for the surgery related to the breaking of Inga's jaw was $4,811.40. The chin adjustment was an additional $970 and was not covered by insurance. To this total cost of $5,781.40, a $403 credit was applied by Blaha, reducing his charges to $5,378.40. The noncovered hospital charge was $189.83, making a total noncovered expense of $5,568, with each party's one-half share totaling $2,784. However, Swenson alleged in his petition that if Dale had used a participating physician, each party would be responsible for only approximately $845 of uninsured medical expense, as opposed to the approximately $2,890 each party was liable for because of the use of Blaha.

Swenson filed a petition to modify, requesting that Dale use a participating physician for medical services for Inga, and if Dale did not use participating physicians, that she should be responsible for any uninsured medical expenses. Dale filed a cross-petition placing at issue the use of a participating physician and requesting that Swenson be responsible for one-half of the oral surgery for Inga, whether or not a participating physician is used. After the petition to modify was filed but before a decision was rendered, Dale chose to go forward with the surgery.

The district court held that Swenson should pay one-half of what the uninsured costs would have been if a participating physician had been used. Dale was ordered to pay the costs connected with using a nonparticipating surgeon. The district court modified the divorce decree to provide as follows:

> That the Respondent shall use preferred care providers for any health needs for the minor child, but in the event the Respondent uses non-preferred care providers, Respondent shall be responsible for all uninsured medical expenses for the minor child other than the amount that would have been paid had a preferred care provider been used, which amount would be divided equally between the parties.

ASSIGNMENTS OF ERROR

Summarized and restated, Dale asserts that the district court erred in modifying the divorce decree because (1) Swenson did not show a material change in circumstances affecting the best

interests of the child, (2) the divorce decree was not ambiguous in its terms, and (3) said modification does not consider the best interests of the child and penalizes Dale by making her responsible for all noncovered expenses if she uses a nonparticipating provider.

STANDARD OF REVIEW

Modification of a dissolution decree, child visitation, and amount of child support are matters initially entrusted to the discretion of the trial court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

Although in conducting its de novo review of a modification of a dissolution decree an appellate court reaches a conclusion independent of the trial court, 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

Our initial inquiry in the present case is whether a material change in circumstances occurred warranting a modification of the dissolution decree. In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Smith-Helstrom v. Yonker, supra.*

Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in

income, and whether the change is temporary or permanent. *Sabatka v. Sabatka, supra.*

The record does not reflect the terms of Dale's health and accident policy at the time of the decree, nor does the record reflect whether the terms of the original policy with regard to participating and nonparticipating providers are any different from the health and accident policy now provided for Inga. Therefore there is no basis in the record for determination whether there was a material change of circumstances with regard to the health and accident insurance policy to be provided for the Inga.

CONCLUSION

Having found no material change in circumstances requiring modification of the parties' decree, we find the district court to have abused its discretion. The judgment of the district court is therefore reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE,
V. STEVEN G. HOWELL, APPELLANT.
575 N.W. 2d 861

Filed March 20, 1998. No. S-96-1295.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Constitutional Law: Double Jeopardy.** The double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.
3. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Double Jeopardy: Legislature: Intent.** In analyzing whether administrative license revocation for refusal to submit to a chemical test constitutes punishment for purposes of double jeopardy, we must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one.
5. **Statutes: Legislature: Intent.** Whether the Legislature intended a civil or criminal sanction is simply a matter of statutory construction.

6. ____: ____: ____. In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, we consider (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to an alternative purpose assigned. These factors are helpful, but certainly neither exhaustive nor dispositive, and must be considered in relation to the statute on its face. Furthermore, only the clearest proof is sufficient to negate the Legislature's intent, rendering a civil sanction criminal.
7. ____: ____: ____. The views of a later Legislature cannot control the intent of an earlier one when enacting a particular statute absent some substantial change in the statute's operation or effect.
8. **Criminal Law.** Although deterrence is an objective of criminal punishment, deterrence may serve civil as well as criminal goals.
9. **Statutes: Legislature: Intent.** In determining whether the Legislature intended a statute to establish civil or criminal proceedings, the language used by the legislators, on the floor and in the statute, is not dispositive. An appellate court must also look at the structure and design of the statute to determine the Legislature's intent. The primary consideration in this regard is the procedural mechanisms established by the Legislature to enforce the statute.
10. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Legislature: Intent.** The Legislature intended administrative license revocation to be a civil sanction.
11. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Intent.** Although there is an element of deterrence in administrative license revocation, its primary purpose is to protect the public, a rational alternative purpose, and an important nonpunitive goal.
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Double Jeopardy.** To the extent that the behavior to which administrative license revocation applies is already a crime, this fact is insufficient to render the sanction criminally punitive, particularly in a double jeopardy context.
13. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** Even though administrative license revocation serves as a deterrent, which is a traditional aim of punishment, the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve legitimate nonpunitive goals as well.
14. **Motor Vehicles: Licenses and Permits.** A driver's license is a privilege, not a right.
15. **Revocation.** Revocation of a privilege is usually not considered punishment.

Appeal from the District Court for Antelope County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Antelope County, STEPHEN P. FINN, Judge. Judgment of District Court affirmed.

Rodney W. Smith, of Smith & Doerr, P.C., for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

This case presents the question, Does the administrative revocation of a driver's license for refusal to submit to a chemical test constitute punishment, such that any subsequent criminal prosecution puts the offender twice in jeopardy? Although we addressed a similar question in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), we now readdress Nebraska's administrative license revocation statute, applying the U.S. Supreme Court's analysis from *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). We conclude that administrative license revocation for failure to submit to a chemical test does not violate double jeopardy, and thus, we affirm.

I. BACKGROUND

Appellant, Steven G. Howell, was arrested and charged with refusal to submit to a chemical test and driving under the influence. Howell's driver's license was later administratively revoked by the Department of Motor Vehicles. After Howell's driver's license was revoked, he filed a plea in bar alleging that his criminal prosecution for refusal to submit to a chemical test and for driving under the influence placed him twice in jeopardy for the same offense. The county court denied Howell's plea in bar, and Howell appealed to the district court, which affirmed.

II. ASSIGNMENT OF ERROR

Howell asserts that the district court erred in affirming the decision of the county court overruling Howell's plea in bar.

III. SCOPE OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

IV. ANALYSIS

The double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution. *State v. Hansen, supra.* Thus, our analysis will proceed under the Double Jeopardy Clause of the U.S. Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997). Howell argues that the administrative revocation of his driver's license for refusal to submit to a chemical test constituted "punishment" for double jeopardy purposes, and thus, that any further prosecution therefor constitutes multiple punishment for the same offense. The State disagrees, relying on *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982).

In *Neil*, the defendant had been criminally charged with refusal to submit to a chemical test, which charge was later dismissed. After the defendant's criminal charge was dismissed, his driver's license was administratively revoked for refusal to submit to a chemical test, which revocation arose from the same incident as the criminal charge. This court held that the subsequent administrative license revocation did not constitute double jeopardy because "[a]cquittal on a criminal charge is not a bar to a civil action by the government." *Id.* at 379, 314 N.W.2d at 276. Implicit in the holding in *Neil* is that the administrative license revocation does not constitute punishment for purposes of double jeopardy. We note, however, that *Neil* lacked any substantive analysis concerning punishment. We also note that *Neil* was decided before several significant double jeopardy decisions concerning punishment, including our decision in *State v. Hansen, supra.* Therefore, we reconsider the issue of whether administrative license revocation for refusal to submit to a chemical test is punishment, taking into account recent double jeopardy decisions.

1. APPLICABILITY OF *HANSEN*

We have previously analyzed whether the administrative revocation of a driver's license pursuant to Neb. Rev. Stat. § 60-6,206 (Reissue 1993) constitutes punishment for purposes of double jeopardy. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). In *Hansen*, the defendant's license was revoked after he submitted to a chemical test, the results of which were over the legal limit of .10 grams of alcohol per 210 liters of breath. The defendant was already facing criminal prosecution for the same incident of driving under the influence at the time his license was revoked. The defendant filed a plea in bar, asserting that the administrative license revocation constituted punishment and, thus, that the criminal prosecution was barred by double jeopardy. Relying on *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), we held that " 'under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only as a deterrent or retribution*.' " (Emphasis in original.) *State v. Hansen*, 249 Neb. at 188-89, 542 N.W.2d at 432.

After *Hansen* was decided, the U.S. Supreme Court disavowed *Halper* and reaffirmed its previously established analysis of multiple punishment under the Double Jeopardy Clause, as set out in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), supplemented by *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Since the protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution's, we conclude that the analysis in *Hansen*, which was based on that in *Halper*, no longer applies to administrative license revocation. Instead, we will apply the two-part *Kennedy-Ward* analysis, as applied in *Hudson*.

2. MULTIPLE PUNISHMENT FOR SAME OFFENSE

Thus, in analyzing whether administrative license revocation for refusal to submit to a chemical test constitutes punishment

for purposes of double jeopardy, we must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See *Hudson v. United States, supra*. Whether the Legislature intended a civil or criminal sanction is a matter of statutory construction. See *id.*

In analyzing whether the purpose or effect of the statute is so punitive as to negate the Legislature's intent, we look to the factors set forth in *Kennedy v. Mendoza-Martinez, supra*. See *Hudson v. United States, supra*. We consider:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) whether it appears excessive in relation to the alternative purpose assigned."

Hudson v. United States, 522 U.S. at 99-100, quoting *Kennedy v. Mendoza-Martinez, supra*.

These factors are "helpful," but "certainly neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. at 249, and "'must be considered in relation to the statute on its face,'" *Hudson v. United States*, 522 U.S. at 100, quoting *Kennedy v. Mendoza-Martinez, supra*. Furthermore, only the "'clearest proof'" is sufficient to negate the Legislature's intent, rendering a civil sanction criminal. See *id.* See, also, *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (indicating that such proof is "heavy burden"); *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996).

(a) Legislative Intent

We must first determine whether the Legislature intended the sanction to be civil in nature. "If so, we ordinarily defer to the legislature's stated intent." *Kansas v. Hendricks*, 521 U.S. at 361. The Legislature specifically set forth its intent concerning

administrative license revocation procedures in Neb. Rev. Stat. § 60-6,205(1) (Cum. Supp. 1996):

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

This language clearly states that the Legislature intended administrative license revocation to protect the public from the health and safety hazards posed by drivers who are under the influence of alcohol. Thus, the Legislature intended to create a civil sanction. See *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

Howell, however, correctly points out that the Legislature amended § 60-6,205's declared purpose in 1996. The views of a later Legislature cannot control the intent of an earlier one when enacting a particular statute absent some substantial change in the statute's operation or effect. See, *O'Gilvie v. United States*, 519 U.S. 79, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996); *United States v. Price*, 361 U.S. 304, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960). A comparison of preamendment § 60-6,205 with the present version indicates that little substantive change was wrought by the amendment. Thus, the 1996 Legislature's declared purpose, although it may be helpful, is not controlling.

Before the 1996 amendment, § 60-6,205 stated that the Legislature's purpose was to protect the public, at least in part, by "deter[ring] others from driving while under the influence of alcohol." § 60-6,205(1) (Reissue 1993). See *State v. Hansen, supra*. Although deterrence is an objective of criminal punishment, *Kansas v. Hendricks, supra*, deterrence "may serve civil as well as criminal goals," *United States v. Ursery*, 518 U.S. at 292. Assuming arguendo that the Legislature intended the deterrent aspect of administrative license revocation to be punitive, we concluded in *Hansen* that the statute was "designed *primarily* to serve remedial purposes [and only secondarily served] the exemplary purpose of general deterrence." (Emphasis supplied.) 249 Neb. at 191, 542 N.W.2d at 434.

In any event, the language used by the legislators, on the floor and in the statute, is not dispositive. *State v. Hansen, supra.* See, also, *Kansas v. Hendricks*, 521 U.S. at 361 (stating that "a 'civil label is not always dispositive' "). We must also look at the structure and design of the statute to determine the Legislature's intent. The primary consideration in this regard is the procedural mechanisms established by the Legislature to enforce the statute. See *United States v. Ursery, supra.* In administrative license revocation, a peace officer, not a judge, initially revokes the license, which revocation is effective automatically. § 60-6,205(2) (Cum. Supp. 1996). See, also, *Wilson v. Com.*, 23 Va. App. 443, 477 S.E.2d 765 (1996). If the offender requests a hearing, the burden of proof is on the State to make a prima facie case for revocation before the director of the Department of Motor Vehicles, who has the authority to reinstate the offender's license or uphold the revocation. *State v. Hansen, supra.* Once a prima facie case is made the burden shifts to the offender, who must disprove the prima facie case by a preponderance of the evidence to avoid revocation. *Id.* This type of summary proceeding, which shifts the burden of proof to the offender, is a distinctly civil procedure. *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *U.S. v. Imngren*, 98 F.3d 811 (4th Cir. 1996); *Ex parte Avilez*, 929 S.W.2d 677 (Tex. App. 1996). See, also, *State v. Mantich*, 249 Neb. 311, 327, 543 N.W.2d 181, 193 (1996) (stating that "this burden never shifts" in criminal case). "That such authority was conferred upon administrative agencies is prima facie evidence that [the legislative body] intended to provide for a civil sanction." *Hudson v. United States*, 522 U.S. 93, 103, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Moreover, even if the offender appeals the revocation to the district court, he or she must do so in accordance with the Administrative Procedure Act, see Neb. Rev. Stat. § 60-6,208 (Reissue 1993), which is a civil appeals procedure. See Neb. Rev. Stat. § 84-918 (Reissue 1994) (stating that "the appeal shall be taken in the manner provided by law for appeals in civil cases"). Thus, the declared purpose of § 60-6,205 and its distinctly civil procedures, both at the department level and on appeal, lead us to conclude that the Legislature intended administrative license revocation to be a civil sanction.

(b) Punitive in Purpose or Effect

Having determined that the Legislature intended administrative license revocation to be a civil sanction, we presume the sanction is civil unless Howell provides the clearest proof that the statute is so punitive in purpose or effect as to negate the Legislature's intent. See *Hudson v. United States, supra*. See, also, *United States v. Ursery, supra*. Howell has failed to do so.

As we stated in *State v. Hansen*, 249 Neb. 177, 191, 542 N.W.2d 424, 433 (1996), "Although there is an element of deterrence" in administrative license revocation, its primary purpose is to protect the public, a rational alternative purpose, and an important nonpunitive goal. See, also, *United States v. Ursery*, 518 U.S. at 291 (indicating that whether alternative purposes are assignable to the statute is "[m]ost significant"). Howell argues that our holding in *Hansen* does not apply, since persons who refuse to submit to a chemical test yet are not under the influence of alcohol are not in the class which presents the harm to be avoided. Howell overlooks § 60-6,205(6)(c)(i)(A), which requires a peace officer to have probable cause prior to revoking a driver's license for refusal to submit to a chemical test. This requirement ensures that those who are asked to submit to a chemical test are only those persons who are likely to be under the influence and, thus, serves to protect public health and safety by removing the threat such persons pose.

Howell also contends that the sanction appears excessive in relation to its purpose, a relevant *Mendoza-Martinez* factor. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Specifically, Howell notes that the period of revocation for refusing to submit to a chemical test is 1 year, whereas the period of revocation for failing the test, first offense, is 90 days. § 60-6,206(1). Howell also points out that a person who submits to and fails a chemical test may apply for an employment driving permit 30 days after the order of revocation, while a person who refused to submit to a chemical test may not. § 60-6,206(2). Finally, Howell observes that in the context of failing a chemical test, if the prosecuting attorney declines to prosecute, if the charge is dismissed, or if the person is found not guilty, that person's license may be reinstated without payment of the reinstatement fee. § 60-6,206(4).

Imposing a longer period of revocation for failure to submit to a chemical test, as opposed to taking and failing the test, does not mean that the period is excessive in relation to its purpose. Administrative license revocation serves different purposes when it is imposed for refusal to submit to a chemical test. In the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. In the context of refusal to submit to a chemical test, administrative license revocation both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose. *Ellis v. Pierce*, 230 Cal. App. 3d 1557, 282 Cal. Rptr. 93 (1991).

Howell's argument emphasizes two other *Mendoza-Martinez* factors: whether the behavior to which the administrative license revocation statutes apply is already a crime and whether the operation of the administrative license revocation statutes will promote the traditional aims of punishment. First, although the behavior to which administrative license revocation applies in this case is already a crime, see Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 1996), "[t]his fact is insufficient to render the [sanction] criminally punitive . . . particularly in the double jeopardy context," *Hudson v. United States*, 522 U.S. 93, 105, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). See, also, *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *U.S. v. Imngren*, 98 F.3d 811 (4th Cir. 1996); *Ex parte Avilez*, 929 S.W.2d 677 (Tex. App. 1996). Second, even though administrative license revocation serves as a deterrent, which is a traditional aim of punishment, *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), "the mere presence of this purpose is insufficient to render a sanction criminal," as deterrence may serve legitimate nonpunitive goals as well. *Hudson v. United States*, 522 U.S. at 105. See, also, *United States v. Ursery, supra*; *U.S. v. Imngren, supra*; *Ex parte Avilez, supra*. That administrative license revocation deters others from driving while under the influence or refusing to submit to a chemical test certainly serves the statute's stated purpose, which is nonpunitive. As the Court noted in *Hudson*, "all civil [sanctions] have some deterrent effect." 522 U.S. at 102. See, also, *United States v. Ursery*, 518 U.S. at 284 n.2 (stating that "it is hard to imagine a sanction that has no punitive aspect whatso-

ever"). What is most significant in the instant case is that any deterrent purpose served by administrative license revocation is secondary to its primary purpose of protecting the public health and safety. See *State v. Hansen, supra.*

The remaining *Mendoza-Martinez* factors indicate that administrative license revocation is civil in purpose and effect. A driver's license is a privilege, not a right. *State v. Hansen, supra.* Revocation of a privilege is usually not considered punishment, *Hudson v. United States, supra*, and administrative license revocation has not traditionally been understood to constitute punishment in this state. See *State v. Hansen, supra.* Because a privilege is granted to an individual by the State, and is not a fundamental right, revocation thereof is not an affirmative disability or restraint. See *Hudson v. United States, supra.* Finally, administrative license revocation for refusal to submit to a chemical test does not require any showing of scienter. *Ellis v. Pierce, supra*; *Ex parte Avilez, supra.*

Our application of the *Mendoza-Martinez* factors, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), persuades us that the administrative license revocation statutes are not so punitive in purpose or effect as to negate the Legislature's intent. Howell has failed to meet his burden of showing, by the clearest proof, that such is the case. Therefore, we must defer to the intent of the Legislature and conclude that administrative license revocation is a civil sanction.

V. CONCLUSION

The Supreme Court's analysis in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), supplemented by *Kennedy v. Mendoza-Martinez, supra*, as applied in *Hudson, supra*, and not its analysis in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1982, 104 L. Ed. 2d 487 (1989), controls this case. We conclude that the Legislature intended administrative license revocation to be a civil sanction and that Howell has failed to demonstrate by the clearest proof that the sanction is so punitive in purpose or effect as to negate the Legislature's intent. Thus, administrative license revocation for failure to submit to a chemical test does not violate the Double

Jeopardy Clauses of the U.S. or Nebraska Constitutions because it does not constitute multiple punishment for the same offense.

AFFIRMED.

GERRARD, J., concurring.

Although I disagreed with the majority's double jeopardy analysis in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996) (Gerrard, J., dissenting, joined by White, C.J., and Fahrnbruch, J.), I concur in the instant judgment in light of *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), in which the U.S. Supreme Court largely "disavow[ed] the method of analysis used in *United States v. Halper*," 522 U.S. at 96, and reaffirmed the traditional rule that the Double Jeopardy Clause prohibits multiple sanctions for the same offense only if those sanctions are "*criminal* punishments," (emphasis in original) *id.* at 99. I agree that *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), *rehearing denied* 448 U.S. 916, 101 S. Ct. 37, 65 L. Ed. 2d 1179, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), set forth the proper approach.

This court has never construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the federal Constitution. See *State v. Hansen, supra.* Howell contends that because he has already had his driver's license administratively revoked, to prosecute him for failure to submit to a chemical test would subject him to multiple punishment for the same offense. However, in protecting an already-punished person against further punishments, it is clear that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that "could, ' "in common parlance," ' be described as punishment," *Hudson v. United States*, 522 U.S. at 99; rather, it "protects only against the imposition of multiple *criminal* punishments for the same offense" in successive proceedings (emphasis in original), *id.* Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory interpretation. See, *Hudson v. United States, supra*; *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938).

Thus, the *first question* the court must ask is "whether the legislature, 'in establishing the penalizing mechanism, indi-

cated either expressly or impliedly a preference for one label or the other.' " *Hudson v. United States*, 522 U.S. at 99 (quoting *United States v. Ward, supra*). If the court determines that the Legislature has indicated an intention to establish a sanction that is civil, the court *must then ask* whether the statutory scheme is " 'so punitive either in purpose or effect,' " as to " 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' " 522 U.S. at 99.

With regard to the first question, I agree with the majority's analysis that the Legislature *intended* the administrative license revocation sanction to be civil in nature. A legislative body's designation of a penalty as civil is entitled to considerable deference. As such, a legislative body's designation of a penalty as civil will not be overborne unless the statute, considered on its face and without reference to the level of sanction imposed in the particular case, see, *Hudson v. United States, supra*; *Kennedy v. Mendoza-Martinez, supra*, is clearly so punitive as to "render [it] criminal despite Congress' intent to the contrary," *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 2148, 135 L. Ed. 2d 549 (1996). " '[O]nly the clearest proof' " of its punitive character "will suffice to override legislative intent and transform" a sanction labeled "civil" into one that is criminal. *Hudson v. United States*, 522 U.S. at 100 (quoting *United States v. Ward, supra*).

The test to be used in determining whether a sanction is so punitive in nature as to transform what was intended as a civil remedy into a criminal penalty, and thus subject to the Double Jeopardy Clause's bar on multiple punishments, is the same inquiry that is used in determining whether other criminal proceeding protections apply. See *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (citing *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), *rehearing denied* 448 U.S. 916, 101 S. Ct. 37, 65 L. Ed. 2d 1179; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). Thus, the majority correctly considered the seven factors set out in *Kennedy v. Mendoza-Martinez, supra*:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been

> regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

(Emphasis in original.) *Hudson v. United States*, 522 U.S. at 99-100 (quoting *Kennedy v. Mendoza-Martinez, supra*).

This seven-factor list provides "useful guideposts," 522 U.S. at 99, and certainly no single factor is meant to be dispositive, see, *Hudson v. United States, supra*; *United States v. Ward, supra*. By and large, I agree with the majority's analysis of the *Kennedy v. Mendoza-Martinez* factors; however, for the reasons stated in my dissent in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996) (Gerrard, J., dissenting, joined by White, C.J., and Fahrnbruch, J.), I submit that the administrative license revocation sanction does indeed involve " 'an affirmative disability or restraint,' " and I disagree with the majority's conclusion that the sanction of license revocation has not been historically regarded as a punishment. Nevertheless, I cannot conclude, in balance, that the administrative license revocation sanction appears excessive in relation to its remedial purpose of protecting the public health and safety or that the administrative license revocation statutes are so punitive in purpose or effect as to negate the Legislature's stated intent.

I therefore concur in the judgment.

WHITE, C.J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V.
CHARLIE BUSH, JR., APPELLANT.
576 N.W.2d 177

Filed March 20, 1998. No. S-97-018.

1. **Convictions: Ordinances: Judicial Notice: Appeal and Error.** In reviewing the sufficiency of the evidence to support a conviction for violation of a municipal ordinance, an appellate court will not take judicial notice of a municipal ordinance not in the record, but assumes that a valid ordinance exists and that the evidence sustains the findings of the trial court.

2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, but considers the evidence in the light most favorable to the successful party.
3. **Records: Appeal and Error.** It is incumbent upon an appellant to present a record which supports the errors assigned.
4. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
5. **Convictions: Ordinances: Sentences: Judicial Notice: Appeal and Error.** When considering an assignment of error claiming that evidence is insufficient to support a criminal conviction for violation of a municipal ordinance, or that the sentence imposed upon such conviction is excessive, an appellate court will take judicial notice of the ordinance creating the offense and specifying the penalties for violation if it is included in the certified transcript prepared by the clerk of the county court.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JOHN V. HENDRY, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Charlie Bush, Jr., appeals his conviction for operating a motor vehicle while his operator's license was suspended, in violation of Lincoln Mun. Code § 10.16.060 (1993). In affirming the conviction, the Nebraska Court of Appeals held that the inclusion of the municipal ordinance used to charge Bush, as it appeared in the certified transcript, was insufficient to permit its consideration by the appellate court under the "ordinance rule" articulated in *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992). We granted the parties' joint petition for further review of this issue.

On January 8, 1996, Officer Cindy Arthur of the Lincoln Police Department cited Bush for operating a motor vehicle

while his operator's license was suspended, second offense, in violation of § 10.16.060. At a bench trial on June 6, Arthur, a narcotics investigator and 17-year veteran of the Lincoln Police Department, testified that at approximately 4:30 p.m. on January 8 she observed Bush driving a black and gray Cadillac in Lincoln, Nebraska. Arthur further testified that on a prior occasion she stopped Bush and found marijuana in his vehicle and that, therefore, she felt there was a "good possibility" Bush had illegal drugs in the Cadillac. Arthur also testified that while following Bush on January 8, she contacted her dispatcher and learned that Bush's operator's license was suspended. When Bush parked the Cadillac in an alley, Arthur confronted him and, after identifying herself as a police officer, informed him that he was under arrest for driving while his license was suspended.

On cross-examination, Arthur denied any resentment over the fact that her prior arrest of Bush did not result in a conviction, but she admitted that she was "upset" about the proceeding because she felt someone had committed perjury. She also testified that while a uniformed officer arrived on the scene after she arrested Bush, she was the only officer who actually observed him operating the Cadillac.

Over defense objection, the court received in evidence a certified copy of Bush's driving record which disclosed that a suspension of his operator's license was in effect on January 8, 1996. After the prosecution rested, the court overruled Bush's motion to dismiss which was "based on a failure of evidence."

Tara Dawn Spence, Bush's girl friend and the mother of his child, testified that she did not see him driving on January 8, 1996, and that he was inside her apartment until late that morning when he went outside. One or two minutes after Bush left the apartment, Spence looked out her window and observed him standing near the parked Cadillac, talking to police officers. She stated that the Cadillac had been parked in her parking stall the entire day.

Testifying on his own behalf, Bush gave an account of the events of January 8, 1996, which differed sharply from Arthur's testimony. He denied operating the Cadillac on that day. He testified that he had left the apartment to retrieve a diaper bag from the Cadillac and that as he was returning to the apartment,

Arthur confronted him and requested permission to search the Cadillac. He declined, and an argument between the two ensued. Bush denied telling Arthur that he had been driving the Cadillac.

After the defense rested, Arthur was recalled to the stand and testified that she had asked Bush "why he was driving." She further testified that "[Bush] told [her] that he had just had to go pick up his car because it had been involved in an accident. . . . [H]e said it was a hit and run and he just had to pick the car up."

In his closing argument, Bush argued that Arthur's testimony should be discounted because of her alleged bias against Bush arising from their prior contact and that in view of the testimony of Bush and Spence, the evidence was insufficient to sustain a conviction. Upon consideration of the evidence and argument, the county judge ruled that Bush was guilty of operating a vehicle while his license was suspended. At a hearing on July 12, 1996, the court received evidence establishing a prior offense for driving under a suspended operator's license and sentenced Bush to 30 days' incarceration and a 2-year suspension of his operator's license. He was ordered to pay a fine of $500 and court costs.

Bush appealed his conviction and sentence to the district court for Lancaster County. His praecipe for transcript filed in the county court included a request for inclusion of the ordinance under which he was charged. A document designated "Lincoln Municipal Ordinance § 10.16.060" appears in the transcript certified by the clerk. The district court affirmed the conviction and sentence on December 11, 1996, and Bush perfected his appeal to the Court of Appeals. His sole assignment of error was insufficiency of the evidence to support the conviction.

The Court of Appeals affirmed the conviction in a memorandum opinion and judgment on appeal filed October 6, 1997. In its analysis, the Court of Appeals cited the established rule that an appellate court will not take judicial notice of a municipal ordinance not in the record, but assumes that a valid ordinance exists and that the evidence sustains the findings of the trial court. *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992); *State v. Lewis*, 240 Neb. 642, 483 N.W.2d 742 (1992). The Court of Appeals construed Nebraska law to require that the ordinance be included in the bill of exceptions and, therefore,

held that the inclusion of the ordinance in the transcript was insufficient to permit its consideration by an appellate court. The Court of Appeals concluded: "The law is clear that we may not consider alleged evidence contained in a transcript. The ordinance at issue is not in the bill of exceptions; thus, this court assumes a valid ordinance exists and the evidence sustains the findings of the district court." Noting that both parties considered inclusion of the ordinance in the transcript to be sufficient, the Court of Appeals stated:

> Even if we treat the position of the attorneys as a stipulation that the ordinance be treated as though it was included within the bill of exceptions, the evidence in the record requires the affirmance of this conviction. Officer Arthur testified that she observed Bush driving a motor vehicle, confirmed that his license was suspended, and arrested him. In effect, Bush argues that Officer Arthur's identification is unbelievable as a matter of law. However, in a bench trial, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and weight to be given their testimony. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997). The county court judge believed the testimony of Officer Arthur and convicted Bush of driving under a suspended license. In reviewing a judgment in a bench trial, an appellate court does not reweigh evidence but considers the evidence in the light most favorable to the successful party. *Peterson v. Kellner*, 245 Neb. 515, 513 N.W. 2d 517 (1994); *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993). The evidence, viewed in the light most favorable to the State, clearly supports the conviction.

The parties filed a joint petition for further review, assigning as error the finding by the Court of Appeals that "the city ordinance under which Mr. Bush was prosecuted was not 'in the record' for purposes of a review of the sufficiency of the evidence." We granted the petition and requested additional briefs directed to the issue of whether this court should overrule or modify the rule as stated in *State v. Buescher, supra*, regarding appellate review of the sufficiency of evidence to support a conviction under a municipal ordinance.

The parties are essentially in agreement with respect to this issue. Neither advocates that we overrule the long-established precedent articulated in *State v. Buescher*. Rather, they ask that we clarify the law regarding the appropriate manner of presenting the ordinance on appeal. Noting that Neb. Rev. Stat. § 25-2703 (Reissue 1995) requires cities and villages to maintain a current copy of their ordinances on file with the county court in order to prosecute complaints for violation of such ordinances, the parties argue that an appropriate method of placing the ordinance before an appellate court is to request that the clerk include a copy of the ordinance in the transcript prepared for appeal.

We find this argument both sensible and consistent with established law. What has become known as the "ordinance rule" was originally articulated in *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907), where we stated:

> This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, *or in some manner present them as a part of the record.*

(Emphasis supplied.) This language clearly suggests that inclusion in the bill of exceptions is not the exclusive means of placing an ordinance before an appellate court.

While we agree with the Court of Appeals that evidentiary matters must be included in the bill of exceptions in order to be considered on appeal, we do not regard a municipal ordinance as evidence in a prosecution based upon its alleged violation. In a prosecution before a county court, the ordinance creating the offense is not a matter of proof, but, rather, a statement of the applicable law which is available to the court by virtue of the fact that the ordinance is on file with the clerk pursuant to § 25-2703. The ordinance rule is simply a recognition of the practical reality that an appellate court cannot determine whether evidence is sufficient to sustain a conviction unless it has before it the ordinance defining the offense as well as the evidence upon which the conviction was based. There is no statutory requirement that cities and villages maintain their ordinances on file with the district or appellate courts; any such

requirement would require legislative action. Thus, the ordinance rule places responsibility upon an appellant to include the ordinance in the record which is transmitted to the appellate court.

We see no reason why this responsibility cannot be met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed, as was done in this case. Such a procedure imposes no burden upon a defendant at trial and is consistent with the general rule that it is incumbent upon an appellant to present a record which supports the errors assigned. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996). Such presentation is necessary because "[m]eaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision." *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. at 484, 558 N.W.2d at 53. Our rules provide that in addition to the pleadings, final order, and other documents filed with the trial court which must be included in the transcript, an appellant may request the clerk to include such other documents which are deemed "necessary for the proper presentation of the errors assigned" on appeal. Neb. Ct. R. of Prac. 4A(2) (rev. 1992). Thus, designation of the ordinance on file with the county court for inclusion in the transcript is both logical and appropriate.

We therefore hold that when considering an assignment of error claiming that evidence is insufficient to support a criminal conviction for violation of a municipal ordinance, or that the sentence imposed upon such conviction is excessive, an appellate court will take judicial notice of the ordinance creating the offense and specifying the penalties for violation if it is included in the certified transcript prepared by the clerk of the county court. Based upon our review of the evidence in this case, we agree with the Court of Appeals that, when considered in the light most favorable to the State, it is sufficient to support Bush's conviction for violation of § 10.16.060. The judgment of the Court of Appeals is therefore affirmed.

AFFIRMED.

CONNOLLY, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES R. VALGORA, RESPONDENT.

576 N.W.2d 468

Filed March 20, 1998. No. S-98-162.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Charles R. Valgora was admitted to the practice of law in the State of Nebraska on September 28, 1995.

On July 18, 1996, Valgora was retained to assist a client in the adoption of her children by her current husband. Valgora failed to attend the final adoption hearing on August 5, 1997, and failed to provide all the necessary documents to complete the adoption. Instead, Valgora delegated his responsibilities to the guardian ad litem and asked her to prepare the necessary documents.

On November 1, 1996, Valgora was retained to represent a client regarding modification of a child custody order. At that time, the client paid Valgora $200. Thereafter, Valgora failed to take any steps to represent the client and failed to refund her money. On June 2, 1997, the client filed a complaint with the Nebraska State Bar Association. In response to the complaint, Valgora stated that he had notified the client in February 1997 that he was withdrawing from her case, when, in fact, he had not so notified the client. In June 1997, Valgora refunded $200 to the client. When Valgora was asked by the Assistant Counsel for Discipline to produce the letter he claimed to have written to the client in February 1997, Valgora created a false letter and submitted it to the Assistant Counsel for Discipline in order to cover up his false statement.

On November 11, 1996, Valgora was retained to represent a client regarding modification of a child custody order. Prior to trial, Valgora did no formal discovery regarding any of the issues set forth in the client's application for modification of decree, nor did he interview any witnesses. Further, he did not

subpoena any witnesses for trial or make other arrangements for the attendance of witnesses on his client's behalf.

On November 19, 1996, Valgora was retained to represent a client in a dissolution of marriage case. Valgora failed to timely file an answer in the proceeding and generally neglected the client's case.

On December 6, 1996, Valgora was retained to represent a client in a bankruptcy case. At that time, he was paid $175 for filing fees. Valgora did not deposit the funds into his attorney trust account, but, rather, deposited them into his business account. Valgora did not pay the filing fees until April 4, 1997, said payment being made out of his business account.

On July 18, 1997, Valgora withdrew $1,800 from his attorney trust account for his personal use, and on July 28, he withdrew $1,431.60 from his attorney trust account for his personal use.

On February 26, 1998, Valgora voluntarily surrendered his license to practice law in the State of Nebraska pursuant to Neb. Ct. R. of Discipline 15 (rev. 1996). In so doing, Valgora specifically admitted that he had violated Canon 1, DR 1-102(A)(1), (4), and (6); Canon 6, DR 6-101(A)(2) and (3); Canon 7, DR 7-102(A)(5); and Canon 9, DR 9-102(A)(1) and (2) and (B)(3), of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court. Valgora expressly waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Valgora's surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately. Valgora is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 1996).

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

HILLIS F. MATHES, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, AND THE CITY OF OMAHA PERSONNEL BOARD, AN ADMINISTRATIVE TRIBUNAL, APPELLEES.

576 N.W.2d 181

Filed March 27, 1998. No. S-96-377.

1. **Administrative Law: Municipal Corporations: Appeal and Error.** Where it appears in an error proceeding that an administrative agency of a municipal government has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the agency will be affirmed.
2. **Evidence: Words and Phrases.** Competent evidence is that which is admissible and relevant on the point in issue; stated another way, it is that which is admissible and tends to establish a fact in issue.
3. **Rules of Evidence: Words and Phrases.** Relevant evidence is defined as that evidence which has any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence.
4. **Evidence: Proof.** Under the test or standard enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the proponent of scientific evidence must prove general acceptance by the relevant scientific community.
5. **Administrative Law: Municipal Corporations: Trial: Polygraph Tests.** The results of polygraph examinations are inadmissible for the purpose of attempting to show deception in a proceeding before an administrative agency of a municipal government.
6. **Administrative Law: Appeal and Error.** In an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Steven J. Riekes, P.C., for Marks Clare & Richards, for appellant.

Kent N. Whinnery, Deputy Omaha City Attorney, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff in error and appellant, Hillis F. Mathes, challenges the district court's affirmance of the decision of the

defendant-appellee City of Omaha Personnel Board, which upheld Mathes' dismissal from the employment of the police division of the defendant-appellee City of Omaha. In his appeal to the Nebraska Court of Appeals, Mathes asserted that the district court erred in failing to find that the board wrongly and prejudicially received the testimony of a polygraph examiner. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to our docket. We affirm.

II. SCOPE OF REVIEW

We have at times declared that where it appears in an error proceeding that an administrative agency of a municipal government has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the agency will be affirmed. *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987); *Matula v. City of Omaha*, 223 Neb. 421, 390 N.W.2d 500 (1986). We have also written that in an error proceeding involving the decision of an administrative agency, both the district court and this court review the record to determine whether the agency acted within its jurisdiction and whether there is relevant evidence to support the decision. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).

We have defined "competent evidence" to be that which is admissible and relevant on the point in issue or, stated another way, admissible and tending to establish a fact in issue. See, *Hammann, supra*; *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975). "Relevant evidence" is defined as that evidence which has any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995); *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). Because relevant evidence might nonetheless be inadmissible, as for example, relevant hearsay evidence, the scope of review is better stated in terms of the existence of competent evidence.

III. FACTS

Mathes was dismissed from his position for conduct unbecoming an Omaha police officer. The behavior in question occurred when he was off duty and riding with his wife in their pickup truck while traveling from Blair to Omaha. While still in Blair, a Suburban vehicle pulled out in front of the Mathes vehicle and cut it off. The driver of the Suburban, Thomas Taylor, made an unfriendly gesture toward the Matheses and, traveling in front of the Mathes vehicle, accelerated, then suddenly decelerated several times. Taylor motioned to the Mathes vehicle to pull off to the side of the road, and Mathes' wife did so. Taylor next pulled back out onto the highway and drove away. The wife was upset by his behavior, and she and Mathes switched places so that Mathes could drive.

Mathes testified that he drove at 55 to 60 miles per hour and caught up with the Suburban, which was traveling at approximately 40 miles per hour at that time. When he attempted to pass the Suburban, Taylor accelerated, then decelerated to keep Mathes from pulling back into the correct lane. The two vehicles drove in that fashion for about a mile. During that period, a vehicle approaching from the opposite direction was forced onto the shoulder because Mathes was driving in the wrong lane of the two-lane highway.

Mathes asked his wife to roll down her window so that he could signal to Taylor to allow him to pull back into the correct lane. Taylor claims that at that point, his window was shot out. The Suburban then ran into the side of the truck.

The authorities took possession of Mathes' 9-mm police handgun, which he had been carrying in his belt but which he had placed under the driver's seat of his truck before the police arrived. Several police officers testified that there was no indication that the gun had been recently fired. In particular, there was no smell of gunpowder as there usually is on guns that have been recently discharged. The gun, which is capable of holding 16 shells at one time, had 1 shell in the chamber and 14 in the clip.

Neither Taylor nor Russell L. Nelsen, a witness to the accident, saw Mathes fire at Taylor's vehicle. However, the authorities found two holes on the inside of the passenger door of the

Suburban which could have been made by a projectile. There appeared to be an indentation in the metal behind one of the holes. When officers removed the paneling from the door, they found a lead slug. They also noticed that the driver's-side window was broken and that glass was scattered in the cab.

Richard Circo, a polygraph examiner for the Omaha Police Division, testified that he found "deception on all of the relevant questions asked" Mathes about the details of the shooting.

A forensic examiner employed by the Federal Bureau of Investigation testified that the slug taken out of the Suburban door was consistent with the weight of a slug of the type of shell found in Mathes' gun after it had gone through a glass window. This expert also testified that the lead used in bullets contains trace amounts of other elements such as antimony, arsenic, copper, bismuth, silver, and tin. The lead for bullets is shipped to ammunition manufacturers in 70-pound billets. Each billet has a unique composition of trace elements so that individual bullets may be matched with other bullets from the same billet. About 4,000 9-mm bullet cores are produced from a billet. The slug found in the Suburban door matched two other bullets found in Mathes' possession.

Mathes and his wife both testified that he did not fire a shot at Taylor. Mathes also presented an expert who test-fired the same type of ammunition that Mathes had in his gun. This expert testified that the lead core found in the Suburban was too light to come from the ammunition Mathes had and that the bullets issued by the Omaha Police Division have a small identifiable spike inside the hollow point, which was lacking in the slug found in the Suburban.

IV. ANALYSIS

We have long held that the results of polygraph examinations are not admissible as evidence in criminal cases. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Houser*, 234 Neb. 310, 450 N.W.2d 697 (1990) (single-judge opinion); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980);

State v. Steinmark, 195 Neb. 545, 239 N.W.2d 495 (1976); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949).

In *Boeche, supra*, we concluded that the scientific principle involved in the use of such examination had not yet gone beyond the experimental stage and had not yet received general scientific acceptance. More recently, we have noted that experimenting psychologists themselves admit that a wholly accurate polygraph examination is yet to be perfected. *Reynolds, supra.*

While *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989), involved a polygraph examination in the context of a police disciplinary appeal, we did not reach the question of admissibility of the results at such hearings. *Olson* was a consolidated disciplinary hearing involving Officers Dunning, Infantino, and Olson. Infantino's polygraph examination results were admitted through the stipulation by both the city and Infantino as to him, but not as to Olson. Olson argued in his appeal that since both hearings revolved around who was telling the truth, he or Infantino, Olson was prejudiced by evidence that Infantino was truthful. However, we noted that the board chair had admonished the members no less than three times that the Infantino polygraph results were not to be considered in Olson's case and, relying on the proposition that errors in the admission of evidence may be cured by an instruction of the court, rejected Olson's argument.

A number of other jurisdictions which have decided this issue have held that polygraph results are inadmissible in administrative hearings. E.g., *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983); *Zanesville v. Sheets*, 38 Ohio App. 3d 24, 525 N.E.2d 842 (1987); *Tp. of Silver Spring v. Thompson*, 90 Pa. Commw. 456, 496 A.2d 72 (1985). Such truth and deception examinations are not favored under Nebraska law. In fact, their mandatory use by employers is statutorily prohibited except for those engaged in public law enforcement. Neb. Rev. Stat. § 81-1932 (Reissue 1994). Interestingly, Neb. Rev. Stat. § 23-1737 (Reissue 1997) provides not only that deputy sheriffs submit to a polygraph examination upon the commencement of duties and upon certain subsequent requests, but that they "agree to the admission into evidence of the results

of such test or tests in any civil proceeding before the [merit] commission or any court."

Whatever questions might exist about the validity of those statutes, see *In re Interest of Constance G., ante* p. 96, 575 N.W.2d 133 (1998), § 81-1932 does not purport to make the results of polygraph examinations admissible in any proceeding, and it is clear that the scientific foundation needed to meet the *Frye* standard was not laid in this proceeding. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994) (under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), proponent of scientific evidence must prove general acceptance by relevant scientific community), *cert. denied* 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995). In addition, courts must be particularly cautious in according evidentiary status to a polygraph examination since the result "is unique in that its truth seeking functions nearly duplicate the purpose of the trial." *People v. Monigan*, 72 Ill. App. 3d 87, 100, 390 N.E.2d 562, 571 (1979). We discern no reason for making admissible in administrative hearings the results of polygraph examinations which are not admissible in criminal cases and therefore hold that the results of such examinations are inadmissible for the purpose of attempting to show deception in a proceeding before an administrative agency of a municipal government.

The board therefore erred in receiving the polygraph examiner's testimony. However, the board made no reference to the polygraph testimony in its findings of fact, and the question becomes whether there exists other competent evidence sustaining the board's findings and decision.

In that regard, we recall that in an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989).

There is substantial competent evidence exclusive of the polygraph testimony that Mathes fired a shot at the Taylor vehicle. The most convincing evidence, as detailed in the board's order, is that relating to the lead in the slug found in Taylor's

passenger-side door, which matched the lead found in two of the bullets in Mathes' possession. The record demonstrates that it is very likely that all three bullets came from the same 70-pound billet of lead. Additionally, the gun carried by Mathes had room for one more shell. Moreover, the record supports by competent evidence the board's finding that Mathes drove recklessly, forcing a vehicle to leave the traveled portion of the roadway in order to avoid a collision.

V. JUDGMENT

Accordingly, as first noted in part I, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., participating on briefs.

TAYLOR OIL COMPANY, INC., APPELLANT, V. EDITH A. RETIKIS AND FICKE & FICKE, THE AUCTIONEERS, APPELLEES.
575 N.W.2d 870

Filed March 27, 1998. No. S-96-686.

1. **Declaratory Judgments: Appeal and Error.** On appeal from a declaratory judgment, an appellate court, regarding a question of law, has an obligation to reach a conclusion independent of the trial court's conclusions.
2. **Declaratory Judgments: Parties.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
3. ____: ____. Neb. Rev. Stat. § 25-21,159 (Reissue 1995) is applicable only where all interested or necessary persons are made parties to the proceedings.
4. **Parties: Words and Phrases.** A necessary or indispensable party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest.
5. **Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
6. **Declaratory Judgments: Parties.** The parties are not permitted to first obtain a judgment and then apply the requirements of Neb. Rev. Stat. § 25-21,159 (Reissue 1995) to determine who is a necessary party to an action.
7. ____: ____. An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto; courts should,

under most circumstances, dismiss such an action without prejudice whenever all parties whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

8. ____: ____. The absence of necessary parties prevents a court from finally deciding a controversy.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with directions to dismiss.

Edmond E. Talbot III, O'Hanlon Law Offices, for appellant.

Steven E. Achelpohl for appellee Retikis.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Taylor Oil Company, Inc. (Taylor Oil), brought this declaratory judgment action against Edith A. Retikis and Ficke & Ficke, The Auctioneers, to determine rights to the proceeds received from an auction sale. Taylor Oil appeals from an order of the district court finding that the proceeds were not subject to Taylor Oil's security agreement.

SCOPE OF REVIEW

On appeal from a declaratory judgment, an appellate court, regarding a question of law, has an obligation to reach a conclusion independent of the trial court's conclusions. *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997).

FACTS

Retikis and Peter Adams operated an establishment known as Aunt Kate's Restaurant pursuant to a lease agreement with Taylor Oil executed on June 16, 1992. In the fall of 1992, Adams, Retikis, and Brad Taylor, a part owner and vice president of Taylor Oil, met to discuss a change in the lease agreement. At this meeting, Adams informed Brad Taylor that he was disaffiliating himself from the restaurant and that he wanted to be removed from the lease agreement. Brad Taylor and Retikis

consented to this change, marked through Adams' name on the lease agreement, and initialed the change.

In February 1993, Retikis leased another restaurant, located in Arlington, Nebraska, from James Taylor, president of Taylor Oil. Soon afterward, Retikis informed James Taylor that the restaurants were not doing well. At a meeting, James Taylor informed Retikis that he would help her in any way he could.

On April 23, 1993, Retikis sent Adams to retrieve a $5,000 loan from Taylor Oil. When Adams arrived, he was given a check and asked to sign a "receipt." The receipt, which was written out longhand and signed by Adams on April 23, 1993, reads as follows: "I Do Hereby Promise To Pay Taylor Oil Co., Inc[.] 5000.00 (Five Thousand) Payable on Demand."

Retikis apparently cashed the check, and she indicated at trial that initially she was not asked to sign a promissory note for the $5,000 loan. Retikis stated that she had wanted to repay the loan, but that each time she mentioned the subject to Brad Taylor, he would tell her "not to worry about it."

On December 2, 1993, Retikis was asked by Brad Taylor to go to his office and sign a backdated promissory note for $5,000 regarding the loan by Taylor Oil. At this meeting, Retikis signed a promissory note, a security agreement, and a financing statement. The promissory note, dated April 23, 1993, stated that Retikis promised to pay Taylor Oil $5,000 with an interest rate of 9½ percent per year until the debt was paid in full. Retikis testified that the date on the note did not reflect the date the note was signed, but indicated the date on which Taylor Oil advanced the $5,000 to Retikis.

The security agreement Retikis signed provided that it was granted to secure payment of a promissory note for $5,000 with an interest rate of 9½ percent per year from "date until due." As collateral for the debt, Retikis provided "[a]ll inventory, fixtures and equipment contained in 'Aunt Kate's' restaurant, more particularly described in Exhibit 'A' . . . ." Exhibit A is a metes and bounds description of property located in Harrison County, Iowa. There is no description of any collateral contained in exhibit A.

Retikis was not given a copy of the security agreement, and she testified that she did not understand what the document was

until trial. She claimed that when she was asked to sign the security agreement, she asked Brad Taylor what the document was, and she was told that she was signing a promissory note and a repayment schedule. She also testified that Taylor Oil never informed her that it wanted a security agreement prior to the December 1993 meeting with Brad Taylor.

Adams testified that he was the owner of the restaurant equipment located at Aunt Kate's Restaurant and that he never agreed that this equipment could be used as collateral for a loan involving Taylor Oil. He also testified that he did not know that Retikis had signed a security agreement encumbering the restaurant equipment owned by him.

In April 1994, Adams met with an auctioneer, Don Ficke, of Ficke & Ficke, The Auctioneers, to discuss an auction sale of restaurant equipment which Adams owned. Prior to the meeting, Adams had moved the property to Aunt Kate's Restaurant for the purpose of selling it at auction. Some of the equipment, such as booths, was used in the operation of the restaurant, but the majority was simply stored on the premises. Adams testified that with the exception of a few items, he was the sole owner of all the items sold at the auction.

Prior to the auction, Adams informed Brad Taylor that Adams owned the equipment located at Aunt Kate's Restaurant and that he intended to sell it. Adams claimed that he offered to sell the equipment to Brad Taylor prior to the auction, but this offer was refused. Ficke testified that he dealt exclusively with Adams in connection with the auction and that he believed Adams was the owner of the equipment which was sold, with the exception of some china worth approximately $10.

In February 1994, Taylor Oil demanded that Retikis vacate Aunt Kate's Restaurant, and it was closed on May 31. On June 28, an auction took place at Aunt Kate's Restaurant, resulting in net sale proceeds of $5,624.07. Ficke testified that Brad Taylor contacted Ficke the day of the auction, gave him a business card, and asked him for a copy of the closing statement. However, Ficke did not recall Brad Taylor's disclosing that Taylor Oil claimed a security interest in the proceeds of the auction.

On April 3, 1995, Taylor Oil filed a petition for declaratory judgment in the district court for Lancaster County, seeking a

judgment declaring that Taylor Oil was entitled to the net sale proceeds under the terms of the security agreement. Retikis answered, denying that the property was subject to a security agreement and alleging that the property was not owned by her and that the security agreement was not supported by consideration because it was not executed in connection with the promissory note.

The district court found that the auction proceeds were not subject to the security agreement and financing statement, and dismissed the petition. Taylor Oil appeals.

ASSIGNMENT OF ERROR

Taylor Oil asserts that the district court erred when it found that the property sold at auction was not subject to Taylor Oil's financing statement and security agreement.

ANALYSIS

This is a declaratory judgment action, and Neb. Rev. Stat. § 25-21,159 (Reissue 1995) provides in part that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." In her answer to Taylor Oil's claim that it was entitled to the proceeds of the auction, Retikis alleged that she was not the owner of the property sold. The evidence also suggests that Taylor Oil had access to information which would have indicated that Adams was the partial or total owner of some of the equipment stored at Aunt Kate's Restaurant. Still, Taylor Oil did not join Adams as a party to the action. Therefore, we must first consider whether Adams is a necessary party to Taylor Oil's petition for declaratory relief and, accordingly, whether the district court had jurisdiction to hear this action.

In *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991), we stated that our case law makes it clear that the statute authorizing a declaratory judgment is applicable only where all interested or necessary persons are made parties to the proceedings. (Citing *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977).) Accord *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988). A necessary or

indispensable party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993); *Shepoka v. Knopik, supra.*

In *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 497, 536 N.W.2d 56, 65 (1995), we stated: "[T]he presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties then the district court has no jurisdiction to determine the controversy." See, also, *Redick v. Peony Park*, 151 Neb. 442, 37 N.W.2d 801 (1949) (finding that presence of necessary parties is jurisdictional and cannot be waived).

Adams had a stake in the controversy such that a final decree could not be entered in this case without affecting his interest. Thus, Adams is a necessary or indispensable party. Since the statute authorizing a declaratory judgment, § 25-21,159, is applicable only where all necessary and indispensable persons are made parties to the proceeding, see, *Hoiengs v. County of Adams, supra*; *Concerned Citizens v. Department of Environ. Contr., supra*; *Krohn v. Gardner, supra*; *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., supra*; *Redick v. Peony Park, supra*, the district court had no jurisdiction to enter a judgment without first making Adams a party to the lawsuit.

Despite the omission of Adams, the district court did make a final determination. At first impression, one might infer that Adams was not an indispensable party, because the district court determined that Taylor Oil did not have an interest in the collateral, and that, therefore, Adams' ownership rights in the collateral were not affected by the district court's ruling. However, such an inference would result in a misapplication of the intent and purpose of the law. The parties are not permitted to first obtain a judgment and then apply the requirements of § 25-21,159 to determine who is a necessary party to an action.

In *Updike Investment Co. v. Employers Liability Assurance Corporation*, 128 Neb. 295, 258 N.W. 470 (1935), this court stated that an action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto and that courts should, under most circumstances, dismiss such an action without prejudice whenever all parties whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

The absence of necessary parties prevents a court from finally deciding a controversy. Without Adams being made a party, the question of whether the proceeds of the auction were subject to a security interest could not be fully and completely adjudicated. Therefore, we conclude that Adams' presence in the action is a jurisdictional requirement and that the failure to join Adams as a necessary party requires a reversal of the district court's judgment and dismissal of the action without prejudice.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss without prejudice.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, C.J., dissenting in part.

The majority erroneously allows the losing party to relitigate its rights. While I may agree that as to the nonparty Adams, Taylor Oil may relitigate, I do not agree that Taylor Oil should have the opportunity to relitigate against Retikis. Taylor Oil had its day in court against Retikis and lost.

The doctrine of res judicata should operate to protect one who fully and fairly litigated an issue. The majority has snatched defeat from the jaws of victory. I dissent in part.

ANITA BECHTOLD AND TIMOTHY L. SAVAGE AND KAREN M. SAVAGE, HUSBAND AND WIFE, APPELLEES, V. MARTIN GOMEZ, APPELLANT.

576 N.W.2d 185

Filed March 27, 1998. No. S-96-775.

1. **Trial: Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Jurisdiction: Final Orders: Motions for New Trial: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
3. **Motions for New Trial.** A motion for new trial must be by motion upon written grounds, filed at the time of making the motion.
4. **Courts: Judgments: Time: Appeal and Error.** A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.
5. **Rules of the Supreme Court: Attorney and Client: Conflict of Interest.** Under the principles of loyalty and confidentiality set forth in the Code of Professional Responsibility, an attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.
6. **Attorney and Client: Conflict of Interest: Presumptions.** Confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm.
7. ____: ____: ____. An attorney who leaves the first firm is presumed to have acquired client confidences during the attorney's tenure at that firm, regardless of whether the attorney was actually privy to any confidential communication. It is further presumed that the attorney has shared or will share those client confidences with members of any subsequent firm with which the attorney becomes employed.
8. **Attorney and Client: Conflict of Interest.** An attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm.

Appeal from the County Court for Cass County: WILLIAM B. ZASTERA, Judge. Reversed in part, and in part dismissed.

Catherine Mahern, of Creighton Legal Clinic, for appellant.

Herbert J. Elworth, of Casey and Elworth, and Mark R. Widell for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Martin Gomez appeals from an order of the Cass County Court disqualifying the Creighton Legal Clinic (Clinic) and Catherine Mahern from representing Gomez.

SCOPE OF REVIEW

In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

FACTS

On April 23, 1996, Anita Bechtold, Timothy L. Savage, and Karen M. Savage filed an "Amended Petition for Adjudication of Claim of Paternity and Right to Custody." During the course of the proceedings, the Savages moved to disqualify Mahern and the Clinic from continued representation of Gomez, alleging that such representation violated this court's decisions regarding disqualification of attorneys.

Subsequently, Bechtold moved to disqualify the Clinic. Bechtold's motion was concerned with the fact that Noah Geary had worked for Bechtold's attorney, Edward Fogarty, after having participated in the Clinic while the Clinic was representing Gomez. The motion stated that Geary was a student at the Creighton University School of Law who, with the concurrence of the Creighton faculty, including clinic director Mahern, hoped to receive a law degree in the spring of 1996 and that in February and March 1996, Geary was hired by Fogarty as an independent contractor to do research on an unrelated case.

The motion noted that Geary's employment with Fogarty was terminated on March 21, 1996, and Bechtold admitted she had no knowledge that Geary had obtained information during his employment with Fogarty that could be harmful to her case. However, Bechtold claimed that her case could be compromised because Geary was still "beholden" for his degree to Creighton

University and its faculty, including Mahern, and that, therefore, the Clinic should be barred from representing Gomez.

Gomez thereafter moved to disqualify Fogarty and any member of his law firm on the ground that Fogarty employed Geary during a time when there had been and continued to be active litigation involving Bechtold, the Savages, and Gomez. Gomez claimed that Fogarty's representation of Bechtold created a direct conflict of interest because Geary had been a participant in the Clinic while it was representing Gomez in the pending litigation.

After a hearing on April 23, 1996, the county court made the following findings of fact: Geary was a senior certified law student under the general supervision of Mahern, whose certification commenced August 21, 1995, and had not expired, changed, or been revoked as of the date of the hearing. As a part of and in conjunction with his certification, Geary was enrolled in the Clinic from August 17 to December 11, 1995, and between August 17 and December 11, the Clinic was actively representing Gomez. At some time after December 11, Geary came into the employ of Fogarty on an unrelated matter. At the time Geary was in the employ of Fogarty, Fogarty was actively representing Bechtold. At the time of the hearing, Geary was no longer in the employ of Fogarty. Geary remained a student at the Creighton University School of Law, but was no longer enrolled in the Clinic.

Basing its order in part upon our holdings in *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993); and *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), on May 6, 1996, the county court concluded that because Geary was in possession of confidences relating to Gomez, Fogarty was disqualified from further representation of Bechtold. In addition, the court disqualified the Clinic because of the continuing relationship between Geary and Mahern that the court opined was created by Geary's status as a certified senior law student under Mahern's supervision. The court explained that the rule of senior practice and the fact that Mahern was still listed as Geary's supervising attorney created a relationship no different in the eyes of the

court than a legal partnership. Therefore, the court concluded there was an appearance of impropriety and a violation of the "bright line rule" presumption of shared confidences. Although the court did not disqualify Mahern in its May 6 order, the court stated that if requested, the presumption of shared confidences and the appearance of impropriety would require that Mahern be disqualified from representing Gomez in the proceedings.

On May 16, 1996, Gomez filed a pleading entitled "Motion to Reconsider & Motion for Hearing." Gomez moved the county court "to reconsider its Opinion and Order of May 6, 1996, wherein it disqualified Catherine Mahern and the Creighton Legal Clinic as legal representative[s] for . . . Gomez." On June 4, Bechtold and the Savages jointly moved the court for an order expanding the May 6 order to specifically include disqualification of Mahern as counsel for Gomez. Bechtold and the Savages pointed out that the motion previously filed by the Savages had requested the court to disqualify both Mahern and the Clinic, but that the order disqualified only the Clinic.

On June 11, 1996, the county court stated that it was still of the opinion that the Clinic should be disqualified, and the court sustained Bechtold and the Savages' motion to disqualify Mahern. On July 8, Gomez appealed from the June 11 order.

ASSIGNMENTS OF ERROR

Gomez asserts that the county court erred (1) in finding both an appearance of impropriety and a presumption of shared confidences by Mahern and the Clinic, (2) in finding that Mahern supervised or held a confidential relationship with Geary, (3) in applying the bright line rule to Mahern and the Clinic, (4) in failing to properly apply the balancing test, and (5) in failing to address whether Mahern's disqualification would deprive Gomez of counsel.

ANALYSIS

We first address our jurisdiction to consider the Clinic's disqualification. The Clinic was disqualified by the county court's May 6, 1996, order. Gomez did not file a notice of appeal from the May 6 order, but waited to file his appeal until after the court's June 11 order on his "Motion to Reconsider" and

Bechtold and the Savages' motion for expansion of the May 6 order. In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). To determine whether we have jurisdiction to consider the May 6 order, we address whether Gomez' "Motion to Reconsider" and the attached affidavit constitute a motion for new trial.

Neb. Rev. Stat. § 25-1144 (Reissue 1995) provides:

> The application [motion for new trial] must be by motion upon written grounds, filed at the time of making the motion. It shall be sufficient, however, in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity. The causes enumerated in section 25-1142, subdivisions (2), (3) and (7), of this code must be sustained by affidavits showing their truth, and may be controverted by affidavits.

Neb. Rev. Stat. § 25-1142 (Reissue 1995) provides:

> A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party . . . (6) that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law . . . .

Few cases in Nebraska discuss whether a postjudgment motion labeled as a "motion to reconsider" can be considered as a motion for new trial. In *Lewis v. Gallemore*, 173 Neb. 441, 113 N.W.2d 595 (1962), the defendant filed a motion asking the court to reconsider the action taken on a particular date. The court found that the order in question was ministerial in nature and was not a final order from which an appeal could be taken. The issue of the validity of such motion was not discussed. In *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991), we discussed a motion filed by the plaintiff for reconsideration of the ruling on the defendant's motion for

summary judgment or, alternatively, for a new trial. We did not discuss the validity of the motion for reconsideration, finding that although the plaintiff's motion for new trial was not timely, the plaintiff nonetheless filed a notice of appeal within 30 days of the final order as required.

In *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991), the plaintiffs filed a pleading entitled "Motion to Vacate Dismissal" on January 18, 1989, from the order of dismissal of January 13. Later, the plaintiffs filed a pleading entitled "Motion for Reconsideration & Motion for New Trial" on January 26. On January 25, the court entered its docket entry overruling the "Motion to Vacate Dismissal" and dismissing the case. The notice of appeal was filed on February 13. The bill of exceptions consisted of the record of a hearing held February 8 on the plaintiffs' motion for reconsideration of the dismissal. The defendants argued that the court was without jurisdiction because the plaintiffs did not file a notice of appeal within 30 days of the order of dismissal of January 13. We held that the "Motion to Vacate Dismissal" was the equivalent of a motion for a new trial, citing *Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 196 Neb. 158, 241 N.W.2d 674 (1976) (new trial is reexamination in same court of issue of fact after verdict by jury, report of referee, or decision by court).

In *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993), the Nebraska Court of Appeals concluded from the contents of the postsummary judgment motions labeled "Motion for Reconsideration" that they were, in fact, motions for new trial because they were based on an allegation that the decision of the court was not sustained by sufficient evidence and was contrary to law. As such, the Court of Appeals treated them as motions for new trial, which had to be filed within 10 days of the district court's order granting summary judgment.

The "Motion to Reconsider" filed by Gomez included the affidavit of Connie Kearney, an adjunct professor with the Clinic. The affidavit stated in part: "The court's May 6, 1996, Opinion and Order extends the 'bright line' rule beyond the interpretation and parameters set forth in present decisional law in that the court seems to hold that the senior certification process is the equivalent of a legal partnership."

We decline to treat Gomez' "Motion to Reconsider" as a motion for new trial. A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. See *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990). Accordingly, the time for filing an appeal as to the disqualification of the Clinic has expired, and we have no jurisdiction to consider Gomez' arguments involving such disqualification.

We next consider Mahern's disqualification. On June 11, 1996, the county court extended its May 6 order disqualifying the Clinic to include Mahern. Gomez timely perfected his appeal from the June 11 order by filing a notice of appeal on July 8. Therefore, we have jurisdiction to consider the order disqualifying Mahern.

In its order, the county court determined that the bright line rule applied to irrebuttably presume that Geary had acquired confidences of Bechtold and the Savages while working for Fogarty and that he had subsequently shared those confidences with Mahern. Under the principles of loyalty and confidentiality set forth in the Code of Professional Responsibility, "an attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof." *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 389, 534 N.W.2d 575, 579 (1995).

Confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm. *State ex rel. FirsTier Bank v. Mullen, supra.* Therefore, an attorney who leaves the first firm is presumed to have acquired client confidences during the attorney's tenure at that firm, regardless of whether the attorney was actually privy to any confidential communication. It is further presumed that the attorney has shared or will share those client confidences with members of any subsequent firm with which the attorney becomes employed. *State ex rel. Freezer Services, Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). In *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 810-11, 559 N.W.2d 496, 501 (1997),

we explained that "an attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm." Accord *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

In *Kortum*, we noted that the rule stated above has been applied only in the context where an attorney or attorneys ceased working for a law firm that represented a particular client and then began working for another law firm in a position adversarial to that particular client. We have never applied the rule of presumed acquisition and sharing of client confidences to disqualify the original firm from continued representation of the client. Thus, this rule would not have been applicable to disqualify the Clinic on the grounds that Geary left the Clinic and did unrelated research for Fogarty. However, as previously explained, Gomez did not timely appeal from the order disqualifying the Clinic, and we have no jurisdiction to reverse that order.

The issue is whether Geary's doing research for Fogarty on an unrelated matter disqualifies Mahern from further representation of Gomez. For the reasons set forth herein, we conclude that Mahern is not disqualified from such further representation.

First, we find that the county court erred in applying an irrebuttable presumption that Geary acquired client confidences of Bechtold and the Savages during his employment with Fogarty. Geary apparently worked as an independent contractor for Fogarty for approximately 6 weeks doing research and investigation in an unrelated criminal matter. Geary was not certified to work under Fogarty's supervision and, apparently, never went to Fogarty's office during the time that he worked for Fogarty.

Under the facts of the present case, Geary had no real or perceived access to Fogarty's client files. No evidence established that Geary in fact gained any confidence or had any information regarding Bechtold or the Savages while working for Fogarty. Since there is no evidence of gained confidences, then Geary could not have shared any such confidences with Mahern or the Clinic so as to warrant disqualification.

The county court also erred in concluding that after Geary's contact with Fogarty, Geary had a relationship with Mahern and the Clinic such that if he had acquired confidences of Bechtold and the Savages, it would be irrebuttably presumed that he shared those confidences. Despite its finding that Geary was not enrolled in the Clinic during or subsequent to his employment with Fogarty and despite the undisputed evidence that Geary had no actual contact with Mahern and the Clinic during or after his employment with Fogarty, the court relied on Geary's senior certification to erroneously conclude that the certification created a condition no different than that of a legal partnership. Based on this continuing "partnership," the court irrebuttably presumed that Geary shared with Mahern confidences which, as discussed above, the court presumed he gained through his work for Fogarty.

In the cases where we have applied the irrebuttable presumption of shared confidences, the context has been that of an actual partnership or employment relationship. See, *Richardson v. Griffiths, supra* (attorney had previous attorney-client relationship with plaintiff and was member of firm which represented defendant in same matter); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994) (attorney for plaintiff who later worked as clerical help for firm representing adverse party); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993) (attorney at firm representing defendant's predecessor moved to firm representing plaintiff in substantially related matter); *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990) (attorney who was intimately involved with litigation on behalf of plaintiff moved to law firm representing defendant in same litigation).

There is no evidence that Geary had an employment-related relationship with Mahern or the Clinic after he completed the research project for Fogarty. An undisputed affidavit submitted on behalf of Gomez states that after December 11, 1995, which was the end of the law school semester, Geary had no contact with any legal matter in the Clinic and was no longer under Mahern's supervision. Geary was employed by Fogarty after December 11. Although Geary did not withdraw his senior certification after he ceased being enrolled in the Clinic, the certi-

fication states only that Geary met the requirements "to perform as a legal intern under the general supervision of Catherine Mahern." The certification does not indicate that Geary was actually working under Mahern's supervision, but only that he was qualified to be under her supervision.

We conclude that Geary's senior certification did not create a relationship to which the irrebuttable presumption of shared confidences should have been applied by the county court to disqualify Mahern. Thus, even disregarding the fact that Geary was not an attorney and did not in fact acquire any client confidences through his work for Fogarty, Mahern and the Clinic cannot fall under the prohibition announced in *Hickman* that "[e]mploying, in any capacity, one who was an attorney on the other side of a case carries with it the appearance of impropriety." 245 Neb. at 253, 512 N.W.2d at 378. Nor can it be said that Mahern violated the bright line rule that "an attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm." *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 810-11, 559 N.W.2d 496, 501 (1997). Accord *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

On July 23, 1997, this court adopted Canon 5, DR 5-109, of the Code of Professional Responsibility entitled "Support Personnel of a Law Firm—Conflict of Interest." DR 5-109 states:

> (A) For purposes of this rule, a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.
>
> (B) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in

which another lawyer or firm with which the support person formerly was associated had previously represented a client:

(1) Whose interests are materially adverse to the current client; and

(2) About whom the support person has acquired confidential information that is material to the matter, unless the former client consents after consultation. The support person shall be considered to have acquired confidential information that is material to the matter unless the support person demonstrates otherwise.

(C) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under subsection (B), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

(1) The former client consents, or

(2) There is no genuine threat that confidential information of the former client will be used with material adverse effect on the former client because the confidential client information communicated to the support person while associated with the former firm is not likely to be significant in the current client's case.

Thus, although DR 5-109 was not in effect on June 11, 1996, it is consistent with our decision herein. In accordance with DR 5-109, the evidence demonstrates that Geary did not acquire confidential information about Bechtold and/or the Savages.

CONCLUSION

For the reasons stated herein, we reverse the portion of the county court's June 11, 1996, order disqualifying Mahern as counsel for Gomez. Because we do not have jurisdiction over the May 6 order disqualifying the Clinic, we dismiss that portion of Gomez' appeal.

REVERSED IN PART, AND IN PART DISMISSED.

WILLIAM MARK OLSEN, APPELLEE AND CROSS-APPELLANT, V. CHERIE L. OLSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CLARE OLSEN, DECEASED, APPELLANT AND CROSS-APPELLEE.

575 N.W.2d 874

Filed March 27, 1998. No. S-96-827.

1. **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.
2. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
3. **Courts: Jurisdiction.** Where one court of competent jurisdiction in a proceeding in rem obtains jurisdiction of the res, or, in other words, the thing in controversy, no other court can acquire jurisdiction over it.
4. ____: ____. Where an action is pending in two courts, the court first acquiring jurisdiction will hold jurisdiction to the exclusion of the other.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Banner County, JOHN D. KNAPP, Judge. Judgment of Court of Appeals affirmed.

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, P.C., for appellant.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This is an appeal by Cherie L. Olsen (Cherie Olsen), personal representative of the estate of her deceased husband, Harold Clare Olsen (Harold Olsen). Cherie Olsen appealed an order of the Banner County District Court awarding Harold Olsen $20,271.81 in an action on an accounting which originated from a cross-petition filed by Harold Olsen against his son, William

Mark Olsen (Mark Olsen). In a memorandum opinion filed October 10, 1997, the Nebraska Court of Appeals vacated the judgment and remanded the cause with directions to dismiss Harold Olsen's cross-petition, holding that the Banner County District Court lacked subject matter jurisdiction over the matter. We granted further review.

This case involves three separate lawsuits filed by the same parties involving many of the same issues.

Harold Olsen owned a life estate in certain real property in Banner County, Nebraska. On August 15, 1983, Harold Olsen and Mark Olsen entered into a contract in which Harold Olsen assigned his interest in the gross income from the life estate (hereinafter life-estate contract) to Mark Olsen. The life-estate contract required that Mark Olsen use the income to pay certain described debts of Harold Olsen. The contract also provided that once the debts were paid, the contract terminated and the income reverted back to Harold Olsen.

During the term of the contract, Harold Olsen continued to farm part of the property. Harold Olsen also leased out part of the property, but the payments he received were remitted to Mark Olsen. Mark Olsen also leased part of the property and farmed the remainder.

In 1986, Mark Olsen paid off all of Harold Olsen's obligations. In 1987, Harold Olsen and Mark Olsen had conversations about Mark Olsen's desire to place the life estate in the Conservation Reserve Program (CRP). Prior to placing the land in the CRP, Mark Olsen informed Harold Olsen that the Agricultural Stabilization and Conservation Service (ASCS) wanted a guarantee that Harold Olsen would not renege on the agreement if the ASCS signed the property into the program. Accordingly, on February 26, 1987, Harold Olsen signed an agreement (CRP agreement) which provided, "I [Harold Olsen] agree that farm land which I have a life estate in, I will honor William Mark Olsen's CRP contract in all its terms."

In February 1989, Harold Olsen brought suit against Mark Olsen in the Kimball County District Court to recover on a promissory note (hereinafter *Olsen I*). *Olsen I* is not part of the present appeal, but *Olsen I* is relevant to the case at bar. The only part of *Olsen I* that has been made a part of the record in

this appeal is the judgment of the Kimball County District Court.

While *Olsen I* was still pending, Mark Olsen filed suit against Harold Olsen in the Banner County District Court seeking to enjoin Harold Olsen from using the land which was the subject of the life-estate contract (hereinafter *Olsen II*). Harold Olsen filed a cross-petition in *Olsen II,* alleging that the life-estate contract had terminated in 1986; that on April 21, 1989, Harold Olsen's attorney had sent Mark Olsen a letter to inform Mark Olsen that the conditions of the life-estate contract had been fulfilled; and that Mark Olsen was still in possession of the property. Harold Olsen requested that he be restored possession of the property and that Mark Olsen be required to account for rents and profits Mark Olsen received subsequent to the termination of the life-estate contract. Mark Olsen later voluntarily dismissed his petition in *Olsen II*, and the case proceeded on Harold Olsen's cross-petition for an accounting.

On April 6, 1992, the Kimball County District Court entered judgment in *Olsen I*. The district court determined that all of Harold Olsen's obligations, subject to the life-estate contract, had been paid in full no later than January 1, 1987; that the life-estate contract terminated on January 1, 1987; that all the income from the life estate then reverted to Harold Olsen; and that Mark Olsen had received from Harold Olsen all the pasture rentals due him from Harold Olsen. The district court's findings did not reflect the amount of the income from the life estate since January 1, 1987.

Relying on this ruling, Harold Olsen applied to the Banner County ASCS office requesting that the life-estate property enrolled in the CRP program be reconstituted and that Harold Olsen, as owner-operator, succeed to a revised CRP contract. The ASCS ruled in Harold Olsen's favor, and in 1992, Harold Olsen began receiving the CRP payments.

On November 13, 1992, while *Olsen II* was still pending, Mark Olsen filed another suit against Harold Olsen in the Banner County District Court (hereinafter *Olsen III*), asking the court to declare that the CRP agreement Harold Olsen executed February 26, 1987, was in full force and effect and to issue an injunction enjoining Harold Olsen from violating or breaching

the terms of that contract. *Olsen II* and *Olsen III* were combined for trial.

Trial was held April 21, 1995. Harold Olsen died after the trial started, but before the court entered its judgment. Cherie Olsen, personal representative of Harold Olsen's estate, was substituted as a party, and the cases were revived.

On May 3, 1996, in a memorandum opinion and order, the Banner County District Court found that Mark Olsen owed rents and profits to Harold Olsen in the amount of $20,271.81, and that the CRP agreement could not reasonably be construed as an agreement by Harold Olsen allowing Mark Olsen to receive all payments accruing from Mark Olsen's contract with the CRP after Mark Olsen's assignment terminated. Accordingly, the district court dismissed Mark Olsen's *Olsen III* petition. Cherie Olsen appealed from the amount awarded in *Olsen II*, claiming that the evidence showed Harold Olsen was entitled to a landlord's share from the life estate of $59,856.88. Mark Olsen cross-appealed the *Olsen II* award, claiming that Harold Olsen was owed nothing from him, and he appealed the dismissal of his petition in *Olsen III*.

The Court of Appeals, in its memorandum opinion, dismissed Harold Olsen's action on cross-petition for an accounting in *Olsen II*, finding that the Banner County District Court lacked subject matter jurisdiction. The Court of Appeals held that Harold Olsen's cross-petition in *Olsen II* involved the "'same parties, on the same subject, and to test the same rights'" that were involved in *Olsen I*. Therefore, the Court of Appeals held that Harold Olsen's remedy was within the confines of *Olsen I* rather than in raising the same issue by cross-petition in another county. Since *Olsen I* was still pending in the Kimball County District Court when *Olsen II* was filed in the Banner County District Court, the Court of Appeals held that the Kimball County District Court acquired jurisdiction over the matter first and that the Banner County District Court's assertion of jurisdiction over the matter was improper. The Court of Appeals also affirmed the dismissal of Mark Olsen's petition in *Olsen III*.

In her brief in support of her petition for further review, Cherie Olsen claims the Court of Appeals erred in (1) holding

that the Banner County District Court did not have subject matter jurisdiction because an earlier action was pending in Kimball County and (2) failing to reverse the judgment and remand the cause, directing the entry of judgment of $59,856.88 against Mark Olsen.

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. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

As stated previously, the judgment in *Olsen I* is the only part of that case made a part of the record herein. The fact that Mark Olsen brought a counterclaim and that the Kimball County District Court, in adjudicating the counterclaim, made particular determinations as to the parties' rights and interests in the life-estate contract is evident from the judgment in *Olsen I*. Specifically, the court determined that all of Harold Olsen's debts were paid in full no later than January 1, 1987, and that as of that date the contract terminated and all the income from the life estate reverted back to Harold Olsen.

The record also indicates that while *Olsen I* was pending, Harold Olsen filed a cross-petition against Mark Olsen in Banner County, which became the basis for *Olsen II* after Mark Olsen voluntarily dismissed his petition. See Neb. Rev. Stat. § 25-603 (Reissue 1995) (where setoff or counterclaim has been presented, defendant shall have right of proceeding to trial on his claim, although plaintiff may have dismissed his action).

In his cross-petition, Harold Olsen alleged that his obligations pursuant to the life-estate contract had been paid in full, that the life-estate contract had terminated, and that all the gross income in the life estate now belonged to him, and he prayed for

an accounting of all the rents and profits from the life estate that were retained by Mark Olsen.

In *Lincoln Joint Stock Land Bank v. Fuller*, 132 Neb. 677, 680, 273 N.W. 14, 16 (1937), we stated:

> We are familiar with the rule announced in *Terry v. State*, 77 Neb. 612, 110 N.W. 733, in which we said: "It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res*, or, in other words, the thing in controversy, no other court can acquire jurisdiction over it."

"In the strict sense of the term, a proceeding 'in rem' is one which is taken directly against property or one which is brought *to enforce a right in the thing itself.*" (Emphasis supplied.) Black's Law Dictionary 793 (6th ed. 1990).

It is clear from the judgment in *Olsen I* that Mark Olsen's counterclaim was "brought to enforce a right" in the income from the life estate. The judgment makes specific reference to the August 15, 1983, contract, and it quotes the pertinent provisions regarding reversion of the income to Harold Olsen upon payment of the obligations. It is also clear that the "thing in controversy" in *Olsen II* is the income from the life estate.

Therefore, when Mark Olsen filed his counterclaim in *Olsen I*, the Kimball County District Court obtained jurisdiction over the parties' rights in the life-estate contract first, to the exclusion of any other court of concurrent jurisdiction. Where an action is pending in two courts, the court first acquiring jurisdiction will hold jurisdiction to the exclusion of the other. See, *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980); *Bell v. Dingwell*, 91 Neb. 699, 136 N.W. 1128 (1912). See, also, *Clawson v. Millard*, 934 S.W.2d 899 (Tex. App. 1996) (court in which suit is first filed acquires dominant jurisdiction to exclusion of other coordinate courts); *Seattle Seahawks v. King County*, 128 Wash. 2d 915, 913 P.2d 375 (1996) (court in which suit is first filed has jurisdiction and control of all subsequent proceedings); *Minnesota Mut. Life Ins. v. Anderson*, 410 N.W.2d 80 (Minn. App. 1987) (in general, when courts have concurrent jurisdiction, first court to acquire jurisdiction has priority in considering case); *Fantony v. Fantony*, 36 N.J. Super. 375, 115 A.2d 610 (1955) (in in rem

action, court first acquiring jurisdiction will retain it regardless of subsequent action by different court); *Martinez v. Martinez*, 153 Fla. 753, 15 So. 2d 842 (1943) (first court exercising jurisdiction acquires control to exclusion of other courts of concurrent jurisdiction).

Since the Kimball County District Court never relinquished jurisdiction over the life-estate contract, that court maintained jurisdiction over the matter to the exclusion of all courts of concurrent jurisdiction. Therefore, we cannot say that the Court of Appeals erred in finding that the Banner County District Court lacked jurisdiction.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

CASTLE ROSE, INC., APPELLANT, V. PHILADELPHIA BAR AND GRILL OF ARIZONA, INC., ET AL., APPELLEES.
576 N.W. 2d 192

Filed March 27, 1998. No. S-96-967.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
2. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
3. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector.
4. **Jurisdiction: Proof.** The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate a court's personal jurisdiction over the defendant.
5. **Constitutional Law: Jurisdiction.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits.
6. **Jurisdiction: States: Contracts: Parties.** An individual's contract with a party within a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state.
7. ____: ____: ____: ____. To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the

parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.

8. **Due Process: Contracts: States.** It is sufficient for purposes of due process that suit is based on a contract which had substantial connection with a forum state.
9. **Jurisdiction.** The existence of a Nebraska choice-of-law clause is a factor to be considered in determining whether a party should reasonably anticipate being haled into court in Nebraska.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for further proceedings.

Thomas E. Whitmore, of Monen & Whitmore, and Sandra Markley for appellant.

Michael W. Heavey, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The district court sustained the special appearance filed by the defendant-appellee Philadelphia Bar and Grill of Arizona, Inc., and subsequently dismissed the cause of the plaintiff-appellant, Castle Rose, Inc. The defendants-appellees Paul D. Kogel, David T. Robinson, and Thomas D. LeClair were all shareholders of the Arizona corporation. Asserting that the district court erred in finding it lacked personal jurisdiction over the Arizona corporation, Castle Rose appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of that court and this court, we removed the matter to our docket. As the record sustains Castle Rose's assignment of error, we reverse, and remand for further proceedings.

The scope of our review is controlled by the rule that when a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. See, *Crete Carrier Corp. v. Red Food Stores, post* p. 323, 576 N.W.2d 760 (1998); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995).

Clyde Pittman was the president of Country Line Corporation, which conducted its business at offices located in Bellevue, Nebraska. It engaged in the development of food-service operations and franchised enterprises under the names "Philadelphia Bar and Grill" and "Mickey Finn's." Country Line was succeeded by Concepts 2000, Inc., and on January 1, 1995, Castle Rose purchased Concepts 2000. We henceforth refer to Country Line as if it had at all times been Castle Rose. As a franchisor, Castle Rose provided expertise and guidance to people wishing to enter into the restaurant business. It developed all menu items of its franchises in Nebraska, where it also designed the layout and appearance of the restaurants and developed the operating procedures.

In 1989, Wayne Thompson, a Castle Rose franchisee in Albert Lea, Minnesota, informed Pittman that Kogel was interested in a franchise in Arizona. Pittman does not recall who made the initial contact, but he traveled to Arizona to meet with Kogel and Robinson for 3 days in late December 1989 or early January 1990.

It is Pittman's understanding that Kogel had made a visit to Nebraska prior to their meeting and had visited some of Castle Rose's restaurants. Pittman further testified that although he did not meet with them, Thompson and Kogel were in Nebraska in late 1989.

After their first meeting, Kogel and Robinson mailed some financial information to Pittman in Nebraska. Pittman visited Arizona again in February 1990, after which Robinson and LeClair visited Des Moines, Iowa, to see some of Castle Rose's existing restaurants. The only face-to-face meetings between the parties took place in Iowa and Arizona. Kogel and Robinson signed the franchise agreement for the Arizona corporation in Phoenix, and LeClair signed the agreement in Des Moines.

In early 1990, Castle Rose and the Arizona corporation entered into a franchise agreement whereby the Arizona corporation would operate a Philadelphia Bar and Grill franchise in Arizona for a period of 20 years. Castle Rose agreed to assist, guide, and supervise the Arizona corporation in initializing its franchise, and to provide continual advice, guidance, and supplies for the franchise's operation. This included the training of

key personnel; the furnishing of recipes and directions for proper preparation; the designation of a food supplier and negotiation of the prices for raw materials for preparation, service, and sale of beverages and menu food items; the frequent inspecting of the restaurant and consulting with its key personnel; and the selling and supplying of quantities of its spice mixture.

Under the terms of the contract, the Arizona corporation agreed to pay Castle Rose an initial fee, plus weekly royalties and compensation. The contract also required the Arizona corporation to prepare and submit weekly, monthly, and annual reports to Castle Rose and to operate in conformity with the standards of quality and service as established by Castle Rose. The contract provides that its terms be interpreted and enforced in accordance with Nebraska law.

Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997); *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant. *Crete Carrier Corp. v. Red Food Stores, post* p. 323, 576 N.W.2d 760 (1998); *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995); *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995).

Because Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits, we need address only whether the Arizona corporation had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles. See, *Crystal Clear Optical, supra*; *Wagner, supra.*

Thus, we must determine whether a Nebraska court's assertion or exercise of jurisdiction over the Arizona corporation would be consistent with due process.

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Wagner, supra*; *24th and Dodge Ltd. v. Commercial Nat. Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993).

> [D]ue process for personal jurisdiction over a nonresident defendant requires the defendant's minimum contacts with the State of Nebraska so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). To determine whether a court has personal jurisdiction over a nonresident defendant, the court must examine the quality and nature of the nonresident's activities and ascertain that the nonresident has sufficient minimum contacts with the forum state to satisfy the requisite due process for assertion or exercise of personal jurisdiction. *Internat. Shoe Co. v. Washington*, *supra*.
>
> Fairness and reasonableness, essential to due process in personal jurisdiction over a nonresident defendant, require that the defendant's contact with the forum state must be of a quality and nature that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The minimum contacts standard, expressed in *Internat. Shoe Co. v. Washington*, *supra*, supplies "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, *supra* at 297.
>
> A defendant's purposeful act, directed to the forum state, not merely the unilateral activity of another who claims a relationship to the defendant, connects the

> defendant to the forum state. *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Williams v. Gould, Inc., 232 Neb. 862, 876-77, 443 N.W.2d 577, 587 (1989).

> "[W]hether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's 'purposeful availment' of the benefits and protections of Nebraska law."

Wagner, 247 Neb. at 223, 526 N.W.2d at 78, quoting *Williams, supra.*

> " 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' "

24th and Dodge Ltd., 243 Neb. at 102, 497 N.W.2d at 390, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

An individual's contract with a party within a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state. *Burger King Corp., supra*; *Williams, supra.* To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in the forum state, the court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing. *Burger King Corp., supra*; *Williams, supra.* It is sufficient for purposes of due process that suit is based on a contract which had substantial connection with that state. *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

The facts in the instant case are substantially similar to those in *Burger King Corp., supra*. Therein, Burger King Corporation, a Florida corporation whose principal offices were in Miami, entered into a contract which provided that John Rudzewicz and Brian MacShara would open and operate a Burger King franchise in Michigan for a period of 20 years and that all disputes be governed by Florida law.

Burger King instructed its franchisees on how to operate the restaurant, provided market research and advertising assistance, trained the franchisees in restaurant management, and provided accounting, cost-control, and inventory-control guidance. The franchise agreement allowed franchisees "to tap into Burger King's established national reputation and to benefit from proven procedures for dispensing standardized fare . . . enabl[ing] them to go into the restaurant business with significantly lowered barriers to entry." 471 U.S. at 465. In exchange, franchisees paid Burger King an initial amount, plus monthly royalties. Burger King also imposed national standards of uniformity and undertook regulation to ensure that franchisees followed the national standards.

Burger King filed a diversity action in the federal district court in Florida, alleging that Rudzewicz and MacShara had breached their franchise obligations. In holding that the district court's exercise of jurisdiction did not violate Rudzewicz' or MacShara's due process rights, the U.S. Supreme Court noted:

> In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami. Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." [Citation omitted.] Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. [Citation omitted.] Upon approval, he entered into a carefully structured

> 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated."

(Emphasis in original.) *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

The *Burger King Corp.* Court also reasoned that the choice-of-law provision "reinforced [Rudzewicz'] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." 471 U.S. at 482. It noted that in reversing the district court's order, the U.S. Court of Appeals for the 11th Circuit gave insufficient weight to that provision which declared that although suits need not be brought in Florida, the contract would be governed and construed under and in accordance with Florida law. Thus, we conclude that the existence of a Nebraska choice-of-law clause is a factor to be considered in determining whether a party should reasonably anticipate being haled into court in Nebraska.

By entering into the franchise agreement, the Arizona corporation deliberately "reached out" beyond Arizona and created a long-term relationship with and voluntarily assumed obligations with Castle Rose under a contract which has a substantial connection to Nebraska. Because the facts in *Burger King Corp.* are so closely on point, there can be little doubt that subjecting the Arizona corporation to the jurisdiction of the Nebraska courts would not offend due process. "[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp.*, 471 U.S. at 474.

The Arizona corporation's emphasis on the fact that the parties never met in Nebraska is of no significance, for a defendant's physical presence in Nebraska is not controlling on the question of whether the contacts with Nebraska were sufficient to subject the defendant to suit in Nebraska. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

(Emphasis in original.) *Burger King Corp.*, 471 U.S. at 476.

Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, v. WORLD DIVERSIFIED, INC., ET AL., APPELLEES.

576 N.W.2d 198

Filed March 27, 1998. No. S-96-1017.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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.
4. **Highways.** Under Neb. Rev. Stat. § 39-215 (Cum. Supp. 1996), the erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the Highway Beautification Control System is prohibited.

5. ____. In order to be protected under the grandfather clause in Neb. Rev. Stat. § 39-215 (Cum. Supp. 1996), a sign must remain substantially the same as it was on the statute's effective date.
6. **Highways: Words and Phrases.** A change of advertising message or customary maintenance is not an erection of a sign for purposes of Neb. Rev. Stat. §§ 39-212 to 39-222 (Cum. Supp. 1996).

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Don Stenberg, Attorney General, and K. Osi Onyekwuluje for appellant.

Jerold V. Fennell, of Domina & Copple, P.C., for appellee World Diversified.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This case presents the question of whether changes made to a sign constitute the "erection" of a new sign rather than "customary maintenance," pursuant to 410 Neb. Admin. Code, ch. 3, § 002.01E (1992). The appellees own and or operate a sign located at the Crossroads Mall in Omaha, Nebraska. In 1972, the Legislature passed Neb. Rev. Stat. § 39-1320.06 (Cum. Supp. 1972), now codified at Neb. Rev. Stat. § 39-215 (Cum. Supp. 1996), prohibiting the advertisement of products and services not located on the premises on which a sign is located. The appellees' sign would have been prohibited by the new statute, but it was allowed to remain under a grandfather clause in § 39-215. In 1985, the appellees converted the sign to an electronic format that was not in conformance with the regulations of the appellant, State of Nebraska, Department of Roads, because the sign advertised off-premises products and services. Arguing that a new sign had been erected and that the grandfather clause no longer applied, the department sought to enjoin the appellees from utilizing an electronic format to advertise products and services not located on the premises on which the sign is located. The district court determined that the change in format constituted a modernization of the sign and denied an injunction. We affirm.

BACKGROUND

The department appeals the district court's denial of an injunction that would require the appellees to cease from advertising on their sign by electronic means products or services not available on the property. The facts of the case are largely stipulated to or undisputed by the parties.

The Crossroads area is zoned as commercial or industrial, and the land use is clearly established by law or ordinance as industrial or commercial. The sign is three-sided, and each face of the sign is rectangular in shape, measuring approximately 14 feet wide by 25 feet long. The messages on the sign provide advertising for the tenants of the mall and for their establishments' principal or accessory products and services. However, the sign also advertises products or services that are not located on the Crossroads property. The sign further provides public-service messages such as the time, date, and temperature. The owner of the sign receives compensation for locating the sign on the Crossroads property. The sign, located at the intersection of 72d and Dodge Streets in Omaha, is visible from U.S. Highway 6, a federal-aid primary highway that is subject to advertising control.

Prior to March 27, 1972, the sign did not display electronic messages. Rather, the sign had a marquee face that required the manual changing of letters and symbols. It also had a fixed panel with advertising above the marquee area. The sign did not contain and was not illuminated by flashing, intermittent, or moving lights. However, the marquee area of the sign was illuminated so it could be seen at night. The sign provided advertisements for products or services located both on and off the premises.

On March 27, 1972, Neb. Rev. Stat. §§ 39-1320 through 39-1320.11 (Cum. Supp. 1972), now codified at Neb. Rev. Stat. §§ 39-212 through 39-222 (Cum. Supp. 1996), regulating signs visible from the federal highways, went into effect, and the department promulgated regulations. The sign was in violation of these statutes and regulations because it was not an "on-premise" sign as defined by 410 Neb. Admin. Code, ch. 3, § 002.01J (1992). However, § 39-215 contains a grandfather provision that allows signs erected prior to the effective date of the

statute to remain in place as legal nonconforming signs. Under the department's regulations, such signs may not be moved or replaced, although they may be reasonably maintained.

In April 1985, the marquee section of the sign was removed and replaced by an electronic message display that utilized flashing, intermittent, or moving lights. The sign now changes its messages at reasonable intervals by an electronic process or remote control. Additional fixed-panel advertising was also added by reducing the size of the marquee area of the sign, covering the posts supporting the sign with modernized siding, and adding additional trim to the sign. However, the actual support pillars of the sign remained, the sign remained in the same location, and the overall size and shape did not change in any significant way.

The city of Omaha issued a permit for the sign in August 1984. On November 4, 1993, the city issued a clarification of the permit that identified the sign as a "legal non-conforming sign" under the city of Omaha zoning ordinances and regulations, because due to a change in zoning for the Crossroads area, the sign became in violation of certain spacing requirements.

The department filed this action in district court, alleging that the appellees had erected a sign in violation of § 39-215 and seeking an injunction to stop the appellees from advertising by electronic means products and services not located on the Crossroads property. The appellees filed answers denying the department's allegations and alleging that because the sign was in place before §§ 39-212 through 39-222 went into effect, it could remain in place under the grandfather clause in § 39-215.

At trial, an employee of the department testified that Nebraska could lose federal highway funds if it lacked an effective control program for outdoor advertising. The employee further testified that if the Crossroads sign were allowed to continue as is, many other signs would convert to advertising by electronic means. The employee also testified the sign would not have been in violation of any regulations if it had converted to its present electronic format but only advertised products located on the Crossroads premises. The employee agreed with the appellees that whether the sign advertises products available

on or off the premises does not change the nature of the sign in terms of when it is turned on or the hours during which it advertises.

The district court determined that the sign location, triangular configuration, height, overall size, and placement of supporting members had remained virtually the same, with the main difference in the sign being the change to electronic communications. The district court concluded that the change to electronic messages did not constitute an erection of a new sign, but, rather, was a modernization of the old sign with the basic use of the sign remaining the same. Thus, the district court concluded that the sign enjoyed grandfather rights under § 39-215, and the court denied the department's request for an injunction.

ASSIGNMENTS OF ERROR

The department contends that the district court erred in (1) failing to find that the appellees erected and are maintaining an advertising sign in violation of state advertising laws and denying the department's request for an injunction and (2) granting the appellees' sign grandfather rights under the statute.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Omega Chem. Co. v. United Seeds*, 252 Neb. 137, 560 N.W.2d 820 (1997).

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

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. *Omega Chem. Co., supra*; *Central Neb. Broadcasting v. Heartland Radio*, 251 Neb. 929, 560 N.W.2d 770 (1997).

ANALYSIS

The department contends that when the sign was changed in 1985, the appellees lost any rights they had under the grandfather clause in § 39-215 to advertise off-premises products or services because a new sign was "erected." As a result, the department argues that the "new" sign violates department regulations regarding the lighting of signs because under the regulations, only an on-premises sign or a sign providing public-service information may advertise by the electronic means employed by the appellees' sign. The appellees respond that the sign was previously able to advertise off-premises products and services under § 39-215 and that because the changes made to the sign constitute only customary maintenance, the sign continues to be protected by the grandfather clause.

In 1965, Congress passed the federal Highway Beautification Act, and federal regulations were promulgated requiring the states to effectively regulate outdoor advertising structures within 660 feet of the primary right-of-way of any interstate or primary highway. The penalty for failure to comply is a loss of 10 percent of the state's federal highway appropriation. 23 U.S.C. § 131 (1994); 23 C.F.R. § 750.701 et seq. (1997). In 1972, in order to be in compliance with the federal statutes, the Nebraska Legislature passed L.B. 1181, codified at §§ 39-1320 through 39-1320.11, now found at §§ 39-212 through 39-222, prohibiting certain kinds of advertising that is visible from the National System of Interstate and Defense Highways.

Section 39-215 provides that "[e]xcept as provided in sections 39-212 to 39-222, the *erection or maintenance* of any advertising sign, display, or device which is visible from the main-traveled way of the Highway Beautification Control System is prohibited. On-premise signs . . . shall be permitted." (Emphasis supplied.)

The statute further describes the types of signs that are permissible in certain areas, such as in commercial or industrial areas. Section 39-215(3)(b)(iii) states that "[w]ithin the areas in which, according to sections 39-212 to 39-222, advertising signs will be permitted, such signs shall conform to standards and criteria as to height, width, spacing, and lighting as set forth in the rules and regulations of the department."

Section 39-215(3)(b)(vi) next provides that "[n]othing contained in such section shall be construed to require the removal of signs in zoned and unzoned commercial and industrial areas, lawfully in existence on March 27, 1972, which signs may under such sections remain and continue in place even if nonconforming."

The federal regulations promulgated by the U.S. Department of Transportation require that in order to continue to be protected under a grandfather clause, the sign "must remain substantially the same as it was on the effective date of the State law or regulations." 23 C.F.R. 750.707(d)(5). The federal regulations then require each state to "develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights." *Id.*

The regulations promulgated by Nebraska's Department of Roads define an "on-premise" sign as a sign that

> consists solely of the name of the establishment; identifies the establishment's principal or accessory products or services offered on the property on which they are located. Any sign bringing in any type of compensation to the property owner for the location on which the sign is erected shall not be considered an on-premise sign.

410 Neb. Admin. Code, ch. 3, § 002.01J.

The regulations define "erect" as

> to construct, build, raise, assemble, place, affix, attach, create, paint, draw or in any other way bring into being or establish, but it shall not include any of the foregoing activities when performed as an incident to the change of an advertising message or the customary maintenance of the sign structure.

410 Neb. Admin. Code, ch. 3, § 002.01E.

"Nonconforming sign" is defined as "a sign which was lawfully erected, but which does not comply with the provisions of the State Law or State Rules and Regulations." 410 Neb. Admin. Code, ch. 3, § 002.01H (1992). The regulations further provide:

> Signs which contain or are illuminated by flashing, intermittent, or moving light or lights are prohibited except for the following signs:

> 002.08C1 Signs which change their message at reasonable intervals by electronic process or remote control giving public service information such as time, date, temperature, weather, or On-Premise Signs advertising goods or services available on the premises shall not contain or be illuminated by beacons, strobe lights or other bright flashing lights.

410 Neb. Admin. Code, ch. 3, § 002.08C (1992).

The parties do not dispute that the Crossroads sign was in existence on March 27, 1972; nor do the parties dispute that the sign was not an on-premises sign at that time because the sign advertised products and services not available on the Crossroads premises. Thus, the sign could not have been newly erected after the effective date of the statute on March 27 without being in violation of the statute. However, because of the grandfather clause in § 39-215, the sign was able to continue to remain in place, even though it was nonconforming due to the fact it advertised off-premises products or services.

The question of what constitutes a "substantial change" so that a "new" sign is erected is an issue of first impression for this court. However, other jurisdictions have addressed the issue. The majority of jurisdictions hold that a new sign is erected when it has been moved, its support poles have been removed and replaced, or the size and dimensions of the sign have changed. See, *Appalachian Poster Advertising Co. v. Harrington*, 120 N.C. App. 72, 460 S.E.2d 887 (1995), *rev'd* 343 N.C. 303, 469 S.E.2d 554 (1996) (new sign was erected when new cross braces were added, support poles were replaced, and sign was moved approximately 3 to 5 feet); *Indep. Stave Co. v. Hwy. & Transp. Com'n*, 748 S.W.2d 870 (Mo. App. 1988) (sign was not substantially same after increase in size of advertising panel by 224 square feet); *Park Outdoor Adv. Co. v. Com. Dept. of Transp.*, 86 Pa. Commw. 506, 485 A.2d 864 (1984) (new billboards erected when wood frame and two support posts were changed to metal frame and one support post); *Advertising Co. v. Bradshaw, Secretary of Transportation*, 48 N.C. App. 10, 268 S.E.2d 816 (1980) (new sign "erected" after old sign had blown down, when broken pole was splinted and another pole replaced); *White Adver., Etc. v. Fl. Dept. of*

Transp., 364 So. 2d 104 (Fla. App. 1978) (when size and dimension of sign face and message were changed, alterations were too extensive to be customary maintenance or repair, and new sign was erected).

However, a slight change in location and other changes have been held to be maintenance of a sign rather than the erection of a new sign. For example, in *Rothrock v. Zoning Hearing Board of Whitehall Tp.*, 13 Pa. Commw. 440, 319 A.2d 432 (1974), a sign that existed prior to a zoning change was put into a new concrete base, the advertising text was changed, and an extra support pole was added. The sign was also moved by about 9 inches. Under the zoning ordinance at issue, nonconforming signs could continue to be maintained. The Commonwealth Court of Pennsylvania determined that the changes were de minimis and were a continuation or modernization of the old sign.

As 410 Neb. Admin. Code, ch. 3, § 002.01E, states, a change in the advertising message does not constitute the erection of a new sign. Thus, in *Royal Food Systems v. Hwy. & Transp. Com'n*, 876 S.W.2d 38 (Mo. App. 1994), the face of a sign was changed from reading "Texaco" to "Wendys" but the structure and support poles were left intact. The Missouri Court of Appeals concluded that the changes constituted a permissible change in the advertising message and that a new sign had not been erected due to the change.

The federal regulations leave each state to determine its own criteria of what constitutes "customary maintenance" as opposed to a "substantial change." The conclusion that the changes in the instant case constituted routine maintenance is supported by the department's definition of the term "erect." Under that definition, a new sign would have to be brought into being or established in order to conclude that a new sign had been "erected." Furthermore, activities incident to the change of an advertising message or customary maintenance cannot be considered the erection of a new sign.

In the instant case, the face of the sign was updated and additional trim was added. These updates occurred upon the original frame of the sign, and the sign remained in the same location on the same support posts. The overall size, dimensions,

and location of the sign did not change. Thus, under the definition of "erect," instead of a new sign's being brought into being, an old sign was updated to make it more modern. As in *Rothrock, supra*, the change from a marquee that required messages to be changed manually to a display on which the messages are controlled electronically is akin to a modernization or maintenance of the sign rather than the erection of a new sign. However, the department argues that because the changes cause the sign to violate the lighting regulations promulgated by the department, those changes cannot be considered customary maintenance. The department's contention is that 410 Neb. Admin. Code, ch. 3, § 002.08C, allowing signs to utilize moving lights in commercial areas, allows such lights only on either on-premises signs or signs that provide public-service information. The sign in the instant case is not an on-premises sign and does not provide solely public-service information. Thus, the sign violates § 002.08C. However, the sign would not violate the regulation if it refrained from advertising off-premises products or services.

The department's argument ignores the fact that the reason the sign was nonconforming was because it utilized off-premises advertising. It was the capacity of the sign to continue to advertise off-premises products and services that was protected by the grandfather clause in § 39-215. Thus, the change to an electronic system, which would otherwise be permissible if the sign was an on-premises sign, should not serve to destroy any protection under the grandfather clause, because it is the capacity to continue to carry off-premises advertising that is protected by the clause. As the district court stated, the overall use of the sign has remained the same.

We conclude that the conversion of the sign to an electronic format did not constitute the erection of a new sign and that the sign continues to be covered under the grandfather clause in § 39-215. Accordingly, the order of the district court is affirmed.

AFFIRMED.

CONNOLLY, J., participating on briefs.

DOUGLAS COUNTY SCHOOL DISTRICT 001, APPELLANT, V. THERESA A. DUTCHER AND DAN DOLAN, COMMISSIONER OF LABOR, APPELLEES.

576 N.W.2d 469

Filed March 27, 1998. No. S-96-1149.

1. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Employment Security: Words and Phrases.** Misconduct has been defined, pursuant to Neb. Rev. Stat. § 48-628 (Supp. 1995), as behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

David M. Pedersen and Carol C. Knoepfler, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

John F. Sheaff and John H. Albin for appellee Dolan.

WHITE, C.J., WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

Douglas County School District 001, a political subdivision administering the Omaha Public Schools (hereinafter referred to as "OPS"), appeals the decision of the district court for Douglas County, Nebraska, affirming the judgment of the Nebraska Appeal Tribunal of the Nebraska Department of Labor that appellee Theresa A. Dutcher was discharged from her employment with OPS for misconduct in connection with her work and was properly assessed a 7-week benefit disqualification. We, on our own motion, removed this case to our docket pursuant to our authority to regulate the dockets of the Nebraska Court of Appeals and this court. We reverse, and remand with directions.

BACKGROUND

Dutcher was employed by OPS as a full-time van driver from August 29, 1984, to October 24, 1995. OPS has a drug-free workplace policy which provides for random drug testing and further provides:

> The unlawful manufacture, sale, distribution, dispensation, possession or use of a controlled substance by an Omaha Public Schools employee is strictly prohibited at any time or place whether on or off duty . . . . Any employee violating this policy shall be subject to disciplinary action, up to and including discharge and referral to law enforcement authorities.

The stated purpose of the OPS policy is as follows:

> The illegal use of drugs and/or alcohol is determined by the Omaha Public Schools to be one of the greatest potential threats to the educational process and to the community . . . . Alcohol or drug abuse by employees of the Omaha Public Schools, whether on or off the job, presents a variety of risks which are unacceptable.
>
> a. Risk of harm to students, who may be injured due to a lack of supervision or alertness on the part of Omaha Public Schools employees.
>
> b. Risk of harm to co-workers, who similarly may be injured by accidents resulting from a lack of supervision or alertness on the part of Omaha Public Schools employees.
>
> c. Risk that students will be improperly influenced by Omaha Public Schools staff members who use or promote the use of illegal drugs or alcohol.
>
> d. Risk of harm to the Omaha Public Schools, through low productivity, high absenteeism or damage to the reputation of the Omaha Public Schools as a public educational institution.
>
> e. Risk of physical, mental, spiritual and economic harm to the employee who is abusing drugs or alcohol.

As a van driver, Dutcher was required by OPS board policy to submit to this random drug testing. Dutcher was aware of and understood the OPS policy. She received and signed for a copy of the policy. Dutcher consented to a random test to determine

the presence of drugs and/or alcohol in her body. Dutcher tested positive for cannabinoids. Pursuant to OPS board policy, Dutcher's employment was terminated. Dutcher admitted to using marijuana a few weeks before her testing and did not contest the findings of the drug test.

Dutcher filed for unemployment insurance benefits. The claims deputy found that Dutcher was discharged from her employment with OPS for misconduct in connection with her work and assessed a 7-week benefit disqualification. OPS appealed the decision of the claims deputy to the appeal tribunal. The appeal tribunal affirmed the claims deputy's determination that Dutcher was discharged from her employment for misconduct in connection with her work and also assessed a 7-week benefit disqualification.

OPS timely filed its petition for review of the decision of the appeal tribunal pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994), arguing that Dutcher should be totally disqualified from receiving benefits. The district court affirmed the decision of the appeal tribunal, despite the fact that appellee Dan Dolan, Commissioner of Labor, reversed his position in the case and also argued that Dutcher should be totally disqualified from benefits.

ASSIGNMENTS OF ERROR

OPS asserts that the district court erred (1) when it affirmed the decision of the appeal tribunal and failed to find that Dutcher was discharged for gross misconduct; (2) when it found that Dutcher was discharged for misconduct and affirmed the appeal tribunal's decision to disqualify Dutcher from benefits for 7 weeks; (3) when it and the appeal tribunal failed to find that Dutcher was discharged for gross misconduct, which would thereby disqualify Dutcher from receiving any unemployment benefits; (4) when it and the appeal tribunal failed to find that a violation of an employer's drug-testing policy constitutes misconduct sufficient to disqualify a discharged employee from unemployment compensation; and (5) when it and the appeal tribunal failed to find that an employee's use of an illegal drug was unlawful misconduct sufficient to disqualify a discharged employee from unemployment compensation.

STANDARD OF REVIEW

In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997); *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Omaha World-Herald v. Dernier, supra.*

ANALYSIS

Pursuant to Nebraska's Employment Security Law, Neb. Rev. Stat. § 48-601 et seq. (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), an employee may be partially or totally disqualified from receiving benefits if he or she is found to have been discharged for misconduct connected to his or her work. Section 48-628 provides:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (2) For the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct. If the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

Misconduct has been defined, pursuant to § 48-628, as behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disre-

gard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995).

In *Dolan v. Svitak, supra*, the employer, Chief Industries, adopted a policy prohibiting employees, such as Svitak, from being under the influence of illegal drugs when performing company business. Chief Industries' stated reason for adopting the drug-free workplace policy was to improve safety, to ensure the quality of the product produced, and to enhance the employer's reputation. Under the policy, an employee was deemed to be under the influence if he or she tested positive for cannabinoids. This court determined that Chief Industries' policy prohibiting employee drug use bore a reasonable relationship to the employer's business interests and that Svitak was discharged from his employment for misconduct in connection with his work. The court then directed the district court to reinstate the appeal tribunal's decision assessing a 7-week benefit disqualification.

In the present case, we find that OPS' drug-free workplace policy clearly satisfies our holding in *Dolan v. Svitak, supra*, that there must be a reasonable relationship between the employer's rule and the employer's business interest. Here, OPS has a reasonable interest in providing children in its custody with safe transportation. Therefore, to prohibit drug use by an OPS van driver who transports children is a reasonable rule in relation to OPS' interest in the safety of the children it transports.

There is no question in the present case that Dutcher engaged in misconduct. Dutcher received a copy of the OPS policy, does not contest the findings of the drug test performed, and admits that she used marijuana in the 2-week period immediately before the drug test was performed.

Having determined that OPS' rule was reasonably related to a business interest and that Dutcher committed misconduct related to her work, we turn now to the principal issue to be determined in the present case: what level of disqualification should be assessed for Dutcher's misconduct. OPS and the com-

missioner urge this court to find that Dutcher was discharged from her employment for gross misconduct and should therefore be denied all unemployment benefits pursuant to § 48-628(2). The commissioner argues that in directing the district court to affirm the decision of the appeal tribunal in *Dolan v. Svitak, supra*, this court did not specifically rule on the appropriate level of misconduct penalty to be applied for violation of employer policies prohibiting drug use. The commissioner further argues that a court or tribunal may find that a discharge for violation of an employer's drug-free workplace policy constitutes gross misconduct pursuant to § 48-628(2) if the facts warrant the greater penalty. We agree.

We determine that because Dutcher was a government employee whose job was to transport school children, the appeal tribunal's assessment of a general misconduct penalty of 7 weeks' benefit disqualification was not an appropriate penalty for her violation of the OPS drug-free workplace policy. Because Dutcher was entrusted with the lives and safety of the children riding in her van, her violation of OPS' drug-free workplace policy warrants more than a 7-week benefit disqualification. See, e.g., *McAllister v. Board of Review*, 263 Ill. App. 3d 207, 635 N.E.2d 596 (1994); *Farm Fresh Dairy, Inc. v. Blackburn*, 841 P.2d 1150 (Okla. 1992); *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990); *Barkley v. Peninsula Transp. Dist. Com'n*, 11 Va. App. 317, 398 S.E.2d 94 (1990).

CONCLUSION

We reverse the judgment of the district court and remand the cause with directions that a judgment be entered totally disqualifying Dutcher from unemployment benefits.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., participating on briefs.

CAPORALE, J., not participating.

CRETE CARRIER CORPORATION, APPELLANT, V. RED FOOD STORES, INC., AND BI-LO, INC., APPELLEES.

576 N.W.2d 760

Filed March 27, 1998. No. S-96-1211.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; 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. **Jurisdiction: Proof.** The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate a court's personal jurisdiction over the defendant.
3. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Jurisdiction.** Neb. Rev. Stat. § 25-536(2) (Reissue 1995) expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits.
5. **Constitutional Law: Due Process.** The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.
6. **Due Process: Jurisdiction: States.** In order to subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
7. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
8. ____: ____: ____. In determining whether a defendant has the necessary minimum contacts with a forum state to satisfy due process, the unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum state.
9. **Due Process: Jurisdiction.** Due process does not require a defendant's physical presence in a forum before personal jurisdiction is exercised.
10. **Jurisdiction: States: Contracts: Parties.** A contract with a party in a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state.
11. **Jurisdiction.** The mere use of interstate facilities, such as telephones, mail, or facsimile machines, is not enough to confer jurisdiction.
12. ____. Mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction.

13. **Jurisdiction: States: Contracts: Parties.** When dealing with contracts, it is the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, that must be evaluated in determining whether a defendant purposefully established minimum contacts necessary for personal jurisdiction within a forum.
14. **Jurisdiction: States.** In considering whether it is fair to assert jurisdiction over a defendant, a court may consider the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.
15. **Jurisdiction.** Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

David L. Brown for appellant.

Andrew S. Pollock, of Knudsen, Berkheimer, Richardson, Endacott and Routh, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

CONNOLLY, J.

The appellant, Crete Carrier Corporation, appeals the district court's sustaining of the special appearance objecting to personal jurisdiction entered by the appellees, Red Food Stores, Inc., and BI-LO, Inc. The district court concluded that Red Food Stores' and BI-LO's contacts were insufficient to subject them to personal jurisdiction. We conclude that in the instant case, numerous telephone and mail communications made pursuant to an ongoing and long-term contract are sufficient to establish personal jurisdiction.

BACKGROUND

Crete Carrier is a common carrier, incorporated in Nebraska, with its principal place of business in Lincoln. BI-LO is a Delaware corporation, with its principal place of business in Mauldin, South Carolina. BI-LO purchased appellee Red Food Stores in March 1994 and assumed all of Red Food Stores'

debts and liabilities. In June 1991, Red Food Stores entered into a transportation contract with Crete Carrier. The contract stated it would continue in force until canceled and was still in effect as of September 30, 1996. Under the contract, Red Food Stores agreed to indemnify and hold Crete Carrier harmless from any liability or expense for personal injury that resulted from Red Foods Stores' negligence. The record is unclear regarding how the contract was negotiated and which party solicited the contract. Red Food Stores and BI-LO state that they never negotiated the contract in Nebraska or sent a representative to Nebraska. However, the contract was required to be approved by Crete Carrier's marketing division in Nebraska.

Following BI-LO's purchase of Red Food Stores, all requests for Crete Carrier to transport products for Red Food Stores pursuant to the contract were initiated by employees of Red Food Stores and made to employees of Crete Carrier in Nebraska. Following shipment, Red Food Stores would again contact Crete Carrier's Nebraska office to verify that shipment had been completed. All billings for services performed by Crete Carrier originated in Nebraska, and payment for those services was sent to Nebraska. Likewise, claims made by Red Food Stores for cargo damage were presented to, and paid by, Crete Carrier employees in Nebraska. Between October 1, 1994, and September 30, 1996, Crete Carrier hauled 1,386 loads for Red Food Stores pursuant to the contract. As a result, Red Food Stores contacted Crete Carrier a minimum of 2,772 times during that period. Red Food Stores and BI-LO do not own property in Nebraska, have not had any business locations in Nebraska, have not advertised in Nebraska, have not paid taxes in Nebraska, and have never authorized an agent to accept service of process in Nebraska.

In June 1992, a driver employed by Crete Carrier was injured while unloading a truck at a Red Food Stores warehouse in Tennessee. As a result, Crete Carrier paid workers' compensation benefits to the driver. In June 1996, Crete Carrier filed the instant action against Red Food Stores and BI-LO, alleging that the driver's injuries were caused by Red Food Stores' and BI-LO's negligence and that Red Food Stores and BI-LO breached the 1991 contract by refusing to indemnify Crete Carrier for the

workers' compensation payments. Red Food Stores and BI-LO entered a special appearance in order to object to personal jurisdiction. The district court concluded that the sole contacts of Red Food Stores and BI-LO to the State of Nebraska were placing of telephone orders or instructions, being billed from Nebraska, remitting payments to Crete Carrier's Nebraska office, and other contacts resulting from a variety of paperwork generated through Crete Carrier's office. The court then determined that such contacts were not sufficient to subject Red Food Stores and BI-LO to the jurisdiction of the court. The district court further concluded that considering the nature of the action and the location where the negligence occurred, it would be burdensome, inefficient, and illogical to litigate the matter in Nebraska.

ASSIGNMENTS OF ERROR

Crete Carrier assigns that the district court erred in (1) concluding that Red Food Stores' and BI-LO's contacts with Nebraska were insufficient to subject them to the personal jurisdiction of the court and (2) concluding that it would be unduly burdensome upon Red Food Stores and BI-LO to compel them to litigate the action in Nebraska.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; 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. *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995).

The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant. *Id.*

ANALYSIS

Minimum Contacts

Crete Carrier contends that Red Food Stores' and BI-LO's activities are such that they have sufficient minimum contacts

with Nebraska for the district court to assert personal jurisdiction over them. In particular, Crete Carrier argues that the years of continuous business dealings between Red Food Stores and Crete Carrier, the contract between the companies, and the minimum of 2,772 communications by Red Food Stores to Crete Carrier in Nebraska serve to establish sufficient minimum contacts on the part of Red Food Stores and BI-LO. However, Red Food Stores and BI-LO essentially argue that they have no physical presence in Nebraska, stating, for example, that they do not own property in Nebraska, have never advertised in Nebraska, have never had any business locations in Nebraska, and have not paid taxes in Nebraska. Red Food Stores and BI-LO further assert that they never negotiated a contract with Crete Carrier in Nebraska or sent a representative to Nebraska to deal with Crete Carrier and argue that the existence of a contract and telephone or mail communications are not sufficient to establish sufficient minimum contacts.

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Crystal Clear Optical v. Silver, supra*; *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

In addressing the special appearance, it is necessary to consider the breadth of the long-arm statute. See, *Crystal Clear Optical v. Silver, supra*; *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995). Section 25-536(2) expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits. *Castle Rose v. Philadelphia Bar & Grill, ante* p. 299, 576 N.W.2d 192 (1998); *Crystal Clear Optical v. Silver, supra*; *Wagner v. Unicord Corp., supra.* Therefore, we need address only whether Red Food Stores and BI-LO had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles of due process.

The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations. *24th and Dodge Ltd. v. Commercial Nat. Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993), citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In order to subject an out-of-state defendant to personal jurisdiction in the forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend " 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316. Thus, the determination of whether the district court has jurisdiction is a two-step process. First, we must determine whether Red Food Stores and BI-LO had the necessary minimum contacts with Nebraska; then, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and

substantial justice. See, *Burger King Corp. v. Rudzewicz, supra*; *Internat. Shoe Co. v. Washington, supra*.

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Castle Rose v. Philadelphia Bar & Grill, supra*; *Wagner v. Unicord Corp., supra*; *24th and Dodge Ltd. v. Commercial Nat. Bank, supra*. This analysis requires that we consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Internat. Shoe Co. v. Washington, supra*; *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

Under such an analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Burger King Corp. v. Rudzewicz, supra*; *Castle Rose v. Philadelphia Bar & Grill, supra*; *Wagner v. Unicord Corp., supra*. Rather, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts. *Burger King Corp. v. Rudzewicz, supra*; *Castle Rose v. Philadelphia Bar & Grill, supra*. However, due process does not require a defendant's physical presence in the forum before personal jurisdiction is exercised. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *Burger King Corp. v. Rudzewicz, supra*; *Castle Rose v. Philadelphia Bar & Grill, supra*; *Williams v. Gould, Inc., supra*.

Red Food Stores and BI-LO are correct in their assertion that the existence of a contract with a party in a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state. *Burger King Corp. v. Rudzewicz, supra*; *Castle Rose v. Philadelphia Bar & Grill, supra*; *Williams v. Gould, Inc., supra*. Likewise, the mere use of interstate facilities, such as telephones, mail, or facsimile machines, is not

enough to confer jurisdiction. *Bell Paper Box, Inc. v. Trans Western Polymers*, 53 F.3d 920 (8th Cir. 1995); *Angelica Corp. v. Gallery Mfg. Corp.*, 904 F. Supp. 993 (E.D. Mo. 1995). However, this does not mean that the existence of a contract and the use of interstate communications may not be considered in the overall analysis. Mail and telephone communications sent by the defendant into a forum may count toward the minimum contacts that support jurisdiction. *Grand Entertainment Group v. Star Media Sales*, 988 F.2d 476 (3d Cir. 1993); *Angelica Corp. v. Gallery Mfg. Corp., supra.* Further, if a substantial connection is created, "even a single telephone call into the forum state can support jurisdiction." *Taylor v. Phelan*, 912 F.2d 429, 433 n.4 (10th Cir. 1990). See, *Grand Entertainment Group v. Star Media Sales, supra*; *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415 (10th Cir. 1988).

When dealing with contracts, it is the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, that must be evaluated in determining whether a defendant purposefully established minimum contacts within the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Castle Rose v. Philadelphia Bar & Grill, ante* p. 299, 576 N.W.2d 192 (1998); *Williams v. Gould, Inc., supra.* Accordingly, it has been held that a company's contacts were sufficient to subject it to personal jurisdiction in Missouri when there existed both a contractual relationship and contacts utilizing interstate communications. *Angelica Corp. v. Gallery Mfg. Corp., supra.*

Thus, the U.S. Supreme Court has stated:

> "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."

Williams v. Gould, Inc., 232 Neb. 862, 879, 443 N.W.2d 577, 588 (1989), quoting *Burger King Corp. v. Rudzewicz, supra.*

See, also, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (stating that limits on state jurisdiction imposed by due process have been substantially relaxed over time due to fundamental transformation in American economy).

The U.S. Supreme Court has further stated that " 'with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. . . .' " *McGowan Grain v. Sanburg*, 225 Neb. 129, 138, 403 N.W.2d 340, 347 (1987), quoting *Burger King Corp. v. Rudzewicz, supra.*

The district court concluded that the sole contacts of Red Food Stores and BI-LO with the State of Nebraska were placing of telephone orders or instructions, being billed from Nebraska, remitting payments to Crete Carrier's Nebraska office, and other contacts resulting from a variety of paperwork generated through Crete Carrier's office. However, Red Food Stores and BI-LO do not dispute that an ongoing contractual relationship has existed between them and Crete Carrier for a minimum of 5 years, nor do they dispute that they contacted Crete Carrier in Nebraska to place shipping orders and verify deliveries a minimum of 2,772 times over a 2-year period of that contract. Finally, Red Food Stores and BI-LO do not dispute that the instant case arises out of an alleged breach of the contract, and a copy of the contract is in the record. Thus, there is no dispute of fact regarding the existence, duration, or terms of the contract. However, under our conclusion in *Williams v. Gould, Inc., supra*, and the conclusions of the U.S. Supreme Court in *Burger King Corp. v. Rudzewicz, supra*, the district court was in error as a matter of law in not considering the length and nature of the contractual relationship of the parties.

The instant case does not present an issue where jurisdiction is sought on the basis of a single contract or a few contacts. Rather, Red Food Stores and BI-LO, both corporations, engaged in an ongoing contractual and business relationship with Crete Carrier, another corporation, over a period of years.

As part of this relationship, Red Food Stores continually made contact with citizens of Nebraska in order to carry out its business with Crete Carrier. Considering the quality and nature of such contacts, these activities are far from being contacts based on the unilateral activities of someone other than Red Food Stores; neither are they random, fortuitous, or attenuated. Rather, Red Food Stores and BI-LO actively created continuing relationships and obligations with Nebraska citizens. Furthermore, Crete Carrier's cause of action arises directly out of those contacts. Accordingly, we conclude the district court erred in its determination that Red Food Stores and BI-LO did not have sufficient minimum contacts with Nebraska to satisfy due process.

FAIR PLAY AND SUBSTANTIAL JUSTICE

Having determined that Red Food Stores and BI-LO had the necessary minimum contacts with Nebraska to support the exercise of personal jurisdiction over them, we next weigh the facts of the case to determine whether the exercise of personal jurisdiction would comport with " 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In doing so, we may consider the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz, supra*; *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995), citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1982). These "other considerations" sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King Corp. v. Rudzewicz, supra*. In addition, where, as here, a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz, supra*. See, also, *Grand Entertainment Group v.*

Star Media Sales, 988 F.2d 476 (3d Cir. 1993) (burden on defendant who wishes to show absence of fairness or lack of substantial justice is heavy); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989) (nonresident defendant failed to show any "other considerations" discussed in *Burger King Corp. v. Rudzewicz, supra*, which weigh against Nebraska court's exercise of personal jurisdiction over him).

In the instant case, although the district court concluded it would be burdensome, inefficient, and illogical to litigate the matter in Nebraska, Red Food Stores and BI-LO failed to provide any facts to support such a finding. The affidavits in the record provided by Red Food Stores and BI-LO do not state reasons or facts to show any "other considerations" as discussed in *Williams v. Gould, Inc., supra*, and *Burger King Corp. v. Rudzewicz, supra*, that would weigh against an exercise of personal jurisdiction over them. Accordingly, Red Food Stores and BI-LO have failed to show that an exercise of jurisdiction over them would offend notions of fair play and substantial justice.

CONCLUSION

We conclude that the numerous telephone and written contacts between Red Food Stores and Crete Carrier, combined with the long-term and ongoing contractual relationship between the parties, are sufficient contacts to establish personal jurisdiction over Red Food Stores and BI-LO. We further conclude that Red Food Stores and BI-LO have not shown that any other considerations apply that would weigh against an exercise of jurisdiction. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

IN RE ESTATE OF ERVIN W. PETERSON, DECEASED. NORMAN LEWIS PETERSON, APPELLANT, V. ELAINE MOORE, PERSONAL REPRESENTATIVE OF THE ESTATE OF ERVIN W. PETERSON, DECEASED, APPELLEE.

576 N.W.2d 767

Filed March 27, 1998. No. S-96-1285.

1. **Statutes: Appeal and Error.** Statutory interpretation presents questions of law, and an appellate court is obligated to reach a conclusion independent of that reached by the trial court.
2. **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.
3. ____. A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute.
4. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, 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.
5. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
6. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Decedents' Estates: Wills: Statutes: Intent.** The clear intent of Neb. Rev. Stat. § 30-2323 (Reissue 1995) is to provide an exempt property allowance, which benefit is in addition to any benefits passing to the surviving spouse or surviving children by will, by intestate succession, or by way of elective share. Unless a testator clearly provides in the will that the devises and bequests are in lieu of allowances, then the spouse or children are entitled to both.

Appeal from the County Court for Sarpy County: LARRY F. FUGIT, Judge. Reversed and remanded for further proceedings.

Michael F. Pistillo, of Pistillo & Pistillo, P.C., for appellant.

Dixon G. Adams for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

This case presents a question of first impression regarding whether an adult, emancipated son of a testator is entitled to an exempt property allowance of $5,000 pursuant to Neb. Rev. Stat. § 30-2323 (Reissue 1995) when the will specifically provided that under no circumstance should any share of the testator's estate go to his son.

SCOPE OF REVIEW

Statutory interpretation presents questions of law, and an appellate court is obligated to reach a conclusion independent of that reached by the trial court. See *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997).

FACTS

Ervin W. Peterson (testator) died on April 20, 1996. On April 30, his will was informally admitted to probate in the county court for Sarpy County. In the will, the testator disinherited his only son, Norman Lewis Peterson (Peterson). The fifth article of the will provides:

> I have intentionally omitted to provide for, and specifically direct and will that under no circumstances shall any part, share or interest in my estate go to, vest in, or be taken by my son, NORMAN LEWIS PETERSON, or any of his descendants, and I hereby generally and specifically disinherit each and any and all persons whomsoever claiming to be or who may lawfully be determined to be my heirs at law except as otherwise mentioned in this Will. Should this son, NORMAN LEWIS PETERSON, or any of his heirs or any one [sic] else seek to set aside this Will, or to change the intent I have designated, or endeavor to change or set aside the provisions of this Will in any manner whatsoever, then in any or all of the above-mentioned cases and events I hereby give and bequeath to such person or persons the sum of ONE DOLLAR and NO MORE, in lieu of any other share or interest in my estate.

Peterson filed an "Application for Authorizing Exempt Property Allowance and Order Directing Payment," requesting an exempt property allowance in the amount of $5,000. The personal representative, Elaine Moore, filed a "Resistance to Application for Exempt Property Allowance," alleging that Peterson was not entitled to the exempt property allowance because he was specifically disinherited by the testator.

The county court denied Peterson's application, and Peterson thereafter perfected his appeal to this court pursuant to Neb. Rev. Stat. § 30-1601 (Reissue 1995).

ASSIGNMENT OF ERROR

Peterson alleges that the county court erred in concluding that he was not entitled to receive an exempt property allowance under the provisions of § 30-2323.

ANALYSIS

This court has never addressed the issue of whether a disinherited, adult child is entitled to an exempt property allowance under § 30-2323, which provides:

> In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than five thousand dollars, or if there is not five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the five thousand dollars value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except for costs and expenses of administration, and except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of

> homestead allowance and family allowance. *These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share.*

(Emphasis supplied.)

Peterson claims that he is entitled to an exempt property allowance even though he was specifically disinherited by the testator. He asserts that the disinheritance of a child by a testator does not affect the statutory right to property and claims that this court should treat an exempt property allowance as an absolute right.

The personal representative argues that Neb. Rev. Stat. § 30-2341 (Reissue 1995) controls and that the testator's intent overrides Peterson's right to the exempt property allowance. Section 30-2341 states: "The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will." The personal representative asserts that the last sentence of § 30-2323 refers to the testator's intent and that Peterson is not entitled to the exempt property allowance because the testator clearly intended that Peterson receive nothing from his estate or, in the alternative, that he would take only "ONE DOLLAR and NO MORE" in lieu of any other share or interest.

The county court's rationale for denying Peterson's claim was that the exempt property and homestead allowances are "there to exempt those amounts from the claims [of] creditors, to exempt those amounts from the payment of inheritance taxes, and not to benefit or in other words take the property out of an estate . . . ." We conclude that the court misinterpreted the language of the statute. Statutory interpretation presents questions of law, and an appellate court is obligated to reach a conclusion independent of that reached by the trial court. See *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997). Since this is a question of law, our review must be independent of the determination made by the county court.

It is undisputed that the testator intended to disinherit Peterson. Thus, the issue presented is whether this disinheri-

tance affects Peterson's claim to an exempt property allowance pursuant to § 30-2323.

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. *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996). A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

We direct our attention to the last sentence of § 30-2323, which provides that "[exempt property] rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share." In *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), we discussed Neb. Rev. Stat. §§ 30-2324 and 30-2325 (Reissue 1979), which provided for an allowance to the surviving spouse in the total amount of $6,000, payable in periodic installments not exceeding $500 per month for 1 year. We held that the family allowance was a specific, vested, and indefeasible statutory right accruing to the spouse upon the decedent's death.

We must determine whether § 30-2323 creates a vested and indefeasible right. In the absence of anything indicating to the contrary, 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. See *In re Estate of Muchemore*, 252 Neb. 119, 560 N.W.2d 477 (1997), *disapproved on other grounds, In re Estate of Nelson*, 253 Neb. 414, 571 N.W.2d 269. Accordingly, a statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the

act are consistent, harmonious, and sensible. *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996). We conclude that the plain and unambiguous language of § 30-2323 creates a statutory right that accrues to the surviving spouse or the surviving children jointly if there is no surviving spouse upon the death of the testator.

The next question is whether this right is indefeasibly vested or whether it may be abrogated by will. The Montana Supreme Court addressed a similar issue in *Matter of Estate of Dunlap*, 199 Mont. 488, 649 P.2d 1303 (1982). Paragraph 7 of Dunlap's will provided as follows: " 'I hereby declare that I have one child: J. Wayne Dunlap, a/k/a Joseph A. Dunlap. I specifically leave nothing to my said child.' " *Id.* at 489, 649 P.2d at 1304. By other provisions of the will, Dunlap devised all her property to her husband, and in the event that he predeceased her (which he did), the entire estate was devised to a cemetery association. The son filed a petition for exempt property allowance, which was denied by the personal representative. The district court granted the allowance, and the Montana Supreme Court affirmed and stated:

> Section 72-2-802 [of the Montana Code regarding exempt property] provides:
>
> ". . . If there is no surviving spouse, children of the decedent are entitled jointly to the same value. . . .
>
> ". . . .
>
> ". . . These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share."

(Emphasis omitted.) *Matter of Estate of Dunlap*, 199 Mont. at 489-90, 649 P.2d at 1304.

In *Matter of Estate of Dunlap*, the personal representative contended that the testator's intent governed, that the statutory language "unless otherwise provided" included disinheritance of the son by will, and that, therefore, the son could not be the recipient of exempt property. The Montana Supreme Court held that § 72-2-802 did not use the term "exemption" or "exempt" in its colloquial form, but, rather, treated "exempt property" together with "homestead allowance" in the noun form to iden-

tify an absolute grant. The court held that these rights were in addition to any benefit or share passing to the surviving spouse or children "(1) by will of the decedent unless otherwise provided, (2) by intestate succession, or (3) by way of elective share." *Matter of Estate of Dunlap*, 199 Mont. at 490, 649 P.2d at 1305. The court stated that the family protection provisions of the Uniform Probate Code were intended by the drafters to protect a surviving spouse and children from disinheritance by a decedent. The court held that Dunlap's will did no more than disinherit her son and expressed no intention as to statutory rights. Therefore, the son was disinherited, but remained entitled to his statutory rights.

The personal representative argues that the phrase "unless otherwise provided therein" in § 30-2323 suggests that a testator may abrogate a party's right to receive an exempt property allowance. Other jurisdictions have recognized that a testator may give a bequest in lieu of a statutory allowance. However, these courts have held that this intent must be clear from the language of the will before the court will bar the statutory grant. See, *In re Estate of Reddick*, 102 Ohio App. 3d 488, 657 N.E.2d 531 (1995) (finding that bequest in will was in lieu of statutory allowance for support because it was expressed in clear and unambiguous language); *Rush v. Rush*, 360 So. 2d 1240 (Miss. 1978) (noting that widow is entitled to allowance unless it clearly appears that provisions in will are in lieu of statutory support); *In re Estate of E.K. Davis*, 126 Vt. 19, 220 A.2d 726 (1966) (noting that statutory support may be waived by clear and unequivocal language in will that bequest be in lieu of all statutory rights).

In construing the language of § 30-2323, we conclude that the statutory rights granted therein are vested and indefeasible. The clear intent of § 30-2323 is to provide an exempt property allowance, which benefit is "in addition to" any benefits passing to the surviving spouse or surviving children by will, by intestate succession, or by way of elective share. Unless a testator clearly provides in the will that the devises and bequests are in lieu of exempt property, then the spouse or children are entitled to both. However, a clear testamentary stipulation may require the spouse or the surviving children to choose between

the provisions of the will or the statutory exempt property allowance. See Thomas E. Atkinson, Handbook of the Law of Wills § 34 (2d ed. 1953).

If the will of a testator clearly provides otherwise, then an exempt property allowance is not "in addition to" any benefit by will, intestate succession, or elective share. Regardless, the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance.

The county court erred in finding that Peterson was not entitled to an exempt property allowance. The testator disinherited Peterson, but Peterson is entitled to an exempt property allowance in accordance with § 30-2323.

CONCLUSION

The judgment of the county court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AMY J. BETZ, APPELLEE, V. WILLIAM J. BETZ, APPELLANT.
575 N.W.2d 406

Filed March 27, 1998. No. S-97-621.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Child Support.** The proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's earning capacity.
4. **Guardians Ad Litem: Attorneys at Law.** A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings or briefs.
5. **Divorce: Guardians Ad Litem: Attorneys at Law: Minors.** An attorney appointed under Neb. Rev. Stat. § 42-358 (Cum. Supp. 1996) is an advocate for the minor child and is *not* a guardian ad litem.

6. **Attorney and Client: Conflict of Interest.** If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue the representation in the trial.
7. **Guardians Ad Litem: Attorneys at Law: Minors.** Even though there is no clear statutory statement of what a guardian ad litem is, the duties and responsibilities of a guardian ad litem are not coextensive with those of an attorney who represents a minor.
8. **Divorce: Courts: Guardians Ad Litem: Attorneys at Law: Minors.** We hold prospectively that from June 1, 1998, forward, when making an appointment of a guardian ad litem or an attorney to represent the interests of the minor pursuant to Neb. Rev. Stat. § 42-358 (Cum. Supp. 1996) in forums other than the juvenile court, the appointing court, in the order making the appointment, shall specify whether the person appointed is to act as a guardian ad litem or as an attorney pursuant to § 42-358.

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

Joseph S. Daly and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellant.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This appeal arises out of a petition for dissolution of marriage filed by appellee, Amy J. Betz, against appellant, William J. Betz. The district court for Sarpy County, Nebraska, granted custody of the couple's minor child, Emma Betz, to appellee, and appellant filed this appeal. Appellant further appeals the district court's calculation of proper visitation and child support. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We affirm the decision of the district court.

FACTUAL BACKGROUND

Appellant and appellee were married in July 1994 in Council Bluffs, Iowa. Over the course of their 3-year marriage, the cou-

ple encountered numerous problems, which they attempted to resolve. In August 1996, however, appellee filed for divorce. The marriage produced one child, Emma. On its own motion, the district court appointed Attorney Michael Heavey as guardian ad litem.

At trial, appellee testified that following the birth of the minor child, she was the family's primary caregiver as appellant was usually at the bar the couple ran for 12 hours a day, 7 days a week. Appellee further testified that appellant provided almost no care for the minor child prior to the dissolution of their marriage as he was always at work. Appellee testified that appellant often came home from the bar smelling of alcohol and that he would then go to sleep until 1:30 p.m. the next day, a mere hour before he had to go back to the bar to work. Appellee further testified that following the parties' separation, on several occasions appellant was inebriated when he was to have visitation with the minor child. On four occasions, appellee was forced to take the minor child to day care, rather than leave the minor child with appellant because she felt he was too drunk to care for her. Testimony corroborative of appellee's testimony was given by the couple's day-care provider, by appellee's mother, and by appellee's Alcoholics Anonymous sponsor.

Appellant testified that he had a good relationship with the minor child and that he was better suited to care for her than appellee because his schedule allowed him to be free during the day. As such, the minor child could be with a parent during the day rather than in day care. Furthermore, appellant testified that it would be problematic for him to see the minor child on another visitation schedule due to his work schedule at the bar.

Gary N. Lehmer, the couple's marriage counselor, testified that both parents seemed fit and proper parents. Lehmer further testified that it was his experience that children should spend as much time with both parents as possible. He concluded by stating that the child would be better off being placed with a parent than with a babysitter. On cross-examination, however, Lehmer admitted that this was a general proposition and that it was not specifically tailored to appellant and appellee's situation.

At the close of appellant's case in chief, appellant attempted to call the guardian ad litem to testify that the minor child

would be better served by giving custody to appellant. Heavey, the guardian ad litem, had cross-examined witnesses on behalf of the minor child throughout the course of earlier testimony. The court sustained appellee's objection to Heavey's testimony on the basis that the appointment of the attorney created an attorney-client relationship between the minor child and Heavey which would be violated by his testimony. Appellant then attempted to enter Heavey's report into evidence to which appellee objected, and the court sustained the objection on hearsay grounds. Heavey's report stated his opinion that joint custody be awarded if the parties could so agree but, if not, that custody go to appellee with appellant having priority over any other day-care providers.

The court then granted the petition for dissolution and awarded custody to appellee. The trial judge expressed his belief that the current system of visitation was in the best interests of the child because the child had become accustomed to the schedule during the parents' separation. The court then awarded appellee child support in the amount of $638 per month, based upon appellant's military pension and his earning capacity.

ASSIGNMENTS OF ERROR

Appellant assigns as error that the trial court (1) abused its discretion in refusing to allow the court-appointed guardian ad litem to testify and in awarding appellee custody of the parties' minor child, (2) abused its discretion in its award of visitation to appellant, and (3) abused its discretion in calculating the parties' respective monthly income and child support.

STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996). Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Abboud v. Papio-Missouri River*

NRD, 253 Neb. 514, 571 N.W.2d 302 (1997); *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997). The proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's earning capacity. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

ANALYSIS

Role of Court-Appointed Guardian Ad Litem

The fact that in this case the court-appointed guardian ad litem also participated in the trial by performing the functions of an attorney points to the confusion that has existed between the role of a guardian ad litem and the role of a court-appointed attorney.

A court, under its inherent equitable powers, may appoint a guardian ad litem. A guardian ad litem may or may not be an attorney. The guardian ad litem's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court. These reports to the court, whether in written form or testimony by the guardian ad litem, including hearsay, shall be subject to the Nebraska rules of evidence. A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings or briefs. If the guardian ad litem feels that he or she needs an attorney, the guardian ad litem should apply to the appointing court for permission to retain an attorney to represent the guardian ad litem.

An attorney appointed under Neb. Rev. Stat. § 42-358 (Cum. Supp. 1996) is an advocate for the minor child and is *not* a guardian ad litem. The court-appointed attorney shall act as the attorney for the minor child, but shall not testify in the proceedings. This distinction between a guardian ad litem and an attorney appointed under § 42-358 is mandated under Canon 5, DR 5-102(A), of the Code of Professional Responsibility. DR 5-102(A) states:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue the representation in the trial . . . .

The Court of Appeals in *Joyce S. v. Frank S.*, 6 Neb. App. 23, 33, 571 N.W.2d 801, 809 (1997), stated:

> [T]he proper function of a guardian ad litem is to thoroughly investigate the facts to learn where the welfare of his or her ward lies, and then, if the issues necessary for the protection of that ward are not properly framed by appropriate pleadings previously filed by the child's parents, the guardian ad litem should file a report or pleading that will bring to the court's attention those issues. Furthermore, if an investigation by the guardian leads the guardian to conclude that the attorneys for the parties are not going to introduce the relevant and admissible evidence necessary to protect the interests of the ward, the guardian ad litem should do so and then by argument suggest to the court what the law and the evidence dictate would be in the best interests of the ward. We think that under the adversarial system, the duty of the guardian ad litem is to be sure the judge has the full facts and the correct law, accompanied by helpful argument, so that the judge may make a correct decision. In short, the primary function of the guardian ad litem is to give the judge the necessary information by way of admissible evidence so the judge may issue an order which is in the best interests of the ward and which will be upheld on appeal. Of course, if the court does not issue such an order, the guardian ad litem should appeal.
>
> We suggest that the primary function of the guardian ad litem's report is for the guardian to demonstrate to the judge that the guardian has performed his or her duty. Frequently, when a guardian ad litem's report does not contain objectionable hearsay, it is an efficient means of communicating the facts that the guardian has learned to the parties and to the judge, if properly admitted into evi-

> dence, but a report is not somehow made admissible because it was prepared by a guardian ad litem appointed by a court pursuant to a statute. Hearsay within such reports remains hearsay.

The court went on to conclude:

> In this case, the guardian ad litem was allowed to opine that it was in Katie's best interests that Frank's parental rights be terminated. The record clearly shows that opinion is based upon hearsay that would not be admissible in court. We see no merit in giving credence to the opinion of a guardian when that opinion is based in large measure on the very hearsay that our legal tradition holds to be improper. Therefore, in our de novo review we shall consider only that portion of the guardian's testimony and evidence that is relevant and admissible.

Id. at 33-34, 571 N.W.2d at 809. That portion of *Joyce S. v. Frank S., supra*, that a guardian ad litem may file pleadings, introduce relevant and admissible evidence, argue to the court, or act in the role of an attorney, is hereby disapproved.

Even though there is no clear statutory statement of what a guardian ad litem is, the duties and responsibilities of a guardian ad litem are not coextensive with those of an attorney who represents the minor. See *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

One can argue that the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-272.01(2)(e) (Cum. Supp. 1996) allows a guardian ad litem to present evidence and witnesses and cross-examine witnesses at all evidentiary hearings. This statute, however, only applies to juvenile cases. Whether this juvenile statute is constitutional is something that we are not called upon to decide in this case.

We, therefore, hold prospectively that from June 1, 1998, forward, when making an appointment of a guardian ad litem or an attorney to represent the interests of the minor pursuant to § 42-358 in forums other than the juvenile court, the appointing court, in the order making the appointment, shall specify whether the person appointed is to act as a guardian ad litem or as an attorney pursuant to § 42-358. One person may not serve

in both capacities. The appointed person shall, after the date of the appointment, perform his or her duties as outlined above.

VISITATION AND CHILD SUPPORT

Appellant's second and third assigned errors revolve around the trial court's determinations regarding visitation of the minor child and child support. As stated earlier, child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996). We find no abuse of discretion in reviewing the decision of the trial court regarding appellant's visitation. There was ample evidence that appellant did very little in the way of caring for the minor child prior to the dissolution of his marriage. Furthermore, despite the convenience offered by appellant's schedule, evidence in the record clearly questions appellant's sobriety. Appellee testified that on four occasions when appellant was to have the minor child for visitation, appellee was forced to take the minor child to a day-care provider due to appellant's inebriation. Furthermore, it was brought out on cross-examination that appellant had recently been arrested for driving while under the influence. Based upon these facts and the fact that the minor child had become accustomed to her visitation schedule during the temporary separation, the decision of the trial court is neither untenable nor improper and does not amount to an abuse of discretion. As we find no abuse of discretion in the trial court's visitation schedule, appellant's second assigned error is without merit.

Appellant's third assigned error revolves around the amount of child support awarded to appellee. Appellant argues that the only evidence as to his income was his military pension, and thus the court improperly imputed income to him from his operation of the bar. However, there was ample evidence that appellant worked a significant number of hours at the bar and restaurant he owned and operated. As stated above, the proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's earning capacity. *Smith-Helstrom v.*

Yonker, 249 Neb. 449, 544 N.W.2d 93 (1996). We conclude that the trial court did not err in determining the amount of child support from appellant's earning capacity, rather than his earnings. Appellant is an able-bodied, 51-year-old man who has demonstrated that he is able to work.

CONCLUSION

Appellant's first assignment of error is without merit for the reasons stated above. Appellant's second and third assigned errors are without merit, as these matters are within the discretion of the trial court. As to the second assignment of error, visitation, there was ample evidence to support the trial court's ruling. With regard to the third assignment of error, child support, it appears that the appellant works long hours as indicated in the record, yet claims that he has accrued no income from his labor to contribute to the support of the minor child. It is for this reason that this court allows a district court to use a party's earning capacity, rather than the party's earnings, to determine child support obligations. No abuse of discretion can be attributed to the trial court's determination regarding child support.

AFFIRMED.

NANCY J. WEAVER, APPELLANT, V. DR. E.C. CHEUNG AND PLATTE VALLEY MEDICAL GROUP, P.C., APPELLEES.
576 N.W.2d 773

Filed April 3, 1998. No. S-96-506.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
3. **Malpractice: Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
4. ____: ____. In a medical negligence action, the 2-year period of limitations specified in Neb. Rev. Stat. § 44-2828 (Reissue 1993) begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.

5. ____: ____. When a medical negligence action is filed outside the 2-year limitation period, a party seeking to invoke the 1-year discovery exception in Neb. Rev. Stat. § 44-2828 (Reissue 1993) must establish that the cause of action was not and could not reasonably have been discovered within the 2-year period.
6. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury or damage, regardless of whether there is awareness of a legal right to seek redress in court.
7. ____: ____. Discovery of a cause of action occurs when there has been discovery of facts constituting the basis of the cause of action or discovery of the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

P. Stephen Potter, P.C., for appellant.

William M. Lamson, Jr., and David J. Schmitt, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

This is a professional negligence action brought by Nancy J. Weaver against Dr. E.C. Cheung and Platte Valley Medical Group, P.C. (Platte Valley). Weaver appeals from an order of the district court for Buffalo County granting summary judgment in favor of Cheung and Platte Valley based upon its finding that Weaver's claim was barred by the statute of limitations. Finding no error, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In her petition filed on January 19, 1995, Weaver alleged that Cheung, while employed by Platte Valley, was negligent in providing medical diagnosis and treatment. Specifically, Weaver alleged that Cheung erroneously determined that she suffered from cirrhosis of the liver and thereafter treated her for that condition. She further alleged that another physician subsequently advised her that she did not have liver disease, but, rather, a condition known as celiac sprue. Weaver claimed permanent injury resulting from the misdiagnosis and improper treatment, for which she sought general and special damages. Cheung and

Platte Valley filed an answer in which they generally denied Weaver's allegations of negligence and asserted as an affirmative defense that the action was "barred by the applicable statute of limitations, Neb. Rev. Stat. §44-2828 (Reissue 1993)." Weaver did not file a reply.

Cheung and Platte Valley moved for summary judgment on grounds that Weaver was unable to sustain her burden of proof and that her action was time barred. At a hearing on April 22, 1996, Cheung and Platte Valley narrowed the scope of the motion to their statute of limitations defense, and the district court received evidence pertaining to that issue. The evidence is summarized as follows:

Weaver consulted Dr. David Hult of Gothenburg, Nebraska, on December 4, 1991, with complaints of severe fatigue and swelling of her abdomen and lower extremities. Tests ruled out cancer. Weaver was admitted to Good Samaritan Hospital in Kearney on December 16, 1991, where she was examined by Cheung and Dr. G.K. Bascom, both of whom were associated with Platte Valley at that time. After additional diagnostic studies were done and medication was prescribed by Cheung, Weaver was discharged from the hospital on December 23, 1991. She was readmitted to Good Samaritan Hospital on January 17, 1992. After performing a liver biopsy which was reported as normal, Cheung diagnosed cirrhosis of the liver and treated Weaver based upon that diagnosis. Weaver recalled that she was last treated by Cheung sometime in May 1992. Cheung stated in his affidavit that he treated Weaver "through at least April 27, 1992" and that he "may have also rendered care and treatment through May of 1992." There is some evidence that Weaver may have received treatment from another physician at Platte Valley in June or July 1992, but not later than July 14, 1992. At approximately this time, Cheung moved to another state and did not return to Nebraska.

Weaver's health problems persisted following this period of treatment. She was seen by Hult at various times in 1992 and 1993. Weaver arranged to be examined by Dr. John Bloor at the Hepatology Clinic at University Hospital in Denver, Colorado, on February 1, 1994. Bloor performed additional diagnostic studies and advised Weaver on the following day that in his

opinion she did not have liver disease. On April 13 or 14, 1994, Weaver was advised by another physician in Colorado that she suffered from celiac sprue, a disorder which made her allergic to certain foods. Bloor concluded that Weaver also suffered from restrictive lung disease and dysphagia, two chronic medical problems resulting from "severe prolonged malnutrition caused by the delay in treatment of her celiac sprue."

In its order of April 25, 1996, granting the motion for summary judgment, the district court held that the 2-year limitations period contained in Neb. Rev. Stat. § 44-2828 (Reissue 1993) began to run on Weaver's claim no later than July 14, 1992, the last possible date on which she could have been treated by Cheung. The district court further determined that Weaver discovered her cause of action within the 2-year period and that her claim was therefore barred when the action was commenced on January 19, 1995.

ASSIGNMENT OF ERROR

Weaver contends that the district court erred in granting summary judgment in favor of Cheung and Platte Valley based upon its determination that her cause of action against them was barred by the statute of limitations.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997); *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997).

The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). 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. *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985).

ANALYSIS

This case is controlled by the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1993). Section 44-2828 of the act provides in part:

> [A]ny action to recover damages based on alleged malpractice or professional negligence or upon alleged breach of warranty in rendering or failing to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action, except that if the cause of action is not discovered and could not be reasonably discovered within such two-year period, the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

We have held that with respect to a professional negligence claim against a physician, the 2-year period of limitations specified in this statute begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994); *Ourada v. Cochran*, 234 Neb. 63, 449 N.W.2d 211 (1989); *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986).

Weaver contends that Cheung negligently misdiagnosed her condition as cirrhosis of the liver on or about January 17, 1992, and treated her for this condition "until at least May of 1992." Brief for appellant at 4. The district court correctly determined that while there was conflicting evidence as to when the period of treatment ended, it could have been no earlier than April 27, 1992, and no later than July 14, 1992. We agree with the district court that regardless of whether the 2-year limitations period is computed from the earlier or the later of these dates, it had expired before this action was commenced on January 19, 1995.

Weaver contends that her petition was timely because it was filed within 1 year after February 2, 1994, the date on which she was advised by Bloor that she did not have liver disease and, therefore, "discovered" her cause of action. This argument misconstrues the nature of the "discovery exception" contained in

§ 44-2828. The statute does not permit a plaintiff to elect between the 2-year and 1-year limitations periods contained therein. Rather, it provides that

> *if the cause of action is not discovered and could not be reasonably discovered within such two-year period,* the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

(Emphasis supplied.) § 44-2828. The discovery exception is a tolling provision which permits the filing of an action after the 2-year period only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period.

As the district court noted and Weaver acknowledges, our decision in *Ames v. Hehner,* 231 Neb. 152, 435 N.W.2d 869 (1989), is directly applicable to this case. In *Ames*, the defendant physician performed surgery on February 13, 1981, and continued to treat the patient for postoperative complications until December 1982, without diagnosing the cause of the complications. In August 1984, another physician diagnosed the problem as a permanent neurologic condition resulting from improper arm positioning during the 1981 surgery. The patient filed suit in June 1985, alleging negligence in the performance of the surgery and postoperative treatment. The physician's demurrer was sustained on grounds that the action was time barred under Neb. Rev. Stat. § 25-222 (Reissue 1985), which contained a 2-year limitations period and 1-year discovery exception identical in all material respects to § 44-2828. We affirmed, holding that the 2-year limitations period was applicable notwithstanding the fact that plaintiff did not discover the cause of action until approximately 4 months before the expiration of that period. Two judges dissented, contending that a petition alleging professional negligence on the part of a physician should be considered timely if it is filed either within 2 years of last treatment or within 1 year of discovery of the cause of action.

In the present case, Weaver urges us to overrule *Ames* and adopt the rationale advanced in the dissenting opinions in that

case. She contends, as did the dissenters in *Ames*, that a patient who does not discover a professional negligence cause of action against a physician until shortly before the expiration of the 2-year limitations period is unfairly deprived of an opportunity to seek redress. She argues that the rule applied in *Ames* "does not take into account equity principles such as are apparent in the current case" and "would leave a Plaintiff such as Ms. Weaver perhaps days, weeks or only a few months to get a petition on file after discovering apparent negligence . . . ." Brief for appellant at 9.

Weaver correctly notes the judicial origin of the doctrine permitting calculation of the limitations period from the date when the plaintiff discovers a cause of action based upon professional negligence. In *Spath v. Morrow,* 174 Neb. 38, 115 N.W.2d 581 (1962), the plaintiff discovered in 1960 that a portion of a surgical needle had been left in her body during a procedure performed in 1951. At that time, Neb. Rev. Stat. § 25-208 (Reissue 1956) required that an action for malpractice be commenced within 2 years; it contained no "discovery" provision. Although the plaintiff had not been treated by the defendant physicians since 1951, we held that the action filed in 1961 was timely, reasoning that "the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body." 174 Neb. at 43, 115 N.W.2d at 585. See, also, *Acker v. Sorensen*, 183 Neb. 866, 165 N.W.2d 74 (1969).

However, when the Legislature codified the discovery rule, first in § 25-222, applicable to professional negligence actions, and then in § 44-2828, applicable to health care providers who elect to qualify under the Nebraska Hospital-Medical Liability Act, it placed a restriction on its application which we are not free to ignore. Both statutes establish a general 2-year limitations period, subject to an exception that an action may be commenced within 1 year from discovery where "the cause of action is not discovered and could not be reasonably discovered" within the 2-year period. § 25-222; § 44-2828. We have interpreted both statutes to require a plaintiff claiming the applicability of the discovery exception to allege facts to establish why the cause of action was not discovered and could not rea-

sonably have been discovered within the 2-year period. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997) (interpreting § 44-2828); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996) (interpreting § 25-222). In applying § 25-222 in a case where an architect was alleged to have been negligent in supervising the construction of a building, we held that the 2-year limitations period began to run when the building was completed and stated that if the plaintiff

> proves by a preponderance of the evidence that the cause of action was not discovered and could not reasonably have been discovered within such a 2-year period, then an action may be commenced "within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . ."

Board of Regents v. Wilscam Mullins Birge, 230 Neb. 675, 683, 433 N.W.2d 478, 483 (1988) (quoting § 25-222). The same burden of proof would apply in an action governed by § 44-2828.

In the context of statutes of limitations, "discovery" refers to the fact that one knows of the existence of an injury or damage, regardless of whether there is awareness of a legal right to seek redress in court. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Board of Regents v. Wilscam Mullins Birge, supra*. Discovery of a cause of action occurs when there has been discovery of facts constituting the basis of the cause of action or discovery of the existence of " 'facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery . . . .' " *Giese v. Stice*, 252 Neb. at 925, 567 N.W.2d at 165; *Gordon v. Connell, supra*.

Weaver's petition contained no allegation that she was unable to discover her cause of action within the 2-year limitations period. Although the incorrect diagnosis of cirrhosis of the liver was not confirmed until February 2, 1994, clearly within the 2-year period, Weaver admitted in her deposition that "all along [she] questioned" Cheung's diagnosis and that her personal physician advised her that he was "puzzled" about Cheung's diagnosis in light of the fact that her liver biopsy was reported

as normal. Moreover, based upon her personal knowledge of cirrhosis of the liver, Weaver considered her continuing symptoms to be inconsistent with that disease. Prior to her evaluation by Bloor, Weaver contacted the Liver Foundation to obtain the names of physicians from whom she could obtain a second opinion regarding her medical problems; she requested the names of physicians outside Nebraska "because [she] wasn't too happy with the way [she] had been treated" by Cheung. These facts establish notice sufficient to constitute discovery of the cause of action even before the misdiagnosis was confirmed on February 2, 1994. See *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988) (holding that discovery of professional negligence claim against accountant occurred when president of company developed "gut feeling" that inventory was missing, rather than on subsequent date of audit confirming shortage). Thus, the uncontroverted evidence reflects that Weaver discovered her cause of action well within the 2-year limitations period, and there is no evidence in the record that she was denied an opportunity to seek redress before her action became time barred. On these facts, we discern no principle of equity or other reason sufficient to warrant a departure from our holding in *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989), and the plain language of § 44-2828. The judgment of the district court is therefore affirmed.

AFFIRMED.

MARCIE J. DAVIDSON, APPELLANT, V.
LESLIE O. DAVIDSON, APPELLEE.
576 N.W. 2d 779

Filed April 3, 1998. No. S-96-696.

1. **Divorce: Child Custody: Appeal and Error.** Determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that 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. **Evidence: Appeal and Error.** 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
5. **Child Custody.** Neb. Rev. Stat. § 42-364 (Cum. Supp. 1994) mandates that custody of minor children be determined on the basis of their best interests.
6. ____. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Cum. Supp. 1994), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child. In addition, § 42-364(2)(d) requires courts to consider credible evidence of abuse inflicted on any family or household member as one of the factors in its custody determination.

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

James H. Hoppe for appellant.

Terrance A. Poppe and Joseph E. Dalton, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

On June 3, 1996, the district court for Lancaster County entered a decree dissolving the marriage of Leslie O. Davidson and Marcie J. Davidson. In connection with the dissolution decree, the district court awarded the father custody of the parties' five children. The mother appealed to the Nebraska Court

of Appeals, claiming that the district court abused its discretion in granting the father custody of the children. The Court of Appeals agreed with the mother and, thus, reversed the district court's judgment. *Davidson v. Davidson*, 97 NCA No. 14, case No. A-96-696 (not designated for permanent publication). The Court of Appeals further found that the mother is a fit and proper person to be awarded custody of the children and that it is in the best interests of the children that the mother be awarded such. We granted the father's petition for further review in order to determine whether the Court of Appeals applied the correct standard of review in substituting its judgment for that of the district court in this custody dispute.

FACTS

In 1984, the mother and the father began living together, and they were married on July 18, 1992. They have five children: David, born December 15, 1984; Richard, born June 28, 1990; Kyle, born November 1, 1991; Mark, born February 13, 1995; and Brianna, born February 19, 1996. Brianna was only 3 months old and still in the hospital at the time of the trial, as she was born prematurely. Brianna's twin sister, Britany, died shortly after birth. Since her release from the hospital, Brianna has needed to be raised in a smoke-free environment, and the evidence reveals that she may have other special needs.

The father works at Davidson Welding, working 4 days a week on 10-hour shifts and earning approximately $2,000 per month. If the father receives custody of the children, due to his job he has hired Bridget Warne, a currently unlicensed day-care provider, to babysit the children along with her own three children. The mother has not worked outside the home since November 1995, and when not working, she is primarily responsible for the care of the children.

In approximately July 1995, the mother and the father separated. Despite the separation and a protection order, the father stayed at the house with the mother from January through April 1996. The mother initially asked the father to stay in the family home in a separate bedroom because she was pregnant and required bed rest. The father testified that during that time period, he was responsible for almost all of the household

chores. The mother asked the father to leave in late March or early April, but the father told her that if she really wanted him out of the house, she could call the police. On April 21, the father did move out of the house after an altercation in which both the father and the mother were cited for domestic assault on each other. The mother has had one other assault citation.

With regard to the father's arrest history, between August 1984 and April 1996, he was arrested for third degree assault, violation of a protection order, child abuse (arising out of an incident in which the father left the children unattended in a car), possession of marijuana and drug paraphernalia, driving with a suspended license, and resisting arrest. Despite the many arrests, the father has been found guilty only of possession of marijuana and drug paraphernalia, driving with a suspended license, and resisting arrest. The father testified that since receiving his last marijuana citation in November 1995, he has not used marijuana. However, David testified that he has seen his father use marijuana since November 1995, but not in the 3 to 4 months prior to trial.

Because the mother had noticed prior to trial that the children were misbehaving, she thought therapy was necessary and, therefore, arranged for family therapy at Lincoln General Hospital to assist the children in dealing with the divorce and the death of their sister. In addition to their misbehavior, two of the boys had also been absent from school or tardy several times. The mother explained that she kept the children out of school for awhile because she was afraid that the father would go to the school and take them away from her.

David's fifth grade teacher testified that David is an average student in her subject areas, but that she has had to spend extra time with him to help him remain caught up in other subject areas because he tells her he does not have time to do his homework. The teacher thinks that David is not adequately prepared for school because David tells her that he has a lot of responsibilities at home. The mother admitted that David has been responsible for getting himself, the mother, and Richard up in the morning and for getting breakfast ready for himself and Richard. Although neither the father nor the mother has attended parent-teacher conferences for David, the father had

visited with the fifth grade teacher several times about David's progress and had come to school to observe David.

Richard's kindergarten teacher testified that Richard is struggling academically and developmentally and that he needs another year of kindergarten. The kindergarten teacher believes that things would be more stable for Richard if the father had custody of him. As such, the kindergarten teacher testified that if the father was to obtain custody, Richard would not need to be in school full time and would be able to repeat kindergarten as he needs to do. On the other hand, the kindergarten teacher stated that if custody was placed with the mother, the school intends to pass Richard into the first grade where he would be in school full time, allowing the school to provide Richard with a stable environment, an environment that would not be provided by his mother. Finally, the kindergarten teacher testified that unlike the mother, the father is an attentive parent and has Richard's best interests at heart.

Marilyn Rhoades, the maternal grandmother, who sees the mother and the children quite frequently, testified that she has observed the mother helping the children with their schoolwork, but has never seen the father doing the same. In addition, she testified that during the summer of 1995, the father called her and told her that she had better come and watch the children because he was leaving and, in fact, was gone when she arrived. Rhoades testified that in another incident 5 weeks before trial, the father was at her house, was very "agitated," and would not leave when asked to do so.

Rhoades also testified, as corroborated by the mother, that the father was verbally and physically abusive toward the mother. The father admitted that on July 3, 1995, he "unintentionally" injured the mother, causing her to receive a whiplash injury. After this incident, the mother testified that she stopped having sexual contact with the father but that on one afternoon, the father held her down and "took what I said no to." Subsequently, the mother discovered that she was pregnant with twins.

The father denied sexually assaulting the mother; however, in a letter to the mother, the father stated, "I will always be proud to call are [sic] children are [sic] children and fill [sic] good even if it was wrong." When asked at trial what he meant by

"wrong," the father answered, "Because we were going through a divorce and having hard times." The mother had talked to the police about the sexual assault, but she decided not to formally report the assault because she "didn't want to have to go through it because to prove that a husband raped a wife is probably pretty hard. And I did become pregnant and — with twins and I just wanted him gone out of my life."

Besides evidence of the father's abusive behavior, there was also evidence that the father used inappropriate disciplinary techniques. Although the father testified that he disciplines the children by placing them in "timeouts," occasionally giving them a "swat on the bottom," talking to them, or grounding them, the mother testified that she has seen the father "whip" the children's "butts." David also testified that the father disciplines him by sometimes "slap[ping] me up side of my head but he don't do it in a severe way. He tries to get me to — slaps me up side the head so I start paying attention." Furthermore, as punishment for wetting his pants in May 1995, the father removed Richard's clothes and made him sit naked in the dark on the porch until the mother intervened and brought Richard inside. Just 5 months earlier, Richard had allegedly been sexually assaulted at school and was treated at Rivendell Center for Children and Youth for the side effects of the assault, including wetting his pants. The father admitted that the punishment was inappropriate.

David testified at trial, outside the presence of his parents, that he had gone to his father's attorney's office a few days before trial. David explained the circumstances under which he went to the office as follows:

> Well, I was at my friend's house. My mom said I could go help him pack. My dad came, he knocked on the door and Stacy opened the door and he yelled my name and I came upstairs and go, "What?" And then he said, "Come on." I said, "I can't." He got me by the hand and took me to his truck and then he just took off.

This incident occurred at a time when the mother had temporary custody of the children and not during the father's visitation time.

David testified that his father says bad things about his mother; however, he also testified that his mother had once said bad things about his father. The father admitted that he told David he was going to report the mother for not taking care of the children, that the children might end up in foster care, and that David should not worry because he would visit them every day. In addition, when David was asked, "Who is [the mother's alleged boyfriend]?" David answered, "Um, as mom says, he's a friend but my dad says a boyfriend." When asked, "What's your dad say about [the alleged boyfriend]?" David answered, "He says that my mom goes over there just for, just for sex and that's what may [sic] dad says and my mom says [the alleged boyfriend] gives her a hug when she needs one and sometimes he'll give her a kiss on the cheek."

Betty Lou Ball, a marriage counselor, testified on behalf of the mother. She has witnessed the mother's interacting with Mark, when he was an infant, and described such interaction as "very appropriate, very nurturing, very loving." In addition, she has observed from her office window the mother interacting with the children and stated that the children were under control and acting appropriately.

With regard to evidence adduced at trial demonstrating whether the mother is a fit parent, the father attempted to elicit testimony to suggest that the mother was romantically involved with another man. The mother denied being romantically involved with the man and denied kissing the man in front of the children. However, David testified that he has seen his mother and the man kiss each other on the cheek.

In addition, the mother admitted that "emotionally" she had "not been good" until being put on an antidepressant for post-partum depression for an 8-week course of treatment. The mother also admitted that she had not spent a lot of time at the house since the birth of Brianna. The mother testified that between the time of Brianna's birth and the time of the trial, she has gone to Texas, to the auto races, to a Bob Seger concert, to a Rockin' Fossils concert, and to several tanning sessions.

In order to attend the auto races on a Thursday evening 2 weeks before trial, the mother left the children with a 14-year-

old male who is allegedly a member of a local gang. The mother testified that she returned home after the races at 1:30 a.m.; however, David testified that the 14-year-old babysat until 6:55 a.m. David further testified that he stayed home from school the next day because he was tired and upset with his mother. The mother explained that she allowed David and Richard to take a personal day from school so she could take David to the races with her as she felt David needed to spend time with her.

There was also testimony at the trial from a nurse at the neonatal unit that the father had taken an active role in the care of Brianna and that the mother visited Brianna less frequently than the father during the nurse's shifts. The nurse further testified, as corroborated by the hospital's records, that when the mother went to Texas, she did not leave a phone number where she could be reached and did not call to check on Brianna for at least 24 hours. The mother explained that the father had the telephone number of where to reach her in case of an emergency and that the father was authorized to give consent for medical treatment for Brianna.

The mother admitted that she was unable to spend as much time at the hospital as she would like. The mother explained that she and the other children had the flu and that "you can't go up there when anyone is sick." The mother also explained that she was very busy caring for the other four children and preparing the home for Brianna by painting, shampooing the carpet, and scrubbing the paneling to rid the home of residual nicotine. However, the evidence reveals that the mother did find time to attend several tanning sessions while Brianna was in the hospital. In addition, the mother admitted that she had not been to the hospital during the 4 days before trial, despite the fact the other children were with the father for visitation.

Finally, Larry Knollenburg and Jack Warne both testified that they have known the father for several years, that they have visited the Davidson residence frequently, and that they perceive the father to be the primary caregiver of the children. Both testified that they have seen the mother and the father smoke marijuana. However, both Knollenburg and Warne testified that the last time they saw the mother smoke marijuana was between 6 and 12 months previously. Knollenburg also testified that it had

been quite awhile since he had seen the father smoke marijuana and that he has never seen him smoke marijuana in front of his children. Warne has concerns about the mother's being the custodial parent for the children because he does not believe she can financially provide for them and because "now or when I was over there recently, you know, [the father] would always care for them . . . ."

Based on the evidence adduced at trial, the trial court, in connection with the dissolution decree, awarded the father custody of the parties' five minor children. The court found that the father was a fit and proper person to have the permanent care, custody, and control of the minor children and that it was in the best interests of the children that the father be awarded such. The mother appealed, claiming that the trial court abused its discretion in awarding the father custody of the children. Agreeing with the mother, the Court of Appeals reversed the district court's judgment and found that the mother is a fit and proper person to be awarded custody of the children and that it is in the best interests of the children that the mother be awarded such. The father successfully petitioned this court for further review.

ASSIGNMENTS OF ERROR

The father assigns that the Court of Appeals erred in finding that the district court's decision granting the father custody of the children was an abuse of discretion and in awarding the mother custody of the children.

ANALYSIS

Standard of Review

In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. Because courts at any level are not capable of mechanical precision in making custody determinations, the following standards of review have evolved for the sake of consistency in applying the rule of law.

In an original divorce action, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996); *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). 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. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Sullivan v. Sullivan, supra.*

However, in the instant case, the Court of Appeals decided that because the district court did not explain the basis for its determination that the children's best interests would be served by awarding physical custody of the children to the father, the appropriate standard of review was de novo "without particular deference to the district court merely because it heard the witnesses testify in person." *Davidson v. Davidson*, 97 NCA No. 14 at 52, case No. A-96-696 (not designated for permanent publication). In determining this to be the appropriate standard of review, the Court of Appeals relied on *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989). In *Parker v. Parker*, 234 Neb. at 168, 449 N.W.2d at 554, we held that

> the party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child, and, if a finding on that issue is not made in the trial court, the Supreme Court, in its de novo review, may make such finding if the evidence supports it.

Further, in *Parker v. Parker*, we reiterated our holding in *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986), where, in a divorce modification proceeding, we stated that when a trial court fails to make a finding of a material change of circumstances, the question then becomes whether upon de novo

review we conclude that the record shows a material change in circumstances.

The Court of Appeals' reliance on *Parker v. Parker, supra*, is misplaced in the present case. The instant cause is an original divorce action wherein the district court made specific findings that the father was a fit and proper person to have the permanent care, custody, and control of the minor children and that it was in the best interests of the children that the father be awarded such. Therefore, the proper standard of appellate review is de novo on the record for an abuse of discretion, rather than reviewing the record de novo without particular deference to the trial court. More specifically, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Palmer v. Palmer, supra*; *Sullivan v. Sullivan, supra.*

Although we noted in *Parker v. Parker*, 234 Neb. at 168, 449 N.W.2d at 554, that "[*i*]*f findings are not made*, this court can make little application of our general rule that in our de novo review, we consider, and may give weight to, the fact that the trial court saw and heard the witnesses" (emphasis supplied), the Court of Appeals went too far when it failed to acknowledge the trial court's specific findings of fact in making its custody determination. In contested custody cases, the trial court's ability to hear and observe the witnesses is of great importance not only in making credibility determinations but also in making necessary findings as to the best interests and welfare of the children. With that in mind, we review this dissolution proceeding de novo on the record to determine whether the district court abused its discretion in awarding custody of the minor children to the father.

De Novo Review

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Ritter v.*

Ritter, 234 Neb. 203, 450 N.W.2d 204 (1990). Neb. Rev. Stat. § 42-364 (Cum. Supp. 1994) mandates that custody of minor children be determined on the basis of their best interests. In determining a child's best interests under § 42-364, courts

> "may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child."

Ritter v. Ritter, 234 Neb. at 211-12, 450 N.W.2d at 211 (quoting *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988)). In addition, § 42-364(2)(d) requires courts to consider credible evidence of abuse inflicted on any family or household member as one of the factors in its custody determination.

The record reveals that both the father and the mother are far from ideal parents. In fact, the respective environments offered by each parent would indicate borderline parental fitness when considering the significant needs of these five children.

When considering the moral fitness, attitude, stability of character, and parental skills and capacity of each parent, the record is replete with evidence of behavior by each parent that obviously caused concern to the trial court. The testimony reveals that while the mother has provided adequate care for the children during their lifetimes, she has oftentimes used poor judgment, and, particularly during the months prior to the divorce, the mother had placed her own immediate gratification before her children's needs. The mother admitted that she had been away from home a great deal since the birth of Brianna. Two Thursdays before trial, the mother left the children with a questionable 14-year-old babysitter in order to attend the auto

races. According to David, the 14-year-old babysat until 6:55 the next morning, and David stayed home from school the next day because he was tired and upset with his mother.

Moreover, David's fifth grade teacher believed that David was not adequately prepared for school because of the significant responsibilities he had assumed at home. Richard's kindergarten teacher testified that Richard is struggling academically and developmentally and that he will need another year of kindergarten. It is the kindergarten teacher's opinion that unlike the mother, the father is an attentive parent and has Richard's best interests at heart.

We now examine the evidence regarding the father's moral fitness, attitude, stability of character, and parenting skills. While there is substantial testimony in the record that the father is a fit parent and attentive to the children's needs, there is testimony that the father has likewise used poor judgment and has used inappropriate disciplinary measures in the past. We are not unconcerned about the evidence in this regard, or about the allegations regarding spousal abuse. We are particularly concerned about the incident when the father placed Richard on the porch naked as a punishment for wetting his pants until the mother intervened and brought Richard inside the house. Although the father acknowledged that the punishment was totally inappropriate in any circumstances, such an incident at least calls into question his parental skills and capacity.

Nonetheless, there is substantial evidence that the father is a fit parent and attentive to the children's needs. Moreover, there was evidence that the father would provide a more stable home environment for the children's educational and emotional needs. It is this type of case, where neither parent can be described as unfit in a legal sense but neither can be described as an ideal parent, that we give particular weight to the fact that the trial court saw and heard the witnesses in making necessary findings as to the best interests and welfare of the children.

Custody determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996); *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). 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. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). Given the standard of review and the nature of the case, we cannot say that the trial court abused its discretion by granting custody of the children to the father.

CONCLUSION

We therefore reverse the judgment of the Court of Appeals and remand this cause with directions to reinstate the judgment of the district court, which includes the granting of the permanent care, custody, and control of the children to the father.

REVERSED AND REMANDED WITH DIRECTIONS.

ALLEN R. JANSSEN, APPELLANT, V.
TOMAHAWK OIL CO., LTD., A NEBRASKA CORPORATION,
AND YELLOW FREIGHT SYSTEMS, INC., APPELLEES.
576 N.W.2d 787

Filed April 3, 1998. No. S-96-1036.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Judgments: Records: Jurisdiction: Appeal and Error.** A notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on an appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.
3. **Subrogation: Liability: Costs.** One who is made a party defendant for the sole purpose of protecting a statutory right of subrogation is ordinarily not liable for costs other than his own; but where he adopts the position of the plaintiff and for all practicable purposes is a plaintiff, his liability for costs is the same as the plaintiff. Such party is in the same position as an intervenor, cross-petitioner, or other party to the litigation who enters it for the advancement of his own interests.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

Jon S. Reid, of Kennedy, Holland, DeLacy & Svoboda, for appellee Yellow Freight.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Allen R. Janssen appeals from an order denying his request that his employer, Yellow Freight Systems, Inc. (Yellow Freight), be required to pay a percentage of the expenses incurred by Janssen in an unsuccessful attempt to recover damages against a third-party tort-feasor. Yellow Freight had been joined as a defendant pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1993) in order to protect its subrogation lien.

SCOPE OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997).

FACTS

On November 9, 1990, Janssen was employed by Yellow Freight as an over-the-road truckdriver. Janssen allegedly injured the rotator cuff in his right shoulder when he fell on a patch of ice in the parking lot of the Hershey Truck Stop located on Interstate 80 near Hershey, Nebraska. Janssen had parked his semi-tractor and trailer in the parking lot and entered the building. As he returned to his truck, he allegedly fell on the patch of ice.

Janssen sued Tomahawk Oil Co., Ltd. (Tomahawk Oil), a Nebraska corporation which owned the Hershey Truck Stop, alleging that Tomahawk Oil had been negligent in maintaining the parking lot and that this negligence had proximately caused his injury. Yellow Freight was joined as a party pursuant to § 48-118 in order to protect its subrogation lien against

Tomahawk Oil for any workers' compensation payments which Yellow Freight made to Janssen as a result of his accident.

Yellow Freight filed an answer which informed the district court that it had made workers' compensation payments to Janssen after his injury. The answer stated that Yellow Freight had insufficient knowledge to admit or deny Janssen's allegations regarding Tomahawk Oil's negligence. However, the answer contained a prayer for relief which requested that a judgment be entered in favor of Janssen and against Tomahawk Oil and that Yellow Freight be subrogated to the rights of Janssen in any judgment against Tomahawk Oil for all amounts allowed Yellow Freight pursuant to the Nebraska Workers' Compensation Act.

Following trial, the jury returned a verdict for Tomahawk Oil, and Janssen appealed. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial. See *Janssen v. Tomahawk Oil Co.*, 95 NCA No. 50, case No. A-94-480 (not designated for permanent publication). After the cause was remanded to the district court, all three parties entered into settlement negotiations. The parties were unable to reach an agreement, and they proceeded to a second trial. The second trial also ended with a jury verdict in favor of Tomahawk Oil.

Janssen then filed a motion to apportion expenses pursuant to § 48-118. He alleged that his attorneys had incurred $12,144.15 in expenses and asked that the costs be apportioned between him and Yellow Freight. The district court denied the request for apportionment, finding that § 48-118 requires that "a recovery take place before expenses and attorney's fees are allocated between the injured employee and the workers' compensation insurer."

Janssen timely appealed to the Court of Appeals, and pursuant to our power to regulate the caseloads of the appellate courts of this state, we moved this case to our docket.

ASSIGNMENT OF ERROR

Janssen asserts that the district court erred in failing to apportion litigation expenses between Janssen and his employer pursuant to § 48-118.

ANALYSIS

The record reveals that the district court's order denying the apportionment of expenses was filed on October 9, 1996. Janssen's notice of appeal was filed on October 8. In *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979), *overruled on other grounds, Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997), we held that a notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates. We also noted that a number of courts have held that a premature notice of appeal is continuing in nature and becomes effective upon rendition or entry of a judgment. See, *Evola v. Wendt Construction Co.*, 158 Cal. App. 2d 658, 323 P.2d 158 (1958); *Williams v. State*, 324 So. 2d 74 (Fla. 1975); *Haverstick et al. v. Banat, Extr.*, 165 Ind. App. 275, 331 N.E.2d 791 (1975). See, also, *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Lemke v. United States*, 346 U.S. 325, 74 S. Ct. 1, 98 L. Ed. 3 (1953).

We first address whether Janssen's October 8, 1996, notice of appeal was filed before a judgment had been rendered or entered. The appellate record in this case contains a copy of the district court's trial docket entry for October 2 which overrules Janssen's motion to apportion expenses and states that "[o]n its face, Neb. Rev. Stat. § 48-118 requires that a recovery take place before expenses and attorney's fees are allocated . . . ." However, the record does not show that this ruling was pronounced in open court, and thus, we cannot treat this trial docket entry as a final order. See, *Reutzel v. Reutzel, supra*; *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Thus, the final order in this case is the order dated October 9, and as a result, Janssen's October 8 notice of appeal was premature.

However, we conclude that the premature filing of this notice of appeal does not deprive us of jurisdiction. In accordance with the requirements set forth in *Dale Electronics, Inc.*, the notice of appeal recites on its face that it is an appeal from the order entered by the district court on October 2, 1996. The findings recited in the order filed on October 9 are substantially similar to the findings documented by the district court in its October 2 trial docket entry. Consequently, the October 8 notice of appeal became effective upon the entry of the October 9 order, and we have jurisdiction to address the merits of this case.

We next address whether Yellow Freight should be required to share in the expenses of the litigation. At the time the petition in this case was filed, § 48-118 provided as follows:

> When a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person . . . . If either party after the giving of such notice *fails . . . to join* in the making of such claim and the prosecuting of the suit, such party shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement made in accordance herewith, and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees, which . . . shall be apportioned by the court between the parties as their interests appear at the time of such recovery. . . .
>
> If the employee or his or her personal representative or the employer or his or her compensation insurer *join in* the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending . . . .

(Emphasis supplied.)

Whether a party has joined in the prosecuting of a claim is an important consideration when it comes to allocating the costs of the litigation pursuant to § 48-118. If the employer is not joined,

then there must be a recovery before the nonjoined employer is liable for attorney fees. See, *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982) (court allocated costs because nonjoined party had benefited from suit); *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992) (recognizing that employer who benefits from third-party tort litigation must share expense). See, also, *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 564 N.W.2d 592 (1997) (common fund doctrine requires there be monetary recovery prior to allocation of fees). Once a recovery is obtained, the party bringing the claim can deduct from the recovery reasonable expenses incurred in making the recovery.

However, joined parties may be liable for costs even if there is no recovery. The applicable provision of § 48-118 states that "[i]f the . . . employer or his or her compensation insurer *join in* the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be . . . divided between such attorneys as directed by the court . . . ." (Emphasis supplied.) Pursuant to this provision, recovery is not a requirement before expenses and attorney fees can be apportioned as costs.

Janssen argues that if the employer joins in the employee's prayer for relief, the employer has joined the action and therefore is liable for its proportionate share of the costs of the litigation. Janssen correctly argues that if Yellow Freight joined in the prosecuting of the claim, it would be liable for costs, if the district court deemed it appropriate, even if no recovery was obtained. Thus, the issue before us is whether Yellow Freight's participation in this suit qualifies as joining in the prosecuting of the claim pursuant to § 48-118. Because this matter is a question of statutory interpretation, we reach a conclusion independent of that reached by the trial court. See *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997).

In support of his claim that Yellow Freight joined in the prosecuting of the claim, Janssen relies upon *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950). In *Rehn*, the plaintiff obtained a money judgment against Bingaman. John P. Mainelli was made a party defendant for the sole purpose of protecting subrogation rights under § 48-118 (1943). Ultimately, the plaintiff

did not recover. Thereafter, the mandate of this court was entered, and the trial court, in compliance with the mandate, dismissed the action and taxed the costs to both the plaintiff and Mainelli.

Mainelli contended that he should not have been charged with any portion of the costs for the reason that he merely asserted his right of subrogation to any amount recovered by the plaintiff under § 48-118. The record disclosed, however, that Mainelli had actively participated in the trial and that his attorney had participated in the trial by making an opening statement, examining and cross-examining witnesses, and demanding the right to argue in both opening and closing arguments. We held that Mainelli had adopted the position of the plaintiff for his own benefit, his own recovery being dependent upon the success of the plaintiff. We stated the following rule:

> Parties, who come in and adopt plaintiff's petition and seek to participate in its benefits, stand in a similar position as the plaintiff in regard to costs; and where an intervener reiterates the allegations of the petition, he is liable jointly with plaintiff for costs in the event of an adverse result.

Rehn, 152 Neb. at 176, 40 N.W.2d at 676. We stated further:

> One who is made a party defendant for the sole purpose of protecting a statutory right of subrogation is ordinarily not liable for costs other than his own; but where, as here, he adopts the position of the plaintiff and for all practicable purposes is a plaintiff, his liability for costs is the same as the plaintiff. Such party is in the same position as an intervener, cross-petitioner, or other party to the litigation who enters it for the advancement of his own interests.

Id. Thus, we held that the costs were properly assessed against both the plaintiff and Mainelli.

Yellow Freight relies on *Sterkel v. Fruehauf Corp.*, 975 F.2d 528 (8th Cir. 1992), for the position that it did not join in the prosecuting of the claim and, thus, should not be taxed for the costs of the suit. In *Sterkel*, the plaintiff had asked the district court to allocate fees between him and his employer based upon § 48-118. The plaintiff had been unsuccessful in the suit, and there had been no recovery. The district court denied the appli-

cation to allocate costs on the ground that the employer did not "'join in the prosecuting of [the] claim'" and was, therefore, not responsible for the expenses of the litigation. *Sterkel*, 975 F.2d at 533.

The court of appeals stated that the "extent of an employer's participation in the litigation is the critical factor in determining whether the employer 'joined' the action." *Id.* The employer had filed a notice of appearance, filed an answer, answered interrogatories, attended depositions, and attended a pretrial conference, but had not participated in presenting evidence and did not sit at the counsel table or appear to be involved in the trial. The court of appeals concluded that the mere fact that the employer was made a party defendant and had filed an answer did not compel the conclusion that it had joined the employee's claim. The court of appeals held that the employer had not engaged in the level of involvement to constitute a joining in the employee's suit for purposes of § 48-118.

Here, Janssen argues that Yellow Freight joined in the prosecuting of the claim because it adopted his position in its prayer for relief, filed an answer, and informed Janssen in a letter prior to trial that it intended to "actively participate and pursue" its subrogation lien. The evidence of Yellow Freight's participation in the action is not disputed. Yellow Freight did not attend depositions, attend a pretrial conference, or attend or participate in the trial or the appeal. We conclude that Yellow Freight was a party defendant to this action for the sole purpose of protecting its statutory right of subrogation and, therefore, did not join in the prosecuting of the claim. Thus, Yellow Freight is not liable for any costs of the action, other than its own.

When the district court refused to apportion fees, it stated that such a division was possible only if and when Janssen obtained recovery. The district court erred in concluding that recovery by Janssen was a prerequisite to the allocation of reasonable expenses, for as already discussed, joined parties may be liable for costs.

However, the district court correctly refused to apportion expenses between Janssen and Yellow Freight. The critical fact was not that Janssen had not obtained a recovery, but that Yellow Freight had not joined in the prosecuting of the claim.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., concurring in part, and in part dissenting.

I concur with the holding of the majority that it is not necessary for a plaintiff to obtain a recovery in order to require the subrogation interest of the employer or the employer's insurer to participate in the costs.

I respectfully dissent, however, from that portion of the majority opinion holding that Yellow Freight did not join in the prosecution of the claim and, therefore, is not liable for its proportionate share of Janssen's costs.

Having filed an answer adopting Janssen's prayer for relief, Yellow Freight has, in the words of Neb. Rev. Stat. § 48-118 (Reissue 1993), joined in the presentation of the claim. Section 48-118 provides that Yellow Freight shall have an equal voice in the claim in the prosecution of the suit. It also provides that any settlement of Janssen's case would be void unless "such settlement [is] agreed upon in writing by the employee or his or her personal representative *and the insurer* of the employer if there is one, and if there be no insurer, *then by the employer* . . . ." (Emphasis supplied.) § 48-118.

In Janssen's motion to apportion expenses, paragraph No. 3 states:

> [D]uring settlement negotiations at the time of the first and second trial the said defendant Yellow Freight Systems, Inc. refused to discount or discuss a compromise settlement of their claim which was in the amount of $52,114.89. As a result thereof, settlement negotiations completely broke down necessitating a second trial which resulted in a verdict in favor of defendant Tomahawk Oil Co., Ltd.

That Yellow Freight did not attend depositions, attend a pretrial conference, or attend or participate in the trial are choices made by Yellow Freight, and those choices should not operate to Janssen's detriment. In this case, the allegation is made that Yellow Freight's intransigence in insisting upon 100 percent of its subrogation claim hindered settlement negotiations. In negotiating over its subrogation claim, Yellow Freight was obviously

exercising its "equal voice" in the prosecution of the suit as set out in § 48-118. What the employer or employer's insurer is requesting in this case is to be given a free ride, with there being no downside or detriment in the form of potential costs in the event of an unfavorable verdict.

As was held in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992), the Nebraska Court of Appeals, in reciting the history of *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), and *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), stated:

> [T]he decisions show an unwillingness to allow the holder of the subrogated interest to have a "free ride" from the effort of the plaintiff and his or her attorney, who successfully bring the action which results in the creation of the fund which satisfies the subrogated interest. The concept that the employer or compensation insurer who benefits from third-party tort litigation must share in the expenses thereof is now codified in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-118 (Reissue 1988).

Kaiman, 1 Neb. App. at 152, 491 N.W.2d at 358.

Since our holding in the instant case makes the issue of recovery irrelevant in answering the question of whether the employer or the employer's insurance carrier should participate in the costs, I can see no reason why the opportunity should be given to the employer or the employer's insurance carrier to have a "free ride" and participate if the employee wins, but not participate if the employee loses.

I would hold that Yellow Freight did join in the prosecution of the claim and, therefore, reverse the decision of the Court of Appeals and remand the cause for a further hearing to determine the proportion of the costs to be paid by Janssen and the proportion of the costs to be paid by Yellow Freight.

IN RE CONSERVATORSHIP OF JOHN J. HOLLE, A PROTECTED PERSON. CENTRAL FINANCIAL CONTROL, INTERESTED PARTY, APPELLANT, V. PATRICIA M. KOSISKE, CONSERVATOR, APPELLEE.

576 N.W.2d 473

Filed April 3, 1998. No. S-96-1038.

1. **Jurisdiction: Appeal and Error.** It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Notice: Time.** Neb. Rev. Stat. § 30-2220(a)(1) (Reissue 1995) clearly states that in a statutory proceeding, the notice required to be given to all interested parties is 14 days.
5. **Health Care Providers: Liability: Liens: Attorney Fees.** A physician, nurse, or hospital claiming a lien under Neb. Rev. Stat. § 52-401 (Cum. Supp. 1996) shall not be liable for attorney fees and costs incurred by the injured person in securing the judgment, settlement, or compromise, but the lien of the injured person's attorney shall have precedence over the lien created by this section.
6. **Health Care Providers: Damages: Liens: Time.** Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed.

Appeal from the County Court for Sarpy County: LARRY F. FUGIT, Judge. Reversed and remanded for further proceedings.

David W. Watermeier and Joseph E. Dalton, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Michael J. Lehan, of Kelley, Lehan & Hall, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This action arises from the order of the county court for Sarpy County, Nebraska, for distribution of proceeds to credi-

tors, including medical providers, from funds held in conservatorship for the benefit of John J. Holle, who was left incapacitated as a result of a gunshot wound to the head. The proceeds were from a settlement reached with the homeowner's insurance carrier of the parents of the young man who shot Holle. Central Financial Control, on behalf of St. Joseph Hospital, appealed to the Nebraska Court of Appeals the share of the proceeds ordered to be distributed to it based upon its hospital lien against Holle. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Court of Appeals and this court. We reverse the order for distribution of September 10, 1996, distributing proceeds to creditors, including medical providers, and remand the cause for further proceedings.

FACTUAL BACKGROUND

On September 17, 1994, Holle suffered a gunshot wound to his head which left him permanently disabled. As a result of this gunshot wound, several health care providers furnished care to Holle. Appellee, Patricia M. Kosiske, Holle's mother, was appointed special conservator. Appellee filed suit against the parents of the shooter, Steven and Angelita Salazar. Appellee, as conservator, approved a settlement with the Salazars which paid Holle the limit of the Salazars' homeowner's insurance policy.

Appellee filed a "Motion for Hearing on Distribution of Settlement Proceeds" which requested the court to determine (1) the most appropriate vehicle for management of the settlement proceeds; (2) the distribution of proceeds to creditors, including medical providers; and (3) the approval of an application for the approval of attorney fees and costs. On September 10, 1996, the court ruled on the request for determination of distribution of proceeds to creditors and medical providers and directed checks be delivered by the clerk of the court to all medical providers in the sum of 50 percent of their claims. This order directed that a check be distributed to appellant for St. Joseph Hospital in the sum of $22,956. Also on September 10, a separate order was entered approving attorney fees. Appellant filed an appeal of the September 10 order, and no order was ever entered regarding issue No. 1 of the appellee's motion, which

issue requested the determination of the most appropriate vehicle for management of the settlement proceeds.

ASSIGNMENTS OF ERROR

Appellant alleges that the county court erred (1) in entering its order for distribution without determining whether the creditors received notice of the distribution hearing and (2) in determining the amount of money the medical providers, including appellant, were to recover for medical services provided.

STANDARD OF REVIEW

It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it. *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997); *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *State ex rel. Fick v. Miller, supra*; *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997); *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

ANALYSIS

JURISDICTION

The order of September 10 was a final order as to appellant on behalf of St. Joseph Hospital. The order specified the amount awarded and directed that the amount be forwarded by the clerk of the court to appellant from the funds of the conservatorship. See, e.g., *State ex rel. Fick v. Miller, supra.*

NOTICE

Appellant alleges as its first assigned error that it did not receive proper statutory notice of the hearing regarding the

order for distribution. There is no doubt but that appellant is an interested party in the proceedings as the holder of a lien in the amount of $45,536.91. See Neb. Rev. Stat. § 30-2209(21) (Reissue 1995). As appellant points out, Neb. Rev. Stat. § 30-2220(a)(1) (Reissue 1995) clearly states that in a statutory proceeding, the notice required to be given to all interested parties is 14 days. The record is clear, and appellee does not dispute, that notice was not sent to the interested parties regarding the hearing on the order for distribution within the 14-day period. Appellee's affidavit of mailing notice was filed September 4, 1996, and states that a copy of the notice was sent to all interested parties on August 30. As the hearing date was September 10, appellee's notice was clearly infirm, and we must reverse, and remand for further proceedings.

NEBRASKA'S HOSPITAL LIEN STATUTE

Although this cause merits reversal on notice grounds, appellant's final assignment of error merits consideration as well. Appellant claims that under Neb. Rev. Stat. § 52-401 (Cum. Supp. 1996), its hospital lien attached on July 1, 1996, when the settlement with the Salazars was approved, because until that time, no fund existed to which the lien could attach. Appellant further points out that the revisions to § 52-401 became effective on September 9, 1995, almost a year prior to this settlement date. Currently, § 52-401 reads in part:

> A physician, nurse, or hospital claiming a lien under this section shall not be liable for attorney's fees and costs incurred by the injured person in securing the judgment, settlement, or compromise, but the lien of the injured person's attorney shall have precedence over the lien created by this section.

Appellee argues that because the effective date of the revised § 52-401 is September 9, 1995, it is inapplicable to the case at bar because the events giving rise to appellant's lien, namely the providing of services, occurred in 1994. The plain language of § 52-401 states:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury,

> and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien . . . on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed . . . .

What is apparent from a plain reading of the statute is that the lien of the hospital attaches at the time the services are performed. At the outset, the *amount* of the lien is fixed based upon the normal compensation for the lienholder *at the time of the provision of services.* In addition to this clear reading of the statutory language, our case law regarding § 52-401's predecessor is clear that a hospital lien attaches upon a patient's admission for treatment. See, *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993); *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). Thus, appellant's lien clearly attached during 1994, and subsequent changes to § 52-401 are inapplicable.

Neither party has raised the constitutionality of § 52-401, and we therefore will not consider that issue.

CONCLUSION

The notice given to appellant of the hearing regarding disbursement of proceeds was infirm, and we must reverse the order and remand the cause for further proceedings. However, it is clear that the lien anticipated by § 52-401 attaches at the time services are rendered, rather than at settlement by the injured party. Thus, the revised version of § 52-401 is inapplicable in this case.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. RICHARD T. BELLINO, APPELLEE AND CROSS-APPELLANT, V. SCOTT MOORE, SECRETARY OF STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, AND JOHN W. BLACKHAWK ET AL., INTERVENORS-APPELLANTS AND CROSS-APPELLEES.

576 N.W.2d 793

Filed April 3, 1998. No. S-96-1121.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
2. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction.

Robert B. Crosby, of Crosby, Guenzel, Davis, Kessner & Kuester, and Mark A. Hubble, of Dorsey and Whitney, L.L.P., for intervenors-appellants.

Vince M. Powers for relator.

Michael F. Coyle, Special Assistant Attorney General, and Michael L. Schleich, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Moore.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The relator-appellee and cross-appellant, Richard T. Bellino, seeks a declaration that the requirements for signatures of registered voters on petitions to place a measure on a ballot through the initiative process, as contained in Neb. Rev. Stat. § 32-1409(1) (Cum. Supp. 1996), are unconstitutionally vague on their face and as applied by the respondent-appellee and cross-appellant, Scott Moore, Secretary of State of Nebraska. The relator further prays that the secretary be compelled to

place a gambling measure on the ballot. The appellants, John W. Blackhawk, Lance Gregory Morgan, and Erin Christian Morse, intervened and aligned themselves with the secretary. The district court found the questioned statute unconstitutional and ordered that the secretary determine the sufficiency and validity of the signatures in accordance with prior law and place the measure on the ballot at a future general election if all constitutional and other requirements have been met. As the case questions the constitutionality of a statute, the secretary appealed directly to this court under the provisions of Neb. Rev. Stat. § 24-1105 (Reissue 1995), asserting, in summary, that the district court erred in ruling § 32-1409(1) unconstitutional. The relator has cross-appealed, asserting, in summary, that the district court erred in failing to (1) find that the secretary wrongly determined the number of signatures required, (2) find that the requisite number of valid signatures had been obtained, and (3) order the measure placed on the ballot at the 1996 general election or, in the alternative, order that a special election be held. For the reasons hereinafter set forth, we reverse, and remand with the direction that the cause be dismissed.

II. SCOPE OF REVIEW

The dispositive issues present questions of law, in connection with which we are obligated to reach a conclusion independent of the determinations reached by the trial court. *Betz v. Betz, ante* p. 341, 575 N.W.2d 406 (1998); *Hall v. Progress Pig, Inc., ante* p. 150, 575 N.W.2d 369 (1998).

III. FACTS

The relator, a resident of Sarpy County, is a member of an association known as Citizens for Local Option and Control Committee. The committee was formed by an association of keno operators in April 1996 for the purpose of placing on the ballot for the November 5, 1996, general election through the initiative process a measure entitled "The Initiative to Preserve Nebraska Assets and Live Horse Racing."

Upon receipt of initiative petitions, the secretary, in accordance with law, delivered them to the election commissioners and clerks of each county for verification of each signature. See

§ 32-1409(1). When performing the verification procedures, county officials are required to compare the signer's printed name; street and number, or voting precinct; city, village, or post office address; and signature with voter registration records to determine if the signer is a registered voter. *Id.* The signature is presumed to be valid only if all of these items match. *Id.*

As required, the county officials compared the signature of each person signing a petition with the county voter registration records to determine whether each signer was registered as a voter on or before the date on which the petition was required to be filed with the secretary, July 5, 1996. See, Neb. Const. art. XVII, § 4; Neb. Rev. Stat. § 32-1407(1) (Cum. Supp. 1996); § 32-1409(1). The county officials were further required to certify their results to the secretary within 40 days after their receipt of the petitions. See § 32-1409(2). The secretary was then required to determine the total number of valid signatures and determine whether the constitutional and statutory requirements have been met. See § 32-1409(3). The secretary was also required to notify the person filing the initiative petition of the result. See *id.* The secretary sent the signatures to be verified on July 15. The county officials began returning them to the secretary by about August 1.

In order to qualify for the ballot, a petition to amend Nebraska's Constitution must be signed by 10 percent of the registered voters of the State of Nebraska. Neb. Const. art. III, § 2. On July 5, 1996, the secretary certified that 98,939 signatures constituted 10 percent of the registered voters. The committee submitted 133,100 petition signatures, of which 87,524 were determined to be valid by the county officials. On September 4, the committee was notified by the secretary that its initiative petitions did not contain a sufficient number of valid signatures to be placed on the ballot.

The findings of county officials as to the validity or invalidity of petition signatures may be rebutted by any credible evidence that the secretary finds sufficient. § 32-1409(1).

On or about September 6, 1996, the secretary's office explained to the committee the procedures they might use to rehabilitate invalidated signatures. For example, some signatures were originally invalidated when petitions contained the

signers' ZIP codes, but not their towns. The secretary determined that those signatures would be counted as valid if petition supporters brought him petitions which had the ZIP codes on them but no towns, since ZIP codes are credible evidence of the towns where the signers resided.

In addition, some signatures were invalidated because the address shown on the petition was different from the address shown on the voter registration record. The secretary determined that those signatures would be validated if the signer would provide a letter stating that the signer was the person who signed the petition, that the signer had moved from one address to another, and that the signer had never moved from the county in which the signer was registered.

By statute, the secretary was required to certify to the counties by September 13, 1996 (at least 50 days before the election), the issues which would be on the ballot. See Neb. Rev. Stat. § 32-801 (Cum. Supp. 1996). The secretary concluded that he had no authority to place matters on the ballot after September 13. Initially, the secretary set a deadline of September 11 for petition opponents and proponents to submit evidence on the validity of signatures. This deadline was later moved to 9 a.m. on September 12.

The only attempt the committee made with the secretary to rehabilitate any of the invalidated signatures was to submit a statistical analysis to the effect that approximately 9,482 of the invalidated signatures were valid. The secretary rejected the analysis as an improper means by which to rehabilitate signatures and declined to place the constitutional amendment proposed by the committee on the ballot.

IV. SECRETARY'S CROSS-APPEAL

Section 32-1409(1) reads, in relevant part:

> The signature and address shall be presumed to be valid only if the election commissioner or county clerk finds the printed name, street and number or voting precinct, and city, village, or post office address to match the registration records and that the registration was received on or before the date on which the petition was required to be filed with the Secretary of State. The finding of the

election commissioner or county clerk may be rebutted by any credible evidence which the Secretary of State finds sufficient.

Concluding that the foregoing statute hindered rather than facilitated the initiative process, the district court ruled that it violates Neb. Const. art. III, § 4, which provides that "[t]he provisions with respect to the initiative . . . shall be self-executing, but legislation may be enacted to facilitate their operation."

Neb. Rev. Stat. § 32-1412 (Cum. Supp. 1996) provides that if the secretary refuses to place on the ballot any measure proposed by an initiative petition, any resident may apply to the district court for Lancaster County for a writ of mandamus. In *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), we explicitly held under a prior codification of § 32-1412, Neb. Rev. Stat. § 32-704(2) (Reissue 1993), that a prayer for injunctive relief based on the legal insufficiency of the initiative petition could be joined with a prayer for declaratory relief based on the unconstitutionality of the ballot measure. See, also, *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994) (permitted without analysis or comment joining of prayer for injunctive relief based on insufficiency of signatures with prayer for declaration that measure unconstitutional).

However, in both of those cases, it was the constitutionality of the ballot measure which was at issue. Thus, there was no inconsistency in questioning the means by which the measure came to be on the ballot and questioning as well the constitutional validity of the measure. Here, it is the constitutionality of § 32-1409(1) which is at issue, the very statute under which the committee sought to rehabilitate the signatures which had been rejected.

It is axiomatic that a litigant who invokes the provisions of a statute may not challenge its validity or seek the benefit of such statute and in the same action and at the same time question its constitutionality. *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993); *In re Dissolution of School Dist. No. 22*, 216 Neb. 89, 341 N.W.2d 918 (1983). Accordingly, the relator cannot challenge the constitutionality of § 32-1409(1), as it is the statute invoked in an effort to persuade the secretary to rehabilitate signatures which had been rejected.

For that reason, the district court erred in considering the constitutionality of § 32-1409(1), and its pronouncements in that regard are a nullity.

V. RELATOR'S CROSS-APPEAL

We thus reach the relator's cross-appeal.

1. Number of Signatures

The relator first complains that the district court erred in failing to find that the secretary wrongly determined that a total of 98,939 valid signatures were required.

In order to determine how many registered voters there were in Nebraska at the relevant date, the secretary asked the county election officials to provide the number of registered voters in their respective counties at the close of business on July 5, 1996, the date by which the petitions were due to be turned in to him. See § 32-1407(1) (petitions due 4 months prior to general election).

Relator argues that the number set by the secretary was too high because it included so-called "inactive" registrants, that is, those registered but for whom the county election official had received information that they had moved. Such registrants are not removed from the voter rolls because some of the information is inaccurate and because removal requires additional confirmation that the registrant has in fact moved, as provided in Neb. Rev. Stat. § 32-326 (Cum. Supp. 1996).

The term "registered voter" is statutorily defined as "an elector who has a current voter registration record on file with the election commissioner or county clerk in the county of his or her residence." Neb. Rev. Stat. § 32-115 (Cum. Supp. 1996). Thus, the relator's position that inactive voters do not have current registration records and should not be counted as voters is without merit, and the secretary's determination as to the number of signatures required has not been shown to be wrong.

2. Adequacy of Valid Signatures

In contending that the district court incorrectly concluded that an inadequate number of valid signatures had been submitted, the relator argues that the random statistical sampling provided by the committee to the secretary should have been con-

sidered as credible evidence sufficient to rebut the determinations of invalidity made by the county clerks and election commissioners. This is a legal determination that must be made independently of the factual question of whether the evidence submitted is valid.

The relator points out that the use of random statistical sampling has been specifically upheld by the California Supreme Court in *Brosnahan v. March Fong Eu*, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982). However, *Brosnahan* is not applicable because the California Elections Code mandates random sampling for the verification of signatures on petitions. Our statute contains no such provision, but, rather, leaves the determination of what constitutes credible evidence to the discretion of the secretary.

Section 32-1409(1) requires that "the signature and address" be examined by the county election officials. Since it is the findings as to the invalidity of individual signatures which may be rebutted to the secretary, the finding of invalidity could not be rebutted by the use of random statistical sampling.

3. Measure Not on Ballot

In the absence of the requisite number of valid signatures, there was no basis on which the district court could have ordered the measure placed on any ballot, past or future.

4. Conclusion

For the foregoing reasons, there is no merit to the relator's cross-appeal.

VI. JUDGMENT

As first noted in part I, the judgment of the district court is reversed and the cause remanded with the direction that it be dismissed.

Reversed and remanded with direction.

STATE OF NEBRASKA EX REL. STAN DOBROVOLNY, APPELLEE AND CROSS-APPELLANT, V. SCOTT MOORE, SECRETARY OF STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

576 N.W.2d 772

Filed April 3, 1998. No. S-96-1162.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction to dismiss.

Michael F. Coyle, Special Assistant Attorney General, and Michael L. Schleich, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, for relator.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The respondent-appellant, Scott Moore, Secretary of State of Nebraska, declared the effort to place a taxing measure on the ballot by initiative petition unsuccessful because of the lack of an adequate number of valid signatures. The relator-appellee, Stan Dobrovolny, seeks a declaration that the requirements for signatures of registered voters on such petitions, as contained in Neb. Rev. Stat. § 32-1409(1) (Cum. Supp. 1996), are unconstitutionally vague on their face and as applied. He further prays that the secretary be compelled to place such a measure on a ballot. The district court ruled § 32-1409(1) unconstitutional and ordered that the secretary determine the sufficiency and validity of the signatures in accordance with prior law and place the measure on the ballot at a future general election if all constitutional and other requirements have been met. Inasmuch as the constitutionality of a statute is questioned, the secretary appealed directly to this court, asserting, in summary, that the district court erred in ruling § 32-1409(1) unconstitutional. The relator has cross-appealed, asserting, in summary, that the dis-

trict court erred in failing to (1) find that the secretary wrongly determined the number of signatures required, (2) find that the requisite number of valid signatures had been obtained, and (3) order the measure placed on the ballot at the 1996 general election or, in the alternative, order that a special election be held. For the reasons hereinafter set forth, we reverse, and remand with the direction that the cause be dismissed.

The relator is president of Nebraskans for Equal Taxation, an organization devoted to altering Nebraska's tax structure. He circulated an initiative petition to place on the ballot a constitutional amendment entitled "Property Tax Relief Amendment."

In accordance with the law detailed in *State ex rel. Bellino v. Moore, ante* p. 385, 576 N.W.2d 793 (1998), the secretary certified that 10 percent of the registered voters constituted 98,939 voters and determined that 87,488 of the signatures submitted by the relator's group were valid. The relator's group submitted no evidence to the secretary to rehabilitate any of the invalidated signatures. However, in the district court the relator presented statistical evidence suggesting that between 54.6 percent and 59.5 percent of the rejected signatures were valid.

The issues presented by the secretary's appeal and the relator's cross-appeal are the same as those presented in *State ex rel. Bellino, supra*, and are resolved adversely to the relator by the rules set forth therein. We therefore, as stated in the first paragraph hereof, without deciding whether one may present in the district court evidence not presented to the secretary, reverse the judgment of the district court and remand the cause with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

SYRACUSE RURAL FIRE DISTRICT, APPELLANT, V. RONALD PLETAN, APPELLEE.

577 N.W.2d 527

Filed April 3, 1998. No. S-96-1175.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled,

together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.

2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Franchises: Words and Phrases.** A franchise is property or a vested right, protected by the U.S. Constitution that, if accepted and acted on, does create a contract.
5. **Licenses and Permits: Words and Phrases.** A license is a means of regulating and taxing privileges and occupations and the use and disposal of property or a permit or privilege to do what otherwise would be unlawful.
6. **Licenses and Permits.** Because a license is a mere personal privilege, a license is not a contract between the authority granting it and the person to whom it is granted.
7. **Firefighters: Negligence: Licensee.** A firefighter or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be a duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the firefighter in the exercise of ordinary care.
8. **Fireman's Rule: Liability.** A public policy rationale for the "fireman's rule" is that an owner or occupier of property should not be subjected to private liability because he or she created a need for public services.
9. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result.
10. ____: ____: ____. To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith.
11. ____: ____: ____. Wanton negligence consists of doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
12. **Negligence: Licensee.** An owner or occupier owes a duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by a licensee.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Susan I. Strong, of Plessman Law Offices, for appellant.

Douglas J. Peterson, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

CONNOLLY, J.

The appellant, Syracuse Rural Fire District, owned a truck used in fighting grass fires called a grass rig. The grass rig became stalled and subsequently was destroyed by fire in a field owned by the appellee, Ronald Pletan, while the fire district was responding to a grass fire on Pletan's property. The fire district sued Pletan on two causes of action, breach of contract and negligence. The district court for Otoe County sustained Pletan's demurrer to the contract cause of action and sustained Pletan's motion for summary judgment on the tort cause of action. We conclude that the permit issued to Pletan was not a contract between Pletan and the fire district and that the "fireman's rule" applies to bar liability of Pletan to the fire district. Accordingly, we affirm.

BACKGROUND

Pletan owned 160 acres of land located approximately 3 miles north of Syracuse, Nebraska. In 1989 or 1990, Pletan began clearing parcels of his land by burning different parcels on a yearly basis. As part of this controlled burning, Pletan rotated which parcels of land were burned each year so that each parcel would be burned once every 4 to 5 years. Under Neb. Rev. Stat. § 81-520.01 (Reissue 1996), there is a statewide ban on open burning in Nebraska. However, the fire chief of the local fire district may waive the open burning ban by issuing an open burning permit. Pletan had obtained permits in the past when he burned parcels of his property.

On April 6, 1995, Pletan obtained an open burning permit from Chuck Bjork of the fire district. The permit stated that it was being issued in accordance with § 81-520.01, and Pletan signed the permit following a line that read "Signature of person(s) assuming responsibility in event fire becomes out of control." Pletan intended to burn approximately 36 acres of grassland in one quadrant of his property. Pletan, along with three

other men and his son, began igniting the fire on his property the afternoon of April 6.

Before Pletan had finished igniting the 36-acre tract, the fire jumped a creek on Pletan's property into an area that Pletan had not intended to burn. At that point, Pletan and the people assisting him were unable to leave what they were doing, so they finished igniting the controlled fire before returning to the fire that had jumped across the creek.

Approximately 20 minutes later, Pletan and another man returned with a tractor and disc and a water truck to the area where the fire had jumped the creek. Pletan's intention was to disc around the area of the uncontrolled fire to stop it. However, while Pletan and his assistants had been finishing igniting the controlled fire, a neighbor had seen the fire burning out of control on the other side of the creek and had called the fire district. Thus, when Pletan and his assistants got closer to the area where the fire had jumped the creek they discovered that ambulances and firetrucks were already at the scene. Pletan described the situation as "out of control." Pletan assisted the firefighters by scouting for fires. In addition, one of Pletan's assistants used Pletan's tractor to help pull out of the field a firetruck that had become stuck in the mud. At that time, Pletan was unaware that another truck had become stalled in the field and had subsequently burned.

Before Pletan arrived at the scene of the uncontrolled fire, Tim Wurtele, a member of the fire district, arrived driving the grass rig. Wurtele entered Pletan's property in the grass rig on some mowed or shredded grass and observed that the fire was burning out of control. Wurtele then drove the grass rig over several areas of unmowed grass to get a better look at the fire. However, while attempting to drive up a hill in order to return to an area of mowed grass, the grass rig became stalled.

The record is not clear as to whether the grass rig sank into a wet spot on the ground and became stuck or there was a mechanical problem that caused the grass rig to stall. Wurtele's affidavit alleges the grass rig hit a soft spot and sank. But Pletan alleges in his deposition that when he viewed the burned truck a few weeks later, there were no ruts around the tires of the truck and the ground was dry. Pletan also testified that ruts from

other trucks that became stuck in soft spots could still be observed the next growing season. The deposition of Bruce Neemann, chief of the fire district, indicated that the grass rig may have had some transmission problems.

After the grass rig became stalled, a fire subsequently started underneath the truck. This fire was not connected with the fire out of control on Pletan's property, but apparently was ignited as a result of the truck's contact with the grass. Wurtele and the firefighters who were with him were able to fight the fire spreading from the truck with a portable water pump. However, the grass fire on Pletan's property soon made it necessary for Wurtele and the firefighters to abandon the grass rig, which was subsequently destroyed by the grass fire. Wurtele testified that he believes he could have prevented total destruction of the grass rig had he not been forced to abandon it.

Wurtele had no previous knowledge of soft spots on Pletan's property and was not forewarned that there were soft spots on the property that might be hazardous to the grass rig. Pletan testified that he subsequently discovered that there were some wet spots on his land, but since he does not farm the land, many times he does not know where they are. Pletan did know the location of several seasonal wet spots on his land but did not know of any in the area where the truck became stalled. Pletan also testified that he did not observe any mud on the day of the fire. Neemann testified that based on his investigation of the fire, he was of the opinion that no particular person was to blame for the incident and that it was a combination of factors that caused the fire.

The fire district brought this action against Pletan, seeking damages for the loss of its grass rig. For its first cause of action, the fire district alleged that the permit issued to Pletan was contractual in nature and that Pletan breached the contract by not assuming responsibility under the contract for the fire district's damages. For its second cause of action, the fire district alleged that the grass rig was damaged due to Pletan's failure to exercise reasonable care by failing to isolate the controlled fire on his property. The fire district also alleges in the second cause of action the failure to warn the district of known dangerous wet areas on his property that were unobservable to the firefighters.

The district court sustained Pletan's demurrer and dismissed the first cause of action. The district court then sustained Pletan's motion for summary judgment on the second cause of action. The fire district appeals.

ASSIGNMENTS OF ERROR

The fire district assigns that the district court erred in (1) sustaining Pletan's demurrer to its first cause of action and (2) sustaining Pletan's motion for summary judgment.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997).

ANALYSIS

Demurrer to Contract Cause of Action

The fire district contends that the permit issued to Pletan constituted a contract between Pletan and the fire district and that Pletan breached that contract by refusing to pay the fire district for the damage to its grass rig. The district court sustained

Pletan's demurrer and dismissed the fire district's contract cause of action. The court concluded that the inclusion of language in the permit providing that Pletan would assume responsibility if the fire burned out of control was intended to limit the liability of the issuing agency to a third party. The district court further concluded that the permit was a license that does not create contractual obligations between the agency granting it and the person receiving it. The fire district contends that the district court erred in its determination and argues that the permit contained mutual promises and, thus, should be considered to be a contract.

The permit in the instant case was issued pursuant to § 81-520.01, which states in part:

> (1) There shall be a statewide open burning ban on all bonfires, outdoor rubbish fires, and fires for the purpose of clearing land.
>
> (2) The fire chief of a local fire department or his or her designee may waive an open burning ban under subsection (1) of this section for an area under his or her jurisdiction by issuing an open burning permit to a person requesting permission to conduct open burning. The permit issued by the fire chief or his or her designee to a person desiring to conduct open burning shall be in writing, signed by the fire chief or his or her designee, and on a form prescribed by the State Fire Marshal.

The fire district cites *Dunmar Inv. Co. v. Northern Nat. Gas Co.*, 185 Neb. 400, 176 N.W.2d 4 (1970), for the proposition that the permit in the instant case is a contract. However, the section of *Dunmar Inv. Co.* the fire district points to deals with franchises and distinguishes a franchise from a license. In *Dunmar Inv. Co.*, we stated that a franchise is " ' "property, . . . a vested right, protected by the [U.S.] Constitution . . ." ' " and that, if accepted and acted on, a franchise does create a contract. *Id.* at 403, 176 N.W.2d at 6. However, in the instant case we are concerned with a license, not a franchise.

We have defined a license as " 'a means of regulating and taxing privileges and occupations and the use and disposal of property . . . .' " *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 157, 505 N.W.2d 654, 659 (1993). We

have also defined a license as " 'a permit or privilege to do what otherwise would be unlawful . . . .' " *Dunmar Inv. Co. v. Northern Nat. Gas Co.*, 185 Neb. at 403, 176 N.W.2d at 6. Thus, because a license is a mere personal privilege, a license " 'is not a contract between the authority granting it and the person to whom it is granted . . . .' " *Id.* Accord *Concerned Citizens v. Department of Environ. Contr., supra.* See, also, 53 C.J.S. Licenses § 3 (1987).

In the instant case, the permit was a license because it granted Pletan the privilege to conduct open burning, something that would otherwise be unlawful. As a license, the permit did not create contractual obligations between Pletan and the fire district. Accordingly, a cause of action for breach of contract did not exist between Pletan and the fire district, making a demurrer appropriate. The fire district's first assignment of error is without merit.

SUMMARY JUDGMENT

Pletan contends that summary judgment was appropriate in this case because the "fireman's rule" applies to bar any liability Pletan would have to the fire district for negligently causing the fire. Pletan further argues that exceptions to the fireman's rule for willful or wanton negligence or a failure to warn of hidden dangers do not apply. The fire district contends that summary judgment was not appropriate because there are genuine issues of fact as to whether Pletan was negligent in allowing the fire to burn out of control. The fire district further argues that the fireman's rule does not apply in this case. In particular, the fire district argues that the rationale behind the rule does not apply in the instant case because Pletan intentionally set out to burn a portion of his property under a permit, because an out of control fire was foreseeable, and because Pletan was allegedly negligent in allowing the fire to burn out of control.

The fireman's rule negates liability to firefighters by one whose negligence causes or contributes to a fire which in turn causes injury to a firefighter. *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979). The rule has been stated as follows:

> "[A] fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be a duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care."

Lave v. Neumann, 211 Neb. 97, 99-100, 317 N.W.2d 779, 781 (1982). Accord, *Buchanan v. Prickett & Son, Inc., supra*; *Wax v. Co-Operative Refinery Assn.*, 154 Neb. 805, 49 N.W.2d 707 (1951). See, also, *Nared v. School Dist. of Omaha*, 191 Neb. 376, 215 N.W.2d 115 (1974) (applying rule to police officers). While the rule is commonly seen as applying to personal injuries to firefighters, it has been applied to damage of personal property as well. *Commonwealth v. Millsaps*, 232 Va. 502, 352 S.E.2d 311 (1987). The rule is also applicable to volunteer firefighters as well as paid firefighters. *Buchanan v. Prickett & Son, Inc., supra*; *Fentress v. Co-Operative Refinery Assn.*, 149 Neb. 355, 31 N.W.2d 225 (1948).

Under the fireman's rule, an injured firefighter cannot establish liability on the part of the property owner or occupant by simply establishing negligence in starting the fire, and therefore it is immaterial whether a fire was started by negligence or that such was continuing negligence. *Buchanan v. Prickett & Son, Inc., supra.* Such a rule is based on the premise that a firefighter who undertakes to fight a fire knows it exists and as a licensee ordinarily assumes the risk of the premises as he finds them. *Id.*

The rationale of the fireman's rule varies from jurisdiction to jurisdiction and has evolved over the years. Initially, the rule originated from the common-law premises liability rules by classifying a firefighter as a licensee to whom the owner or occupier of the premises owed only the duty to avoid inflicting injury by willful, wanton, or intentional acts. See, e.g., *Carson v. Headrick*, 900 S.W.2d 685 (Tenn. 1995) (discussing history of rule). As time passed, the common-law distinctions from which the fireman's rule originated were abandoned in many jurisdictions, including Nebraska. *Id.* See *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). However, the

overwhelming majority of courts have reaffirmed the fireman's rule based on rationales of assumption of the risk or public policy considerations even though the classifications of premises liability have given way to one general standard of reasonable care under the circumstances. See *id.* See, also, *Hack v. Gillespie*, 74 Ohio St. 3d 362, 658 N.E.2d 1046 (1996); *Waggoner v. Troutman Oil Co.*, 320 Ark. 56, 894 S.W.2d 913 (1995). Because a number of jurisdictions have merged the doctrine of assumption of risk into their comparative fault schemes, many courts now cite public policy considerations as the sole basis for reaffirming the fireman's rule. *Carson v. Headrick, supra.* See, also, *Hack v. Gillespie, supra*; *Waggoner v. Troutman Oil Co., supra*; *Thomas v. Pang*, 72 Haw. 191, 811 P.2d 821 (1991); *Fox v. Hawkins*, 594 N.E.2d 493 (Ind. App. 1992); *England v. Tasker*, 129 N.H. 467, 529 A.2d 938 (1987); *Commonwealth v. Millsaps, supra.*

The public policy considerations supporting the fireman's rule are based on the nature of the service firefighters provide to the public. Firefighters are employed for the benefit of society in general and are on the premises of others not because of any private duty owed to the owner or occupier, but because of a duty owed to the public as a whole. *Thomas v. Pang, supra.* The purpose of a firefighter's profession is to confront danger. The public hires, trains, and compensates firefighters to deal with fires, which will inevitably occur. *Carson v. Headrick, supra.* Often, especially with fires, negligence causes the occasion for the firefighters' presence on the property. *Id.* Thus, it has been said that " '[i]t offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services.' " *Thomas v. Pang*, 72 Haw. at 197, 811 P.2d at 825, quoting *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984). Furthermore, it has been stated that principles of public policy should prevent a firefighter from complaining of negligence in the creation of a fire when the firefighter has been trained to deal with such situations at public expense. *England v. Tasker, supra.* Thus, there is the premise that a citizen should not be made to pay twice for the rendering of a public service, once through taxation and a second time through damages. *Id.* Finally, although entry onto a person's property by firefighters

is foreseeable, the timing of entry cannot be predicted, and while the firefighters are performing their duties, the owner or occupier is without authority to control their actions. *Thomas v. Pang, supra*; *England v. Tasker, supra*. Although we have previously framed the rule in terms of common-law premises liability, this court has also recognized that the costs of meeting the risks of fire should be borne by the government. *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979).

The thrust of the fire district's argument is that the fireman's rule does not apply because the initial fire set by Pletan was not accidental and because he was negligent in allowing the fire to burn out of control. However, these factors do not negate an application of the fireman's rule. The public policy rationale for the rule is that an owner or occupier of property should not be subjected to private liability because he or she created a need for public services. Accordingly, the rule itself is worded to negate liability to a firefighter by a person whose negligence causes or contributes to a fire. In addition, under public policy considerations it makes no difference that the initial fire was intentionally started by Pletan or was done so under a permit. Neither of these factors affects the underlying rationale of the rule that a firefighter is trained to confront danger at public expense. To conclude that an owner or occupier of property is subject to liability any time an intentionally set fire becomes out of control would negate application of the rule in many situations, such as fires resulting from the use of home fireplaces or campfires. Such a conclusion would undermine the public policy rationale for the rule, which recognizes that in many instances, the reason firefighters are on the scene is as a result of some form of negligence. Accordingly, the fireman's rule applies in the instant case.

Because the fireman's rule applies, Pletan had a duty only to refrain from injuring the fire district by willful or wanton negligence or a designed injury or to warn of hidden danger or peril known to him but unobservable by the firefighters in the exercise of ordinary care.

We have described "willful or wanton" as follows:

> "In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge

> that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. [Citation omitted.]
>
> "To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury."

(Emphasis in original.) *Blackbird v. SDB Investments*, 249 Neb. 13, 19, 541 N.W.2d 25, 30 (1995), quoting *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988). See, also, *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996); *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

In the instant case, the fire district's second amended petition alleged that Pletan was negligent in failing to isolate the area he intended to burn and in failing to warn the fire district of soft or wet areas on his property. The petition does not allege any acts of willful or wanton negligence or plead any facts to show willful or wanton negligence. Nor does the petition allege any actual knowledge on the part of Pletan that a danger existed or that Pletan intentionally failed to act to prevent harm.

Concerning the duty to warn, we have said that the owner or occupier of the premises owes a "duty to warn, *if an opportunity is afforded*, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee." (Emphasis supplied.) *Lave v. Neumann*, 211 Neb. 97, 100, 317 N.W.2d 779, 781 (1982). See, also, *Hack v. Gillespie*, 74 Ohio St. 3d 362, 658 N.E.2d 1046 (1996) (no duty to warn when owner was not at residence at time of fire and not aware of plaintiff firefighter's presence on premises); *Price v. Morgan*, 436 So. 2d 1116 (Fla. App. 1983) (duty to warn arises once presence of firefighter on premises is known or should reasonably be anticipated). "Hidden dangers" have been defined as "those unusual hazards which are not normally anticipated and

not ordinarily incidental to fire fighting." *Thomas v. Pang*, 72 Haw. 191, 199, 811 P.2d 821, 826 (1991).

The fire district contends that Pletan should have foreseen the possibility of an out-of-control fire and warned the fire district of the soft spots at the time of the issuing of the permit. However, this argument ignores the fact that the duty to warn does not arise until the property owner is aware of the firefighters' presence on the property. Furthermore, the argument that Pletan had the opportunity and duty to warn of soft spots on his property at the time the permit was issued ignores the public policy rationale behind the fireman's rule that although entry by firefighters onto a property is foreseeable, the owner or occupier cannot predict the time of entry and is without authority to control the firefighters' actions while they perform their duties.

The record is clear that Pletan was not present at the time the firefighters entered his property or at the time the grass rig burned. Thus, Pletan did not have an opportunity to warn of soft spots about which he had knowledge, if any, prior to the time the grass rig burned, and Pletan did not breach any duty he may have had to warn the fire district about soft spots on his property. Except alleging that Pletan failed to warn, the fire district did not plead that Pletan was willfully or wantonly negligent in any other way. Accordingly, there are no issues of material fact and summary judgment in favor of Pletan was appropriate.

AFFIRMED.

STEPHAN, J., not participating.

STEPHEN R. SMITH AND DORIS SMITH, APPELLEES, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT.

576 N.W.2d 797

Filed April 10, 1998. No. S-95-376.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.

3. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
5. **Eminent Domain: Valuation: Offers to Buy or Sell: Words and Phrases.** Fair market value is the price which property will bring when offered for sale upon the open market as between a willing seller and buyer, neither being obligated to buy or sell.
6. **Trial: Eminent Domain: Valuation: Evidence.** In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties.
7. **Eminent Domain: Valuation: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
8. **Eminent Domain: Valuation.** An appraisal must be made near enough in point of time to furnish a test of the market value as of the date in question and is a matter within the discretion of the trial court.
9. **Eminent Domain: Valuation: Witnesses.** An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation.
10. **Trial: Eminent Domain: Valuation: Witnesses.** In order for the testimony of either an expert or a lay witness to be admissible on the question of market value of real estate, the witness must be familiar not only with the property in question, but also with the state of the market.
11. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
12. **Juror Misconduct: Proof.** Allegations of misconduct by jurors must be substantiated by competent evidence.
13. **Juror Misconduct: Verdicts.** Juror misconduct complained of must relate to a disputed matter that is relevant to the issues in a case and must have influenced the jurors in arriving at the verdict.
14. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Washington County, MARK J.

FUHRMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Paul F. Peters, of Schmid, Mooney & Frederick, for appellant.

Michael J. Mooney and Francie C. Riedmann, of Gross & Welch, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPETHMAN, D.J., and GRANT, J., Retired.

GERRARD, J.

Stephen R. "Reed" Smith (Reed Smith) and Doris Smith sought and obtained further review in this court from the judgment of the Nebraska Court of Appeals in which it reversed a district court judgment based on a jury verdict in their favor and remanded the matter for a new trial. We conclude that the Court of Appeals erred in disturbing the jury verdict and, as such, reverse its judgment and remand the cause with the direction to reinstate the jury verdict and judgment entered in the district court.

I. FACTS

On July 3, 1991, the Papio-Missouri River Natural Resources District (district) initiated an action to condemn a 21.22-acre tract of land owned by the Smiths located on the Boyer Chute of the Missouri River. The county board of appraisers awarded the Smiths $42,247.94 for the taking, and the Smiths appealed to the district court. Following a 4-day trial, a jury awarded the Smiths $127,500, and the trial court entered judgment in that amount.

The district appealed from the jury verdict, assigning several errors. In a decision not designated for permanent publication, the Court of Appeals held that the trial court abused its discretion when it allowed the Smiths to testify as to their opinions concerning the fair market value of their property and when it allowed the Smiths' real estate expert, Patrick Morrissey, to render his opinion concerning the value of the Smiths' property without proper and sufficient foundation. *Smith v. Papio-Missouri River NRD*, 96 NCA No. 34, case No. A-95-376 (not designated for permanent publication).

The Court of Appeals concluded that such opinions were predicated on insufficient foundation for two reasons. First, the opinions were based on the mistaken premise that the Smith property was suitable for residential use, and second, the value of the Smith property was improperly compared to the so-called Novy trade. As the record in this matter is quite voluminous, additional facts will be supplied as required for proper analysis of the assigned errors.

II. STANDARD OF REVIEW

A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Id.*

A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Kaminski v. Bass*, 252 Neb. 760, 567 N.W.2d 118 (1997); *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

III. ASSIGNMENTS OF ERROR

The errors assigned by the Smiths in their petition for further review are that the Court of Appeals erred in concluding that (1) the property at issue could not be used for residential purposes, (2) the Novy trade could not be considered a comparable sale for valuation purposes, and (3) the Smiths' opinions concerning the fair market value of their property were inadmissible.

Because of the Court of Appeals' disposition of this matter, it did not reach two errors assigned by the district below: The trial court erred in (1) allowing the Smiths to cross-examine the dis-

trict's real estate expert concerning real estate commission rates in Nebraska and (2) overruling the district's motion to vacate the verdict due to juror misconduct. For the purposes of our review, both assignments of error will be examined.

IV. ANALYSIS

1. Admissibility of Opinion Testimony

(a) Evidence of Potential Residential Use

The Court of Appeals concluded that

> there is *no evidence* to support Stephen Smith's assertions that a part of his property was outside of the floodway at the time of the taking and that there is *no evidence* to support a finding that there was any reasonable probability that the Smiths could have obtained the right to build a residence on the tract.

(Emphasis supplied.) *Smith v. Papio-Missouri River NRD*, 96 NCA No. 34 at 6. These conclusions are not supported by the record.

The land at issue, frontage property along a spring-fed portion of the Boyer Chute, had been in the Smith family for about 60 years. Through the 1930's, Reed Smith's grandparents lived in a house on the property. Other structures located on the property during the 1930's included a barn, a chicken coop, and a machine shed. Reed Smith's grandparents moved into town in the 1940's, and the buildings were lost when the banks of the chute eroded later that decade. Reed and Doris Smith purchased the property from Reed Smith's grandfather in the late 1970's and, along with family and friends, have enjoyed the use of a portion of the property as a recreational area for picnics, fishing, and hunting. The rest of the property was cropland. The Smiths testified that they intended to one day build their retirement home on this land and supplement their income by operating a fishing-guide service and duck-hunting area. At the time of the taking, Reed Smith was 46 years old and planned to retire when he was 55 years old.

The evidence at trial established that the owners of property within a floodway may build a residence or other structure on their property only if they can establish either that the site where the structure will be built is not actually within the flood-

way but instead within the floodway fringe or that construction in the floodway will not impede the flow of water within the floodway.

At the time of taking, the Federal Emergency Management Agency (FEMA) map revealed that only a very small portion of the southwest corner of the Smith property might possibly lie in the floodway fringe. Reed Smith testified that according to the FEMA map, he estimated that a triangle-shaped portion of his property, approximately 90 feet by 190 feet, along the right angle of the triangle, was outside the floodway and within the floodway fringe.

Wayne Kirk, a registered land surveyor and former surveyor and flood plain administrator for Washington County, testified that the FEMA floodway maps are computer-generated models that are inaccurate as to the actual elevations of land within a floodway. Kirk stated that anyone who wanted to build near a floodway was entitled to request a restudy of his or her property and revision of the FEMA floodway map. Kirk also testified that based on his survey of the area near the Smith property, the southern portion of the Smith property was out of the floodway. In addition, Doug Cook, planning administrator for Washington County, testified that a structure could be built within a floodway if it is certified that the structure is on an isolated portion of high ground.

The Smiths testified that the southern end of their property was high ground that historically had not been inundated during periods of flooding. Further, Reed Smith testified that he, along with the Omaha Public Power District and the Cottonwood Marina, requested a restudy and revision of the FEMA map with respect to their properties. According to Reed Smith, the revised FEMA map indicated that 5 to 6 acres of what was formerly his property were located outside of the floodway.

The Washington County board considered adoption of the revised FEMA map after the district had acquired the Smith property. Reed Smith testified that at the third county board meeting concerning the restudy, the board voted to table adoption of the revised FEMA map until the instant litigation was final. Cook testified that the district appeared at the third county board meeting in opposition to the adoption of the proposed

revisions to the FEMA map and requested that the board table the matter until the litigation between the district and the Smiths was completed.

The Smiths were required to prove the fair market value of their property in view of any reasonably probable use, reasonably occurring in the immediate future. See *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971). The Smiths did, in fact, adduce evidence to demonstrate that their valuation opinions, as well as the valuation opinion of their expert, were correctly based on the fact that it was reasonably probable that the Smith property could be used for residential purposes, reasonably occurring in the immediate future.

At the time of the taking, even the "inaccurate" FEMA map disclosed that a portion of the Smith property was within the floodway fringe and thus suitable for residential construction. The revised FEMA map revealed that at least one-quarter of the Smiths' property was outside the floodway and thus suitable for residential use. The revised FEMA map was corroborated by the survey conducted by Kirk and consonant with the Smiths' observations of the extent to which their property was inundated during periods of flooding.

The Court of Appeals placed some emphasis on the fact that the revised FEMA map did not have "official standing." While it is true that the FEMA map had not been adopted by the Washington County board, the only reason the revised FEMA map had not been adopted by the county board prior to the time of trial was because the district stood in opposition to its adoption. However, the record establishes that the district opposed adoption of the restudy map not because it questioned the accuracy of the map, but, instead, because the district complained that Reed Smith was without standing to request the restudy, as he was no longer the owner of affected property.

We therefore determine that the Court of Appeals erred in finding that there was no evidence to support the conclusion that it was reasonably probable that the Smith property could be used for residential purposes in the immediate future. The record before us is replete with evidence that supports the Smiths' assertion that a part of their property was outside of the floodway at the time of the taking and that it was reasonably

probable that the Smiths could obtain the right to build a residence on their land in the immediate future.

(b) Novy Trade

The Court of Appeals concluded that the trial court erred by allowing the Smiths and their real estate expert, Morrissey, to consider the so-called Novy trade as a measure of the fair market value of the Smith property. The Novy trade involved an 18-acre tract of Missouri River frontage land near the Smith property and similar in many respects to the Smith property. John Novy, Jr., had at one time promised an adjoining landowner, Jess Wright, president of the Fort Calhoun Stone Company, a right of first refusal should Novy decide to sell his land. Although Wright intended to quarry the Novy property at some point in the future, his immediate interest in purchasing the Novy property was to limit the use of the road across his land to only Novy and his family. This road through Wright's quarry provided the best access to the Novy property.

According to Wright, sometime in 1993, Novy told Wright that an unidentified third party had offered $150,000 for his property. Wright then agreed to purchase the property from Novy. For their mutual tax advantage, they structured the exchange as a trade of land with yet another third party. This exchange was valued by Wright and Novy at $150,000. Since Wright did not intend to quarry the Novy land at the time, he granted Novy and his daughter a 20-year life estate to continue to use the property for recreational purposes.

The district's real estate expert, Kenneth Beckstrom, testified that Novy told him that the exchange was valued at $150,000 because that was the cost of the land Novy wanted to acquire and that it was not the result of an independent third-party offer on Novy's Missouri River property.

The Court of Appeals concluded that because Novy reserved for himself a life estate in the recreational attributes of his property and since it is these recreational attributes that are claimed to be similar to the Smith property's, the exchange cannot be considered a sale for the equivalent of cash suitable for comparison to the Smith land. *Smith v. Papio-Missouri River NRD*, 96 NCA No. 34, case No. A-95-376 (not designated for permanent publication).

This conclusion, however, does not take into account the fact that the fair market value of the land exchanged was not established as the result of negotiations between Novy and Wright. Fair market value is the price which property will bring when offered for sale upon the open market as between a willing seller and buyer, neither being obligated to buy or sell. See, *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

Construing the evidence in favor of the Smiths, we find the fair market value of Novy's property, $150,000, was established on the open market through an offer from a third-party willing buyer not obligated to buy and made to a willing seller not obligated to sell. Wright merely matched the independent third party's offer. Thus, Novy's retention of a life estate in the recreational attributes of the property and Wright's desire to limit access to the Novy property across his land are irrelevant. The value of the exchange arose from negotiations independent of the negotiations which allowed Novy to retain a life estate and Wright to limit access to the road through his quarry. The retention of a life estate in the recreational attributes of the property, as well as Wright's ability to limit access across his quarry property, had no bearing whatsoever on the fair market value of the exchange.

In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996); *McArthur v. Papio-Missouri River NRD, supra.* Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *Patterson v. City of Lincoln, supra.*

We conclude that the trial court did not abuse its discretion when it allowed the Smiths and Morrissey to base their opinions as to the fair market value of the Smith property on the sale or exchange of the Novy property. Not only did the Smiths adduce evidence demonstrating that the Novy trade was a fair market exchange valued at $150,000, but they adduced additional evidence as to other factors which demonstrated that there was not a marked difference in the situations of the Smith and Novy properties.

For example, evidence was adduced that demonstrated that the Smith and Novy properties were similar in that both were approximately 20-acre riverfront tracts, with about half of the acreage tillable ground and the rest primarily enjoyed for its recreational attributes. The tracts differed in that the Novy land was on the Missouri River and the Smith property was on the Boyer Chute. Reed Smith opined that this difference made his property better. The tracts also differed in that the Novy land was completely in the floodway whereas the Smith property was not. However, Novy had a cabin on his land whereas the Smith land did not have any already-constructed, habitable buildings.

The Smith property had access via a county road, had a boat ramp, and was suitable for duck hunting. The Novy property had none of these attributes. Finally, the Novy property was situated directly across the river from Wilson's Island, an Iowa recreation area. Reed Smith testified that the noise from Wilson's Island would be a negative attribute compared to his property. These differences are not factors which would render a comparison for the purposes of valuation inadmissible, as they do not demonstrate a marked difference in the situation of the properties. Instead, such differences go toward the weight to be accorded such testimony, not its admissibility.

Further, the Novy trade cannot be thought of as too remote in time to be considered a comparable exchange. An appraisal must be made near enough in point of time to furnish a test of the market value as of the date in question and is a matter within the discretion of the trial court. *Schmailzl v. State*, 176 Neb. 617, 126 N.W.2d 821 (1964).

The Novy trade occurred around July 1993, approximately 2 years after the district filed its condemnation action against the

Smiths. Morrissey testified that there was no need to make an adjustment merely because the Novy trade was 2 years later in time than the taking by the district. The test is whether the sale has probative value with respect to the present value. See 8A Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain § 27.02[1] (rev. 3d ed. 1997). The district's expert, Beckstrom, likewise examined the Novy trade and did not conclude that this transaction was too remote, but instead concluded that Wright was under duress to purchase the property at whatever price Novy demanded. Thus, the trial court did not abuse its discretion, based on remoteness, by allowing into evidence the Novy trade.

The conclusion of the Court of Appeals that the Novy trade was not a comparable sale is in error. The fair market value of the Novy property was established in an arm's-length negotiation between a willing seller and buyer, neither obligated to buy or sell. Novy's retention of a 20-year life estate in the recreational attributes of the property was unrelated to this negotiation. There is no support in the record for the assertion that the Novy trade was too remote for consideration as a comparable sale. Moreover, the various similarities and differences between the properties should not bear on the admissibility of the Novy trade as evidence of a comparable sale and, thus, fair market value. Instead, all the evidence presented in this regard should properly be considered by the jury as to the weight to give to a witness' opinion of fair market value.

(c) Resolution

An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996). In order for the testimony of either an expert or a lay witness to be admissible on the question of market value of real estate, the witness must be familiar not only with the property in question, but also with the state of the market. *Id.*

The Smiths testified only as to their opinions of the fair market value of their property for the use to which it was then being

put. There is sufficient evidence in the record indicating that the Smiths could have used their property for residential purposes in the immediate future, as a portion of their property sufficient for use as a residence either was within the floodway fringe or was high ground within the floodway. Accordingly, the trial court did not abuse its discretion when it allowed the Smiths to offer valuation opinions. As such, the Court of Appeals erred in holding to the contrary.

2. Errors Assigned Below but Not Reached

Because of its disposition of this case, the Court of Appeals did not address two errors assigned by the district. We must now address those assignments, as a proper result will not be reversed merely because it was reached for the wrong reasons. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

The district assigned as error below the trial court's failure to sustain the district's relevance objection to the cross-examination of its expert in regard to real estate commission rates. A review of the record indicates that the Smiths' counsel questioned the district's expert, Beckstrom, in regard to his knowledge of the commission rate a buyer would pay to a real estate agent. In its proper context, this questioning was elicited in an attempt to impeach Beckstrom's credibility as a real estate market expert. As such, this line of questioning was relevant. No objection was made as to unfair prejudice. Thus, the trial court did not abuse its discretion in allowing such testimony. Accordingly, this assignment of error, assigned by the district but not decided by the Court of Appeals, is without merit.

The district also assigned error in regard to the trial court's failure to sustain the district's motion to vacate the verdict due to purported juror misconduct. During a recess in the trial, a juror went to the Washington County assessor's office in order to inquire about a 40-acre parcel of land south of Blair that he was interested in purchasing. The juror asked three office employees their opinion as to how much it would cost to purchase a portion of the property. The office employees told the juror that a 10-acre parcel would go for around $3,500 to $4,000 per acre and that anything over 20 acres tends to be less.

The juror testified that he did not inquire about the Smith property. The juror also testified that he did not share this information with the other jurors.

Allegations of misconduct by jurors must be substantiated by competent evidence. *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Nichols v. Busse, supra*. The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. *Id.*

At trial, the Smiths' real estate expert valued the Smith property in the range of $4,000 per acre. Thus, the value of the land that the juror was considering was arguably relevant to an issue in the case, that being, the value of the Smith land. However, the property the juror was interested in was distant from the Smith and Novy properties. Further, the property the juror inquired about was not farmland, nor was it riverfront property. The juror did not tell any other juror what he had learned at the county assessor's office. The juror went to the county assessor's office purely for personal reasons and made no inquiry as to the Smith or Novy properties.

We conclude that the district has failed to substantiate its charge of juror misconduct with competent evidence. The record reflects that the juror did not seek information from the county assessor's office in an attempt to either corroborate or impeach testimony offered at trial with respect to a disputed matter. Instead, the juror, acting solely in his own self-interest, took the opportunity to ask employees of the county assessor's office some questions concerning a parcel of property in which he was interested.

Further, the property in which the juror was interested is not similar in any manner to the Smith property. The property that the juror was interested in is so markedly dissimilar to the Smith and Novy properties that it could never be considered a comparable sale for the purposes of determining the fair market value of the Smith property. Thus, the district's final assignment of error is without merit.

V. CONCLUSION

Having concluded that the Court of Appeals erred in disturbing the jury verdict, we reverse the judgment of the Court of Appeals and remand the cause with the direction that the verdict and the district court judgment rendered thereon be reinstated.

REVERSED AND REMANDED WITH DIRECTION.

JOHNSON LAKES DEVELOPMENT INCORPORATED, APPELLEE, V. CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT, A POLITICAL SUBDIVISION AND PUBLIC CORPORATION OF NEBRASKA, APPELLANT.

R. DANIEL NIEMOTH AND LOIS M. NIEMOTH, APPELLEES AND CROSS-APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT, A POLITICAL SUBDIVISION AND PUBLIC CORPORATION OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

576 N.W.2d 806

Filed April 10, 1998. Nos. S-95-1380, S-95-1388.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Leases: Contracts.** A lease agreement is to be construed as any other contract.
3. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Contracts.** The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language.
6. ____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
7. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
8. ____. A party may not pick and choose among the clauses of a contract, accepting only those that advantage it.
9. **Contracts: Rescission: Words and Phrases.** When used in reference to a contract, the terms "abrogate," "annul," and "cancel" mean to rescind the contract and thereby nullify its existence.

10. **Property: Leases.** As a general rule, the owner of property is entitled to terminate a lease of that property so long as the termination is accomplished in accordance with the law and in a timely fashion.
11. **Contracts: Notice: Equity.** When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; and the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience.
12. **Contracts.** An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise.
13. ____. Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.
14. ____. A unilateral power to terminate does not render a contract illusory so long as the party reserving the power to terminate is irrevocably bound for any appreciable period of time or has materially changed any of his legal relations or otherwise rendered some performance capable of operating as consideration.
15. **Contracts: Notice.** Even a slight restriction on the exercise of the right of termination, such as the requirement that advance notice be given, is sufficient to prevent a unilateral right of termination from being regarded as illusory in nature.

Petition for further review from the Nebraska Court of Appeals, HANNON, MUES, and INBODY, Judges, on appeal thereto from the District Court for Dawson County, JOHN P. MURPHY, Judge. Judgments of Court of Appeals affirmed.

Michael C. Klein and Robert J. McCormick, of Anderson, Klein, Peterson, Swan & Bogle Louthan, for appellant.

Patrick W. Healey, of Healey & Wieland Law Firm, and E. Bruce Smith for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

These cases involve the interpretation of a lease agreement between the Central Nebraska Public Power & Irrigation District (Central) and Johnson Lakes Development Incorporated (JLDI), which was incorporated in subleases between JLDI and various individuals who own cabins situated on the lakefront property owned by Central which is the subject of the

lease agreement. In an action commenced in the district court for Dawson County, JLDI obtained an injunction preventing Central from exercising a reserved power of termination contained in the lease agreement (JLDI action). A similar action filed by R. Daniel Niemoth and Lois M. Niemoth was dismissed as moot by virtue of the injunction entered in favor of JLDI (Niemoth action). On appeal, the Nebraska Court of Appeals consolidated the cases and reversed in part the district court's judgments, finding as a matter of law that the power of termination was unambiguous and valid. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 957, 568 N.W.2d 573 (1997). Upon further review, we conclude that the judgment of the Court of Appeals with respect to each case was correct, and we therefore affirm the judgments of the Court of Appeals.

FACTS

Central is a public corporation and political subdivision of the State of Nebraska. See Neb. Rev. Stat. § 70-601 et seq. (Reissue 1996 & Supp. 1997). On July 30, 1937, Central was granted a license by the Federal Power Commission, now known as the Federal Energy Regulatory Commission (FERC), to construct, operate, and maintain project No. 1417, which included dams, reservoirs, canals, power plants, transmission lines, and related improvements along the North Platte and Platte Rivers in several Nebraska counties. The license was issued for a period of 50 years.

On May 1, 1978, Central and JLDI entered into a written lease agreement pertaining to land owned by Central in conjunction with project No. 1417, which borders reservoirs commonly known as Johnson Lake and Plum Creek Lake (Johnson Lakes) in Gosper and Dawson Counties. The following provisions of the lease are pertinent to the issue before us:

> WHEREAS, the DISTRICT [Central] desires to provide a new Agreement for a thirty-one (31) year term with automatic renewal extension at the end of the first year and each successive year, resulting in a thirty-one (31) year maximum and a thirty (30) year minimum Agreement . . . [.]
>
> . . . .

NOW THEREFORE, in consideration of the mutual covenants, promises and agreements herein contained, the parties do hereby covenant, promise and agree as follows:

(1) The DISTRICT does hereby lease to JLDI for a period of thirty-one (31) years from this date the various properties or lands owned by the DISTRICT . . . .

(2) Said thirty-one (31) year period shall take effect on the date of this Agreement and shall include an automatic renewal period of one (1) year. This renewal period shall take effect at the end of the first year and at the end of each successive year in which the Agreement is in existence, resulting in a thirty-one (31) year maximum term and a thirty (30) year minimum term. Any and all leasing or subleasing done by JLDI under this Agreement shall not extend beyond the terms or period of this Agreement.

(3) Within one (1) year from the effective date of this Agreement, JLDI and all sub-lessees shall enter into new agreements based on the thirty/thirty-one (30/31) year period . . . .

(4) Within one-hundred-twenty (120) days from the effective date of this Agreement, JLDI shall furnish all sublessees with copies of this new Agreement between the DISTRICT and JLDI and copies of the revised lease between JLDI and its sublessees.

. . . .

(11) . . . Said subleases, leases or agreements shall also provide that the holders thereof shall be bound by all of the terms of this Agreement as herein written and that any violation of these terms and conditions of this Agreement shall be adequate and sufficient grounds for the termination or breach of said sublease, lease or agreement on the part of JLDI.

. . . .

(17) . . . All subleases or agreements made in the future by JLDI or any renewals of existing agreements concerning these [Johnson Lakes] properties shall be subject to all of the terms and provisions of this Agreement, as though this Agreement were fully set forth in the same.

. . . .

(31) It is understood and agreed by the parties to this Agreement that the powers of the DISTRICT are under limitation and restriction by reason of the Federal Energy Regulatory Commission (formerly Federal Power Commission) license dated July 30, 1937, and expiring fifty (50) years thereafter with the rights as thereon granted and agreed to, and in the event said FERC license is not renewed, that upon the expiration of such license this Agreement shall deliver full and complete possession of all leased areas to the DISTRICT by JLDI.

. . . .

(33) *The DISTRICT shall have complete power and authority to cancel or terminate this Agreement at any time it so desires by giving JLDI written notice of such intentions at least six (6) months in advance addressed to JLDI at its last known corporate address. . . .*

. . . .

(35) All prior existing agreements between the DISTRICT and JLDI shall be and whereby [sic] are terminated and this Agreement shall be the entire and only Agreement between these parties. *This Agreement cannot be changed, modified, abrogated or annulled, except that the same be in writing and signed by the parties hereto,* after the officers of the DISTRICT are authorized to do so by the Board of Directors of the DISTRICT.

(Emphasis supplied.) The lease agreement contained no provisions for rent.

JLDI subsequently entered into subleases with individuals, including the Niemoths, who own cabins situated on the lakefront property. The subleases contained the following pertinent provisions:

1. That JLDI has this day leased to TENANT, for cabin lot purposes only . . . on a 30 year minimum/31 year maximum, with an automatic annual renewal extension being made on the 1st day of May of each successive year, subject to all the terms and provisions of JLDI's lease agreement with The Central Nebraska Public Power & Irrigation District, hereinafter referred to as DISTRICT, dated the 1st day of May, 1978, all of the same being made

> a part of this agreement; and subject to any amendments, changes and extensions of said agreement with the DISTRICT, and this lease agreement shall continue so long hereafter as JLDI's lease agreement with said DISTRICT shall remain in effect . . . .
>
> . . . .
>
> 14. . . . [T]here are no other promises or covenants made by JLDI except as are contained in this Agreement, and/or as contained in the Agreement between DISTRICT and JLDI, which is attached hereto and made a part hereof.
>
> 15. TENANT hereby acknowledges receipt of a copy of this lease and a copy of the Lease Agreement dated May 1, 1978, between the DISTRICT and JLDI (excluding exhibits) and has read both agreements prior to signing this lease.

On June 28, 1984, Central filed an application with FERC for a new license for project No. 1417. Since that date, Central has continued to operate and maintain project No. 1417 under a series of annual licenses issued by FERC pending action on the application.

On March 4, 1994, Central's board of directors passed resolution No. 94-2, authorizing and instructing Central's president and secretary to enter into a modification agreement with JLDI and other lake associations "to provide, among other things, for the payment of fair and reasonable rent for the personal benefit received from the use of" the property owned by Central. The resolution gave JLDI until June 1, 1994, to enter into a modification agreement with Central. If JLDI failed to do so, Central's officers were authorized to begin the process of terminating the lease with JLDI. After negotiations between Central and JLDI failed to reach an agreement, JLDI and the Niemoths filed these actions in the district court for Dawson County.

PROCEDURAL HISTORY

District Court Proceedings in JLDI Action

JLDI filed a petition on its own behalf as the lessee of Central and as representative of "the class and individual interest of sublessees with common interests who have built upon and improved lots upon JOHNSON LAKES." Although JLDI

alleged that it had leased properties bordering on Johnson Lakes for a period of approximately 50 years, the only written lease alleged was that of May 1, 1978, summarized above. JLDI alleged that it leased subdivided lots on this property to various individuals who, with the knowledge and approval of Central, made improvements on the lots, which improvements included structures, shoreline stabilization, and landscaping "in reliance on the status quo and representations made by CENTRAL." JLDI alleged that the adoption of resolution No. 94-2 by Central and its stated intention to terminate the lease if JLDI did not agree to a modification agreement providing for rents were unlawful, ultra vires, and unconstitutional. JLDI further alleged that Central was barred by equitable estoppel and laches from "disrupting, altering and changing the lot fees for the sublessees" of JLDI. JLDI also alleged that it had no adequate remedy at law and that it and its sublessees would be irreparably harmed unless Central were enjoined from taking unilateral action with respect to the lease. JLDI prayed for an injunction barring Central from enforcing resolution No. 94-2 or from taking any other action affecting JLDI or its sublessees without mutual consent; for declaratory judgment determining its rights and duties under the lease; and for other relief, including damages and attorney fees.

Before Central filed its answer, the district court granted Central's motion to strike the allegations in JLDI's petition dealing with improvements made by its sublessees in alleged reliance upon the actions and representations of Central. The court determined that JLDI, as a corporate entity, could not represent the interests of the individual sublessees. Central then filed an answer and cross-petition in which it admitted execution of the lease but denied JLDI's characterization of its terms. Central also admitted enactment of resolution No. 94-2 and submission of the proposed modification agreement to JLDI, but denied that "the management of Central did on or about March 10, 1994 assert an intention unilaterally to make material, substantial and unfavorable modifications [to the lease] contrary to the rights of JLDI and its sublessees." Central further alleged that it "has not fixed or established a rent for the use of Central's properties bordering said Johnson Lakes" and that the

modification agreement which it proposed was "offered to JLDI for purposes of negotiating a settlement and compromise." In its cross-petition, Central alleged that the lease had already terminated pursuant to paragraph 31 thereof because its FERC license expired on July 30, 1987, and had not been renewed, or, in the alternative, if the lease was still in effect, that Central had a right to cancel or terminate the lease pursuant to paragraph 33. Central prayed for a declaration of its rights under the lease agreement and other appropriate relief. JLDI filed a reply denying the interpretation of the lease alleged by Central in its cross-petition and alleging that Central "still purports to act as a licensed entity within the meaning of the agreements between the parties and is barred and estopped from claiming that it is not operating as a lawfully licensed entity."

JLDI and Central each filed motions for summary judgment. In an order entered November 28, 1995, the district court held that because Central had operated under a 1-year renewable license from the FERC pending renewal of its 50-year license, the lease agreement with JLDI had not terminated by operation of paragraph 31. The district court further held that paragraph 33 of the lease, setting forth Central's right to cancel, was ambiguous when read with paragraph 2, setting forth the term of the agreement, and paragraph 35, stating the agreement could not be annulled or abrogated except in writing signed by both parties. The district court concluded:

> In order to logically interpret the agreement, paragraph 33 must be read conditionally. That is the power and authority of [Central] to terminate the agreement must be based on a condition of termination relating to the operation or modification of the series of lakes and canals operated by [Central]. . . .
>
> To read paragraph 33 in any other way makes the agreement an illusory contract binding only [JLDI], and would result in a situation as has developed in the instant case. Here, [Central], in order to circumvent the requirement of paragraph 35 that any modification, such as for lot rents, be in writing and signed by both parties, attempts to terminate the agreement outright. The Court finds that [Central] is not so empowered under the agreement. The

> Court finds that the ambiguity in the agreement must be resolved by determining paragraph 33 is one conditioned upon a showing by [Central] that the termination is directly related to the physical operation of the lake in its system of lakes and canals created to provide irrigation and hydroelectric services.

Based upon these findings, the district court granted JLDI's motion for summary judgment, overruled Central's motion for summary judgment, and entered a permanent injunction enjoining Central "from enforcing the provisions of Resolution 94-2 or proposed Modification Agreement, and from interfering with the rights, benefits and enjoyments of JOHNSON LAKES DEVELOPMENT INCORPORATED and its sublessees under the [lease agreement] and from unilaterally altering such agreement or providing for rents or application of rents." After its motion for new trial was overruled, Central perfected this appeal.

District Court Proceedings in Niemoth Action

In their operative amended petition, the Niemoths alleged that they sublease an improved lot on Johnson Lakes from JLDI and that they and other sublessees are third-party beneficiaries of the May 1, 1978, lease agreement between JLDI and Central. The Niemoths alleged that they and other sublessees made improvements on their lots "in reliance on the status quo and representations made by CENTRAL" and that they would be irreparably harmed if Central were permitted to proceed with the plan of action described in resolution No. 94-2. The Niemoths alleged that such action would be unlawful, unconstitutional, and barred by equitable estoppel and laches. On behalf of themselves individually, and as representatives of a class consisting of "sublessees with common interests who have built upon and improved lots upon JOHNSON LAKES," the Niemoths prayed for declaratory and injunctive relief, damages, and attorney fees. Central filed an answer and cross-petition similar to that which it filed in the JLDI action. The Niemoths filed a reply similar to that filed in the JLDI action. Central and the Niemoths filed motions for summary judgment. In an order entered on November 28, 1995, the district court did not rule specifically on either motion, but dismissed the action, finding

that it was moot because of its order entered in the JLDI action. After its motion for new trial was overruled, Central perfected this appeal.

Decision of Nebraska Court of Appeals

Following consolidation of the two cases, the Court of Appeals issued a single dispositive opinion. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 957, 568 N.W.2d 573 (1997). With respect to the JLDI action, the Court of Appeals held as a matter of law that (1) Central received a series of 1-year extensions following the alleged expiration of its original 50-year FERC license on July 30, 1987, and had operated the reservoir pursuant to those extensions; (2) by its actions since July 30, 1987, Central waived any right to claim that the lease terminated upon the expiration of the original license; and (3) the termination clause contained in paragraph 33 of the lease was unambiguous and gave Central a right to terminate the lease under the terms stated in that paragraph. The Court of Appeals did not decide the issues of equitable estoppel and laches arising from improvements on the property by JLDI or its sublessees, holding that these issues could not be resolved on a motion for summary judgment and that "such issues cannot arise until, at the earliest, Central in fact terminates the lease under paragraph 33." 5 Neb. App. at 972, 568 N.W.2d at 584. The Court of Appeals therefore reversed the findings of the district court with respect to paragraph 33 of the lease, ordered the injunction reversed and terminated, and remanded the cause to the district court with directions to enter partial summary judgment for Central recognizing its right to terminate the lease pursuant to paragraph 33 thereof. The Court of Appeals also determined that the rights of JLDI's sublessees are no greater than those of JLDI and that the Niemoth action should therefore be controlled by the results of the JLDI action. The Court of Appeals therefore reversed the finding of the district court that the Niemoths' action was moot. We granted the petitions of JLDI and the Niemoths for further review.

ASSIGNMENTS OF ERROR

In its appeal of the JLDI action, Central contended that the district court erred in sustaining JLDI's motion for summary

judgment, in overruling Central's motion for summary judgment and motion for new trial, and in construing the terms and provisions of the lease agreement. In the Niemoth action, Central assigned as error the denial of its motion for summary judgment and the dismissal of its cross-petition as moot. The Niemoths cross-appealed, asserting that their case would not be moot if the summary judgment entered in favor of JLDI in the JLDI action were reversed on appeal and the cause remanded for further proceedings.

Restated, JLDI and the Niemoths allege in their petitions for further review that the Court of Appeals erred in (1) disregarding language in the lease which they characterize as creating "a rolling 30 year term," (2) misconstruing language in the lease which provided that it could not be "changed, modified, abrogated or annulled" without the consent of both parties, (3) disregarding the principle of construction requiring provisions of a contract to be read together so as to give meaning to all, and (4) determining that the trial court had stricken allegations concerning alleged improvements to Johnson Lake made by JLDI and its sublessees.

STANDARD OF REVIEW

The dispositive issues in these appeals present questions 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, *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997); *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997).

ANALYSIS

JLDI Action

As a preliminary matter, we note that Central has not requested further review of the determinations made by the district court and the Court of Appeals that Central's lease with JLDI did not terminate by operation of paragraph 31 thereof because of its continued operation of project No. 1417 pursuant to renewable 1-year licenses issued by the FERC. We determine

that this issue was correctly decided by the district court for the reasons articulated by the Court of Appeals. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 957, 568 N.W.2d 573 (1997).

The principal issue before us is whether paragraph 33 of the lease gives Central a right to cancel or terminate by giving JLDI written notice of such intent at least 6 months in advance. A lease agreement is to be construed as any other contract. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996); *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Daehnke v. Nebraska Dept. of Soc. Servs., supra; Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995). The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *Murphy v. City of Lincoln, supra.*

We find no ambiguity in the language of paragraph 33, which provides that Central "shall have complete power and authority to cancel or terminate this Agreement at any time it so desires by giving JLDI written notice of such intentions at least six (6) months in advance addressed to JLDI at its last known corporate address." Giving the language its plain and ordinary meaning, this provision unequivocally gives Central the right to end its contractual relationship with JLDI upon giving the requisite notice in the manner prescribed. However, this finding is not determinative, since we are required to construe a contract as a whole, and if possible, to give effect to every part of the contract. See, *C.S.B. Co. v. Isham, supra*; *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

JLDI contends that paragraph 33 of the lease agreement is ambiguous when read in conjunction with that portion of paragraph 35 which provides that the lease agreement "cannot be changed, modified, abrogated or annulled" except by written agreement of the parties. JLDI argues that

> [r]ead together, paragraphs 33 and 35 provide that Central may, throught [sic] its directors, propose cancellation or termination of the agreement but that for any change, modification, abrogation or annulment of the contract to take effect, such change, modification, abrogation or annulment has to be in writing and signed by both parties.

Memorandum brief for appellees in support of petition for further review at 6-7. We reject this argument for two reasons. First, it would require that we simply ignore the language of paragraph 33, which gives Central *complete power and authority* to terminate or cancel the lease agreement, and focus instead on paragraph 35, which requires written consent of the parties in order to change, modify, abrogate, or annul the agreement. We have written that a party "may not pick and choose among the clauses of a contract, accepting only those that advantage it." *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. at 303, 557 N.W.2d at 21. Accord *Bedrosky v. Hiner, supra*. Second, we agree with the Court of Appeals that "a proviso that the lease may not be 'changed, modified, abrogated or annulled' " without mutual consent of the parties does not conflict with a clause under which the lessor reserves the right to " 'cancel or terminate' " a lease by giving advance written notice to the lessee. *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 957, 970, 568 N.W.2d 573, 582 (1997). When used in reference to a contract, the terms "abrogate," "annul," and "cancel" mean to rescind the contract and thereby nullify its existence. See, *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). In contrast, the

> "reservation of such a power to terminate does not invalidate the contract or render the consideration for a promise insufficient, so long as the party reserving the power to terminate is irrevocably bound for any appreciable period of time or has materially changed any of his legal relations

> or otherwise rendered some performance capable of operating as a consideration. If a period of notice is required, the contract remains in force and must continue to be performed according to its terms during the specified period after receipt of the notice of termination. . . ."

Johnson Lakes Dev. v. Central Neb. Pub. Power, 5 Neb. App. at 970-71, 568 N.W.2d at 583 (quoting 6 Arthur L. Corbin, Corbin on Contracts § 1266 at 66 (1962)). Thus, if a contract lawfully grants a party the right to unilaterally terminate the contractual relationship after partial performance, the exercise of that right in the manner specified is not a change, modification, abrogation, or annulment of the contract, but, rather, an action contemplated by and taken pursuant to the original agreement of the parties as embodied in their contract. We agree with the Court of Appeals that the dispositive issue is whether the termination provision contained in paragraph 33 of the lease agreement is valid.

As a general rule, the owner of property is entitled to terminate a lease of that property so long as the termination is accomplished in accordance with the law and in a timely fashion. See *Moudry v. Parkos*, 217 Neb. 521, 349 N.W.2d 387 (1984). However, JLDI argues that the unilateral termination clause contained in paragraph 33 of the lease agreement is invalid because it conflicts with the term of the lease as set forth in paragraphs 1 and 2. JLDI contends that these provisions create "a 'rolling' term of at least 30 years beyond the year's term in effect at any moment in time." Memorandum brief for appellees in support of petition for further review at 7. Central acknowledges that paragraphs 1 and 2 "provide that the term of the lease agreement automatically renews for an additional year at the end of each year in which the lease agreement is in existence." Additional brief for appellant on appellee's petition for further review at 10. For purposes of analyzing the validity of the termination clause, we regard the lease as creating a tenancy for a term of years. The legal issue which we must resolve is whether parties may legally contract for a leasehold of at least 30 years' duration, with the lessor reserving a unilateral right to terminate the lease for any reason upon the giving of 6 months' written notice.

Two of our cases provide some guidance. In *Morrissey v. Broomal*, 37 Neb. 766, 56 N.W. 383 (1893), a party to a commercial contract with a stated term of 1 year contended that the other party could not terminate the contract prior to the end of the year, notwithstanding a clause in the contract which reserved the right to terminate upon giving 30 days' notice. We rejected this argument, holding that

> [w]hen the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; and the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience.

37 Neb. at 780, 56 N.W. at 386.

We considered the validity of a reserved power of termination in a lease for a term of years in *Frankel v. Pitlor*, 166 Neb. 219, 88 N.W.2d 770 (1958). There the plaintiff, a real estate agent, claimed a commission based upon a listing agreement in which the sellers specified that the buyer must agree to lease the property back to them for a period of 1 year from the date of closing. The purchase agreement which the agent obtained contained the buyer's agreement to a 1-year lease back to the sellers, but also incorporated a printed lease form pursuant to which the buyer/lessor could terminate the lease at the end of any calendar month on 6 months' notice. In determining that this did not constitute an unconditional acceptance of the offer to sell, we rejected the agent's contention that the typewritten terms of the purchase agreement controlled over the printed lease form attached to the agreement. Noting that this principle of construction applied only where ambiguity or inconsistency existed between the typewritten and printed documents, we held that the 1-year lease term and the reserved right of the lessor to terminate prior to the expiration of that term were "neither ambiguous nor inconsistent." *Id.* at 222, 88 N.W.2d at 773. We cited with approval the decision of the Iowa Supreme Court in *Pearson v. Howell*, 184 Iowa 990, 169 N.W. 368 (1918), holding that unaided by extrinsic evidence, a court would be required to construe similar provisions as a fixed term subject to

defeat by exercise of the lessor's reserved power of termination. Finding that the listing agreement clearly included as a condition of sale a lease back to the sellers for a period of 1 year, we concluded:

> Since the purchase agreement [obtained by the agent] provided for a lease that could be terminated at the end of any calendar month after 6 months' notice, [the sellers] could properly assert that the purchase agreement was not an unconditional acceptance of [their] offer to sell, as set forth in the listing agreement. If [the sellers] had signed the purchase agreement tendered to them, the termination provision in the lease could have been enforced against them.

166 Neb. at 223, 88 N.W.2d at 773.

Other courts have recognized the right of parties to a lease for a term of years to reserve the power to terminate the lease prior to the expiration of the stated term. See, e.g., *Pedigo's Groceries, Inc. v. Mr. M Corp.*, 633 S.W.2d 353 (Tex. App. 1982) (upholding reserved right of either party to terminate 180-month commercial lease by giving 30 days' written notice); *Amoco Oil Co. v. Burns*, 496 Pa. 336, 437 A.2d 381 (1981) (upholding reserved right of lessor to cancel commercial lease after automatic renewal of term by giving 60 days' written notice); *Preston A. Higgins & Co. v. Stevenson*, 28 Ill. App. 3d 150, 328 N.E.2d 79 (1975) (upholding reserved right of parties to commercial lease to terminate before expiration of term by giving 30 days' written notice). While each of these cases involved lease provisions permitting either party to terminate, we do not regard the reserved power to terminate in the instant case as invalid simply because it is unilateral. As observed in Williston on Contracts:

> The confusion attendant upon the use of the term mutuality has arisen most frequently when one party under a contract has an option, not given to the other, of discontinuing or extending performance or of cancelling or renewing the contract, or in some manner of determining the extent of performance. If the power conferred goes so far as to render illusory the promise of the party having the option, there is indeed no consideration, and therefore no contract.

> However, the mere fact that the option prevents the mutual promises from being coextensive with one another does not prevent both promises from being binding according to their respective terms.

3 Richard A. Lord, Williston on Contracts § 7:14 at 297-300 (4th ed. 1992).

Similarly, it is stated in Corbin on Contracts:

> The power to terminate that is reserved is invariably a power to terminate the whole contract, including both promises alike. Where one promise is illusory and the other is not, it looks as if the one promised performance must be rendered whether the other is performed or not. This is not so in the case of a power to terminate. If the power is exercised, both parties are freed from their promissory duties. If it is not exercised, neither one is freed. It does not appear to involve an attempt to get something for nothing, and there is no such result whether the power is exercised or not.
>
> This being so, the contract should not be regarded as unfair for its supposed lack of "mutuality."

2 Joseph M. Perillo and Helen H. Bender, Corbin on Contracts, § 6.10 at 293 (rev. ed. 1995).

We cannot agree with the finding of the district court that enforcement of paragraph 33 of the lease agreement according to its terms would render the lease "an illusory contract binding only [JLDI]." It is true that an agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise. See, *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987). Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only. *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984). However, courts which have examined the enforceability of unilateral powers to terminate contracts have

held that such powers do not render a contract illusory so long as the party reserving the power to terminate is irrevocably bound for any appreciable period of time or has materially changed any of his legal relations or otherwise rendered some performance capable of operating as consideration. See, e.g., *Niagara Mohawk Power v. Graver Tank & Mfg.*, 470 F. Supp. 1308 (N.D.N.Y. 1979) (applying New York law); *Acme Markets v. Dawson Enterprises*, 253 Md. 76, 251 A.2d 839 (1969); *David Roth's Sons, Inc. v. Wright and Taylor, Inc.*, 343 S.W.2d 389 (Ky. 1961). See, also, 6 Arthur L. Corbin, Corbin on Contracts § 1266 (1962). Even a slight restriction on the exercise of the right of termination, such as the requirement that advance notice be given, is sufficient to prevent a unilateral right of termination from being regarded as illusory in nature. *Niagara Mohawk Power v. Graver Tank & Mfg., supra; David Roth's Sons, Inc. v. Wright and Taylor, Inc., supra.* Here, the requirement that Central give JLDI 6 months' advance written notice of its intent to terminate the lease, and the fact that the lease would remain in effect during that 6-month period, was sufficient to establish the requisite mutuality.

We therefore agree with the Court of Appeals that paragraph 33 of the lease agreement constitutes an unambiguous and valid reserved right of termination and, therefore, that Central is entitled to partial summary judgment. We also agree that the record before us is insufficient to determine as a matter of law whether or not Central is equitably estopped or barred by the doctrine of laches from exercising this power, and we therefore do not address these issues.

NIEMOTH ACTION

The sublease between JLDI and the Niemoths expressly incorporated the provisions of the lease agreement between JLDI and Central. Thus, Central is entitled to partial summary judgment on its cross-petition declaring its contractual right to terminate the lease agreement upon giving the requisite notice. Whether it is equitably estopped or barred from exercising that right remains to be determined; the Niemoths' action is therefore not moot and should not have been dismissed.

CONCLUSION

For the reasons discussed above, we conclude that the Court of Appeals correctly decided the issues before it and that its judgment in the JLDI action affirming in part, and in part reversing with directions should be affirmed. Likewise, its judgment in the Niemoth action reversing with directions should be affirmed. We therefore affirm the Court of Appeals' judgments, and both causes are remanded to the district court for Dawson County for entry of judgment in accordance herewith.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DUSTIN L. BELMAREZ, ALSO KNOWN AS DEON BELMAREZ, APPELLEE.

577 N.W.2d 255

Filed April 10, 1998. No. S-96-1159.

1. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning jurisdiction, it is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. ____: ____. Once the trial court acts upon a mandate issued by an appellate court, the appellate court loses jurisdiction over the cause except upon a subsequent appeal.

Appeal from the District Court for Red Willow County: JOHN P. MURPHY, Judge. Vacated and dismissed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Robert H. Conner for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

The State of Nebraska appealed from the district court's order granting postconviction relief which vacated Dustin L. Belmarez' conviction for aiding and abetting second degree

murder. However, the State and Belmarez jointly moved to dismiss the State's appeal. Subsequently, we granted the State's motion to reinstate this appeal based upon allegations by the State that Belmarez had refused to honor a plea agreement which was the basis for the joint motion for dismissal of the State's appeal. Belmarez now claims that we lacked jurisdiction to reinstate the appeal.

SCOPE OF REVIEW

Whether or not a question is raised by the parties concerning jurisdiction, it is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. See, *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997); *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995).

FACTS

Belmarez was first charged on September 17, 1990, with two counts of first degree murder (one count for the murder of Lester Tucker and one count for the murder of Chester Tucker). In addition, Belmarez was charged with two counts of robbery, one count of theft by unlawful taking, and two counts of using a deadly weapon to commit a felony.

Pursuant to a plea agreement, Belmarez pled no contest to an amended information charging him with one count of first degree murder of Lester Tucker and one count of aiding and abetting another in the commission of second degree murder of Chester Tucker. The plea agreement provided that the State would not seek the death penalty on the first degree murder charge involving Lester Tucker, the State would not file any other charges arising out of the incident, and the State would dismiss the five other felony charges.

On May 16, 1991, Belmarez was sentenced to two consecutive sentences of life imprisonment. The district court stated in part: "Evidence was presented[,] and upon the evidence, the Court finds a factual basis and finds the Defendant guilty as to Count I and guilty as to Count II."

On June 17, 1991, Belmarez filed a direct appeal from the sentence, but the appeal was voluntarily dismissed. See *State v. Belmarez*, 239 Neb. xxvii (case No. S-91-607, Nov. 4, 1991).

On January 31, 1995, Belmarez filed a motion in arrest of judgment pursuant to Neb. Rev. Stat. §§ 29-2104 and 29-2106 (Reissue 1995). The motion alleged that the facts stated in the information did not constitute an offense because the information did not allege malice as an element of second degree murder, in accordance with *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). On March 15, the district court overruled the motion.

On April 1, 1996, Belmarez filed a "Verified Motion to Vacate and Set Aside Judgment and Conviction" pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1995) and refiled a copy of his motion in arrest of judgment. On October 10, the district court set aside Belmarez' conviction for second degree murder, but refused to set aside his conviction for first degree murder.

The State timely filed a notice of appeal from the district court's order setting aside the second degree murder conviction. The State requested this court to reverse our holding in *Myers* and its progeny. Concurrent to this notice of appeal, the State made a plea offer to Belmarez to dismiss its appeal if Belmarez agreed to be rearraigned and plead guilty to a charge of aiding and abetting second degree murder in which malice had been inserted as an element of the offense. By letter, Belmarez' counsel advised the State that Belmarez had accepted this plea offer.

On December 10, 1996, this court received a stipulation and joint motion for dismissal of this case (case No. S-96-1159) which stated that the dismissal was necessary in order for a plea agreement reached by the parties to be executed. We overruled the motion without prejudice to filing a stipulation without conditions. Following a second joint motion for dismissal, we dismissed the appeal on January 6, 1997. This mandate was filed in the district court on January 13.

At a hearing on January 24, 1997, Belmarez' counsel advised the district court that a plea agreement had been reached wherein Belmarez would enter a plea of guilty to a charge of aiding and abetting second degree murder in which the element of malice had been inserted. Belmarez' cocounsel then interjected: "Your Honor . . . I thought that we had all this hammered out. . . . [Belmarez] just informed me that he chooses to exercise his waiting period. So, there's going to be a problem enter-

ing a plea today; and I'm sorry for the inconvenience of the Court."

A hearing for Belmarez to enter his plea was set for January 28, 1997, and Belmarez' counsel requested a psychological evaluation of Belmarez to update the presentence investigation. Belmarez was served with a copy of the amended information charging him with aiding and abetting second degree murder, with malice included as an element of the offense.

On January 28, 1997, Belmarez' counsel informed the district court that Belmarez was not prepared to enter the plea agreement because counsel believed it was necessary to first evaluate Belmarez to determine competency. The motion was later withdrawn, on April 30, because a psychiatrist had determined that Belmarez was competent to stand trial.

On April 30, 1997, the State filed a "reinstated information" charging Belmarez with first degree murder for the killing of Chester Tucker. In response, Belmarez filed a plea in bar, a plea in abatement, and two motions to quash. The plea in bar asserted that under the first plea agreement, which resulted in a second degree murder conviction that was later vacated, the State was bound by its agreement that it would not file any other charges arising out of the incident in question. The plea in abatement made the same objections.

Belmarez' first motion to quash asserted that the information sought to be reinstated had been amended, that the information failed to sufficiently inform him as to the nature of the charge, and that there was no constitutional or statutory authority for a reinstated information. The second motion to quash raised various objections to the possible imposition of the death penalty.

On May 14, 1997, the State filed with this court a motion to reinstate this appeal. Although a copy of the motion was served on Belmarez, no objection to reinstatement was filed. The record does not disclose that the district court was aware of the motion to reinstate the appeal or that the State requested a stay of the district court proceedings.

While the motion to reinstate was pending before this court, proceedings continued in the district court on the State's reinstated information. On May 27, 1997, the district court held a hearing on the motions filed by Belmarez, and Belmarez filed

an amended plea in bar. The amended plea in bar reiterated that the State was bound by the plea agreement not to charge him with more than second degree murder. It further asserted that if Belmarez was charged with first degree murder of Chester Tucker, the plea to and conviction of first degree murder of Lester Tucker would have to be set aside.

On August 12, 1997, the district court found that the death penalty issues raised were premature. Belmarez' plea in bar, amended plea in bar, plea in abatement, and motion to quash in relation to the reinstated information were overruled. Belmarez' motion to strike the addendum to the reinstated information was sustained, and the district court denominated the reinstated information as an amended information. The district court concluded that the State was free to pursue the first degree murder charge involving Chester Tucker absent the entry of a plea of no contest to the charge of second degree murder involving Chester Tucker.

On August 20, 1997, Belmarez filed an interlocutory appeal challenging the district court's order overruling his plea in bar and amended plea in bar. That appeal is before this court as case No. S-97-875. See *State v. Belmarez, post* p. 467, 577 N.W.2d 264 (1998).

On September 17, 1997, we sustained the State's motion to reinstate this appeal. We note that during the pendency of the motion to reinstate, the State did not submit a supplemental transcript or bill of exceptions of the district court proceedings.

On October 30, 1997, Belmarez moved this court for summary dismissal on the grounds that we lacked jurisdiction to reinstate the State's appeal. In the alternative, Belmarez moved for summary affirmance of the district court's order of postconviction relief. We overruled Belmarez' motion but required the parties to submit briefs regarding this court's jurisdiction to reinstate the appeal.

ANALYSIS

This case is before us in the context of a motion to reinstate an appeal based upon the alleged breach of a plea agreement. The motion to reinstate filed by the State on May 14, 1997, alleged that Belmarez had failed to comply with a plea agree-

ment pursuant to which the appeal had voluntarily been dismissed. Although a copy of the motion to reinstate was served upon Belmarez, no objection to the reinstatement was filed. The record does not disclose that the district court was aware of the motion to reinstate the appeal or that the State requested a stay of the proceedings that were pending in the district court.

As previously discussed, Belmarez filed various motions in the district court. On August 12, 1997, while the motion to reinstate was pending before this court, the district court ruled on Belmarez' motions. The district court overruled Belmarez' plea in bar and amended plea in bar, which ruling resulted in Belmarez' interlocutory appeal (case No. S-97-875). See *Belmarez, supra.*

It is the general rule that once the trial court acts upon a mandate issued by this court, this court loses jurisdiction over the cause except upon a subsequent appeal. See, *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929). In *Mackley*, after considering the merits of the case on direct appeal, we reversed the judgment and remanded the cause with directions to enter a judgment for the plaintiff. A motion for rehearing was overruled, and a mandate was issued. Subsequently, believing that no action had yet been taken on the mandate, we sustained a motion by the defendant to recall the mandate and examine the record and motion for rehearing. The plaintiff moved to vacate the order recalling the mandate and presented evidence that after the cause was remanded to the district court, it had taken action upon the original order of reversal. We concluded that we lacked jurisdiction to recall the mandate and stated:

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

Mackley, 118 Neb. at 735, 226 N.W. at 318 (citing *State v. Lincoln Street R. Co.*, 80 Neb. 352, 118 N.W. 326 (1908), and *Horton v. State*, 63 Neb. 34, 88 N.W. 146 (1901)). Cf. *Fick v.*

Herman, 161 Neb. 110, 72 N.W.2d 598 (1955) (holding that where after mandate of this court was received by clerk of district court, but district court had taken no action on it, this court could recall mandate if reason for so doing existed).

In *Rehn*, we likewise overruled a motion to recall the mandate of this court. Previously, we had reversed a money judgment in favor of the plaintiff, dismissed the cause, and taxed costs against the plaintiff and a third-party defendant. After the trial court had complied with the mandate, the third-party defendant complained to this court that we had erred in taxing the costs against him. We refused to recall the mandate and stated:

> In the case before us the mandate of this court was filed in the district court for Douglas County on November 21, 1949. The Supreme Court therefore lost jurisdiction to change or modify its judgment awarding costs unless the mandate was recalled in accordance with the rule announced in State Bank of Beaver Crossing v. Mackley, 118 Neb. 734, 226 N.W. 318.

Rehn, 152 Neb. at 174, 40 N.W.2d at 675.

We point out that there may be some proceedings in a lower court which occur after the filing of the mandate from the appellate court which would not divest the appellate court of jurisdiction to reinstate an appeal which has been dismissed. Therefore, we decline to hold that any proceeding at the lower court level which occurs after the filing of the mandate dismissing an appeal would be an action by the lower court on the mandate such as to divest the appellate court of jurisdiction to reinstate the appeal. However, we conclude that in the context of the facts before us, the prohibition against a trial court and an appellate court having jurisdiction over the cause at the same time divests this court of jurisdiction to hear the State's appeal from the postconviction relief granted to Belmarez by the district court.

Unknown to this court, at the same time we were considering whether to grant the State's motion to reinstate the appeal, proceedings involving the murder of Chester Tucker were continuing at the district court level. These proceedings continued in the district court because the State apparently failed to notify

the court of the pending motion to reinstate the State's appeal or otherwise attempt to stay the district court proceedings. Instead, the State proceeded in the district court on the first degree murder charge. As a result of the district court proceedings on the State's amended information, we now have before us case No. S-97-875, which is the interlocutory appeal described herein. See *State v. Belmarez, post* p. 467, 577 N.W.2d 264 (1998).

During the time that the motion to reinstate was pending, either the district court or this court had jurisdiction of the cause involving the murder of Chester Tucker, but the district court and this court could not have jurisdiction simultaneously. We conclude that we did not have jurisdiction to reinstate the appeal. The district court received the mandate of this court dismissing the State's appeal from the order vacating Belmarez' second degree murder conviction, and there was no motion by the State to recall the mandate. The State filed the amended information charging Belmarez with first degree murder, and the district court acted on the motions and pleas filed by Belmarez therein. As a result, this court lost jurisdiction, and the appeal should not have been reinstated.

CONCLUSION

The reinstatement of this appeal (case No. S-96-1159) is vacated, and the appeal is dismissed.

VACATED AND DISMISSED.

IN RE INTEREST OF FLOYD B., JR., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. FLOYD B., SR., APPELLANT, AND BEVERLY B., ALSO KNOWN AS ROCHELLE B., APPELLEE.

577 N.W.2d 535

Filed April 10, 1998. No. S-97-059.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.

2. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal.
3. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A detention order issued under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected or abused is a final, appealable order.
4. **Jurisdiction: Motions to Dismiss: Pleadings.** A jurisdictional question is not properly raised by a pretrial motion to dismiss, as such pleading is not a part of this state's procedure.
5. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
6. **Juvenile Courts: Child Custody: Jurisdiction.** The Nebraska Child Custody Jurisdiction Act gives jurisdiction to a juvenile court over custody proceedings, including dependency proceedings.
7. **Child Custody: Jurisdiction: Courts: States.** The Nebraska Child Custody Jurisdiction Act's purpose to avoid jurisdictional competition and conflict with courts of other states in matters of child custody is directed not just to present conflicts but to the potential for conflicts in the future.
8. **Child Custody: Jurisdiction.** In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction under the Nebraska Child Custody Jurisdiction Act and then determine whether it is appropriate to exercise that jurisdiction.
9. ____: ____. A court has jurisdiction under the Nebraska Child Custody Jurisdiction Act to make a child custody determination by initial decree if one of the four following grounds of jurisdiction exists: (1) home state jurisdiction, (2) significant connection jurisdiction, (3) emergency jurisdiction, or (4) default jurisdiction (when no other state would have jurisdiction or when another state has declined to exercise jurisdiction, and it is in the best interests of the child that the court assume jurisdiction).
10. ____: ____. Emergency jurisdiction, under the Nebraska Child Custody Jurisdiction Act, permits a court to assume jurisdiction of a child who is physically present in this state when (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected.
11. ____: ____. A child's presence in this state alone is sufficient to confer jurisdiction on a court to make a child custody determination under the emergency provision of the Nebraska Child Custody Jurisdiction Act.
12. ____: ____. Emergency jurisdiction is temporary in nature and confers only the power to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the Nebraska Child Custody Jurisdiction Act.

13. ____: ____. A court should assume emergency jurisdiction over a juvenile only for the duration of the emergency and should terminate its jurisdiction after the emergency has passed.
14. **Evidence: Appeal and Error.** On de novo review, when the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
15. **Child Custody: Jurisdiction: Courts: States.** A court which has jurisdiction to make an initial decree under the Nebraska Child Custody Jurisdiction Act may decline to exercise its jurisdiction at any time prior to making a decree if the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum.
16. ____: ____: ____: ____. To determine whether a court is an inconvenient forum under the Nebraska Child Custody Jurisdiction Act, the court shall consider the following factors, among others, to determine if it is in the best interests of the child that another state assume jurisdiction: (1) another state is or recently was the child's home state; (2) another state has a closer connection with the child and his or her family; (3) substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by a court of this state would contravene a purpose of the act.
17. ____: ____: ____: ____. A paramount consideration in determining whether a state is a convenient forum under the Nebraska Child Custody Jurisdiction Act is a determination of what court is most able to act in the best interests of the child.
18. **Rules of Evidence: Words and Phrases.** Evidence is relevant, under Neb. Rev. Stat. § 27-401 (Reissue 1995), if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
19. **Juvenile Courts: Child Custody: Rules of Evidence: Due Process.** While only relaxed rules of evidence apply at a hearing to determine who shall have temporary custody of a juvenile pending an adjudication, fundamental due process requirements must still be satisfied with regard to the type of evidence used to determine temporary custody.
20. **Rules of Evidence: Due Process.** In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost in that determination.
21. **Rules of Evidence: Other Acts.** According to Neb. Rev. Stat. § 27-404(2) (Reissue 1995), evidence of other crimes or bad acts may be admissible for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Section 27-404(2) allows the use of evidence of other crimes or bad acts if such evidence is relevant for any purpose other than to show the individual's propensity to commit the act alleged.
22. **Trial: Evidence: Other Acts: Appeal and Error.** Absent an abuse of discretion, a trial court's ruling on the admission or exclusion of evidence of other wrongs or acts will not be disturbed on appeal.

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

Milo Alexander, of Legal Aid Society, Inc., for appellant.

James S. Jansen, Douglas County Attorney, and Karen S. Kassebaum for appellee State.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

On December 11, 1996, the State of Nebraska filed an amended petition under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), alleging that Floyd B., Sr. (father), on November 26 subjected his son Floyd B., Jr. (Floyd), to inappropriate physical discipline resulting in a black eye, a cut on his tongue, and bruises on his inner thigh. The amended petition requested that the court enter an order regarding the custody and support of Floyd that the court deemed most appropriate. In response to the State's petition, the father filed a motion to dismiss, contending that pursuant to the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), the court lacked subject matter jurisdiction, and that even if the court had jurisdiction, the court should decline to exercise jurisdiction because Nebraska was an inconvenient forum for the proceedings. Further, the father requested that the court release Floyd to the custody of his mother, Beverly B., also known as Rochelle B. After a hearing on December 16, in which evidence was adduced, the separate juvenile court of Douglas County entered an order on December 18, finding that it would be contrary to the best interests of Floyd if he were released into the custody of either parent and mandating that Floyd be placed in the temporary custody of the then Department of Social Services, now the Department of Health and Human Services (department), until further order of the court. Because the juvenile court properly exercised emergency jurisdiction over Floyd and because Nebraska was a convenient forum for the emergency proceedings, we affirm the order of the juvenile court.

I. FACTUAL BACKGROUND

The father and the mother are married, but at the time of the emergency proceedings, they lived in different states. Their plans are apparently to reunite at some time in the future. The father and the mother have three children: Floyd, M.B., and C.B. The mother resides in Colorado with M.B. and C.B., while the father resides in Alabama with his 12-year-old son Floyd. Because the father and mother are not divorced, Floyd has not been the subject of any custody proceedings.

The father and Floyd resided with the mother in Tacoma, Washington, between October 1989 and April 1992. In April 1992, Floyd moved with his father and mother to Denver, Colorado, where he remained until August 1995. In August 1995, Floyd moved to Mobile, Alabama, to live with his father. On November 27, 1996, the father and Floyd traveled to Nebraska for the Thanksgiving holiday. While in Nebraska, family members of the father's and Floyd's noticed bruising on Floyd, became concerned, and contacted the Omaha Police Division. Subsequently, Floyd was placed in protective custody with the department.

On December 11, 1996, the State filed an amended petition under § 43-247(3)(a), alleging that the father, on November 26, subjected Floyd to inappropriate physical discipline resulting in a black eye, a cut on his tongue, and bruises on his inner thigh. The amended petition requested that the juvenile court enter an order regarding the custody and support of Floyd that the court deemed most appropriate. In response to the State's petition, the father filed a motion to dismiss, contending that the court lacked subject matter jurisdiction under the NCCJA and that even if the court had jurisdiction, the court should decline to exercise jurisdiction because under the NCCJA, Nebraska was an inconvenient forum for the proceedings. Furthermore, the father requested that the court release Floyd to the custody of the mother.

At the detention hearing on December 16, Shirley King, a Child Protective Services worker, testified that she observed the following:

> The child had bruising to his upper eyelid — right eyelid, which appeared to be approximately a week old. The child

> indicated to me that he had a bruise on his left inner thigh which I asked him to show me — [t]he bruise was very large in nature. I would have to say it was at least the size of an apple — where he had indicated to me that his father had kicked him. And he also had a mark on the end of his tongue where he indicated that he had come down and had bit his tongue when his father had hit him in the face.

Floyd indicated to King that the injuries occurred on November 26, after the father discovered that Floyd had altered his report card. Floyd also told King that his father hits him on almost a daily basis and that he has been hit with belts, boat paddles, and extension cords. Floyd told King that he would visit his mother but was afraid to live with her as his mother planned on reuniting with his father.

In addition, King testified that she contacted Mattie Bettis, a counselor from Floyd's school in Alabama, who indicated that the school had been concerned about Floyd for 2 years and that the school had contacted the Alabama Department of Social Services about those concerns. King contacted the Alabama Department of Social Services, but it indicated there was no record of an investigation. However, the mother testified that she was contacted by the Alabama Department of Social Services, and the father also admitted to an investigation in Alabama. King also contacted the Colorado Department of Social Services, which had received three referrals in a 3- to 4-month timeframe concerning the physical abuse of Floyd by his father. Finally, King testified that in her opinion, Floyd was "at [a] very high risk for future maltreatment if returned to either parent at this time."

Marilyn Phelps, the father's sister and Floyd's aunt, testified that the mother informed her that Floyd and his father were on their way to Omaha and requested that Phelps check Floyd for bruises upon their arrival. Phelps testified that upon their arrival, she did observe a bruise on Floyd's eyelid. Phelps stated that the mother has told her on several occasions that she was afraid Floyd was being physically abused by his father. However, the mother, in her testimony, denied calling Phelps and asking her to check Floyd for bruises.

The mother testified that she was not convinced Floyd was physically abused, because she had not observed any injuries on Floyd and because she had the father's "word." The mother testified that until she observes injuries, she has no basis for concluding that Floyd has been physically abused. The mother further testified that Floyd had never told her about any abuse by his father, nor had he told her that he was afraid of his father. The mother testified that if Floyd were placed in her custody, she would keep him away from the father if directed to do so by the court and would allow supervision by the Colorado Department of Social Services.

The father testified that he has never placed his hands on Floyd and that Floyd did not have any bruises on him when the father last saw him, which was prior to Floyd's being placed into protective custody. The father further testified that Floyd had run away from home while in Alabama and had told police that he was being physically abused. Floyd was returned home after a 2-day investigation. Lawrence Coran, who grew up with the father, testified that he saw the father and Floyd on November 28, 1996, and that he did not observe any bruises on Floyd's face.

After the hearing, the juvenile court, on December 18, 1996, entered an order finding that it would be contrary to the best interests of Floyd if he were placed in the custody of either parent and mandating that Floyd be placed in the temporary custody of the department until further order of the court. The father appeals.

II. SCOPE OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). 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. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

The question as to whether jurisdiction existing under the NCCJA should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *Id.*

III. ASSIGNMENTS OF ERROR

On appeal, the father's six assignments of error can be consolidated into the following: (1) The juvenile court lacked subject matter jurisdiction under the NCCJA; (2) even if the court had jurisdiction, the court should have declined to exercise jurisdiction because under the NCCJA, Nebraska was an inconvenient forum for the proceedings; (3) the court erred in sustaining relevance objections to questions regarding the parents' financial condition, as such testimony was relevant to determine whether Nebraska was an inconvenient forum; and (4) the court erred in overruling foundation and relevance objections to questions regarding the father's alleged prison record and alleged past incidents of child abuse.

IV. ANALYSIS

Before addressing the merits, it is incumbent on this court to determine whether the December 18, 1996, order of the juvenile court is a final, appealable order. A detention order issued under § 43-247(3)(a) after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected is a final order and thus appealable. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). Therefore, clearly, the December 18 detention order issued under § 43-247(3)(a) after a hearing which continues to withhold Floyd from the custody of his parents pending a further hearing to determine whether Floyd is abused is a final, appealable order. Accordingly, this court has jurisdiction to address the father's assignments of error.

1. Procedural Irregularity

In response to the State's petition, the father filed a motion requesting the court to "dismiss th[e] case for lack of jurisdic-

tion pursuant to [the] Nebraska Child Custody Jurisdiction Act." While a court's jurisdiction over the subject matter may and should be questioned early in the proceedings by a demurrer, Neb. Rev. Stat. § 25-806 (Reissue 1995); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993), a jurisdictional question is not properly raised by a pretrial motion to dismiss, as such pleading is not a part of this state's procedure, *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); Neb. Rev. Stat. § 25-803 (Reissue 1995). Nonetheless, despite the father's procedural irregularity, the fact is that the absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *State ex rel. Grape v. Zach, supra* (citing *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991)). Thus, it is appropriate for this court to address whether the juvenile court had jurisdiction over the action.

2. JURISDICTION

The NCCJA gives jurisdiction to the juvenile court over custody proceedings, including dependency proceedings. *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). "Custody proceeding," as used in the NCCJA, includes proceedings in a juvenile court in which a person under 18 years of age is alleged to be a child as described in § 43-247(3). § 43-1202(3)(b). Because the State filed its petition alleging that 12-year-old Floyd "comes within the meaning of . . . Section 43-247(3a)" and because the State asked the court to make an order regarding the custody of Floyd, the juvenile court was clearly involved in a custody proceeding, and thus, the NCCJA applies in the instant case.

However, the State contends that the provisions of the NCCJA cannot be invoked in the case at bar because no jurisdictional conflict exists with another state. While it is true that no other state has exercised jurisdiction over Floyd in a custody proceeding, the NCCJA, nevertheless, still applies. In *In re*

Gloria F., 212 Cal. App. 3d 576, 260 Cal. Rptr. 706 (1989), the San Diego Department of Social Services argued that the provisions of the Uniform Child Custody Jurisdiction Act (Uniform Act) did not apply to the custody proceeding that was at bar because no jurisdictional conflict existed with another state. The California Court of Appeals, in rejecting the argument, reasoned that

> [n]othing in [the purposes section of the Uniform Act] indicates the act and its jurisdictional requirements apply only when a present conflict exists, i.e., when custody actions are proceeding in the courts of more than one state. Indeed section 5150, subdivision (1)(c), states that one of the purposes of the act is to "[a]ssure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state." Thus the act is not meant merely to mediate jurisdictional disputes but to direct litigation to the state best able to resolve it.

Id. at 583, 260 Cal. Rptr. at 710. The court further reasoned that

> under section 5161 a custody decree rendered in California is binding in this state only if the rendering court had jurisdiction under section 5152. Moreover, a custody decree under the Uniform Act is entitled to interstate recognition only if issued by a state "which had assumed jurisdiction under statutory provisions substantially in accordance with this title or which was made under factual circumstances meeting the jurisdictional standards of the title." . . . The Uniform Act clearly contemplates that all custody decrees made in states that have enacted the UCCJA will be made only when jurisdiction exists under the act. Thus, the act's purpose to "[a]void jurisdiction competition and conflict with courts of other states in matters of child custody" . . . is directed not just to present conflicts but to the potential for conflicts in the future. The jurisdictional requirements, therefore, of sec-

> tion 5152 apply to all custody cases in California, not just to those where a present conflict exists.

(Citations omitted.) *Id.* at 583-84, 260 Cal. Rptr. at 710. The relevant purposes and provisions of the NCCJA are virtually identical to those cited in the Uniform Act, and we are persuaded by the California Court of Appeals' reasoning. Thus, we hold that the NCCJA's purpose to "[a]void jurisdictional competition and conflict with courts of other states in matters of child custody . . . ," § 43-1201(1)(a), is directed not just to present conflicts but to the potential for conflicts in the future. Therefore, the jurisdictional requirements of the NCCJA apply in the instant case even though a jurisdictional conflict does not currently exist with another state.

Since the jurisdictional requirements of the NCCJA are applicable, it must be determined whether the juvenile court properly exercised its jurisdiction. In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction. *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989).

(a) Subject Matter Jurisdiction

As previously noted, there has been no custody determination by another state regarding Floyd. Thus, the juvenile court was exercising initial jurisdiction over Floyd. The juvenile court had jurisdiction to make a child custody determination by initial decree if one of the four following grounds of jurisdiction existed: (1) home state jurisdiction, (2) significant connection jurisdiction, (3) emergency jurisdiction, or (4) default jurisdiction (when no other state would have jurisdiction or when another state has declined to exercise jurisdiction, and it is in the best interests of the child that the court assume jurisdiction). § 43-1203.

First, home state jurisdiction was not present, because Floyd has been a resident of Alabama exclusively and continuously for at least 6 consecutive months prior to the filing of the petition on December 11, 1996. See § 43-1202(5). Second, significant connection jurisdiction was not present because Floyd lives and attends school in Alabama and Floyd was only visiting

Nebraska at the time that he was taken into protective custody. Third, default jurisdiction was not present, as it is clear that Alabama would have jurisdiction over the action. In addition, although referrals had previously been made in both Alabama and Colorado regarding the father's past physical abuse of Floyd, neither state has been notified of the new allegations raised in the State's petition, and thus, neither has had an opportunity to decline jurisdiction regarding the instant matter.

However, with regard to the December 18, 1996, order granting temporary custody of Floyd to the department, the juvenile court clearly had emergency jurisdiction over Floyd. The emergency jurisdiction provision of the NCCJA permits a juvenile court to assume jurisdiction of a child who is physically present in this state when (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected. § 43-1203(1)(c); *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). A child's presence in this state alone is sufficient to confer jurisdiction on a court to make a child custody determination under the emergency provision. § 43-1203(2); *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992).

In the instant case, the record is replete with evidence that it was necessary for the juvenile court to place Floyd in temporary custody with the department in order to protect him from future maltreatment by the father. Indeed, evidence was adduced that Floyd had received a black eye, a bruise on his thigh, and a mark on his tongue after the father discovered that Floyd had altered his report card. In addition, there was evidence that the father hits Floyd on almost a daily basis and that he has been hit with belts, boat paddles, and extension cords. Based on the evidence of this ongoing pattern of abuse and because Floyd was physically present in Nebraska, the juvenile court properly exercised emergency jurisdiction over Floyd.

The father contends that even if the court had emergency jurisdiction, such jurisdiction was limited in nature to an entry of temporary orders pending the court's conferral with the state having regular jurisdiction. The father claims that the court erred in failing to confer with Alabama or Colorado to deter-

mine the appropriate forum for adjudicating the custody of Floyd. While it is true that emergency jurisdiction is temporary in nature and confers only the power "'"to make temporary orders, including temporary custody for a limited period of time, pending proceedings in the state with regular jurisdiction under the [NCCJA],"'" *Smith-Helstrom v. Yonker*, 249 Neb. at 457, 544 N.W.2d at 100. The juvenile court's December 18, 1996, order complied with the law in that it mandated that the department retain only *temporary* custody over Floyd. Accord *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). Moreover, the failure to communicate with a court of another state does not divest the juvenile court of subject matter jurisdiction. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Thus, the juvenile court did not err in failing to confer with Alabama or Colorado before making its emergency, temporary order.

The father further contends that even if the juvenile court did not err in failing to confer with Alabama or Colorado, an emergency situation does not persist with respect to Floyd so as to support the court's continuing to exercise emergency jurisdiction over Floyd. The father claims that any emergency was eliminated by the mother's offer to take Floyd home with her to Colorado. While a court should assume temporary jurisdiction only for the duration of the emergency and should terminate its jurisdiction after the emergency has passed, *Sheila L. v. Ronald P.M.*, 195 W. Va. 210, 465 S.E.2d 210 (1995); *In Interest of S.L.*, 872 S.W.2d 573 (Mo. App. 1994); *Matter of E.H.*, 612 N.E.2d 174 (Ind. App. 1993); *In re Lemond*, 274 Ind. 505, 413 N.E.2d 228 (1980), the evidence adduced at the December 16, 1996, hearing supports a finding that the emergency situation was, in fact, ongoing. See *In re Interest of L.W., supra*.

In re Interest of L.W., supra, provides guidance for determining when an emergency situation is ongoing. In that case, we stated:

> The juvenile court can assume jurisdiction under [the emergency jurisdiction] provision, since the child [was] physically present in this state and was sexually abused by her stepfather. The emergency situation [was] ongoing, since the case report show[ed] that the mother continue[d]

> to be influenced and directed by the men in her life and [did] not attend the child's counseling sessions. The record also show[ed] that due to the instability of the mother's relationships and the fear expressed by the child of the men in her mother's life, DSS cannot be assured of the child's safety if she [were] returned to her mother.

In re Interest of L.W., 241 Neb. 84, 99, 486 N.W.2d 486, 497 (1992). In addition, it must be noted that this case is before us on de novo review; therefore, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Grape v. Zach, supra.*

Keeping the foregoing in mind, it is apparent that the mother's offer to take Floyd home with her to Colorado would not eliminate the pending emergency situation. In the recent past, the mother has been contacted by authorities, such as the Alabama Department of Social Services, regarding the abuse of Floyd by his father, but nevertheless failed to take steps to protect Floyd. In addition, Phelps testified that the mother had told her on several occasions that she was afraid that Floyd was being physically abused by his father and that the mother specifically asked Phelps to check Floyd for bruises while Floyd was visiting in Nebraska. However, despite the mother's suspicions, she allowed Floyd to continue to reside with his father in Alabama. Finally, King, a Child Protective Services worker, testified that, in her opinion, Floyd was "at [a] very high risk for future maltreatment if returned to either parent at this time."

Clearly, there was ample evidence to support the juvenile court's finding that it could not be assured that Floyd would remain safe if he were returned to his mother. Thus, we conclude upon de novo review of the record that it is in Floyd's best interests that the department retain temporary custody over him pending further proceedings. Accordingly, because the emergency situation was ongoing, the juvenile court properly exercised emergency jurisdiction over Floyd.

(b) Inconvenient Forum

The father next contends that even if the juvenile court had jurisdiction, the court should have declined to exercise jurisdiction because under the NCCJA, Nebraska was an inconvenient forum for the proceedings. According to the NCCJA, a court which has jurisdiction to make an initial decree may decline to exercise its jurisdiction at any time prior to making a decree if the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum. § 43-1207(1); *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989). To determine whether a court is an inconvenient forum, the court shall consider the following factors, among others, to determine if it is in the best interests of the child that another state assume jurisdiction: (1) another state is or recently was the child's home state; (2) another state has a closer connection with the child and his or her family; (3) substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by a court of this state would contravene a purpose [of the NCCJA]. § 43-1207(3). " '[A] paramount consideration in the balancing of these various factors is a determination of what court is most able to act in the best interests of the [child]. . . .' " *Van Norman v. Upperman*, 231 Neb. at 527, 436 N.W.2d at 836.

In applying the factors to the case at bar, Nebraska was a convenient forum for the custody proceedings and was the court most able to act in the best interests of Floyd, especially in light of the fact that the proceedings were emergency in nature. Additionally, because the department's investigation took place in Nebraska and because King, the Child Protective Services worker, and Phelps, who had seen both Floyd and his bruises, were in Nebraska, we conclude that substantial evidence existed in this state to make Nebraska a convenient forum for the emergency proceedings. Furthermore, because no other state has been willing or has sought to exercise jurisdiction to protect Floyd, the interests of Floyd would be best served by the Nebraska court's exercising jurisdiction to protect him. We,

therefore, hold that the juvenile court did not abuse its discretion in exercising jurisdiction based on the evidence in this case.

3. Evidence

(a) Parents' Financial Condition

The father claims that the juvenile court erred in sustaining relevance objections to questions regarding the father's and the mother's financial condition, as this evidence was relevant to determine whether Nebraska was an inconvenient forum for the proceedings. Specifically, because the mother lives in Colorado and the father in Alabama and both live on limited incomes, the father claims that traveling to Nebraska to attend hearings would be financially difficult, thereby making Nebraska an inconvenient forum.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. Neb. Rev. Stat. § 27-401 (Reissue 1995); *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). We determine that the father's claim has merit in that evidence of the parents' financial condition was relevant to one of the issues before the juvenile court, namely, whether Nebraska was an inconvenient forum for the proceedings under the NCCJA. See *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989). Thus, the juvenile court did abuse its discretion in finding that the evidence was irrelevant to determine whether Nebraska was an inconvenient forum. However, in our de novo review of whether Nebraska was an inconvenient forum to conduct the emergency proceedings, we considered the financial evidence contained in the father's offers of proof and, given the totality of the circumstances, determine that Nebraska was an appropriate forum for these proceedings.

(b) Criminal History and Child Abuse

Finally, the father argues that evidence of his physical abuse of his daughter, his incarceration for assault, and his having

been charged with child abuse was irrelevant evidence of other crimes or acts which should have been excluded in accordance with Neb. Rev. Stat. § 27-404(2) (Reissue 1995). While we recognize that only relaxed rules of evidence apply at a hearing to determine who shall have temporary custody of a juvenile pending an adjudication, *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), fundamental due process requirements must still be satisfied with regard to the type of evidence used to determine temporary custody. In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost in that determination. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

In accordance with § 27-404(2), evidence of other crimes or bad acts may be admissible for the purposes of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Section 27-404(2) allows the use of evidence of other crimes or bad acts if such evidence is relevant for any purpose other than to show the individual's propensity to commit the act alleged. *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). Absent an abuse of discretion, a trial court's ruling on the admission or exclusion of evidence of other wrongs or acts will not be disturbed on appeal. *Id.*

The admission of evidence that the father had physically abused his daughter, that the father had been incarcerated for assault, and that the father had been charged with child abuse was not an abuse of discretion in these emergency proceedings. The evidence was tendered to prove identity or the absence of mistake or accident, i.e., that the father was the individual who inflicted the bruises on Floyd and that the father inflicted such bruises intentionally, rather than by mistake or accident. See *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991). Accordingly, we conclude that the admission of the foregoing evidence did not violate due process requirements and, thus, that the juvenile court did not abuse its discretion in admitting such evidence.

V. CONCLUSION

Having considered all of the father's assignments of error and finding them to be without merit, we affirm the juvenile court's order granting the department temporary custody over Floyd until further order of the court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. HILL, APPELLANT.
577 N.W.2d 259

Filed April 10, 1998. No. S-97-619.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
3. **Ordinances: Judicial Notice: Appeal and Error.** Where an appellant assigns as error the insufficiency of the evidence to sustain a conviction under a municipal ordinance, an appellate court will not take judicial notice of a municipal ordinance not in the record, but, instead, assumes that a valid ordinance exists and that the evidence sustains the findings of the trial court.
4. **Convictions: Ordinances: Sentences: Judicial Notice: Appeal and Error.** When considering an assignment of error claiming that evidence is insufficient to support a criminal conviction for violation of a municipal ordinance, or that the sentence imposed upon such conviction is excessive, an appellate court will take judicial notice of the ordinance creating the offense and specifying the penalties for violation if it is included in the certified transcript prepared by the clerk of the county court.
5. **Criminal Law: Weapons.** Absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant, and a weapon is so concealed when it is hidden from ordinary observation.
6. **Motor Vehicles: Convictions.** Evidence of speed alone is not sufficient to sustain a conviction for the offense of willful reckless driving.
7. **Criminal Law: Motor Vehicles: Evidence: Proof.** Where evidence of speed is adduced not to establish a driver's rate of travel so as to prove a charge that he exceeded a particular speed limit, but, rather, as one piece of evidence tending to establish that the driver operated a vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property, the speed is not "at

issue," as contemplated by Neb. Rev. Stat. § 60-6,192 (Reissue 1993), and therefore need not be corroborated by a microwave, mechanical, or electronic speed measurement device.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Judgment of District Court affirmed in part, and in part reversed.

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General; Herbert M. Fitle, Omaha City Attorney; and Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This case arises out of a traffic stop in which the appellant, William J. Hill, was pulled over for speeding and willful reckless driving. After having stopped him, the arresting officer discovered a handgun in Hill's lap. Hill was tried in the county court for Douglas County, Nebraska, and found guilty of violating two city of Omaha ordinances (carrying a concealed weapon and unlawful carrying of weapons) and two State of Nebraska statutes (willful reckless driving and expired license plates and registration). Hill appealed to the district court for Douglas County, which affirmed the county court's rulings as to all charges except the unlawful carrying of weapons charge, which was ordered reversed and dismissed. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We affirm in part, and in part reverse.

FACTUAL BACKGROUND

Hill was working as an armed security officer for the Outback Steakhouse in Omaha, Nebraska, on the evening of August 28, 1996. Hill was required to carry a weapon as part of his employment. Hill provides security while the business is open and stays on the premises after the restaurant closes until all employees and patrons have left. It was uncontested at trial

that Hill had complied with all city of Omaha and State of Nebraska requirements to purchase and possess a handgun. Hill testified that he carried his weapon with him in his car only when traveling to or from work.

On August 29, 1996, Hill left the Outback Steakhouse at approximately 12:45 a.m., going next to the Leavenworth Bar to meet his girl friend. He left the bar between 1:15 and 1:30 a.m. in order to follow his girl friend to her house.

Hill was at approximately 11th and Leavenworth Streets when Officer Irene Cornett of the Omaha Police Division, who was stopped in an alley waiting to come out onto Leavenworth Street, watched him drive past her at a speed she approximated to be around 80 miles per hour. Cornett followed Hill's car, attempting to catch up to it, but did not turn on her cruiser's flashing lights. Cornett watched as Hill's car turned at an intersection controlled by a flashing red light, where he slowed but did not come to a complete stop, and failed to stop at a stop sign at the intersection of 7th and Pierce Streets.

Cornett turned on her cruiser's flashing lights at that time, and Hill immediately pulled over. Hill testified at trial that as Cornett approached his vehicle, he kept his hands on the steering wheel. He testified that when Cornett was approximately 4 feet from the driver's-side door of the car, he stated, "Officer, I have a loaded gun in the car," to which Cornett replied, "I know. I can see it." Hill further testified that the gun was between his right thigh and the padded seat but that the windows were down, as was the car's convertible top.

Cornett testified that she approached the car and was standing next to the car when Hill said he had a loaded weapon. At that point, she looked down and could see the butt and the portion of the gun up to the trigger of the holstered revolver. Cornett further testified that she had asked Hill where he was going in such a hurry and that he responded that he was racing someone home. Hill denied that Cornett posed such a question, and he denied giving such a response.

Hill was charged with the following five violations in Douglas County Court: count I, carrying a concealed weapon, Omaha Mun. Code, ch. 20, § 20-192; count II, willful reckless driving, Neb. Rev. Stat. § 60-6,214 (Reissue 1993); count III,

expired license plates and registration, Neb. Rev. Stat. § 60-302 (Cum. Supp. 1996); count IV, possession and transportation of firearms, Omaha Mun. Code, ch. 20, § 20-195; and count V, unlawful carrying of weapons, Omaha Mun. Code, ch. 20, § 20-206.

After trial, the county court found Hill guilty of counts I, II, III, and V. Count IV was dismissed during trial. Hill appealed to the district court, which affirmed the decision as to counts I, II, and III, but reversed and dismissed as to count V.

ASSIGNMENTS OF ERROR

Hill alleges that the trial court erred (1) in improperly construing Omaha Mun. Code § 20-192, when the arresting officer was able to see the weapon between Hill's legs from a location outside the driver's-side door of Hill's automobile; and (2) in finding that Hill was operating a motor vehicle in a willful, reckless manner on the morning in question.

STANDARD OF REVIEW

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Howard, supra*; *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997).

ANALYSIS

Carrying Concealed Weapon

Hill's first assigned error revolves around his conviction of the offense of carrying a concealed weapon in violation of Omaha Mun. Code § 20-192. The elements of such charge were contained in the complaint filed in county court, which stated that

> the above named defendant, on or about the 29th day of August, 1996, at or near PARK WILD & PINE ST, within the corporate limits of the City of Omaha, did purposely or knowingly carry a weapon concealed on or about his/her person, contrary to the City Ordinance of the City of Omaha and against the peace and dignity of the State of Nebraska.

The State contends that we should apply the "ordinance rule" to assess the sufficiency of the evidence in the present case. Under this rule, where an appellant assigns as error the insufficiency of the evidence to sustain a conviction under a municipal ordinance, an appellate court will not take judicial notice of a municipal ordinance not in the record, but, instead, assumes that a valid ordinance exists and that the evidence sustains the findings of the trial court. See, *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992); *State v. Lewis*, 240 Neb. 642, 483 N.W.2d 742 (1992).

Recently, in *State v. Bush, ante* p. 260, 576 N.W.2d 177 (1998), we addressed the applicability of the "ordinance rule" where a copy of the municipal ordinance under which the appellant was charged appeared in the transcript but not in the bill of exceptions. We held that

> when considering an assignment of error claiming that evidence is insufficient to support a criminal conviction for violation of a municipal ordinance, or that the sentence imposed upon such conviction is excessive, an appellate court will take judicial notice of the ordinance creating the offense and specifying the penalties for violation if it is included in the certified transcript prepared by the clerk of the county court.

Id. at 266, 576 N.W.2d at 180.

Here, the ordinances used to charge Hill do not appear in either the transcript or the bill of exceptions. However, the transcript certified by the clerk of the county court does contain a copy of the long-form complaint containing the charges against Hill. In the absence of any showing to the contrary, we assume that the material allegations in the complaint reflect the substantive content of the ordinances which Hill was charged with violating, and we therefore review the evidence to determine its

sufficiency to prove the matters alleged beyond a reasonable doubt.

The undisputed evidence is that Cornett, while standing outside of Hill's car, could see the butt and up to the hammer of Hill's holstered pistol that was partially underneath his right thigh. The question for this court is whether Hill did purposely and knowingly carry a weapon concealed on his person.

This court previously defined what it means for a weapon to be concealed in violation of the law in terms of Neb. Rev. Stat. § 28-1001 (R.R.S. 1943), which, prior to its repeal in 1977, was substantially similar in its operative language to Omaha Mun. Code, § 20-192. In *Kennedy v. State*, 171 Neb. 160, 170, 105 N.W.2d 710, 718 (1960), we stated that "absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant, and that a weapon is so concealed when it is hidden from ordinary observation . . . ." What is clear from the evidence in this case is that Cornett could see the weapon while she was standing outside of the vehicle. That Hill pointed out the existence of the weapon is corroborative of his obvious intent *not* to conceal the weapon. Giving every inference to the State, we find as a matter of law that the evidence in this case is insufficient to convict Hill of the charge of carrying a concealed weapon, and, therefore, we reverse the judgment and dismiss the conviction on this charge.

Willful Reckless Driving

Hill assigns as error that the trial court found him guilty of willful reckless driving despite the facts that no persons or property were around for him to endanger and that a guilty verdict based upon speed alone cannot stand. Hill is correct that "evidence of speed alone is not sufficient to sustain [a] conviction [for the offense of willful reckless driving]." See *State v. DiLorenzo*, 181 Neb. 59, 63, 146 N.W.2d 791, 794 (1966). However, where evidence of speed is adduced not to establish a driver's rate of travel so as to prove a charge that he exceeded a particular speed limit, but, rather, as one piece of evidence tending to establish that the driver operated a vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property, the speed is not "at issue," as con-

templated by Neb. Rev. Stat. § 60-6,192 (Reissue 1993), and therefore need not be corroborated by a microwave, mechanical, or electronic speed measurement device. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). By his own admission, Hill drove at speeds exceeding the posted limit. Furthermore, Cornett testified that Hill was traveling in excess of 80 miles per hour in a residential area. We question whether Cornett's estimate of Hill's speed at 80 miles per hour is accurate due to the fact that Cornett later testified that she caught up with Hill in a 15-block span without going over 50 to 60 miles per hour.

Most important for our discussion here, however, is that Cornett testified the streets were narrow, with cars parked on both sides, such that Hill's speed would put property at risk. Furthermore, Hill's speed was merely one piece of evidence tending to prove his disregard for the safety of other people and property on the night in question. As pointed out in Hill's brief, Hill was not even charged with a speed violation in this case. The fact that he was not, and was instead charged with willful reckless driving, conforms directly with our holding in *State v. Howard, supra*. The fact that Hill drove through both a stop sign and a flashing red light without coming to a complete stop is sufficient evidence of his disregard for other persons and property to sustain a conviction under § 60-6,214. Evidence of his speed while doing so is merely corroborative of Hill's disregard.

Regardless of the sufficiency of the evidence, we are mindful that

> in reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

State v. Howard, 253 Neb. at 532, 571 N.W.2d at 315. Finding no prejudicial error and viewing the evidence in a light most favorable to the State, we affirm Hill's conviction for willful reckless driving.

The State has raised the issue that the county court's sentence for this violation did not conform to the dictates of the statute;

however, such claim was not assigned as error in the district court and will not be addressed by this court.

CONCLUSION

We hold that as a matter of law, the trial court clearly erred in finding that Hill knowingly concealed a weapon, and we therefore reverse that portion of the district court's order which affirmed the county court's conviction of Hill under Omaha Mun. Code § 20-192. We affirm the district court's order as it relates to all other charges for which Hill was found guilty in the county court.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. DUSTIN L. BELMAREZ, ALSO KNOWN AS DEON BELMAREZ, APPELLANT.

577 N.W.2d 264

Filed April 10, 1998. No. S-97-875.

1. **Pleadings.** An issue presented regarding a denial of a plea in bar is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Pleas: Lesser-Included Offenses.** The acceptance of a plea to a lesser offense is not an implicit acquittal of the greater offense.
5. **Pleas.** In order to support a plea of guilty or no contest, 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 right to assistance of counsel, 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. **Statutes: Appeal and Error.** Interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below.

7. **Homicide: Pleas: Confessions.** Neb. Rev. Stat. § 29-2027 (Reissue 1995) was intended to require a more extensive finding by the trial court when the defendant does not plead to a specific degree of murder, but, rather, merely confesses to the act.
8. **Pleas: Plea Bargains.** A defendant who attacks a guilty plea is choosing to surrender what benefits he may have derived from the plea bargain.
9. **Collateral Attack: Judgments.** A collateral attack on a previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter.

Appeal from the District Court for Red Willow County: JOHN P. MURPHY, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Robert H. Conner for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Dustin L. Belmarez was originally charged with two counts of first degree murder and five other felonies. As the result of a plea agreement, Belmarez pled no contest to one count of first degree murder of Lester Tucker and one count of aiding and abetting the second degree murder of Chester Tucker. The other felony charges were dismissed. Pursuant to a motion for postconviction relief, the conviction for aiding and abetting another to commit second degree murder was vacated. The State of Nebraska ultimately refiled the charge involving Chester Tucker as a charge of first degree murder. Belmarez filed a plea in bar to the charge, and he appeals from the district court's order overruling his plea in bar and amended plea in bar.

SCOPE OF REVIEW

An issue presented regarding a denial of a plea in bar is a question of law. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996).

FACTS

Belmarez was first charged on September 17, 1990, with two counts of first degree murder (one count for the murder of Lester Tucker and one count for the murder of Chester Tucker). In addition, Belmarez was charged with two counts of robbery, one count of theft by unlawful taking, and two counts of using a deadly weapon to commit a felony.

Pursuant to a plea agreement, Belmarez pled no contest to an amended information charging him with one count of first degree murder of Lester Tucker (count I) and one count of aiding and abetting another in the commission of second degree murder of Chester Tucker (count II). The plea agreement provided that the State would not seek the death penalty on the first degree murder charge involving Lester Tucker, the State would not file any other charges arising out of the incident, and the State would dismiss the five other felony charges.

The district court accepted the plea agreement and stated in part: "Evidence was presented[,] and upon the evidence, the Court finds a factual basis and finds the Defendant guilty as to Count I and guilty as to Count II." On May 16, 1991, Belmarez was sentenced to two consecutive sentences of life imprisonment.

A direct appeal from the sentence was voluntarily dismissed. On January 31, 1995, Belmarez filed a motion in arrest of judgment, alleging that the facts stated in the information did not constitute an offense because the information did not allege malice as an element of second degree murder, as required by *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). The district court overruled the motion.

On April 1, 1996, Belmarez filed a "Verified Motion to Vacate and Set Aside Judgment and Conviction" pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1995) and refiled a copy of his motion in arrest of judgment. On October 10, the district court set aside Belmarez' conviction for second degree murder of Chester Tucker, but refused to set aside his conviction for first degree murder of Lester Tucker.

The State timely appealed from the order setting aside the second degree murder conviction. This appeal was docketed as case No. S-96-1159. See *State v. Belmarez, ante* p. 436, 577

N.W.2d 255 (1998). The State requested this court to reverse our holding in *Myers* and its progeny. Concurrent to this notice of appeal, the State made a plea offer to Belmarez to dismiss its appeal if Belmarez agreed to be rearraigned and plead guilty to a charge of aiding and abetting second degree murder in which malice had been inserted as an element of the offense. By letter, Belmarez' counsel advised the State that Belmarez had accepted this plea offer.

On December 10, 1996, this court received a stipulation and joint motion for dismissal of case No. S-96-1159 which stated that the dismissal was necessary in order for a plea agreement reached by the parties to be executed. The motion was overruled without prejudice to filing a stipulation without conditions. Following a second joint motion for dismissal, we dismissed the appeal on January 6, 1997.

At a hearing on January 24, 1997, Belmarez' counsel advised the district court that a plea agreement had been reached wherein Belmarez would enter a plea of guilty to a charge of aiding and abetting second degree murder in which the element of malice had been inserted. Belmarez' cocounsel then interjected: "Your Honor . . . I thought that we had all this hammered out. . . . [Belmarez] just informed me that he chooses to exercise his waiting period. So, there's going to be a problem entering a plea today; and I'm sorry for the inconvenience of the Court."

The district court set a hearing date for Belmarez to enter his plea on January 28, 1997, and Belmarez' counsel requested a psychological evaluation to update the presentence investigation. At Belmarez' counsel's request, Belmarez was served with a copy of the amended information charging him with aiding and abetting second degree murder, with malice included as an element of the offense.

On January 28, 1997, Belmarez' counsel informed the district court that Belmarez was not prepared to enter the plea agreement because counsel believed it was necessary to first evaluate Belmarez to determine competency. The motion was later withdrawn because a psychiatrist had determined that Belmarez was competent to stand trial.

On April 30, 1997, the State filed a "reinstated information" charging Belmarez with first degree murder for the killing of Chester Tucker. The State also filed a "reinstated information addendum." In response, Belmarez filed a plea in bar, a plea in abatement, and two motions to quash. The plea in bar asserted that under the first plea agreement, the State was bound by its agreement that it would not file any other charges arising out of the incident in question. The plea in abatement made the same objections.

Belmarez' first motion to quash asserted that the information sought to be reinstated had been amended, that the information failed to sufficiently inform him as to the nature of the charge, and that there was no constitutional or statutory authority for a reinstated information. The second motion to quash raised various objections to the possible imposition of the death penalty.

On May 27, 1997, Belmarez amended his plea in bar and argued the pending motions. The amended plea in bar reiterated that the State was bound by the plea agreement not to charge him with more than second degree murder and further asserted that if the State charged Belmarez with first degree murder of Chester Tucker, it had to vacate Belmarez' plea and conviction for the first degree murder of Lester Tucker.

The district court found that the death penalty issues raised were premature, and the court overruled Belmarez' plea in bar and amended plea in bar, plea in abatement, and motion to quash in relation to the reinstated information. Belmarez' motion to strike the addendum to the reinstated information was sustained, and the district court denominated the reinstated information as an amended information. The district court concluded that the State was free to pursue the first degree murder charge involving Chester Tucker absent the entry of a plea of no contest to the charge of second degree murder involving Chester Tucker.

Belmarez filed this interlocutory appeal from the overruling of his plea in bar and amended plea in bar.

ASSIGNMENT OF ERROR

Belmarez alleges that the district court violated the Double Jeopardy Clauses of the Fifth Amendment to the U.S.

Constitution and Neb. Const. art. I, § 12, by overruling his plea in bar and amended plea in bar.

ANALYSIS

An issue presented regarding a denial of a plea in bar is a question of law. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996). On questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. McBride, supra.* Belmarez claims he was acquitted of the first degree murder of Chester Tucker and that such acquittal bars a subsequent prosecution for that offense. Specifically, Belmarez relies on Neb. Rev. Stat. § 29-2027 (Reissue 1995) to argue that by accepting his no contest plea and finding him guilty of second degree murder of Chester Tucker, the district court necessarily acquitted him of the greater charge of first degree murder of Chester Tucker. Section 29-2027, which was enacted in 1873, provides:

> In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.

Belmarez claims that by overruling his plea in bar and amended plea in bar to the amended information charging him with first degree murder of Chester Tucker, the district court violated the Double Jeopardy Clauses of the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 12.

We have not specifically addressed this question, but other courts have held that the acceptance of a plea to a lesser offense

is not an implicit acquittal of the greater offense. For example, in *Bally v. Kemna*, 65 F.3d 104, 109 (8th Cir. 1995), the court rejected the argument that a guilty plea to a lesser offense was an implicit acquittal of the greater offense, stating that " '[a] plea to a lesser charge necessarily deprives court and jury of an opportunity to consider the greater charge.' " Accord *United States v. Williams*, 534 F.2d 119 (8th Cir. 1976).

In *Williams*, the court held that double jeopardy did not bar the retrial of the defendant on the original higher charge after the defendant's conviction pursuant to a plea agreement to a lesser charge had been set aside. The court explained that "[t]he district judge had the sole options of accepting or rejecting the plea on the [lesser] charge. By accepting it, he made no determination, explicit or implicit, on the merits of the charges not embraced in the plea." *Id.* at 121-22. See, also, *United States v. Vaughan*, 715 F.2d 1373 (9th Cir. 1983); *United States v. Barker*, 681 F.2d 589 (9th Cir. 1982).

Belmarez argues, however, that the foregoing authorities are distinguishable from the case at hand because under § 29-2027, the judge did more than simply accept his plea. Belmarez asserts that § 29-2027 obligated the district court to make an actual determination of the degree of the crime. He asserts that § 29-2027 governs because being convicted by a "confession in open court" encompasses being convicted pursuant to a plea of no contest to a specific degree of murder. We disagree.

In *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997), we explained and clarified the rule previously set forth in *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and stated that in order to support a plea of guilty or no contest, 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 right to assistance of counsel, 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.

Interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below. See *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997). We conclude that § 29-2027 does not apply. Contrary to Belmarez' contention, § 29-2027 was intended to require a more extensive finding by the trial court when the defendant does not plead to a specific degree of murder, but, rather, merely confesses to the act. The district court, in accepting Belmarez' plea, was not required to conduct an extensive examination of witnesses, assess all possible degrees of murder, or make a determination of the degree of the crime. Rather, the court's role was to determine whether a factual basis existed for the crime for which Belmarez had entered a plea.

Pursuant to the plea agreement, the information was amended so as to no longer charge Belmarez with first degree murder of Chester Tucker. The district court's acceptance of the plea to the lesser crime of aiding and abetting another in the commission of second degree murder of Chester Tucker did not constitute an implicit acquittal of the charge of first degree murder of Chester Tucker. Instead, by accepting the plea, the district court merely determined that there was a factual basis for the second degree murder charge. Therefore, the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions have not been violated.

Belmarez next argues that the terms of his first plea agreement bar further prosecution. The plea agreement required Belmarez to enter pleas of no contest to counts I and II of the amended information. In exchange, the State agreed not to file any other charges related to the incident that occurred on May 18, 1990. Belmarez argues that nothing in the plea agreement prohibited him from filing the motion for postconviction relief which resulted in the setting aside of the second degree murder charge. Belmarez asserts that despite the fact that his conviction was later vacated, the State received exactly what it bargained for when he entered the pleas of no contest, and that the State

should be bound by its promise not to file any other charges. The State contends that Belmarez, by challenging his conviction, surrendered any benefit derived from that portion of the agreement.

U.S. v. Viera, 931 F. Supp. 1224 (M.D. Pa. 1996), is analogous to the case at hand. In *Viera*, the defendant entered into a plea agreement which was silent as to whether the defendant could appeal or attack collaterally his conviction or sentence. Upon the defendant's motion, the court vacated the defendant's conviction, but stated that by challenging his conviction, the defendant had breached the plea bargain and the government could reinstate the dismissed counts against the defendant. The court reasoned that "an implicit part of the agreement, indeed its very heart, was that the defendant would remain convicted and serve the sentence imposed." *Id.* at 1228. See, also, *James v. State*, 289 Ark. 560, 712 S.W.2d 919 (1986) (after defendant successfully challenged plea and conviction for first degree murder, state could charge him with original greater charge of capital murder, and defendant who attacks guilty plea is choosing to surrender what benefits he may have derived from plea bargain); *United States v. Williams*, 534 F.2d 119 (8th Cir. 1976).

In *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997), an information was filed charging the defendant with first degree murder and use of a firearm in the commission of a felony. Pursuant to a plea bargain, an amended information was filed charging the defendant with second degree murder and use of a firearm in the commission of a felony. The defendant pled guilty and was adjudged accordingly. His conviction was affirmed by this court in *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989). Subsequently, the defendant filed for postconviction relief on the ground that the amended information was defective in that it failed to allege that the defendant had acted with malice. The district court granted postconviction relief and vacated and set aside the conviction. The State subsequently filed a second amended information once again charging the defendant with first degree murder and use of a firearm in the commission of a felony. We affirmed the conviction.

Here, the State refiled the original charge after Belmarez refused to plead to the amended information charging him with aiding and abetting second degree murder, with malice included as an element of the offense. By challenging his conviction, Belmarez surrendered any benefit derived from that portion of the first plea agreement. We conclude that upon Belmarez' successful attack on his conviction of second degree murder of Chester Tucker, the State is not prohibited from filing the original charge of first degree murder of Chester Tucker.

Belmarez next claims that even if the State is not bound by its agreement not to file any other charges, the State cannot be allowed to prosecute for any offense greater than second degree murder of Chester Tucker unless Belmarez is allowed to withdraw his no contest plea to the first degree murder of Lester Tucker. The plea agreement entered into in 1991 involved both his plea of no contest to first degree murder of Lester Tucker and his plea of no contest to aiding and abetting the second degree murder of Chester Tucker, and Belmarez claims that his pleas to these counts are interdependent. In other words, Belmarez claims that part of the inducement to enter a plea of guilty for first degree murder of Lester Tucker was that he would be convicted of no charge greater than second degree murder of Chester Tucker.

In essence, Belmarez seeks to collaterally attack the first degree murder conviction by means of a direct appeal from the denial of a plea in bar to a second degree murder charge involving a different victim. Collateral attacks on prior convictions are limited. Avenues of relief outside a direct review are necessarily limited because of the State's interest in the finality of the conviction. *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). It is a general rule that a collateral attack on a previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter. *Id.*; *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995).

In *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), we provided a limited avenue through which a defendant can mount a *Boykin* challenge to a prior offense sought to be used for enhancement. We carefully circumscribed the procedures by which a defendant could mount a *Boykin* challenge in an

enhancement proceeding. In *Lee*, we declined to grant defendants a right to collaterally attack a prior conviction used as an element of a subsequent offense where such attack is based upon the lack of a *Boykin*-type colloquy. Clearly, the case at bar is not an enhancement proceeding, and we decline to permit Belmarez to collaterally attack his first degree murder conviction of Lester Tucker.

Belmarez is procedurally barred from collaterally attacking his conviction for the murder of Lester Tucker in an interlocutory appeal from the trial court's overruling a plea in bar involving the murder of Chester Tucker. We do not consider whether Belmarez could have raised this issue in his prior request for postconviction relief.

The record shows that Belmarez was given the opportunity to again plead no contest to second degree murder and that he refused to do so. We find no error in the district court's order which stated that "[a]bsent a willingness of the Defendant to enter into a plea of no contest to second degree murder, the State of Nebraska is free to file the original charge which forms the basis for the second degree murder charge contained in the Amended Information." The State is not barred from charging Belmarez for the first degree murder of Chester Tucker, and finding no error in the district court's denial of the plea in bar and amended plea in bar, we affirm the judgment of the district court.

AFFIRMED.

LYLE STONEMAN ET AL., APPELLEES, V. UNITED NEBRASKA BANK ET AL., APPELLANTS, AND DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA ET AL., APPELLEES.

577 N.W.2d 271

Filed April 17, 1998. No. S-96-941.

1. **Jurisdiction: Appeal and Error.** When the court from which an appeal was taken lacks jurisdiction, the appellate court acquires no jurisdiction.
2. **Judgments: Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if

any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous.

3. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
4. **Administrative Law: Jurisdiction: Courts.** Jurisdiction in the district courts is proper pursuant to the Administrative Procedure Act when a case is contested and the party bringing the action is aggrieved.
5. **Administrative Law: Words and Phrases.** Under the Administrative Procedure Act, a proceeding becomes a contested case when a hearing is required.
6. **Administrative Law: Due Process: Notice.** When an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.
7. **Administrative Law: Jurisdiction: Words and Phrases.** If an agency acts in a quasi-judicial manner, the case is contested for purposes of jurisdiction under the Administrative Procedure Act.
8. **Administrative Law: Licenses and Permits.** Generally, the exercise of discretion to grant or deny a license, permit, or other type of application is a quasi-judicial function.
9. **Administrative Law: Jurisdiction: Standing: Words and Phrases.** If a person has standing, then that person is aggrieved for purposes of jurisdiction under the Administrative Procedure Act.
10. **Statutes: Intent.** Statutes which effect a change in common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
11. **Words and Phrases: Equity.** Common-law rights include both those rights sounding in law and those sounding in equity.
12. **Constitutional Law: Jurisdiction: Equity.** The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.
13. **Equity: Banks and Banking: Merger: Stock.** Bank shareholders possess an equitable right to receive fair value for their shares in the event that they are canceled by a cash-out merger.
14. **Administrative Law: Appeal and Error.** Under the Administrative Procedure Act, the district court has the authority to review an administrative agency's decision without a jury, de novo on the record of the agency.
15. **Administrative Law: Legislature.** An administrative agency has only that power which has been granted to it by the Legislature.
16. **Courts: Administrative Law.** As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is within the general power of the court to provide.
17. **Banks and Banking: Merger: Stock.** The Nebraska Department of Banking and Finance has the authority to consider the fairness of a merger to minority shareholders. Nevertheless, that authority does not require the department to deny a merger application merely because the minority shareholders will receive less than fair value for their shares, nor does it empower the department to compel payment of fair value to the shareholders.

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

Gerald P. Laughlin and Tiffany L. Seevers, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Terry R. Wittler, Larry A. Holle, and Jill Gossin Jensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellees Stoneman et al.

WHITE, C.J., CONNOLLY, GERRARD, and MCCORMACK, JJ., and ENDACOTT, D.J., and GRANT and FAHRNBRUCH, JJ., Retired.

CONNOLLY, J.

The issue in this appeal presents the question of whether the minority shareholders of a banking corporation who are "cashed out" via merger have a right to receive fair value for their shares, notwithstanding bank minority shareholders' exclusion from Neb. Rev. Stat. § 21-20,138 (Reissue 1997). We conclude that bank shareholders do indeed have such a right, and we affirm.

I. BACKGROUND

Lexington State Bank & Trust Co. (LSB&T), then a Nebraska banking corporation, was a subsidiary of Lexington Bancshares, Inc. (LBI), then a Nebraska holding company, which owned 88.5 percent of LSB&T's issued and outstanding shares. United Nebraska Bank (UNB), also a Nebraska banking corporation, was a wholly owned subsidiary of United Nebraska Financial Company (UNFC), another Nebraska holding company. UNB, LBI, UNFC, and LSB&T are the appellants in the instant case. Harold P. Stuckey, acting as president of both LSB&T and LBI, contacted UNB regarding the sale of LBI. UNB's parent corporation, UNFC, submitted an offer to LBI, which resulted in two stock purchase agreements, an "Agreement for Purchase of Preferred Shares of Lexington Bancshares, Inc." (preferred share agreement) and an "Agreement for Purchase of Common Shares of Lexington Bancshares, Inc." (common share agreement).

1. STOCK PURCHASE AGREEMENTS

The preferred share agreement was between UNFC and the holders of LSB&T's preferred shares. UNFC's purchase of LBI's preferred shares was to occur contemporaneously with UNFC's purchase of LBI's common shares, and all conditions precedent under the common share agreement were to be met or waived by LBI prior to closing.

The common share agreement was between UNFC and certain individuals, including Lexington Bank and Trust Co., trustee of LSB&T's employee stock ownership plan. In the common share agreement, UNFC agreed to purchase all of LBI's common shares, conditioned upon the closing of the purchase of LBI's preferred shares and the "obtaining [of] all necessary regulatory approvals including approval for [UNFC] to merge [LSB&T] into its [sic] subsidiary bank."

In addition, UNFC agreed to purchase 439.01 shares of LSB&T's common stock owned by Stuckey for $470,713, payable at closing, which would yield $1,072 a share. Stuckey was also to be paid "an amount equal to any cash recoveries by [LSB&T] of the principal amount of and interest on a loan by [LSB&T] . . . in the principal amount of $156,000, which loan was charged off in full by [LSB&T]." Finally, the common share agreement required Stuckey to execute an agreement not to compete, for which Stuckey would be compensated in the amount of $450,000.

Upon the closing of the sale of LBI's common shares and Stuckey's 439.01 shares in LSB&T, UNFC would control all but 8.4 percent of LSB&T's issued and outstanding shares. Although the common share agreement clearly contemplated a merger and provided for the purchase of Stuckey's minority shares in LSB&T, it made no provisions concerning LSB&T's remaining minority shareholders.

The purchase price of LBI's shares provided for in the common share agreement was based upon LSB&T's equity capital.

> The value of [LSB&T] shall be determined by adding to the amount of [LSB&T's] equity capital . . . the amount of $8,250,000, provided that [LSB&T's] equity capital . . . is not less than $8,800,000. The value of [LSB&T] as thus computed shall be divided by the *total number of shares* of

> [LSB&T] common stock issued and outstanding, which shall then be multiplied by the number of [LSB&T] shares owned by [LBI] to determine the value of the [LSB&T] shares owned by [LBI].

(Emphasis supplied.) Application of the above formula resulted in a value of approximately $1,217.86 per LSB&T share.

2. Merger Agreement

In yet another separate agreement, LSB&T agreed to merge with UNB, which merger was to occur contemporaneously with the consummation of the stock purchase agreements. The merger was to proceed in three steps. First, the stock purchase agreements would be executed. Second, LBI would merge with UNFC with LBI surviving, resulting in LBI acquiring all of UNB's outstanding voting shares. Third, UNB and LSB&T would merge, with UNB as the survivor, and LBI would change its name to UNFC. Upon completion of the third step, all outstanding voting shares of LSB&T were to be canceled, with the minority shareholders receiving $700 per share in cash, and each share of common stock owned by LBI was to be converted into 1.91 shares of UNFC's common stock. The above transactions would result in UNFC's being a one-bank holding company, with UNB as its wholly owned subsidiary.

These transactions effected a "cash-out" merger, which left the minority shareholders with no equity in the resultant corporation. A cash-out merger may be accomplished without regard to the wishes of the minority shareholders and forces them to accept cash for their shares rather than stock in the newly merged business, thus giving the majority 100-percent control. Such mergers are variously referred to as "cash-outs," "take-outs," "squeeze-outs," and "freeze-outs."

3. Department's Approval

The stock purchase agreements and the merger agreement required the approval of the Nebraska Department of Banking and Finance (Department) prior to their consummation, pursuant to Neb. Rev. Stat. §§ 8-157(3) (Supp. 1995) and 8-1502 (Reissue 1997). UNFC submitted a notice of acquisition and control to the Department, pursuant to § 8-1502, to obtain approval for the stock purchase agreements. The Department

gave notice to UNFC that it had no objection to the change in control that would result from UNFC's purchase of LBI's stock. Upon receiving the above notice, UNFC submitted an application for merger to the Department. In response to the application for merger, several minority shareholders (appellee minority shareholders) submitted a protest and petition for declaratory ruling to the Department. They included Lyle Stoneman, since deceased and substituted for by Michael Alesio; Virginia Ann Hanson, sole beneficiary of the Maurice Braithwait Trust; and First Gothenburg Bancshares, Inc., a Nebraska corporation. They protested the value they would receive for their LSB&T shares under the merger application and requested a hearing on the matter. UNB (not UNFC) filed an answer to the protest, and the appellee minority shareholders responded with a brief in support of their position. UNB then filed a reply brief.

The Department issued an order simultaneously approving the merger application and denying the appellee minority shareholders a hearing. The Department noted that it considers the "fundamental fairness" of a merger to the minority shareholders as a factor when deciding whether to approve a merger application. However, the Department stated that its review does not require that the minority shareholders receive value equal to that of the majority. The Department found that LSB&T's minority shareholders were to receive " 'book value' " for their shares, which does not "violate the concept of fundamental fairness."

4. District Court

Dissatisfied with the Department's order, the appellee minority shareholders appealed to the district court under the Administrative Procedure Act (APA), alleging that the Department violated due process by denying them a hearing and by finding that the merger would not violate the concept of " 'fundamental fairness.' " Concluding that the Department acted in a quasi-judicial manner, the district court reversed the Department's order and remanded the matter with directions to conduct a hearing.

II. ASSIGNMENTS OF ERROR

The appellants argue that the district court erred in (1) granting judicial review of the Department's order pursuant to the

APA; (2) reversing the Department's order and remanding the matter to the Department for hearing, because to the extent the appellee minority shareholders were entitled to due process, they received due process from the Department; (3) reversing the Department's order and remanding the matter to the Department for hearing, because under Nebraska law, minority shareholders of banks are not entitled to dissenters' rights; and (4) disturbing the Department's determination that the price the appellee minority shareholders received for their shares in LSB&T did not violate fundamental fairness.

III. SCOPE OF REVIEW

When the court from which an appeal was taken lacks jurisdiction, the appellate court acquires no jurisdiction. *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous. *Walksalong v. Mackey*, 250 Neb. 202, 549 N.W.2d 384 (1996).

On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

IV. ANALYSIS

1. Appeal Pursuant to APA

As a threshold matter, we must address the appellants' assertion that the district court erred in granting judicial review of the Department's order pursuant to the APA. The appellants argue that the district court did not have jurisdiction in the instant case because the case was not "contested." Thus, to determine whether the district court had jurisdiction under the APA, we must determine whether the instant case was "contested," see *Gretna Public School v. State Board of Education*, 201 Neb. 769, 272 N.W.2d 268 (1978), and whether the appellee minority shareholders were "aggrieved," see *Karnes v. Wilkinson Mfg.*, 220 Neb. 150, 368 N.W.2d 788 (1985). "Any

person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act." Neb. Rev. Stat. § 84-917 (Reissue 1994).

(a) Contested

For purposes of the APA, a "contested case" is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Neb. Rev. Stat. § 84-901(3) (Reissue 1994). This court has held that "a proceeding becomes a contested case when a hearing is required." *Central Park Pharm. v. Nebraska Liq. Cont. Comm.*, 216 Neb. 676, 678, 344 N.W.2d 918, 920 (1984), citing *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975). This court has also held that when an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). Therefore, if the Department acted in a quasi-judicial manner, the instant case was "contested." See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

Generally, "[t]he exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." *Sommerfield v. Helmick*, 57 Cal. App. 4th 315, 320, 67 Cal. Rptr. 2d 51, 54 (1997). See, also, *J K & J, Inc. v. Nebraska Liquor Control Commission, supra*. In *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 566, 192 N.W.2d 736, 739 (1971), we held that the Department must hold a hearing when determining whether to approve or deny an application to establish a savings and loan pursuant to Neb. Rev. Stat. "section 8-331, R. R. S. 1943." This court's holding was based upon its conclusion that the Department's determination was quasi-judicial. *First Fed. Sav. & Loan Assn. v. Department of Banking, supra*. In the instant case, the Department's approval of a banking application was once again required, and as such, its action was quasi-judicial. See, also, *Phelps County Savings Co. v. Dept. of Banking & Finance*, 211 Neb. 683, 320

N.W.2d 99 (1982); *Southwestern Bank & Trust Co. v. Dept. of Banking and Finance*, 206 Neb. 599, 294 N.W.2d 343 (1980); and *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.*, 162 Neb. 22, 74 N.W.2d 863 (1956).

(b) Aggrieved

This court addressed whether a person has been "aggrieved" by an agency decision in *Karnes v. Wilkinson Mfg., supra.* In *Karnes*, this court held that the Tax Commissioner was not a "person aggrieved" because she sat on the same board that rendered the decision she intended to challenge. In so holding, we couched the issue in terms of standing, noting that the phrase "person aggrieved" is not defined by the APA.

Clearly, the appellee minority shareholders in the instant case have standing. See *Schmid v. Clarke, Inc.*, 245 Neb. 856, 515 N.W.2d 665 (1994). In *Schmid*, we indicated that the Department had the authority to review a merger application for fairness to the minority shareholders and that if the minority shareholders of a bank fail to object to the merger before the Department, they have waived their rights and are estopped from bringing a claim in the district court. Had the shareholders in *Schmid* been without standing, their failure to object before the Department would not have waived their right to receive fair value or estopped them from asserting that right. See, also, *First Fed. Sav. & Loan Assn. v. Department of Banking, supra.*

Because the instant case was contested and the appellee minority shareholders were persons aggrieved, we conclude that the district court properly asserted jurisdiction pursuant to the APA.

2. Appellee Minority Shareholders' Right to Dissent and Receive Fair Value

Having concluded that the district court properly asserted jurisdiction and that the appellee minority shareholders were entitled to notice and a hearing, we address the appellants' remaining assignments of error, as they will likely arise on remand before the Department.

Section 21-20,138, governing dissenters' rights, specifically excludes bank shareholders from it purview. Thus, in their third assignment of error, the appellants assert that pursuant to

§ 21-20,138, the appellee minority shareholders have no right to dissent and receive fair value for their shares. The appellee minority shareholders, however, contend that such shareholders do have the right to dissent and receive fair value despite the statutory exclusion in § 21-20,138. According to the appellee minority shareholders, that right must be enforced by the Department, which cannot approve a merger application unless that merger will accord the minority shareholders fair value for their shares. Accordingly, the issue is whether § 21-20,138 denies the appellee minority shareholders the right to recover fair value for their shares and if not, whether the Department is required to enforce such rights by denying the merger application in the event that it determines the appellee minority shareholders did not receive fair value. To dispose of these issues, we must determine the scope of § 21-20,138 and the parameters of the Department's authority to approve or deny a merger application.

(a) Scope of § 21-20,138

Section 21-20,138 states:

> A shareholder shall be entitled to dissent from, and obtain payment of the fair value of his or her shares in the event of . . .
>
> . . . [c]onsummation of a plan of merger to which the corporation is a party:
>
> . . . .
>
> . . . If the corporation is a subsidiary that is merged with its parent . . . .
>
> . . . .
>
> . . . *The right to dissent and obtain payment under sections 21-20,137 to 21-20,150 shall not apply to the shareholders of a bank* . . . or the holding company of any such bank . . . .

(Emphasis supplied.) Thus, according to § 21-20,138's plain language, the appellee minority shareholders have no statutory right to dissent and receive fair value for their shares.

That the appellee minority shareholders have no statutory right does not mean that they have no rights at all. Statutes which effect a change in common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted

unless the plain words of the statute compel it. *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996). Section 21-20,138 does not purport to abrogate the common-law rights of shareholders to dissent and receive fair value for their shares. Rather, by its explicit language, the statute excepts the shareholders of a banking corporation only from "[t]he right to dissent and obtain payment *under sections* 21-20,137 to 21-20,150 . . . ." Thus, construed strictly, § 21-20,138(3) appears to abrogate only statutory rights, leaving untouched those rights and remedies that were available to such shareholders at common law.

Even were we to conclude that § 21-20,138 abrogated bank shareholders' common-law rights, which conclusion we need not reach, such a construction would apply only to causes in law, not those in equity. "Common-law rights" include both those rights sounding in law and those sounding in equity. See *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995). In Nebraska, the "equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled." *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 653, 447 N.W.2d 227, 234 (1989). See, also, Neb. Const. art. V, § 9; Neb. Rev. Stat. § 49-101 (Reissue 1993). To the extent § 21-20,138 is an adequate remedy, equity does not apply, *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996), but to the extent that the statute's remedy is incomplete, equity must intervene, regardless of whether the statute purports to abrogate the common law, see *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

Section 21-20,138 does not provide an adequate remedy to the minority shareholders of a banking corporation, since it explicitly excludes them from the right to receive fair value for their shares. Thus, if the shareholders of a banking corporation have the equitable right to receive fair value for their shares, we need not determine whether § 21-20,138 abrogated whatever additional common-law legal rights those shareholders might otherwise have.

(b) Shareholders' Equitable Rights

At common law, a corporation could not effect a merger without the unanimous consent of its stockholders. See, e.g., *Shidler v. All American Life & Financial Corp.*, 775 F.2d 917

(1985); *Botts v. Simpsonville & B. C. Turnpike Co.*, 10 Ky. L. Rptr. 669, 10 S.W. 134 (1888). In *McLeod v. Lincoln Medical College*, 69 Neb. 555, 559, 98 N.W. 672, 673 (1904), this court addressed the propriety of a squeeze-out merger at common law: "No man can be compelled to dispose of his stock in a corporation, or *other* property interests, because, in the judgment of the parties so compelling him, it is for his interest financially and otherwise so to do." (Emphasis supplied.) Accordingly, this court held that the merger was void ab initio. *Id.*

Many courts, however, recognized the potential abuse inherent in requiring unanimous stockholder consent prior to the consummation of a merger. See *Tanner v. Lindell Ry. Co.*, 180 Mo. 1, 79 S.W. 155 (1904) (addressing this issue in context of sale of assets). When unanimous consent was required, a single shareholder, even one who owned a single share, could block the merger of an entire corporation. *Id.* As the *Tanner* court stated, "Because all the stockholders have not consented to the sale it does not follow that the sale will be set aside regardless of the consequences." *Tanner v. Lindell Ry. Co.*, 180 Mo. at 17, 79 S.W. at 158. Thus, the court held:

> [T]he minority stockholders . . . may have out of the proceeds of the sale . . . the market value of their stock at the date of the sale or their proportional share of the proceeds . . . and, if the transaction be made with bad faith, they may, under some circumstances . . . have the sale set aside and a rehabilitation of the corporation, or, if equity requires it, and the application is timely . . . they may have an injunction to arrest the transaction.

Id. at 21-22, 79 S.W. at 159-60. The holding in *Tanner* demonstrates that minority shareholders have the right to dissent and receive fair value for their shares in equity, even in the absence of a statutory right. See, also, e.g., *Gabhart v. Gabhart*, 267 Ind. 370, 370 N.E.2d 345 (1977); *Wunsch v. Consolidated Laundry Co.*, 116 Wash. 44, 198 P. 383 (1921); *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 75 S.E. 309 (1912). Moreover, that equitable right could be invoked as readily in the banking context as in any other. *Equitable Trust Co. v. Columbia National Bank*, 145 S.C. 91, 142 S.E. 811 (1927). See, also, *Baugh v.*

Citizens & Southern National Bank, 248 Ga. 180, 281 S.E.2d 531 (1981) (applying dissenter's rights statute).

The appellee minority shareholders' contention that the shareholders of a bank retain rights in equity, regardless of the absence of a right to receive payment under the dissenters' rights statute, was implicitly recognized in *Schmid v. Clarke, Inc.*, 245 Neb. 856, 515 N.W.2d 665 (1994). In *Schmid*, the minority shareholders of a bank that was to be merged out of existence were to receive $3.75 per share of stock and an additional $1.50 per share if they signed a covenant not to compete. Two shareholders brought an action against the bank's holding company, the holding company which purchased the bank, and the subsidiary of the latter holding company, alleging theories of conspiracy, *breach of fiduciary duty*, restraint of trade, and contract, all of which were apparently based upon the covenant not to compete. The court specifically noted, and the minority shareholders conceded, that "*under* Neb.Rev.Stat. § 21-2079 (Reissue 1991), shareholders of a banking corporation, unlike ordinary business corporations, do not have the right to dissent from a merger and receive the fair market value for their shares." (Emphasis supplied.) 245 Neb. at 860, 515 N.W.2d at 668. Nonetheless, this court held that the minority shareholders had *waived* their right to dissent to the merger and were *estopped* from bringing their claims, because they failed to object to the merger application before the Department. *Schmid v. Clarke, Inc., supra.*

This court's reliance on theories of waiver and estoppel implies that the minority shareholders had equitable rights because waiver and estoppel are equitable defenses. See *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). If the minority shareholders in *Schmid* were without equitable rights, the court would not have had an occasion to discuss waiver and estoppel, for one cannot waive nor be estopped from asserting a right which does not exist. Therefore, *Schmid* stands for the proposition that minority shareholders retain rights in equity separate and distinct from the right to dissent and receive fair value for their shares pursuant to § 21-20,138. See, also, *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979).

We conclude that bank shareholders possess an equitable right to receive fair value for their shares in the event that they are canceled by a cash-out merger, regardless of their exclusion from such rights under § 21-20,138(3). However, equity no longer requires the unanimous consent of a corporation's shareholders to approve a merger, so long as equity ensures that the shareholders receive fair value for their shares. To the extent that *McLeod v. Lincoln Medical College*, 69 Neb. 555, 98 N.W. 672 (1904), indicates otherwise, it is disapproved.

3. Authority of Department

The appellants' last assignment of error concerns the authority of the Department to approve or deny a merger application when the merger is unfair to the minority shareholders. According to the appellants, "Given the Department's expertise in the area of evaluating financial institutions, the district court should not be permitted to second guess the Department's Order with respect to the value of the Plaintiffs' shares." Brief for appellants at 19. Apparently, the appellants are contending that the Department's decision to approve or deny a merger is not subject to judicial review on the basis of the merger's fairness to the minority shareholders. The appellee minority shareholders, however, argue that the Department's determination in that regard is not only subject to judicial review, but must be reversed by the district court if the merger is unfair to the minority shareholders. Essentially, the appellee minority shareholders' contention is that the Department is the minority shareholders' sole forum in which to seek relief. We disagree with both parties' positions. What then is the extent of the Department's authority to review the merger's fairness?

Insofar as the appellants' argument is concerned, we have already concluded that the district court properly had jurisdiction pursuant to the APA. Under the APA, the district court has the authority to review an administrative agency's decision without a jury, de novo on the record of the agency. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). Thus, the Department's authority to approve or deny a merger is subject to judicial review, regardless of the grounds upon which the merger is approved or denied.

The appellee minority shareholders' argument is based on our conclusion in *Schmid v. Clarke, Inc.*, 245 Neb. 856, 515 N.W.2d 665 (1994), where we held that the minority shareholders must make an objection to the Department to preserve their rights. The appellee minority shareholders' contention that the Department is the sole forum is not, however, supported by a careful analysis of *Schmid*. First, if the Department were the sole avenue of relief, the district court would not have had subject matter jurisdiction, because the action would have been brought in the wrong forum. Without subject matter jurisdiction, the court would have been powerless to conduct an appellate review of the lower court's decision. See *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). Rather, the court would simply have held that it did not have jurisdiction to decide the matter. Second, as we have already stated, the *Schmid* court considered the appellants' claims in equity. Had the Department been the sole forum of relief for the appellee minority shareholders, the appellee minority shareholders would have had an adequate remedy at law, which would have precluded resort to equitable remedies and defenses. See *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996).

Although we have not directly addressed the scope of the Department's authority to review a merger application, we have previously addressed the scope of an agency director's authority to deny or approve a bulk reinsurance contract, which is closely analogous to a cash-out merger. See *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979). In *Doyle*, a mutual insurance company ceded its business to another company by a contract of bulk reinsurance, pursuant to Neb. Rev. Stat. "[s]ection 44-224.05, R. R. S. 1943." *Doyle v. Union Ins. Co.*, 202 Neb. at 604, 277 N.W.2d at 39. The transaction required the approval of a majority of the policyholders and the Director of Insurance, who was to ensure that the contract was " 'fair and equitable to the policyholders of each insurer . . . .' " (Emphasis omitted.) *Id.* The contract was indeed approved by the director and a majority of the policyholders, which resulted in the policyholders' receiving a distribution of their equity in the surplus funds of the company, as required by the statute. The policy-

holders then brought a class action in the district court, alleging that the directors of the company had breached their fiduciary duties by, inter alia, selling the company for less than its fair value, which action the court considered in equity.

As a threshold matter, the court addressed the effect of the approval of the contract by the Director of Insurance. The court stated:

> Nowhere does this statute or the related statutes impliedly or expressly demonstrate an intent to abridge or limit the common law rights of policyholders, who are, in the case of a mutual company, its owners. Rather, the statutes indicate that review and approval by the Director of Insurance is *intended to be an initial screening process by means of which obviously inequitable arrangements may be avoided without the necessity of possible expensive and protracted litigation by policyholders*. Neither does the language of the statute demonstrate any intention that mere approval by the Director of Insurance absolves (assuming that this is a legislative prerogative) the corporate directors from liability for violation of their fiduciary duties.

(Emphasis supplied.) *Id.* at 605, 277 N.W.2d at 40.

Likewise, the statute at issue in the instant case, § 8-157(3), merely states that bank mergers are authorized "[w]ith the approval of the director." The statute does not indicate that the director's approval absolves the bank of any obligations it may owe to the minority shareholders. The Department, as an administrative agency, has only that power which has been granted to it by the Legislature. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). Furthermore, as a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. *Ventura v. State, supra.* Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is "within the general power of the court" to provide. *Ventura v. State, supra.*

Section 8-157(3)'s plain language authorizes the Department to either approve or deny a bank merger; nowhere does the

statute indicate that the Department is required to disapprove a merger that is unfair to the minority shareholders, nor does it indicate that the Department is empowered to require a bank to pay the fair value of a dissenter's shares, which is a historically equitable remedy. As we stated in *Doyle* when discussing the effect of the Director of Insurance's approval of an insurance application:

> "It is true he may disapprove a control transaction when he finds it unfair or unreasonable to policyholders. Thus, as an incident of his powers he may provide a preventive administrative remedy for the wrongs alleged in this case. However, the statutory power to disapprove a control transaction is a limited power. It is not a legislative delegation to the insurance commissioner of jurisdiction over corporate insider torts, even though the commissioner is granted administrative authority to disapprove control transactions when such wrongs appear."

Doyle v. Union Ins. Co., 202 Neb. 599, 607, 277 N.W.2d 36, 41 (1979), quoting *Rowen v. LeMars Mut. Ins. Co. of Iowa*, 230 N.W.2d 905 (Iowa 1975).

Finally, we note that Neb. Rev. Stat. § 8-102 (Reissue 1997), the Legislature's "declaration of public purpose," states that "banks . . . are hereby declared to be quasi-public in nature and subject to regulation and control by the state." We have long held that the banking laws were intended to protect the health of the banking industry for the benefit of the entire public. See, e.g., *In re Invol. Dissolution of Battle Creek State Bank, ante* p. 120, 575 N.W.2d 356 (1998). Thus, the Department has a duty to consider the potential effects of a particular merger on the entire banking industry, which may override whatever concerns the Department may have about the fairness of the merger to the minority shareholders.

For example, in the instant case, the Department approved the merger even though one minority shareholder, Stuckey, received more for his shares of LSB&T than the remaining minority shareholders. Therefore, the Department did not ensure that LSB&T's minority shareholders were treated with fundamental fairness, since as a matter of law, fundamental fairness requires that all minority shareholders receive the same

treatment. This is not to say that the Department erred in approving the merger as a matter of law. It only points out that the inherent conflict of interest between the needs of the banking industry and the needs of minority shareholders is properly resolved by the district courts in a separate equity proceeding, and not by the Department's approval proceeding.

In sum, "the Department of Banking and Finance has the authority to *consider* the fairness of a merger to minority shareholders." (Emphasis supplied.) *Schmid v. Clarke, Inc.*, 245 Neb. 856, 860-61, 515 N.W.2d 665, 669 (1994). Nevertheless, that authority does not *require* the Department to deny a merger application merely because the minority shareholders will receive less than fair value for their shares, see *IRA ex rel. Oppenheimer v. Brenner Companies Inc.*, 107 N.C. App. 16, 419 S.E.2d 354 (1992), nor does it empower the Department to compel payment of fair value to the shareholders. The shareholders in *Schmid* were not estopped because the Department was the sole forum for their claim; rather, they were estopped because, had they made a timely objection to the Department, they may have prevented the merger entirely, obviating the need for a remedy.

V. CONCLUSION

We conclude that the district court properly exercised its jurisdiction pursuant to the APA and correctly determined that the Department was required to hold a hearing concerning the appellants' merger application. On remand to the Department, the Department must consider the fairness of the merger to the minority shareholders, which consideration acts as an initial screening process. If the Department determines that the merger warrants approval even though the minority shareholders will not receive fair value for their shares, then the minority shareholders may bring an action in equity in the district court to receive fair value for their shares. We affirm.

AFFIRMED.

CAPORALE, WRIGHT, and STEPHAN, JJ., not participating.